



## PROTEST AND PARTNERSHIP: CASE STUDIES OF INDIGENOUS PEOPLES, CONSULTATION AND ENGAGEMENT, AND RESOURCE DEVELOPMENT IN CANADA

Edited by Jennifer Winter and Brendan Boyd

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# Conclusion

*Jennifer Winter and Brendan Boyd*

The goal of this edited volume is to advance understanding of the relationship between Indigenous Peoples and resource development in Canada through a series of case studies where Indigenous Peoples had a critical role as partners, as protestors, or somewhere in between. We use the lens of resource governance to explore the mechanisms, processes, and institutions for successful establishment of mutually beneficial partnerships and greater involvement and control by Indigenous Peoples in decision-making. The chapters in this book provide different perspectives on the experiences Indigenous Peoples in Canada have had with resource development. The contributing authors address this important issue by investigating a cross-section of resource development projects—oil and gas, renewable energy, mining, and forestry—in Canada where Indigenous Peoples have played a critical role in the projects. As we discuss in the introduction, political and legal developments in Canada have purportedly empowered Indigenous communities and has given them greater say in resource governance and decision-making. Despite legal advancements, we observe slow and uneven progress in developing equitable and mutually acceptable relationships and outcomes among Indigenous communities, resource development companies, and government. This necessitates a better understanding of *what works* in these relationships. While we do not accept *prima facie* that resource development on or in Indigenous territories is inevitable or beneficial, our focus is on the institutions, mechanisms, and processes used to consult and engage Indigenous communities. Fine-grained analysis of institutions and processes through case studies addresses an important gap in the literature discussing Indigenous Peoples and resource development in Canada. Specifically, exploring how industry and governments consult and engage with Indigenous communities, and

the relationships that exist among these actors, is essential to creating better processes and outcomes. With this conclusion, we summarize each chapter's contribution, then describe key themes from the overall work.

In chapter 1, Boyd, Lorefice, and Winter examine policy statements and guideline documents related to consultation and engagement produced by Indigenous groups, government, and industry, thus providing insight into each actor's perspective on the barriers and challenges to consultation. The actors have different documented approaches to resource development. Indigenous groups' documents revealed that resource development is often thought of in the context of reconciliation. In contrast, the analysis suggests that governments are most concerned with fulfilling legal obligations, and industry with reducing risk. Relatedly, an important place where perspectives and objectives differed is the timing of consultation: Indigenous groups raise concerns that industry and governments dedicate insufficient time to establishing trusting relationships and respectful and meaningful consultation. Moreover, the authors find agreement across the different actors' documents that meaningful consultation requires involving Indigenous Peoples in the design of the consultation process itself. A limitation of the approach of analyzing policy documents is that the documents say nothing about the process of engagement and consultation in practice, and the analysis is point-in-time; the case studies provide more fine-grained detail on institutions, processes, and mechanisms.

In chapter 2, Cameron, Martin, and Sharpe describe the development of modern treaties in Yukon, and the implications for resource governance. They argue that First Nations in Yukon have looked for meaningful partnerships with the Crown, which has driven them to sign modern treaties. This has led them to have more say in decision-making, leading to the Nations operating on a more equal footing with government and industry. The authors argue the institutionalization of co-management and co-relational governance explains why there have been few instances of First Nations-driven protests over resource development. The key conclusion from this chapter is that the creation of mutually beneficial institutional partnerships is a long process, and one that requires patience, compromise, and dedication. Moreover, the authors find a precondition for positive relationships is stable institutions, where the institutional processes are negotiated between equal partners.

In chapter 3, Rodon, Therrien, and Bouchard examine whether impact assessment processes and impact benefit agreements contribute to meaningful consultation, and whether the presence of a land claims agreement facilitates

these mechanisms in achieving meaningful consultation. They do this through analyzing Indigenous engagement in the approval processes of two mineral development projects in Inuit Nunangat: the Mary River project in Nunavut and the Voisey's Bay project in Nunatsiavut. The key conclusion from this chapter is that impact assessment and impact benefit agreement processes allow proponents to fulfill their duty to consult and to secure the consent of Indigenous groups, but do not provide assurance that the projects will meet the expectations of affected communities. In particular, the authors argue free, prior, and informed consent (FPIC) principles are emerging as a new norm for engagement with Indigenous Peoples, but there is a lack of clarity around the objectives of consultation and the definition of FPIC in Canadian projects.

In chapter 4, McMillan, Maloney, and Gaudet review the history of the Mi'kmaq Rights Initiative and the Kwilmu'lw Maw-klusuaqn Negotiation Office (KMKNO). The Mi'kmaq did not participate in the federal claims commission program, instead establishing their own course of action for consultation and negotiation methods. The chapter highlights the tension between creating a process and organization that pools the collective power of individual communities, while continuing to respect their unique interests and autonomy. The key conclusion from this chapter is that a process that ensures the rights of the Mi'kmaq are respected and acknowledged does not alone ensure the success of negotiations and consultations. Openness and accountability on the part of those representing the Mi'kmaq is required to maintain the support of those they represent.

In chapter 5, Bikowski and Slowey explore what factors influence whether an Indigenous community chooses to support or reject oil and gas projects. They answer this question by using an analytical framework to compare the experiences of Indigenous communities affected by development of the Athabasca oil sands in Alberta with those of the Frederick Brook shale play in New Brunswick. They argue the vastly different outcomes—development in Alberta and its lack in New Brunswick—are a direct result of each province's approach to the duty to consult. The key conclusion from this chapter is that it is in governments' best interest to devise clear plans and policies that will help Indigenous communities feel invested and secure in development projects. Specifically, the same characteristics of modern treaties that ameliorate differences between the Crown and Indigenous communities on the subject of resource development can be applied to consultation processes, and provide legal, political, economic, and cultural certainty to Indigenous communities.

In chapter 6, Wyatt and Dumoe examine the Meadow Lake model of forest sector development, focusing on three elements: governance, community engagement, and economic development. The chapter demonstrates how First Nations can improve the socio-economic status of their communities through entrepreneurship and participation in decision-making regarding local resource development and describes elements that are critical to resolving resource disputes in traditional territories. The authors note that while Meadow Lake's involvement in forestry is and has been successful, it was not without challenges. The key conclusion from this chapter is that a governance structure that maintains clear distinctions between political and business roles, along with community engagement to allow community members to influence resource management, leads to improved economic outcomes and increased autonomy and sovereignty for Indigenous communities. The Meadow Lake example demonstrates that bilateral agreements between communities and businesses can be an effective mechanism for meaningful consultation, and that government-mandated processes are not always necessary.

The case studies in this volume demonstrate how Indigenous communities work within and outside frameworks and processes established by governments and industry to assert their rights and self-determination in resource development. Borrows (2016) notes that there is weak policy or legislative support for Indigenous economic self-determination or control over Indigenous-driven economic and natural resource development outside of government- or business-initiated projects. This often leaves Indigenous communities with little actual power to drive decisions about development. Moreover, the fact that consultation and engagement processes are imposed on Indigenous communities rather than co-developed reflects the fact that institutions and processes are still defined and controlled by the state, limiting the involvement of Indigenous Peoples in decision-making. A common thread through the case studies is the persistent failure of Canadian governments to recognize and respect Treaty Rights, despite the emphasis on procedural duty to consult in policy documents analyzed in chapter 1. And yet, the case studies show that despite the imperfect and biased nature of Canadian institutions—and governments' failures to uphold Indigenous rights—communities are able to engage in self-determined development.

This volume offers four broad lessons. First, the importance of co-management or co-governance arrangements in respecting Indigenous rights and maintaining the autonomy of Indigenous Peoples, particularly through the

examples of Yukon (chapter 2), Mi'kmaq (chapter 4), and Meadow Lake (chapter 6). These arrangements support ongoing community engagement, and result in relationships characterized by respect and consent between self-determining partners. Developing governance arrangements was a complex and decades-long process for the Indigenous communities involved. The Yukon and Mi'kmaq experiences demonstrate that establishing self-determination and rights-based governance is a lengthy and adversarial process that remains imperfect, in part because of the fraught nation-to-nation relationship with the Crown. A key failure of governments in these processes was failure to treat the Indigenous communities as equal partners and recognize their rights. In contrast, the Meadow Lake example shows that despite an adversarial situation with protests, private proponents can develop respectful co-management relationships with Indigenous communities. The lesson from all three case studies is that a precondition of positive relationships is accepted institutional spaces for decision-making processes, where Indigenous rights are recognized and upheld, and Indigenous communities are equal partners.

In contrast to the above examples, chapter 3 shows that implementation matters as much as process. The example of Inuit engagement in mining projects governed by the Nunavut Land Claims Agreement demonstrates that engagement processes under land claim agreements can be insufficient and superficial even with co-management agreements in place. This shows that while process is important, implementation is also crucial. The Voisey's Bay case study offers a similar conclusion through a different mechanism. There was no formal agreement in place, but community members and Inuit nation representatives were highly involved in negotiations and the deliberative processes, in the end giving their consent to the project. These five examples speak to the importance of Indigenous communities' assertion of their Treaty Rights and equal footing in negotiations, and recognition of these rights by project proponents and governments.

Second, and relatedly, is the importance of transparency and accountability within Indigenous nations, between representatives and the community members they represent, as part of the stable institutions underpinning effective partnerships and resource governance. This is exemplified by the experiences of the Mi'kmaq (chapter 4), Meadow Lake (chapter 6), and communities participating in the impact assessment of the Voisey's Bay and Mary River mines (chapter 3). The Mi'kmaq developed a unique self-governance model with the KMKNO co-ordinating consultation on behalf of member

nations, balancing collective negotiations and communities' individual needs. As McMillan, Maloney, and Gaudet note, the scope and breadth of KMKNO activities mean communication and accountability is paramount in KMKNO fulfilling its mandate and defending Treaty Rights.

Meadow Lake deliberately separated business operations from the influence of political power, and the political governance structures prioritize accountability. The Meadow Lake example also emphasizes that Indigenous-led businesses must also engage with its communities to manage concerns and Treaty Rights. With Voisey's Bay, communities were fully informed about the content of the impact benefit agreement (IBA) and voted in favour of the mine and the IBA. In the Mary River mine case, the land claims agreement process channelled Inuit communities' concerns through local and regional representatives. Divergent views between community concerns and representatives' views, alongside a secretive negotiation process, led to substantial opposition and a superficial engagement process.

Third, economic benefits of development can be closely tied to self-determination, sovereignty, and autonomy, but are not necessarily. The experiences of Fort McKay First Nation (chapter 5) and Meadow Lake (chapter 6) show how strategic investments enable less dependence on government transfers and programs, creating economic autonomy that leads to greater social autonomy. The Mary River project (chapter 3), in contrast, created tension between community members and local and regional representatives, exacerbated by the secretive nature of the Inuit Impact and Benefit Agreement negotiations and the fact that the agreement was signed before the impact assessment process. In this instance, the economic benefits stymied self-determination and undermined the governance process.

Fourth, it is imperative to improve implementation of meaningful consultation and engagement. This is a theme reflected in all chapters, but most poignantly in the discussion of expectations and impact benefit agreements in mining (chapter 3), the long and drawn-out process to recognize Mi'kmaq rights (chapter 4), the comparison of support for oil and gas development in Alberta and New Brunswick (chapter 5), and the analysis of documents related to consultation and engagement (chapter 1). Canadian governments and businesses struggle with the concept of effective and meaningful consultation. Whether this is deliberate—relying on existing institutions to advance development over Indigenous rights—or comes from uncertainty about the application of often-narrow legal guidance to a specific project, current norms

can and should change. Several court cases provide guidance, which is slowly changing processes and procedures, but the legal system is a time-consuming and financially costly avenue for dispute resolution. Protest is an effective means for Indigenous communities to uphold their rights, but it is systemic institutional failures that lead to this outcome. Fundamentally, Canadian institutions need to change. A more productive approach is suggested by the case studies presented above: co-develop principles and processes where Indigenous communities are equal partners.

We also note some areas of future research we have identified through developing this edited volume. First, there is much more that can be shared regarding Indigenous Peoples' experiences with resource development and consultation and engagement processes; the chapters presented in this book are a small subset of these experiences. We hope that more Indigenous communities will consider sharing their perspectives and experiences so that self-determination and rights-based governance becomes the norm rather than the exception. Second, and relatedly, there is much scope for research identifying and quantifying the failures of current institutions in upholding Indigenous rights. This goes beyond analysis of court cases and requires co-operative research on large and small injustices related to resource development. Third, as noted by Rodon, Therrien, and Bouchard, the ambiguity inherent in current consultation and approval processes with regard to addressing or considering Indigenous Peoples' concerns appears to require the implementation of a real process reflecting FPIC. The case studies presented in this volume further highlight the need to clarify the objectives of consultation and the definition of FPIC in Canada.

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The development of equitable relationships and outcomes among Indigenous communities, resource development companies, and governments in Canada is slow and uneven. *Protest and Partnership* brings together expert contributors to ask what works—and what doesn't—in these relationships. It explores what processes lead to greater involvement and control in decision-making by Indigenous Peoples and the establishment of mutually beneficial partnerships.

*Protest and Partnership* presents case studies on a range of resource development sectors including oil and gas, renewable energy, mining, and forestry, drawn from regions across Canada. It presents a fine-grained analysis of institutions and processes, demonstrating how Indigenous communities work within and outside frameworks and processes established by governments and industry. It recognizes the persistent failure of Canadian governments to honour treaty rights and provide meaningful consultation and demonstrates how Indigenous groups, communities, and governments have engaged in self-determined resource development despite these ongoing failures.

Offering broad lessons in the importance of co-management and co-governance, the autonomy of Indigenous Peoples, transparency and accountability, Indigenous economic security, and meaningful collaboration and engagement, *Protest and Partnership* is a thorough and careful exploration of the current state of consultation and engagement on resource development with Indigenous communities in Canada.

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