

Webinar Presentation to the Assembly of First Nations, Nov.28, 2024

First Nations-led Impact Assessment

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State of Play

WHAT IS THE STATUS OF AFFECTED INDIGENOUS COMMUNITIES UNDER EA/IA ?

- ◇ Must be “consulted”, and sometimes “accommodated”
- ◇ May make submissions, contribute studies
- ◇ But **lack decision-making authority**

Indigenous Jurisdiction in Impact Assessment?

◆ From the Expert Panel Report (2017):

“Should Indigenous Groups *without* modern treaties wish to undertake their own IA processes, they should be able to do so, and co-operation arrangements with these Groups should be negotiated. Federal IA governance structures and processes should support Indigenous jurisdiction”
(p25)

SYNTHESIS REPORT

Implementing a Regional, Indigenous-Led and Sustainability-Informed Impact Assessment in Ontario's Ring of Fire

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Impact Assessment under IAA

- ◇ Opened up possibility that federal government will establish an assessment with a “partner jurisdiction”
- ◇ Eventually, they feds will pass regulations to allow “**Indigenous governing authorities**” to be partner jurisdictions, even in historic treaty areas
- ◇ Either way, Terms of Reference could be set through **negotiated agreements...** (**possibility of gaining some decision-making authority**)
- ◇ WHAT KIND OF PROCESSES WOULD BE IDEAL?

Berger Inquiry, NWT, 1974-1977

to establish the “terms and conditions” of
accepting a pipeline



Hearings in the communities
In the language
No cross-exam
Live broadcast

One judge
Issues recommendations to Minister

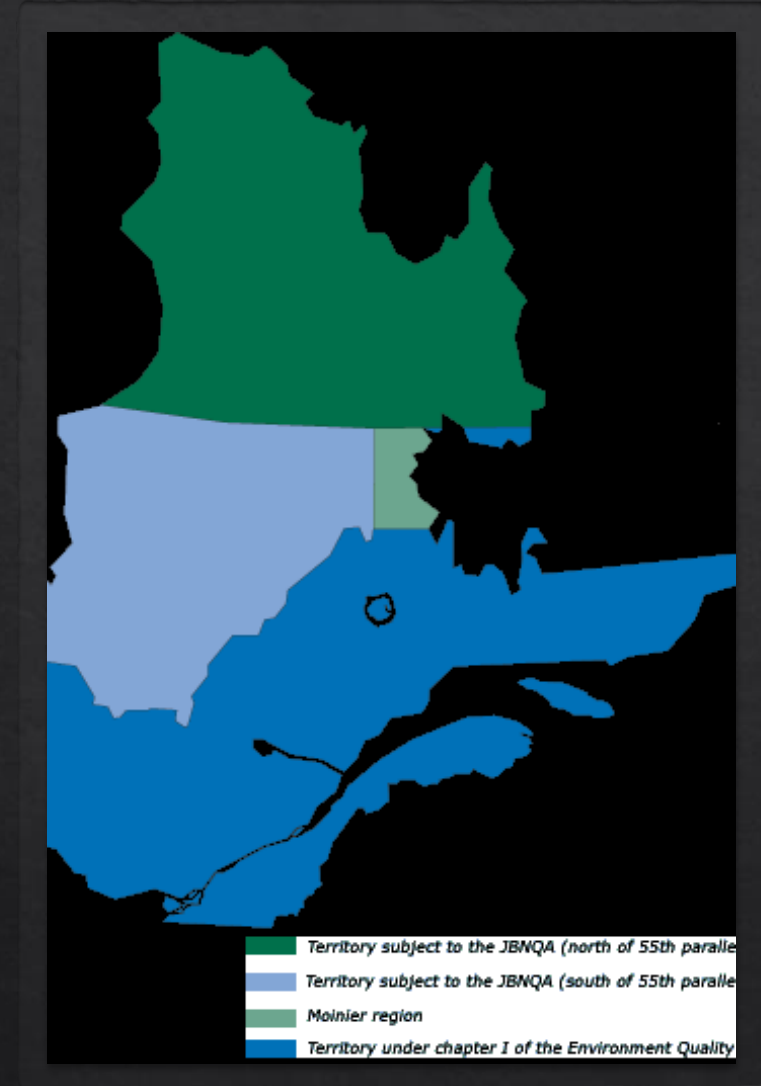
Environmental and Social Impact Assessment (ESIA) process

James Bay Cree and Inuit, 1975

Co-management regime for environmental assessment and monitoring

Tri-partite “Evaluating Committee”
(2 reps Cree Nation, 2 reps Quebec, 2 reps feds) makes recommendations to relevant authority

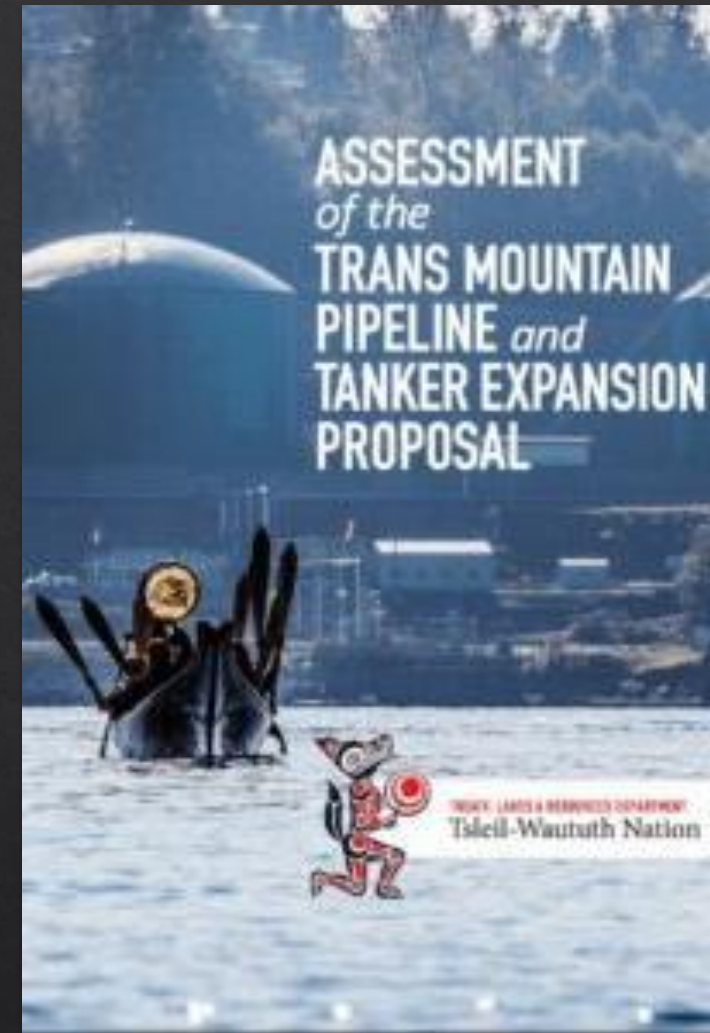
The Final Decision-Maker depends on the Category of Land: Cree Nation Administrator (above 55th parallel), Prov or Fed Minister



Indigenous-led EA

- Grounded in the specific, applicable Indigenous laws
- May exist outside of, or parallel, to the Crown processes
- Based on the community's own laws, values and process
- Growing number across the country
- Requires significant resources

What are the various ways to connect this kind of work with Crown decision-making?... (is that the goal?)



Conceptualizing Indigenous-led IA

- ◇ investigating the strategies Indigenous nations are employing to build and strengthen their authority through IA processes;
 - ◇ considering the level of Indigenous participation at different phases of the IA; and
 - ◇ delineating where and why tensions occur in the IA context **when Indigenous and settler jurisdictions meet.**
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- ◇ **CRITICAL FACTOR** = the ability of the Indigenous nation to use its own processes, and to apply its own laws and legal principles, to the issues the community determines to be important when it makes a decision.



2023 REPORT

Operationalizing Indigenous Impact Assessment

Edited by Jennifer Sankey, Dayna Nadine Scott & Laura Tanguay

with contributions from Donna Ashamock, Warren Bernauer, Aaron Bruce, Veronica Guido, Dawn Hoogeveen, Sarah Morales, Jerry Natanine, and Estair Van Wagner

Increasingly, Indigenous nations are asserting their own frameworks for impact assessment (IA) when resource development projects are proposed in their ancestral territories.

Impoverished consultation and decision-making processes found in provincial and federal IA legal frameworks have compelled **Indigenous nations to develop IAs based on their own legal orders; these IAs challenge the presumed unilateral authority of settler laws.** Various forms of Indigenous-led IA have emerged, each exhibiting unique characteristics dependent on the context of the community, the territory, the project, and the Indigenous nation's relationship with Canadian governments and proponents.

Indigenous-led IAs demonstrate varying levels of Indigenous control over both the process and the final decision-making. Some have been developed to operate in conjunction with Crown IAs while others have been structured to function completely outside of Crown frameworks.

As these different models emerge, it is necessary to closely examine whether, and how, they strengthen Indigenous jurisdiction over land and resources more broadly. Important questions include:

- How do Indigenous-led IAs articulate with Crown IAs?
- Whose laws govern the IA; how is power mediated in these contexts?
- What compromises are made when Indigenous and Crown IA processes become integrated?

Terminology

“**Environmental assessment**” (EA) and “**Impact assessment**” (IA) refer to processes used by both settler and Indigenous governments to assess major resource extraction projects.

“**Settler law**” refers to legislation and doctrine enacted by federal, provincial and territorial governments in Canada or espoused by settler courts.

“**Aboriginal Law**” refers to rules and doctrines enacted or made by settler governments or courts concerning Indigenous peoples, while “**Indigenous law**” refers to the laws of Indigenous groups/nations based on their Indigenous legal orders and traditions and specific to their territories.

Canada’s Indigenous legal tradition is comprised of multiple Indigenous legal orders that pre-existed the common and civil law in Canada. Within these **multiple Indigenous legal orders** are the laws and legal processes specific to each Indigenous group. Indigenous law, like all law, is fluid not static. It continues to evolve and regenerate as lawmakers face new problems to which they must apply legal principles to solve the issues before them.

Research Objectives

With this case study research, our team has assembled knowledge and experiences from across Canada of different forms of Indigenous leadership and participation in IA and considered whether there are key criteria emerging for classifying these processes. Our central research objective has been to learn how Indigenous communities in different parts of Canada are participating in and leading IAs with the aims of:

1. refining scholarly understanding of what constitutes Indigenous-led IA; and
2. generating insights on how settler law should evolve in order to make space for and restore Indigenous jurisdiction in the IA context.

Methodology

Impact Assessment Agency of Canada through the Policy Dialogue Program (2021-2023); Ethics approval from York University

2021 background research on different forms of impact and risk assessments being led or informed by Indigenous groups in Canada, Australia, and New Zealand.

Selected four cases for deeper study because they demonstrate different models of Indigenous-led and/or informed assessments taking place in Canada, and because members of the Indigenous communities interested in, or affected by, the proposed projects were available and willing to share their knowledge and experiences with our research team.

Selected Case Studies



1) Squamish Nation's assessment of the Woodfibre Liquefied Natural Gas (LNG) Project near Squamish, BC;



2) Stk'emlúpsenc te Secwepemc Nation's assessment of the Ajax Mining Project, an open-pit copper and gold mine and enrichment plant near Kamloops, BC;



3) assessments of the Martin Falls Community Access Road and Webequie Supply Roads in northern Ontario's Ring of Fire region; and



4) assessments of the Baffinlands Mary River Iron mine by the Nunavut Inuit Review Board (NIRB) in the Qikiqtani region of Nunavut (the Qikiqtani Inuit Association (QIA) and Hunter and Trapper Organizations (HTOs) represent the Inuit of the region).

May 2022: Our team organized and convened a workshop in Vancouver titled *Contested Authorities: Operationalizing Indigenous Impact Assessment*

in conjunction with a 5-day International Association of Impact Assessment conference

More than 50 practitioners and experts working in IA joined our workshop to hear from invited Indigenous experts about their experiences leading and developing IAs in their communities.

Indigenous IA experts, Leah George-Wilson (Tsleil Wautauth Nation), Aaron Bruce (Squamish Nation), and Sunny LeBourdais (Pell't'iq'te Secwepemc Nation) spoke about their experiences leading assessments for the Trans Mountain Pipeline, the Woodfibre LNG and the Ajax Mining Projects, respectively.

Following their presentations, University of Victoria law professor Dr. Sarah Morales, who is Coast Salish and a member of Cowichan Tribes, discussed the theory of Indigenous-led IA as an expression of Indigenous law and jurisdiction. The workshop deepened our knowledge and generated a focussed set of questions to guide the case study research. We were able to speak to and hear from individuals who had direct experience developing Indigenous-led IAs in their own communities.

The workshop provided a forum for robust discussion and debate among practitioners and experts in the field concerning effective models of Indigenous-led IAs and the relationship between Indigenous jurisdiction and the conduct of IAs in Canada.

Through the conference and workshop, our research team made connections and gained insights from other Indigenous leaders from across Canada who are developing IAs and consent based decision-making models in their communities. That synthesis work was conducted by the research team at a writing retreat held in January 2023.



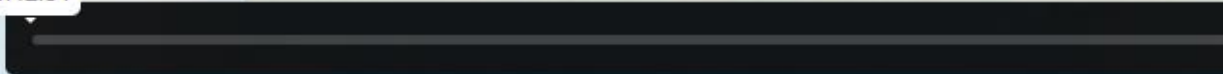
Contested Authorities

Polity Media Lab



CONTESTED AUTHORITIES

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vimeo

Research

Research for each case study derives from documents available on the public registries of the regulators of the projects being studied, government and proponent websites, and media coverage.

Knowledge of the Indigenous communities' assessment processes was largely obtained from documents and videos found on the websites of Indigenous communities, court filings, and conversations held with the Indigenous leaders and participants involved in the various Indigenous-led impact assessments, who were present at the *Contested Authorities* workshop.

A few supplemental interviews were conducted. Two of the case studies are co-written with Indigenous authors who had direct experience leading and participating in the Indigenous-led IA being examined.

Analysis



Following the workshop, our research team met to delineate a framework to guide the writing of the case studies based on what we learned about the central tenets of Indigenous-led IA from our research and from Indigenous IA experts at the workshop.

We decided **some case studies would focus on the development of IA processes at the community level**, the level of Indigenous participation at different phases of the IA, and how Indigenous processes met with Crown IA processes, **whereas others would focus on the ability or inability of Indigenous peoples to participate in government-led or co-managed processes**, and what structural impediments they faced.



Our research team concluded that the main challenge to developing an overarching framework for case study analysis of Indigenous-led IA is that **Indigenous approaches and responses to Crown IAs vary greatly depending on a multiplicity of factors** including the region of Canada, the absence or presence of a modern treaty, historical impacts to the territory, community capacity, and the Indigenous nation's relationship with settler governments and proponents.



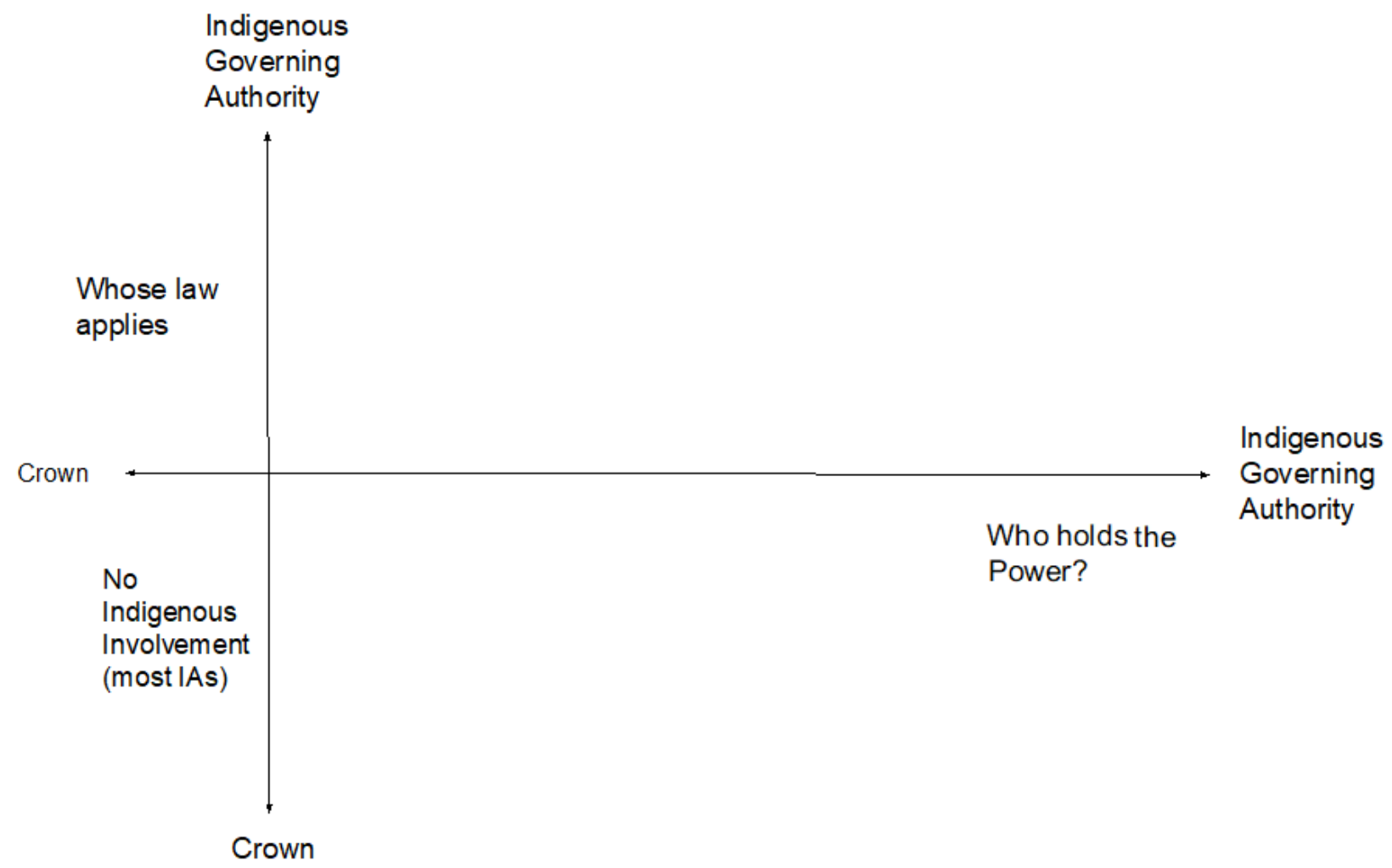
Rather than writing each case study in accordance with a set of pre-defined categories, the team agreed that it would be more effective to provide **detailed descriptive analyses of each Indigenous nation's experience with the IA** in relation to the specific major project, and highlight the unique tensions experienced by that community.



Thus, the team determined that each case study would be oriented around the broad question: **“how did the Indigenous community operationalize its impact assessment in relation to the particular project,”** but depending on the unique nature of each project and community under investigation, the issues discussed would vary.



Impact Assessment in the Ring
of Fire: Contested Authorities,
Competing Visions, and a Clash
of Legal Orders



Key Messages

- All assessments conducted by Indigenous nations are undermined by the background conditions created under settler law which continues to fail to provide a true consent mechanism.
- The degree of authority that an Indigenous nation can achieve through Indigenous IA varies according to many factors, a crucial one of which is the legal status of the land in question under settler law.
- Despite these shortcomings and constraints, the act of engaging in Indigenous IA can energize Indigenous communities, revitalize their laws, and strengthen their life-affirming connections to their laws and territories.
- In order to reach the transformative potential of Indigenous IA, we need to continue to push for new interpretations and meaningful recognition of inherent Indigenous jurisdiction within the Canadian constitutional order.

Indigenous-led IA is:

1. Completed *prior* to any approvals, agreements or consent being provided for a proposed project (that is, communities should be able to apply a threshold determination as to whether a project is in line with identified priorities for the territory, or would violate established no-go zones, before they even decide to conduct an assessment);
2. Undertaken with some degree of control by affected Indigenous parties – on their own terms and subject to their approval;
3. Structured according to the relevant Indigenous nations' determination of the appropriate scope; methods for data collection; values to be protected; principles for assessment, follow-up and monitoring; and threshold for decision-making about a project (according to their own protocols);
4. Governed by a process determined by local realities, capacities, challenges, priorities, practices, knowledge, and relations; and
5. Subject to the applicable Indigenous legal order and oriented towards maintaining the life-affirming practices that flow from reciprocal relations with lands and waters.

Operationalizing Indigenous-led Impact Assessment

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