

# Revitalizing Indigenous Women's Water Governance Roles in Impact and Benefit Agreement Processes Through Indigenous Legal Orders and Water Stories

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## Article abstract

In the Canadian mining sector, the use of an impact and benefit agreement (IBA) is the dominant legal instrument that structures the legal relationship between a First Nation and a proponent. However, barriers to Indigenous women's participation in IBA law-making exist, which raises the question : How can IBA law-making be strengthened to include Indigenous women ? Emergent scholarship by Graben, Cameron and Morales takes up this question of Indigenous women's participation in their gendered approach. In this article, I critically examine and expand upon Graben, Cameron and Morales gendered approach, and argue that mining, Indigenous women, and water are interconnected, and advancing Indigenous women's participation is essential, as argued by Graben, Cameron and Morales. However, offering Indigenous women a place at the IBA negotiating table is meaningless without recognizing their Indigenous law stories and governance responsibilities to speak for water, as long argued by Indigenous water governance scholars and Indigenous women.

# Revitalizing Indigenous Women's Water Governance Roles in Impact and Benefit Agreement Processes Through Indigenous Legal Orders and Water Stories

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Patricia HANIA\*

*In the Canadian mining sector, the use of an impact and benefit agreement (IBA) is the dominant legal instrument that structures the legal relationship between a First Nation and a proponent. However, barriers to Indigenous women's participation in IBA law-making exist, which raises the question: How can IBA law-making be strengthened to include Indigenous women? Emergent scholarship by Graben, Cameron and Morales takes up this question of Indigenous women's participation in their gendered approach. In this article, I critically examine and expand upon Graben, Cameron and Morales gendered approach, and argue that mining, Indigenous women, and water are interconnected, and advancing Indigenous women's participation is essential, as argued by Graben, Cameron and Morales. However, offering Indigenous women*

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\* Ph.D. (Osgoode), Post-Doctoral Researcher, Ryerson University, Law and Business Program, phania.ryerson.ca. I would like to thank not only the peer reviewers as your comments on the earlier draft of this article deepen my thinking and enhanced the final version but also I thank the law review team for your editorial work. I take responsibility for all errors and omissions in this piece. Thank you to Marilyn Poitras, a former colleague at the University of Saskatchewan, College of Law, who generously gave her time to guide my thinking on an Indigenous worldview of water. I also thank Sari Graben for her generosity with her time and her guidance on the gendering of impact and benefit agreements: your insights were invaluable! I am non-aboriginal, settler-citizen who took on this project as an extension of my doctoral work examining the shift to participatory water governance in Canada. During my doctoral research, I encountered Deborah McGregor's scholarship on Indigenous women as water knowledge holders. In my research, I found that Indigenous women were missing in participatory water governance regimes, and I wondered – why? My interest in Indigenous women's lack of physical presence and their missing water stories in natural resource decision making motivated me to undertake this post-doctoral research, and I thank Ryerson University for funding this project.

*a place at the IBA negotiating table is meaningless without recognizing their Indigenous law stories and governance responsibilities to speak for water, as long argued by Indigenous water governance scholars and Indigenous women.*

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*Tant dans le secteur minier canadien qu'ailleurs dans le monde, le recours aux ententes sur les répercussions et les avantages (ERA) constitue l'instrument juridique dominant pour structurer les relations juridiques entre l'industrie et les peuples autochtones. Par ailleurs, le phénomène de la violence vécue par les femmes autochtones découlant de l'intégration d'une société minière au sein d'une communauté est bien documenté. Cependant, au Canada, les lois discriminatoires de l'État colonial continuent de faire obstacle à la participation des femmes autochtones aux processus des ERA. Ces écueils entraînent une invisibilité des femmes autochtones, qui résulte des ERA pourtant neutres en matière de genre. L'invisibilité en question contribue à marginaliser les femmes autochtones dans les processus d'élaboration des ERA. Une telle situation soulève l'interrogation suivante : comment les processus d'élaboration des ERA envisagent-ils la participation des femmes autochtones dans leurs domaines de compétence et leurs responsabilités en matière de gouvernance de l'eau ? Dans le présent article, l'auteure utilise l'approche sexospécifique de Graben, Cameron et Morales dans l'analyse des ERA afin de favoriser l'inclusion des femmes autochtones. Elle soutient que le droit autochtone, et en particulier la juridiction des femmes autochtones sur la gestion de l'eau et leurs récits, les place dans une position privilégiée pour négocier directement une ERA. Elle en conclut que la revitalisation du rôle des femmes autochtones dans la gouvernance peut ainsi être réalisée en s'appuyant sur les récits relatifs à l'eau des peuples autochtones, comme le prévoit le droit autochtone favorisant la réconciliation, tel que cela est mis en avant dans les appels à l'action contenus dans le rapport de la Commission de vérité et réconciliation du Canada paru en 2015.*

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*En el sector minero canadiense como en otras partes del mundo, recurrir a los Acuerdos de Impacto y Beneficios (AIB) resulta ser el*

*instrumento jurídico predominante para estructurar las relaciones jurídicas entre la industria y los pueblos indígenas. Además, bien se ha documentado sobre el fenómeno de la violencia que han vivido las mujeres indígenas, resultante de la integración de una compañía minera en el seno de una comunidad. Sin embargo, en Canadá, las leyes discriminatorias del Estado colonial siguen obstaculizando la participación de las mujeres indígenas en los procesos de los AIB. Estos escollos han arraigado una invisibilidad de las mujeres indígenas que resulta de los AIB, siendo estos, no obstante, neutros en materia de género. La invisibilidad en cuestión ha contribuido a marginalizar a las mujeres indígenas en los procesos de realización de los AIB. Tal situación plantea la siguiente interrogante: en los procesos de elaboración de los AIB ¿cómo se sopesa la participación de las mujeres indígenas en sus campos de competencia y en sus responsabilidades en materia de gestión pública del agua? En el presente artículo, la autora emplea la perspectiva de género de Graben, Cameron y Morales en el análisis de los AIB con el fin de favorecer la inclusión de las mujeres indígenas. La autora sostiene que el derecho aborígen, y en particular, la jurisdicción de las mujeres indígenas en la gestión del agua y en sus relatos, las sitúa en una posición privilegiada para negociar directamente un AIB. Igualmente, la autora llega a la conclusión que la revitalización del rol de las mujeres indígenas en la gobernanza puede ser realizada basándose en los relatos relacionados con el agua de los pueblos indígenas como lo prevé el derecho indígena, fomentando la reconciliación tal y como se ha destacado en los llamamientos a la acción del informe de la Commission de vérité et réconciliation du Canada publicado en el año 2015.*

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Critical Indigenous feminist and natural resource scholarship has exposed the lack of participation of Indigenous women in natural resource governance in Canada and globally<sup>1</sup>. As a well-established governance tool within the extractive sector, an impact benefit agreement (IBA) is a key private-law instrument that structures the legal relationship between a First Nation<sup>2</sup> and the industry

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1. See generally: Sheena KENNEDY DALSEG and others, "Gendered Environmental Assessments in the Canadian North: Marginalization of Indigenous Women and Traditional Economies", *Northern Review*, n° 47, 2018, p. 135; Joyce GREEN (ed.), *Making Space for Indigenous Feminism*, 2<sup>nd</sup> ed., Winnipeg, Fernwood, 2017; Raywat DEONANDAN, Kalowatie DEONANDAN and Brennan FIELD, "Minding the Gap: Aboriginal Women and the Mining Industry", *University of Ottawa*, 2016, [Online], [ruor.uottawa.ca/bitstream/10393/35187/1/deonandan%20-%20mining%20the%20gap%20SSHRC%20report.pdf] (April 3<sup>rd</sup>, 2019); J.C. KEENAN, D.L. KEMP and R.B. RAMSAY, "Company-Community Agreements, Gender and Development", *Journal of Business Ethics*, vol. 135, n° 4, 2016, p. 607; Nathalie KERMOAL and Isabel ALTAMIRANO-JIMENEZ, *Living on the Land. Indigenous Women's Understanding of Place*, Edmonton, AU Press, 2016; David COX and Susanne MILLS, "Gendering Environmental Assessment: Women's Participation and Employment Outcomes at Voisey's Bay", *Arctic*, vol. 68, n° 2, 2015, p. 246; Stephanie C. LABELLE, *Aboriginal Women, Mining Negotiations, and Project Development: Analyzing the motivations and priorities shaping leadership and participation*, masters thesis, Department of Native Studies, University of Manitoba, 2015; Katy JENKINS, "Women, mining and development: An emerging research agenda", *The Extractive Industries and Society*, vol. 1, n° 2, 2014, p. 329; Ginger GIBSON and Deanna KEMP, "Corporate Engagement with Indigenous Women in the Minerals Industry: Making Space for Theory", in Ciaran O'FAIRCHEALLAIGH and Saleem ALI (eds.), *Earth Matters: Indigenous Peoples, the Extractive Industries and Corporate Social Responsibility*, Sheffield, Greenleaf Publishing, 2008, p. 104; Isabel ALTAMIRANO-JIMENEZ, "Nunavut: Whose Homeland, Whose Voices?", *Canadian Women Studies*, vol. 26, n°s 3/4, 2008, p. 128; Deborah MCGREGOR, "Anishnaabe-Kwe, Traditional Knowledge, and Water Protection", *Canadian Women Studies*, vol. 26, n°s 3/4, 2008, p. 26; Linda ARCHIBALD and Mary CRNKOVICH, "If Gendered Mattered: A Case Study of Inuit Women, Land Claims and the Voisey's Bay Nickel Project", Ottawa, 1999, [Online], [publications.gc.ca/collections/Collection/SW21-39-1999E.pdf] (April 3<sup>rd</sup>, 2019).
  2. In this article, the use of the term First Nations refers to First Nations, Inuit and the Métis.

proponent<sup>3</sup>. Even though this confidential contract is largely aimed at providing financial benefits to a community through employment, preferential treatment of local businesses, and community development,

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3. FIRST NATIONS OF QUEBEC AND LABRADOR ECONOMIC DEVELOPMENT COMMISSION, "The Art of Negotiating Impact and Benefit Agreements", *Nikan*, vol. 17, n° 1, [Online], [www.cdepnql.org/pdf/nikan/NIKAN\_WEB\_January-2018-EN.pdf] (April 3<sup>rd</sup>, 2019); Thierry RODON, "Institutional Development and Resource Development: The Case of Indigenous Peoples", *Canadian Journal of Development Studies*, vol. 39, n° 1, 2018, p. 119; Neil CRAIK, Holly GARDNER and Daniel MCCARTHY, "Indigenous – Corporate Private Governance and Legitimacy: Lessons Learned from Impact and Benefit Agreements", *Resources Policy*, vol. 52, 2017, p. 379; Tarje IVERSON WANVIK and Ken CAINE, "Understanding Indigenous Strategic Pragmatism: Metis Engagement with Extractive Industry Developments in the Canadian North", *The Extractive Industries and Society*, vol. 4, n° 3, 2017, p. 595; Drew MEERVELD, "Assessing Value: A Comprehensive Study of Impact Benefit Agreements on Indigenous Communities", *University of Ottawa*, 2016, [Online], [ruor.uottawa.ca/bitstream/10393/34816/4/Meerveld%2C%20Drew%2020161.pdf] (April 3<sup>rd</sup>, 2019); Jennifer LOUTIT, Jacqueline MANDELBAUM and Sam SZOKE-BURKE, "Emerging Practices in Community Development Agreements", (2016) 7 *J. Sustainable Dev. L. & Pol'y* 64; Norah KIELLAND, "Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements", *Library of Parliament, Canada*, [Online], [lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2015-29-e.pdf] (April 3<sup>rd</sup>, 2019); Ginger GIBSON and Ciaran O'FAIRCHEALLAIGH, "IBA Community Toolkit: Negotiation and Implementation of Impact Benefit Agreements", Toronto, Gordon Foundation, 2015, [Online], [gordonfoundation.ca/app/uploads/2017/03/IBA\_toolkit\_web\_Sept\_2015\_low\_res\_0.pdf] (April 3<sup>rd</sup>, 2019); Guillaume PETERSON ST-LAURENT and Philippe LE BILLON, "Staking Claims and Shaking Hands: Impact and Benefit Agreements as a Technology of Government in the Mining Sector", *The Extractive Industries and Society*, vol. 2, n° 3, 2015, p. 590; Thierry RODON and Francis LÉVESQUE, "Understanding the Social and Economic Impacts of Mining Development in Inuit Communities: Experiences with Past and Present Mines in Inuit Nunangat", *Northern Review*, n° 41, 2015, p. 13; Brad GILMOUR and Bruce MELLETT, "The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations", (2013) 51 *Alta. L. Rev.* 385, 391; Adam J. WRIGHT, *Impact and Benefit Agreements: The Role of Negotiated Agreements in the Creation of Collaborative Planning in Resource Development*, master thesis, University of Guelph, 2013; Ken J. CAINE and Naomi KROGMAN, "Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North", *Organization & Environment*, vol. 23, n° 1, 2010, p. 76; Courtney FIDLER and Michael HITCH, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice", *Environments Journal*, vol. 35, n° 2, 2007, p. 49; Ciaran O'FAIRCHEALLAIGH and Tony CORBETT, "Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements", *Environmental Politics*, vol. 14, n° 5, 2005, p. 629; Ross PRIZZIA, "The Impact of Development and Privatization on Environmental Protection: An International Perspective", *Environment, Development and Sustainability*, vol. 4, n° 3, 2002, p. 315; Irene SOSA and Karyn KEENAN, "Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada", 2001, [Online], [www.cela.ca/sites/cela.ca/files/uploads/IBAeng.pdf] (April 3<sup>rd</sup>, 2019).

scholars are beginning to view an IBA as a means to increase the social equity of Indigenous women and to enhance the mining sector by strengthening the efficacy of voluntary corporate social responsibility initiatives<sup>4</sup>.

Emergent scholarship by Graben, Cameron and Morales points to these agreements as a potential means to bolster Indigenous women's participation in the IBA law-making process<sup>5</sup>. The starting point of these scholars is their argument that an IBA is a gendered instrument as the agreement not only fails to affirm the consent of Indigenous women in the community, but also does not take into account the social inequities<sup>6</sup> experienced by Indigenous women in the Canadian mining sector. However, despite this critique, Graben, Cameron and Morales contend the IBA representation and warranties clause could be restructured to serve as an entry point for Indigenous women's participation in the IBA process. Fundamentally, the representation and warranties clause establishes the power of the parties to the agreement to contract, and signifies the "validity

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4. Sari GRABEN, Angela CAMERON and Sarah MORALES, "Gender Impact Analysis of Impact Benefit Agreements: Representation Clauses and UNDRIP", in Ibironke ODUMOSU-AYANU and Dwight NEWMAN (eds.), *Indigenous-Industry Agreements, Natural Resources and the Law* [forthcoming, Routledge, 2020]; Ciaran O'FAIRCHEALLAIGH, "Social Equity and Large Mining Projects: Voluntary Industry Initiatives, Public Regulation and Community Development Agreements", *Journal of Business Ethics*, vol. 132, n° 1, 2015, p. 91.
  5. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.
  6. *Id.* Susan MANNING and others, "Strengthening Impact Assessments for Indigenous Women", *Canadian Research Institute For The Advancement of Women*, 2018, [Online], [www.criaw-icref.ca/en/product/strengthening-impact-assessments-for-indigenous-women] (April 3<sup>rd</sup>, 2019); Adam BOND and Leah QUILAN, "Indigenous Gender-based Analysis for Informing the Canadian Minerals and Metals Plan", *Native Women's Association of Canada*, 2018, [Online], [www.minescanada.ca/sites/default/files/indigenous-gender-based-analysis-cmmp\_.pdf] (April 3<sup>rd</sup>, 2019); AMNESTY INTERNATIONAL, "Out of Sight, Out of Mind: Gender, Indigenous Rights and Energy Development in Northeast British Columbia, Canada", 2016, [Online], [www.amnesty.ca/outofsight] (April 3<sup>rd</sup>, 2019); CANADIAN'S WOMEN'S FOUNDATION, "The Impact of Resource Extraction on Inuit Women and Families in Qamani'tuaq, Nunavut Territory", *University of British Columbia*, 2016, [Online], [www.pauktuutit.ca/wp-content/uploads/Quantitative-Report-Final.pdf] (April 3<sup>rd</sup>, 2019); Ginger GIBSON and Jason KLINCK, "Canada's Resilient North: The Impact of Mining on Aboriginal Communities", *Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health*, vol. 3, n° 1, 2008, p. 115; Gail WHITEMAN and Katy MAMEN, "Meaningful Consultation and Participation in the Mining Sector? A Review of the Consultation and Participation of Indigenous Peoples within the International Mining Sector", *The North-South Institute*, Ottawa, 2002, [Online], [metisportals.ca/MetisRights/wp/wp-admin/images/Meaningful %20Consultation %20in %20the %20Mining %20Sector.pdf] (April 3<sup>rd</sup>, 2019).



and enforceability of an IBA<sup>7</sup>". Pragmatically, the clause serves as a risk management mechanism that organizes and restricts the risks inherent in the business activity<sup>8</sup>. From a First Nation perspective, the authority to consent to an IBA is often expressed by the Band Council and is proven by a "Band Council Resolution<sup>9</sup>". However, in Graben, Cameron and Morales's view, the lack of Indigenous women's participation in the IBA law-making process raises doubt that consent has been conferred by the First Nation. In their view, the gendered nature of the IBA demands a closer look at women's participation through a critical examination of First Nations' modes of government, negotiation and community organization in order to understand: (1) Who is actually participating and conferring consent to the IBA? (2) Whether the consent is reflective of a collective decision? (3) Or whether it is "representing the one-mind<sup>10</sup>"? The dominance of the IBA, as the preferred legal instrument in the extractive sector, combined with the use of gender-neutral representation and warranties provisions calls into question the consent of community, the legitimacy of IBA processes and the legal binding nature of the agreement<sup>11</sup>.

Creating the space for Indigenous women to participate in the mainstream IBA law-making process in a culturally inclusive manner is a complex endeavour. Indigenous women's worldview is generally informed by an "ethic of responsibility<sup>12</sup>" that encourages women to carry out their responsibilities to protect the environment<sup>13</sup>. Many Indigenous women hold a relational worldview where harm to their relationships with each other, with other beings (i.e., non-human and spiritual, plants, rocks, water) and with the land<sup>14</sup> should be avoided, a perspective, if upheld, is in direct conflict with the disruptive resource extractive activities of a mining project. Because of this ethical perspective, some Indigenous women may elect not to participate in an IBA process that is in conflict

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7. B. GILMOUR and B. MELLETT, *supra*, note 3, 391.

8. *Id.*

9. *Id.*

10. Kiera L. LADNER, "Governing Within an Ecological Context: Creating An AlterNative Understanding of Blackfoot Governance", *Studies in Political Economy*, vol. 70, n° 1, 2003, p. 125, at page 139.

11. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

12. Deborah MCGREGOR, "Lessons for Collaboration Involving Traditional Knowledge and Environmental Governance in Ontario, Canada", *AlterNative: An International Journal of Indigenous People*, vol. 10, n° 4, 2014, p. 340, at page 346.

13. *Id.* See especially Deborah MCGREGOR, "Anishnaabe-Kwe, Traditional Knowledge, and Water Protection", *Canadian Women Studies*, vol. 26, n°s 3/4, 2008, p. 26.

14. Deborah MCGREGOR, Jean-Paul RESTOULE and Rochelle JOHNSTON (eds.), *Indigenous Research. Theories, Practices, and Relationships*, Toronto, Canadian Scholars, 2018; A. BOND and L. QUILAN, *supra*, note 6.



with their responsibilities and a worldview of being in relationship with all of Creation's beings. Indigenous women's resistance to mining developments may also be influenced by the presence of socio-economic barriers<sup>15</sup> that have been generated by the sector's neo-liberal, capitalist, economic development agenda and gendered colonial state laws that systematically destabilized Indigenous women's traditional knowledge<sup>16</sup>, leadership<sup>17</sup>, and Indigenous governance<sup>18</sup>, resulting in an "silencing effect"<sup>19</sup> upon women's voices within mainstream governance processes.

Attention to the lived experiences of Indigenous women in the mining sector is a key aspect to understanding how Indigenous women have become "invisible"<sup>20</sup> to those charged with overseeing the mainstream IBA law-making process<sup>21</sup>. Focusing on Indigenous women's participation by using a gendered lens is important because IBA negotiators can begin to rely on, and reconstruct Indigenous women's traditional governance functions. Bringing forward Indigenous women in the law-making process could center Indigenous women and revitalize their governance functions, norms, and legal orders while addressing the following consequences of Indigenous women's current condition of invisibility: (1) the silencing Indigenous women's voices, (2) the suppression of gendered Indigenous knowledge (for example, Indigenous women's water knowledge), which leads to destabilizing Indigenous women as active agents in generating knowledge<sup>22</sup> with respect to complex social-ecological-economic issues facing a community, like consenting to an IBA, (3) the concealment of

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15. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4. See also, *supra*, note 6.
  16. Rachel ARSENAULT and others, "Shifting the Framework of Canadian Water Governance through Indigenous Research Methods: Acknowledging the Past with an Eye to the Future", *Water*, vol. 10, n° 1, 2018, p. 49; N. KERMOAL and I. ALTAMIRANO-JIMENEZ, *supra*, note 1; Deborah MCGREGOR, "Traditional Knowledge: Considerations for Protecting Water in Ontario", *International Indigenous Policy Journal*, vol. 3, n° 3, 2012, art. 11; D. MCGREGOR, *supra*, note 1.
  17. Susan M. HILL, *The Clay We Are Made of. Haudenosaunee Land Tenure on the Grand River*, Winnipeg, University of Manitoba Press, 2017; Leanne BETASAMOSAKE SIMPSON, *As We Have Always Done. Indigenous Freedom Through Radical Resistance*, Minneapolis, University of Minnesota Press, 2017; Kim ANDERSON, *A Recognition of Being. Reconstructing Native Womanhood*, 2<sup>nd</sup> ed., Toronto, Women's Press, 2016; Patricia A. MONTURE, "Women's Words: Power, Identity, and Indigenous Sovereignty", *Women's Studies*, vol. 26, n°s 3/4, 2008, p. 154; Joyce GREEN (ed.), *Making Space for Indigenous Feminism*, Winnipeg, Fernwood, 2007.
  18. *Id.*
  19. Patricia HANIA and Sari GRABEN, "Overlooked: Indigenous Women's Participation in Natural Resource Governance" [forthcoming].
  20. N. KERMOAL and I. ALTAMIRANO-JIMENEZ, *supra*, note 1.
  21. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.
  22. N. KERMOAL and I. ALTAMIRANO-JIMENEZ, *supra*, note 1, introduction.

cultural identity attached to a specific geography, and (4) the disregard of Indigenous women's distinct, gendered governance authority<sup>23</sup> (for example, women's responsibilities to water<sup>24</sup>).

Placing the focus on Indigenous governance and women's water governance authority re-directs the IBA law-making process to position Indigenous women as key participants in IBA processes, and reinforces the theme of re-emergence of traditional ways of knowing water. Indigenous water governance scholars have long argued for the recognition of Indigenous women as those who hold the "responsibility to speak for water<sup>25</sup>". The participation of Indigenous women and the recognition of their water governance function in IBA law-making offers a way forward for all IBA negotiators, including the extractive industry and the government sectors facing the challenge of incorporating Indigenous law into policy and industry practices.

In support of Graben, Cameron and Morales's gendered approach, I argue that the IBA law-making process, from beginning to end, should be inclusive of Indigenous women's worldview. I expand upon Graben, Cameron and Morales's gendered approach and argue that mining, women, and water are interconnected. Mining is an activity that impacts aquatic systems and implicates Indigenous women's traditional governance function as Indigenous women are viewed as a community's "water-knowledge holders", hold the authority "to speak for water" and carry "responsibilities" to protect water under Indigenous water governance<sup>26</sup>. Advancing the idea of participation as a means to increase Indigenous women involvement in the IBA law-making process is essential but offering Indigenous women a place at the IBA negotiating table is meaningless without recognizing their traditional authority to speak for water.

In this article, I consider Indigenous governance and women's responsibilities to water through Indigenous stories, as articulated in the Indigenous water governance and Indigenous law scholarship and as a subject that is overlooked in the natural resources literature. I have relied

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23. *Id.*

24. D. MCGREGOR, *supra*, note 1.

25. *Id.*

26. *Id.*; D. MCGREGOR, J.-P. RESTOULE and R. JOHNSTON (eds.), *supra*, note 14; K. ANDERSON, *supra*, note 17; Aimee CRAFT, "Anishinaabe Nibi Inaakonigewin Report", 2014, [Online], [create-h2o.ca/pages/annual\_conference/presentations/2014/ANI\_Gathering\_Report\_-\_June24.pdf] (April 3<sup>rd</sup>, 2019); Kim ANDERSON, "Aboriginal Women, Water and Health: Reflections from Eleven First Nations, Inuit, and Metis Grandmothers", 2010, [Online], [www.pwhce.ca/pdf/womenAndWater.pdf] (April 3<sup>rd</sup>, 2019).

on a literature review and a synthesis of academic and community-based research as my methodology ; the Indigenous law literature features stories as a source of Indigenous law<sup>27</sup>, and Indigenous water governance literature discusses how, through a Creation story, responsibilities are conferred upon Indigenous women to speak for water<sup>28</sup>. No Indigenous stories are interpreted, and only published stories and direct personal stories of women are referenced. In response to the challenge posed by Graben, Cameron and Morales to adopt a gendered approach to IBA law-making, I propose that Indigenous women's governance function as water-knowledge keepers is a way of gendering an IBA. As applied to water governance, gendering means the inclusion of Indigenous women, their ways of knowing water and their decision-making authority as recognized under Indigenous governance. Recognition of Indigenous women's responsibilities to water brings forward Indigenous governance into the IBA law-making process and creates the space to centre Indigenous women as participants (rather than stakeholders) within IBA processes. The goal of gendering IBA law-making through story is : to revitalize Indigenous women's traditional governance role as a water-knowledge holder. This objective is in keeping with the well-established Indigenous water governance scholarship<sup>29</sup> that has advocated for Indigenous women's participation as a water-knowledge holder ; the Truth and Reconciliation Commission of Canada: Call to Action Report (TRC, 2015)<sup>30</sup>, which places an onus on government and industry sectors to incorporate Indigenous law into policy and practices with the aim being to develop cross-cultural competency skills ; and the recent recognition of the legal scholarship of Indigenous law and legal orders<sup>31</sup>.

It is hoped this article will, through the recognition of stories as a source of law, assist legal scholars, First Nation community members, advocacy groups, and IBA negotiators in developing an inclusive, gendered-oriented

27. Val NAPOLEON and Hadley FRIEDLAND, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories", (2016) 61 *McGill L.J.* 725 ; UNIVERSITY OF VICTORIA, INDIGENOUS LAW RESEARCH UNIT, [Online], [www.uvic.ca/law/about/indigenous/indigenoulawresearchunit/index.php] (April 3<sup>rd</sup>, 2019).

28. K. ANDERSON, *supra*, note 17 ; D. MCGREGOR, *supra*, note 1 ; P.A. MONTURE, *supra*, note 17.

29. D. MCGREGOR, *supra*, note 1 ; K. ANDERSON, *supra*, note 17 ; A. CRAFT, *supra*, note 26.

30. GOVERNMENT OF CANADA, "Truth and Reconciliation Commission of Canada: Calls to Action", recommendations 45 (iv) (Royal Proclamation and Covenant of Reconciliation) and 92 (Business and Reconciliation), [Online], [trc.ca/assets/pdf/Calls\_to\_Action\_English2.pdf] (April 3<sup>rd</sup>, 2019).

31. V. NAPOLEON and H. FRIEDLAND, *supra*, note 27.

IBA processes that advances Indigenous water law<sup>32</sup> and women's ways of knowing water<sup>33</sup>. The revitalization of Indigenous women's governance functions can be achieved by relying upon Indigenous legal orders, rules and sources, as advanced by Indigenous law scholars<sup>34</sup>, and as recommended in the TRC's Call to Action Report<sup>35</sup>.

This article is structured into three parts. In Part One a brief overview of Indigenous governance, law, women and stories is presented to place the subject—Indigenous women's water governance responsibilities—in context, and as a way to ground Indigenous women's representation in IBA law-making.

Part Two introduces Graben, Cameron and Morales' gendered approach to an IBA. Their gendered framework is important emerging critical scholarship, as there is a dearth of research on the gendered nature of IBA law-making in Canada. These scholars adopt an intersectional feminist methodology to examine an IBA, and specifically raise concerns relating to the representation and warranties clause by asking: How are Indigenous women's participation and consent constructed in an IBA? Given the developing nature of Graben, Cameron and Morales's gendered method, the focus of Part Two is to critique their key argument that Indigenous women's participation in an IBA can be bolstered through the representation and warranties clause by considering the three aspects of consent and participation: (1) government mechanisms, (2) women's participation in negotiation, and (3) methods of reform and resistance. The critique presented here not only relies upon the Indigenous water governance scholarship, as a way of gendering an IBA, but also recognizes gender as a social-cultural construct that is shaped by access to power and resources as well as the economic development, neo-liberal corporate milieu of IBA law-making.

In Part Three, a conclusion presents further thoughts to expand the gendering of IBA law-making. This discussion is offered to legal scholars, First Nation community members, advocacy groups and IBA negotiators as a way to advance an inclusive gendered-oriented IBA process as argued by Graben, Cameron and Morales. But, also to recognize and advance Indigenous law and in particular, Indigenous women's ways of knowing

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32. A. CRAFT, *supra*, note 26. The term Indigenous "water law" is attributed to Aimee Craft.

33. D. MCGREGOR, *supra*, note 1; D. MCGREGOR, *supra*, note 12; D. MCGREGOR, J.-P. RESTOULE and R. JOHNSTON (eds.), *supra*, note 14; K. ANDERSON, *supra*, note 17; A. CRAFT, *supra*, note 26.

34. UNIVERSITY OF VICTORIA, INDIGENOUS LAW RESEARCH UNIT, *supra*, note 27.

35. GOVERNMENT OF CANADA, *supra*, note 30.

water through stories, which is vital to the revitalization of Indigenous women's governance functions, as long argued by Indigenous feminist and water governance scholars, Indigenous women and non-governmental organizations.

## 1 Governance: Indigenous Law, Women, and Stories

*I have a deep love and respect for all of Creation,  
but the responsibility of women is water*<sup>36</sup>.

Within many First Nations, women are recognized as the communities' "water knowledge" holder, where women hold a special relationship with water and have responsibilities to protect water<sup>37</sup>. A woman's responsibility to speak for water is grounded in Indigenous governance, legal orders and stories, where Indigenous stories have recently been advanced in Indigenous law scholarship as a "source of law"<sup>38</sup>. While Indigenous water governance scholars have long argued for the participation and acknowledgement of Indigenous women's responsibilities to water in state-sanctioned natural resource regimes, the dominant theme in natural-resource governance literature is the absence of Indigenous women in decision-making processes<sup>39</sup>. It is recognized that numerous and varied First Nations governance regimes exist across Canada. The diversity in Indigenous legal orders signifies that a diversity of Indigenous women's ways of knowing water exists and these orders offer stories grounded in different Creation stories that inform a woman's relationship with and responsibilities for water. In order to breakdown the gendering of an IBA, three themes are presented below to help us to understand the centring of Indigenous women's participation in IBA law-making processes: (1) governance: an indigenous worldview of relationship and Indigenous law, (2) Indigenous stories, and (3) Indigenous women, water and creation stories.

36. A. CRAFT, *supra*, note 26, p. 30, attributed to Niiizhoosake Copenace.

37. D. MCGREGOR, *supra*, note 1; D. MCGREGOR, *supra*, note 12; D. MCGREGOR, J.-P. RESTOULE and R. JOHNSTON (eds.), *supra*, note 14. D. MCGREGOR, *supra*, note 1 references the *Water Declaration of the First Nations in Ontario*, 2008, [Online], [www.onwa.ca/upload/documents/coo-water-declaration.pdf] (April 3<sup>rd</sup>, 2019). In the Declaration women are explicitly identified as holding a responsibility to water. Under Section: Relationship to Water: "3. First Nations wom[en] are the keepers of water as women bring babies into the world carried on by the breaking of the water and; 4. First Nations in Ontario through the teachings of women have the responsibility to care for the land and the waters by our Creator."

38. V. NAPOLEON and H. FRIEDLAND, *supra*, note 27.

39. D. MCGREGOR, *supra*, note 1.

### 1.1 An Indigenous Worldview is Relational<sup>40</sup>

In “Indigenist thought”, the ideas of relationship and responsibilities frame the governance of society, and how one governs oneself in relation to other beings<sup>41</sup>, as eloquently expressed by Nawwaa’kamigoweinini: “In my culture everything is all in one—it’s a way of life<sup>42</sup>”. Fundamentally, governance is informed by this understanding of a relationship to others—human and non-human, and is influenced by the communities’ Creation story<sup>43</sup>. Humans do not hold a position of dominance over other living entities (for example, animals, plants) as held in a Judeo-Christian worldview. Indigenist thinking reveals an interrelated worldview where humans are connected beings—an individual is “in relationship to the natural world. In other words, it is an expression of how they see themselves fitting in that world as a part of the circle of life, not as superior beings who claim dominion over other species and other humans<sup>44</sup>”. These relationships inform the responsibilities conferred by the Creator, as illustrated in the Blackfoot worldview and practices:

The land was considered a mother, a giver of life, and the provider of all things necessary to sustain life. A deep reverence and respect for Mother Earth infused and permeated Indian spirituality, as reflected in the Blackfoot practice of referring to the land, water, plants, animals and their fellow human beings as “all my relations”. Relations meant that all things given life by the Creator – rocks, birds, sun, wind and waters – possessed spirits. According to their beliefs, the Creator had given them their own territory and entrusted them with the responsibility of caring for the land and all their relations. This responsibility to protect their inheritance for future generations was embodied in the Blackfoot creation story<sup>45</sup>.

Ladner, an Indigenous scholar, offers the Blackfoot’s conception of *Sīikisikaawa* (that is, governance), a natural law concept grounded in

40. *Id.*; D. MCGREGOR, *supra*, note 12; D. MCGREGOR, J.-P. RESTOULE and R. JOHNSTON (eds.), *supra*, note 14; K. ANDERSON, *supra*, note 17; A. CRAFT, *supra*, note 26; A. BOND and L. QUILAN, *supra*, note 6.

41. K.L. LADNER, *supra*, note 10, at page 125.

42. A. CRAFT, *supra*, note 26, p. 7.

43. Deborah MCGREGOR, “Traditional Knowledge and Water Governance: The Ethic of Responsibility”, *AlterNative: An International Journal of Indigenous People*, vol. 10, n° 5, 2014, p. 493, at page 495. Also See: K. ANDERSON, *supra*, note 17; P.A. MONTURE, *supra*, note 17.

44. K.L. LADNER, *supra*, note 10, at page 125.

45. CANADA, ROYAL COMMISSION ON ABORIGINAL PEOPLES, *Report on the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1, Ottawa, 1996, p. 64, [Online], [data2.archives.ca/e/e448/e011188230-01.pdf] (April 3<sup>rd</sup>, 2019) (hereafter “RCAP”).

“relationship” that people establish with “all beings within a territory<sup>46</sup>”. As explained by Ladner, when observing the “older brother”, “the buffalo<sup>47</sup>”, the observer is offered insight into the political system of the herd and “experience[s] Creation” through the herd, including “learning ‘how to exist’ from and within Creation<sup>48</sup>”. In essence, Ladner is speaking to an “ecological” normative frame of interconnection that organizes the Blackfoot’s governance regime, and structures their “Indigenous political traditions, world views and knowledge systems<sup>49</sup>” that in turn informs how one governs oneself. This ecological perspective is in sharp contrast to the human-centric foundation of a western mode of political and personal governance. This ecological frame—connection to “Mother Earth<sup>50</sup>”—illuminates an Indigenous perspective that all things of Creation are living, that is, “most Indigenous knowledge systems are predicted on the idea that the world is alive and are a reflection of the living earth, so too are some Indigenous political traditions<sup>51</sup>”, which inform the “ethic of responsibility<sup>52</sup>” to other beings<sup>53</sup>. As a living entity, an Indigenous political system is organic and is responsive to changing modern circumstances and structures the basis of an Indigenous legal order<sup>54</sup>.

Generally, Indigenous law is centered in the community. Citizens are active agents in participating in legal orders<sup>55</sup>, with women holding a distinct function as water keepers in the community<sup>56</sup>. Each Indigenous society and “legal authority” is distinct in the ways “citizens” are “organized”, and participate in their legal order<sup>57</sup>. For example, “in Cree Society, there are four decision-making groups, and their role and authority depends on the type of decision required: the family, medicine people, elders, and the whole community”. In “Gitksan society where law operates through the matrilineal kinship units of extended family and overarching

46. K.L. LADNER, *supra*, note 10, at page 125.

47. *Id.*

48. *Id.*, at page 129.

49. *Id.*, at page 126.

50. K. ANDERSON, *supra*, note 17, p. 158.

51. K.L. LADNER, *supra*, note 10, at page 126.

52. D. MCGREGOR, *supra*, note 43.

53. *Id.*

54. *Id.*; K.L. LADNER, *supra*, note 10; John BORROWS, *Canada’s Indigenous Constitution*, Toronto, University of Toronto Press, 2010.

55. Val NAPOLEON, “What is Indigenous Law? A Small Discussion”, *Indigenous Law Research Unit*, [Online], [[www.uvic.ca/law/assets/docs/ilru/What %20is %20Indigenous %20Law %20Oct %2028 %202016.pdf](http://www.uvic.ca/law/assets/docs/ilru/What%20is%20Indigenous%20Law%20Oct%2028%202016.pdf)] (April 3<sup>rd</sup>, 2019).

56. K. ANDERSON, *supra*, note 17; D. MCGREGOR, *supra*, note 1; A. CRAFT, *supra*, note 26.

57. V. NAPOLEON, *supra*, note 55.



clans<sup>58</sup>". As a social "intellectual process", Indigenous law encourages citizens to be active agents in debating and making decisions, such as natural-resource development choices<sup>59</sup>. Under many First Nation legal orders, Indigenous women held, and continue today to hold important decision-making roles concerning water governance. Indigenous women are understood "as spokespersons for water and carrying the primary responsibility for protecting that water<sup>60</sup>", which McGregor illustrates by highlighting the advocacy of Elder Edna Manitowabi, who aptly stated: "Aboriginal women have traditionally played important roles with respect to water and that their voices must be included in present-day discussions" affecting the living relative water<sup>61</sup>.

Numerous views on the binding nature and sources of law (sacred, natural, deliberative, positivistic and customary) can operate within Indigenous communities<sup>62</sup>. Since time immemorial, sacred and natural law has informed, and continues to inform, the deliberative source of law where law is a process of debate. Within a community, the process of debate ensures the law is current, responsive to changing circumstances and takes into account knowledge that "includes ancient and modern understandings of [...] gender equality, and economic considerations<sup>63</sup>". The deliberative source of law is key to the negotiation of an IBA as it points to how decision-making processes are carried out within a community, the authority to consent to the IBA, and how social conflicts are managed. Essentially, a deliberative mode facilitates the community's responsiveness to societal problems and can be inclusive when the deliberation takes into account women's concerns.

For Indigenous scholar John Borrows, it is the "positivistic" sources of law ("proclamations, rules, regulations, codes, teachings, and axioms") that can be problematic. While these sources are deemed legitimate because the "proclamations are made by a person or group regarded by a sufficient number of people within a community as authoritative" can be problematic, as debate within the community is stifled by the passing of a rule by a majority group<sup>64</sup>. For example, a Band Council resolution to accept an IBA may represent the consent of a group within the community that that holds the appropriate number of votes to pass the resolution. Borrows' concern

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58. *Id.*

59. *Id.*

60. D. MCGREGOR, *supra*, note 1, at page 27.

61. *Id.*, at page 26. See also: RCAP, *supra*, note 45.

62. J. BORROWS, *supra*, note 54.

63. *Id.*, p. 35.

64. *Id.*, p. 46 and 47.

is how this positivist legal tool effectively places too much power in the hands of one group, and often without proper control mechanisms in place, which in turn raises the question of whether the Band resolution represents the authority to consent as obtained through a community consensus. Applying a gendered lens to the resolution, as argued by Graben, Cameron and Morales, exposes a gendered consent mechanism when the resolution is passed by a male-dominated Band Council and fails to take into account the participation of Indigenous women.

## 1.2 Indigenous Stories as a Source of Law

As a source of law, Indigenous stories serve numerous purposes, and may include both sacred and personal stories. Sacred stories are revered. Sacred Stories are told within the community. The telling of a Sacred Story is limited to a particular knowledge holder, and may be told in specific seasons, times of day and places. Interlaced together, personal stories are informed by Sacred Stories, and Sacred stories ground the personal experience, the offering of personal stories and serve as guidance in living one's life<sup>65</sup>. As explained by Florence Paynter, “[o]ur stories are the essence of our whole being<sup>66</sup>”.

Napoleon and Friedland characterize stories as “tools for thinking<sup>67</sup>” and “active listening<sup>68</sup>”. In their engagement with Indigenous Elders, this idea of stories as tools for thinking offers insight into how Elders structure their thoughts in conversation, in writing and in the practice of living life<sup>69</sup>. As an “public intellectual” and dialogic exchange that involves “listeners and learners, and elders and other storytellers”, and as practiced for “generations”, stories function as an active listening technique<sup>70</sup>. In an active listening exchange, the storyteller may ask the listener for their participation—to reflect on the meaning of the story<sup>71</sup>. In effect, the stories are transformed into active thinking and listening tools for all participants<sup>72</sup>. In the exchange, a story may impart “moral” lessons leading

65. Thank you to Professor Damien Lee (Ryerson, Sociology) for this interpretation.

66. A. CRAFT, *supra*, note 26, p. 7.

67. V. NAPOLEON and H. FRIEDLAND, *supra*, note 27, 734.

68. *Id.*, 738.

69. *Id.*, 734.

70. *Id.*, 738. See also: SECWÉPEMC, “Lands and Resources. Law Research Project”, *University of Victoria*, [Online], [www.uvic.ca/law/assets/docs/ilru/SNTC %20Law %20Book %20July %202018.pdf] (April 3<sup>rd</sup>, 2019).

71. V. NAPOLEON and H. FRIEDLAND, *supra*, note 27.

72. *Id.*

one to a greater “understanding” of “their lives<sup>73</sup>”, while creating a sense of self and identity resulting in personal learning and development.

To help understand stories in a contemporary situation, Napoleon and Friedland suggest stories operate as a “mnemonic device” that enables the listener to later recall the lessons learned from the story<sup>74</sup>. These lessons organize the individual’s thinking in the new situation and embed themselves as a frame of thinking<sup>75</sup>. This way of thinking can also be informed by stories that offer a “prophecy” and “adaptive” themes<sup>76</sup>. These themes aid listeners to “respond to new situations” with ways of knowing centred in the communities’ existing “normative frameworks” that may include human and animal interactions<sup>77</sup>. Fundamentally, these themes in stories create new knowledge, assist with understanding and thinking through the new problem, as well as adapt behavior when responding to the situation<sup>78</sup>.

As Secwépemc Land and Resources Law Research Project illustrates, stories set out legal principles<sup>79</sup>. Under Secwépemc law, consent is to be obtained prior to a guest accessing resources; however, this legal principle is also informed by the understanding that an equal access to resources exists<sup>80</sup>. Together these two legal principles (consent and equal access) are realized through the story of the coyote breaking the ice dam<sup>81</sup>. In this story — “How the Coyote Broke the Ice Dam” — “Coyote performs a good turn for all of the peoples living along the Fraser River by breaking the weir at the river’s mouth that has been preventing the salmon from migrating<sup>82</sup>”. By breaking the dam, the Coyote allows the water to flow and the salmon to migrate, creating equal access to the salmon for all communities along the river not just those communities up river of the weir. Today, this legal principle of prior consent, as informed by the understanding of equal access, formed the basis of the memorandum of understanding between Secwépemc and the Lower Fraser River Fishery Alliance<sup>83</sup>. The lesson

73. *Id.*, 737.

74. *Id.*

75. *Id.*

76. *Id.*, 742 and 743.

77. *Id.*

78. *Id.*

79. SECWÉPEMC, *supra*, note 70.

80. *Id.*

81. *Id.*, p. 57 “The Right to Access Resources.”

82. *Id.*

83. *Id.*, p. 57. The Report states:

The current discussions about the salmon harvest along the Fraser River acknowledges a right of the Secwépemc to their fair share of salmon on it. Specifically, the memorandum of understanding between the Secwépemc and Lower

about obtaining consent and equal access to resources offers insight into a normative frame that upholds the governance of natural resources and relationships within a community. The governance structure is based on an ethic of respect, sharing and care for others as illustrated by Coyote's breaking the dam and allowing the salmon to migrate up the river. It is reasonable to expect that these legal principles and Secwépemc ideas of respect, sharing and caring would be brought into an IBA negotiation when an extractive activity is sited within the Secwépemc territory.

Indigenous stories illuminate Indigenous knowledge, assist in knowledge transmission, offer lessons and a window into an Indigenous worldview, as well as set out Indigenous legal principles<sup>84</sup>. Stories presented through "analogy and metaphor" may structure negotiation behavior, obligations and thinking to include responsibilities to all relations: water, animals, plants, spirits and community members<sup>85</sup>. The "How the Coyote Broke the Ice Dam" story empowers negotiators to carry out their responsibilities with "respect" and "care" for other beings, in particular those individuals marginalized in the IBA process and the natural-resource development project<sup>86</sup>.

### 1.3 Indigenous Women, Water, and Creation Stories

Water is alive<sup>87</sup>. It is a "living relative" carrying the spirits of all relatives<sup>88</sup>. In Indigenist thinking, water is not a natural resource for consumption, use and contamination, but is life giving and adored as a breathing, loving relation. Water is an ancient relative that has inhabited Mother Earth, as told and retold in Creation stories<sup>89</sup>. Creation stories establish a connection to the Creator and all its' beings: a living connection to earth, the plants, animals, spirits, water, humans and future generations<sup>90</sup>. It is this relationship to the Creator and its' beings that establishes the reciprocal

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Fraser Fishery Alliance is about ensuring that salmon are shared in a more equitable way between the Secwépemc and the First Nations on the Lower Fraser, who are currently the biggest harvesters of salmon. The memorandum sets out, in addition to other things, a responsibility to consider both conservation and Secwépemc harvesting needs in future fishing plans.

84. V. NAPOLEON and H. FRIEDLAND, *supra*, note 27.

85. *Id.*

86. SECWÉPEMC, *supra*, note 70.

87. As counselled by Marilyn Poitras; K. ANDERSON, *supra*, note 17.

88. Kristi L. GANSWORTH and Karen WERNER, "First Medicine: Stories of Water and Now", *Rethinking Marxism*, vol. 28, n<sup>os</sup> 3/4, 2016, p. 385.

89. *Id.*

90. K. ANDERSON, *supra*, note 17; A. CRAFT, *supra*, note 26; D. MCGREGOR, *supra*, note 1; P.A. MONTURE, *supra*, note 17.

relationship of humans to each other and other beings. For an Indigenous woman, her community's creation story centres her authority, relationships and responsibilities to all beings, including water, her relative<sup>91</sup>.

A Creation story is alive, relational, offers governance lessons and, importantly, directs one's relationships and responsibilities to the water, land, plants and animals. Katsi Cook, a Mohawk, explains the relational perspective where "[i]n the Indian world, you are never an orphan. You always have your mother the Earth and your grandmother the Moon, and all your relations in the community<sup>92</sup>". Understanding this organic, relational and feminine perspective bestows authority and jurisdiction onto Indigenous women<sup>93</sup>. An Indigenous woman's identity is established through her particularized land-based identity that uniquely situates Indigenous knowledge in a specific waterscape, and creates attentive responsibilities to water, which is tied to a creation story<sup>94</sup>.

Anderson recounts the power of a women's relationship with water. The shape-shifting lessons of water that in part explain an Indigenous woman's adaptability to changing states of water, and her reciprocal responsibilities to water is illustrated by Anderson in Sylvia Maracle's personal story of water:

The thing that strikes me about water is that it will take the shape of any vessels that we put it in. If it's a bowl for ceremony, it doesn't matter if it's a rock or a pottery bowl, a wooden bowl or a copper bowl.

The other thing to remember about water is that is the strongest force on earth... Even wind can't do what water can do, in terms of determining the process of life. And we know that water comes first before life itself. We know it has responsibilities to cleanse us, to quench us, to nourish our thirst; that it is also responsible to allow us to sit beside it to find peace.

But whether it's that single drop, or the largest body of water, it represents the female element. That is our role in terms of tradition; we have the capacity as women to take those shapes, but also to make those shapes. We recognize that we don't have the kind of power where you bang your fist on the table, but we have the power of water – that sort of every day going against something that ultimately changes the shape of the thing<sup>95</sup>.

Through Maracle's water story, we learn the living and gendered nature of water and how this characterization confers power and

91. See generally, K. ANDERSON, *supra*, note 17, p. 47.

92. *Id.*, p. 158.

93. Compare, *id.*, chap. 11.

94. I use the term waterscape to reflect the aquatic features of a watershed, and to recognize water within the term: landscape.

95. K. ANDERSON, *supra*, note 17, p. 162-164.

responsibilities upon a woman. The gendered nature of Earth, including a women's spiritual relationship with water, combined with water's purifying and cleansing capabilities, is reinforced by Earth's feminine cyclical power that is reproduced in a woman's bodily cycles. The feminine relationship with the spirit and life force of water also present when it comes to "Mother Earth, the female body is to be celebrated in all its cycles" (as the Earth is understood in many Aboriginal cultures<sup>96</sup>). In Anderson's research, a number of Grandmothers relate the life-giving waters of women to a woman's life-giving abilities and "the cycles" of the "Great Mother"<sup>97</sup>. Anderson's research illuminates an Indigenous woman's knowledge of paying attention to the lessons of the living relative water, its spirituality while being responsive to the cleansing and changing state of water, and her governance responsibility, as a water steward, to speak for water<sup>98</sup>.

Indigenous women hold a unique relationship to water because of its life-giving powers<sup>99</sup>. In the Creation story, all humans must respect water, but it is women who hold a special relationship because of their ability to give life<sup>100</sup>. Water is life giving, sustains a woman's body and flows through her body, just as water flows through, and sustains Mother Earth<sup>101</sup>. Indigenous women learn water's medicinal and spiritual properties; these lessons are passed down through their Grandmothers' stories and instill women with a "special relationship to water"<sup>102</sup>. This relationship imposes responsibilities where "[i]n some ceremonies women speak for water", and in everyday life, women organize themselves to speak for water and the harm water has experienced as result of development activities<sup>103</sup>. Empowered Indigenous women often act upon their responsibilities to water by organizing themselves in public spaces, often away from the IBA negotiation table. McGregor describes this organization as the "process of rediscovery, revitalization, and healing"<sup>104</sup> where, for example, women in Bkejwanong Territory (Walpole Island) stated their responsibility to protect water in a simple but powerful statement: "We are the voice for the water"<sup>105</sup>. However, in mainstream water governance regimes and in

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96. *Id.*

97. *Id.*

98. *Id.*; D. MCGREGOR, *supra*, note 1; A. CRAFT, *supra*, note 26.

99. *Id.* See also: D. MCGREGOR, *supra*, note 43.

100. *Id.*

101. *Id.*

102. D. MCGREGOR, *supra*, note 1, at page 28.

103. *Id.*, at page 28.

104. *Id.*, at page 29.

105. *Id.*, at page 28.

IBA law-making processes, Indigenous women's responsibility to speak for water is overlooked<sup>106</sup>.

## 2 Gendering IBAs: Graben, Cameron and Morales' Gendered Approach

In the Canadian mining sector the use of IBAs has emerged as the dominant legal instrument to ensure First Nation consent is obtained for access to land and resources, but also to negotiate business interests in employment, training and business opportunities during the mining cycle<sup>107</sup>. As a private "relational"<sup>108</sup> contract, the IBA is negotiated between the mining proponent and the First Nation with perhaps a government representative acting as an observer of the negotiation<sup>109</sup>. As a business practice, the IBA is viewed as the extractive sector's required governance tool. The IBA is a legal instrument, generally drafted outside of Indigenous law and mainstream regulatory environmental regimes, with the state governing from a distance and advancing its "neo-liberal" agenda of economic growth while reconstructing its relationship with First Nations with the view to self-governance<sup>110</sup>. In effect, the IBA is a mechanism that stabilizes the risks inherent in the mining project.

As of recently, IBAs are beginning to incorporate Traditional Knowledge, pointing to a shift in the influence of First Nations and demonstrating that Indigenous values, ways of knowing and law can be used as organizing principles in the IBA law-making process and in the agreement<sup>111</sup>.

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106. *Id.*

107. See generally, *supra*, note 3.

108. *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, par. 66-68.

109. C. FIDLER and M. HITCH, *supra*, note 3; Michael LEWIS and Sara-Jane BROCKLEHURST, "Aboriginal Mining Guide: How to Negotiate Lasting Benefits for Your Community", *Canadian Centre for Community Renewal*, 2009, [Online], [www.communityrenewal.ca/sites/all/files/resource/Aboriginal\_Mining\_Guide.pdf] (April, 3<sup>rd</sup> 2019). One of the first impact and benefit agreement to be signed in Canada between a First nation and a mining company is the 1995 Raglan Impact and Benefit Agreement.

110. C. FIDLER and M. HITCH, *supra*, note 3, at page 51; Emilie CAMERON and Tyler LEVITAN, "Impact Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous-State Relations in Northern Canada", *Studies in Political Economy*, vol. 93, n° 1, 2014, p. 25; Travis FAST, "Stapled to the Front Door: Neoliberal Extractivism in Canada", *Studies in Political Economy*, vol. 94, 2014, p. 31; Gabrielle SLOWEY, *Navigating Neoliberalism. Self-Determination and the Mikisew Cree First Nation*, Vancouver, UBC Press, 2008; Wendy LARNER, "Neo-liberalism: Policy, Ideology, Governmentality", *Studies in Political Economy*, vol. 63, 2000, p. 5.

111. N. CRAIK, H. GARDNER and D. MCCARTHY, *supra*, note 3. At page 381, these scholars report that "Shabotowan" is referenced throughout the Victor Diamond Mine IBA. In "traditional lifestyle practised by the Mushkegowuk Cree", "Shabotowan" means "living in harmony with all life on the land, water and air and using the land in a



Nevertheless, as resistance to extractive projects dominate the media headlines, it is difficult to assess who in the community has consented to the IBA as the confidential nature of the agreement, its fragmented governance and environmental oversight raise questions about who in the community has agreed to the IBA<sup>112</sup>? As Indigenous women are at the forefront of advocating for the protection of environment with respect to the siting of, and consent to, natural resource projects and water protection<sup>113</sup>, and given the ambiguity of an IBA, scholars such as Graben, Cameron and Morales are beginning to critique the gendered nature of IBAs, and are raising questions concerning women's participation.

Graben, Cameron and Morales's gendered approach to IBAs is situated in a vast body of literature and field research on the intersectionality of gender, race, class, and indigeneity in the extractive sector that documents the struggles Indigenous women face when a large-scale mining project occurs within their community<sup>114</sup>. In Canada, this research emphasizes the

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way that preserves it for future generations" and underpins the traditional lifestyle. See also: G. GIBSON and C. O'FAIRCHEALLAIGH, *supra*, note 3. At page 159, Gordon and O'Faircheallaigh state: "Cultural Leave: Some IBAs include this option. For example, the Diavik agreements allow for one week of unexplained cultural leave, so that harvesters or drummers can attend to duties as needed." Also, "Site Visits by Elders and conduct of Cultural Activities on site can be arranged". For example, indigenous women at the Argyle Diamond Mine practice "mantha" – "a welcoming and spiritual cleansing ceremony for every person that comes on site."

112. Justine HUNTER and others, "A contested pipeline tests the landscape of Indigenous law – who controls the land?", *The Globe and Mail* (Ontario Edition: Print Copy), January 12<sup>th</sup>, 2019, p. A12; Gary MASON, "First nations need more leaders like Crystal Smith", *The Globe and Mail*, (Ontario Edition: Print Copy), January 12<sup>th</sup>, 2019, p. A13.
113. Joe WHITTLE, "The Women Fighting a Pipeline that Could Destroy a Precious Wildlife", *The Guardian*, January 16<sup>th</sup>, 2019, [Online], [www.theguardian.com/us-news/2019/jan/16/water-protectors-battle-louisianas-next-pipeline] (April 3<sup>rd</sup> 2019); Justin BRAKE, "Women speak out against criminalization of land defenders, water protectors", *APTNews*, August 3<sup>rd</sup>, 2018, [Online], [aptnnews.ca/2018/08/03/women-speak-out-against-criminalization-of-land-defenders-water-protectors/] (April 3<sup>rd</sup>, 2019).
114. Kristina GROSSMANN, Martina PADMANABHAN and Katharina VON BRAUN, "Contested Development in Indonesia: Rethinking Ethnicity and Gender in Mining", *Current Research on Southeast Asia*, vol. 10, n° 1, 2017, p. 11; Kuntala LAHIRI-DUTT, "Digging women: towards a new agenda for feminist critiques of mining", *Gender, Place and Culture*, vol. 19, n° 2, 2012, p. 193; OXFAM INTERNATIONAL, "Position Paper on Gender Justice and Extractive Industries", 2017, [Online], [www.oxfamamerica.org/explore/research-publications/position-paper-on-gender-justice-and-the-extractive-industries/] (April 3<sup>rd</sup>, 2019); OXFAM and AUSTRALIAN AID, "Gender and the Extractive Industries: Putting Gender on the Corporate Agenda", 2016, [Online], [www.oxfam.org.au/wp-content/uploads/2016/09/2016-PA-004-Mining-and-Gender-report\_FA3\_web.pdf] (April 3<sup>rd</sup>, 2019); FEMNORTHNET, "How Local Women and Northern Communities Benefit from Resource Extraction", 2016, [Online], [fnn.criaw-icref.ca/images/userfiles/

gendered impacts of the monetized economy of mining that is influenced by the legacy of settler colonialism and where Indigenous women's governance activities have been transformed by the extractive industry's neo-liberal orientation that has aided Indigenous women's invisibility in natural resources decision-making. The economic and political neo-liberal shift away from a welfare state underpins IBA law-making and highlights the need to problematize Indigenous women's participation in the sector's key governance mechanisms<sup>115</sup>. By applying a gendered analysis to an IBA, Graben, Cameron and Morales argue these narrowly drafted agreements can be broadened to bolster women's participation by examining three intersecting areas, which are discussed and critiqued below: (1) *Indian Act* government mechanisms such as the Band Council or Hereditary Indigenous structures, (2) women's participation in negotiation, and (3) methods of reform and resistance.

## 2.1 The *Indian Act's* Band Council and Hereditary Indigenous Governance Regimes

### 2.1.1 The *Indian Act's* Band Council

The concepts of participation and consent are legally constituted through the government body of a Band Council, and are gendered concepts shaped by the *Indian Act*<sup>116</sup>. In the production of an IBA, a key concern is

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files/LWM8\_BenefitfromResourceExtraction.pdf] (April 3<sup>rd</sup>, 2019); KAIROS CANADA, "Gendered Impacts: Indigenous Women and Resource Extraction", 2014; Emma GILBERTHORPE and Glenn BANKS, "Development on whose terms? CRS discourse and social realities in Papua New Guinea's extractive industries sector", *Resources Policy*, vol. 37, n° 2, 2012, p. 185; William HOLDEN, Kathleen NADEAU and R. Daniel JACOBSON, "Exemplifying Accumulation by Dispossession: Mining and Indigenous Peoples in the Philippines", *Geografiska Annaler*, vol. 93, n° 2, 2011, p. 141; Prajna Paramita MISHRA and M. Gopinath REDDY, "Gender Mainstreaming in Mining: Experiences Across Countries", *RULNR Working Paper 14-109*, 2012; Leah S. HOROWITZ, "'It shocks me, the place of women': intersectionality and mining companies' retrogradation of indigenous women in New Caledonia", *Gender, Place & Culture*, vol. 24, n° 10, 2017, p. 1419; Christopher JONES and Chris SOUTHCOTT, "Mobile Miners: Work, Home and Hazards in the Yukon's Mining Industry", *Northern Review*, n° 41, 2015, p. 111.

115. See generally, *supra*, note 110.

116. *Indian Act*, R.S.C. 1985, c. I-5. Also see: P. HANIA and S. GRABEN, *supra*, note 19; J. GREEN, *supra*, note 1; L. BETASAMOSAKE SIMPSON, *supra*, note 17; K. ANDERSON, *supra*, note 17; Jo-Anne FISKE and Evelyn GEORGE, *Seeking Alternative to Bill C-31: From Cultural Revitalization through Customary Law*, Ottawa, Status of Women, 2006; Judith F. SAYERS and others, *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports*, Ottawa, Status of Women, 2001. The gendered burden embedded in the institutional structure of the Band Council must

consent—who is represented in the community when consent to an IBA is provided by the Band Council. Graben, Cameron and Morales’s gendered approach raises the question of “[i]n what ways [are] IBA methodologies that rely on Band Council approval representative of women’s insights<sup>117</sup>?” These scholars argue the limited participation of Indigenous women on Band Councils affects the types of issues that are brought forward to the Band Council and how issues are “decided<sup>118</sup>”, pointing to the need to examine the gendered nature of Band Council decision-making and the techniques used to obtain Band Council consent.

Obtaining consent to a development project is a political endeavor that requires further analysis beyond gender when a Band Council resolution and the IBA clauses of “confidentiality and noncompliance<sup>119</sup>” are taken into account, which together point to a shift in power towards the Band Council and away from Indigenous governance structures and processes. In practice, a Band Council resolution is generally relied upon by the mining company party to an IBA to obtain consent to access resources<sup>120</sup>. In effect, the resolution confirms the consent of the Council, that is, a majority of Band Council members who hold the appropriate number of votes to pass the resolution. However, the resolution, as a positivistic technique of law, is viewed as problematic because the procedure of a vote fails to promote a community debate<sup>121</sup>. Borrows raises the concern that this legal technique effectively places too much power in the hands of one group, which further introduces the question: Does the Band Council

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be acknowledged as informing the IBA law-making processes. The Band Council method of obtaining consent is mired in a historical gendered context where Indigenous women were systematically targeted through the *Indian Act*’s legislative actions. It is well-documented that the historical legal legacy of a Band Council’s decision-making structure is fraught in sexist settler colonialism where women’s traditional governance roles, authority and decision-making power were legislatively restructured resulting in a silencing effect upon Indigenous women’s voices and their governance functions. The effect of these legislative actions resulted in the diminishment of Indigenous women’s position of equality and respect for their decision-making authority within their communities while creating barriers to participation in public governance that continue today, and play out in the negotiation of an IBA.

117. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

118. *Id.*

119. K.J. CAINE and N. KROGMAN, *supra*, note 3, at page 79: “[C]onfidentiality clauses [...] limit who may receive copies of the agreements.” At 85: “Confidentiality clauses restrict the communication of the contents of IBAs to anyone outside of the negotiation process or beneficiary population.” And, at 86: “noncompliance provisions that prohibit Aboriginal groups from undertaking any action to delay a development”.

120. J. HUNTER and others, *supra*, note 112.

121. J. BORROWS, *supra*, note 54.

resolution truly uphold the IBA representation clause<sup>122</sup> when the authority to consent is not obtained through a community consensus?

Generally, Indigenous legal orders encourage community members to be active agents in deliberating and making decisions<sup>123</sup>. In contrast, community debate can be stifled when the Band Council vote is taken, and a knowledge gap is created when information is held back from community members through the use of non-compliance and confidentiality clauses that are approved by the Band Council. A majority vote supporting the Band Council resolution combined with the private confidential IBA law-making process reinforced by specific IBA clauses (for example, non-compliance and confidentiality) serve to limit transparency and accountability to the wider community<sup>124</sup> and expands the power base of the Band Council, as the Council holds the knowledge. The lack of accountability calls into question whether or not the mining company holds the “social license<sup>125</sup>” to access the natural resources, and whether the First Nations’ signatories hold “sufficient power<sup>126</sup>” to represent the consensus of the community as defined by Indigenous governance protocols.

Grabén, Cameron and Morales’s focus on “Indigenous women’s participation in government bodies<sup>127</sup>” hints at political representation as a technique to evaluate whether “institutional equality<sup>128</sup>” and Indigenous women’s empowerment has been achieved. These scholars argue applying a gendered lens to a Band Council’s resolution exposes a gendered consent mechanism when the *Indian Act*’s sexist and discriminatory nature is considered, and given that it is legislation that has largely upheld male-dominated Band Councils. Their gendered critique advances an argument for increased representation of Indigenous women in decision-making forums without consideration of the barriers that women face in achieving institutional equality. Research examining the representation of women and men “on northern co-management boards as officially appointed board

122. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4. An example of one of the five representation clauses (“made by an Indigenous nation to a Company”) provided by the authors is as follows: “That the signatory has good and sufficient power, authority and right to enter into and perform its obligations under this agreement”.

123. J. BORROWS, *supra*, note 54; V. NAPOLEON, *supra*, note 55.

124. K.J. CAINE and N. KROGMAN, *supra*, note 3.

125. E. CAMERON and T. LEVITAN, *supra*, note 110.

126. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

127. *Id.*

128. David C. NATCHER, “Gender and Resource Co-Management in Northern Canada”, *Arctic*, vol. 66, n° 2, 2013, p. 218, at page 219.

members<sup>129</sup>” revealed that men hold the majority of board membership positions<sup>130</sup>. This research concluded a “minority” (that is, 15 %) representation of women on boards led to “tokenism” and “marginalization”, with some women reporting feeling “invisible in decision-making processes” and at “the margins of formal decision making<sup>131</sup>”. These research findings of a lack of “critical mass” and the effects upon women in co-management arrangements are instructive in advancing an argument for institutional equality through equal representation in IBA law-making arrangements<sup>132</sup>. To avoid tokenism and empower Indigenous women’s voices within IBA law-making and its complementary processes, political representation (rather than participation in government bodies) as the object of a gendered approach offers the opportunity to evaluate, first, whether a critical mass exists within the decision-making forum, and if not, What type of barriers exist in creating a critical mass? What techniques can be used to establish institutional equality? Establishing institutional equality enables the second stage of analysis: Has the feeling of invisibility in decision-making been eliminated for Indigenous women decision-makers? Are Indigenous women’s socio-economic concerns being raised more effectively in the IBA law-making process? Are these concerns taken into account in the agreement as result of Indigenous women’s achievement of a critical mass?

However, advancing the concept of equality to bolster Indigenous women’s decision-making authority requires a sensitivity to Indigenous women’s views on gender equality. Graben, Cameron and Morales highlight equality as a norm to be explored to understand how views on equality may influence Indigenous women’s participation and the IBA outcomes. Gendering IBAs requires understanding of the cultural misalignment of the dominant North American feminist notion of equality onto Indigenous women and their institutions of governance. Indigenous feminism can be distinguished from western forms of feminism by examining the oppressive colonial state’s legacy and its discriminatory techniques advancing forms of domination, specifically, patriarchy, racism and sexism<sup>133</sup>. Historically, the first wave of the North American feminist movement, primarily led by white women, advanced political rights (a right to vote) agenda based

129. *Id.*, at page 218: “Board members are nominated by their respective territorial or Aboriginal governments, and final appointments are made by the federal government.”

130. *Id.* Of the 34 co-management boards reviewed in the research: of 210 members – 179 (84 %) were males and 34 (16 %) were females. “In summary, female representation was found to be limited across all three territories, among all claimant groups, and across all sectors of responsibility (e.g., land, water, wildlife)” (at page 219).

131. *Id.*, at page 219.

132. *Id.*

133. J. GREEN, *supra*, note 1, p. 5.

on the notion of equality with men<sup>134</sup>. However, an Indigenous feminist is not seeking equality with men<sup>135</sup>. As Louise McDonald, an Indigenous Elder, explained at the 2018 World Indigenous Law Conference, since time immemorial Indigenous women have always been equal partners under Indigenous governance systems<sup>136</sup>.

### 2.1.2 Hereditary Indigenous Governance Regimes

Effective leadership and IBA law-making should consider not only the diverse ways First Nation governance structures are legally constituted within each community, but also Indigenous women's governance functions, as mining is an activity that directly affects aquatic systems and implicates women's responsibility to speak for water. Within a First Nation, a possibility exists that a Band Council, a Hereditary Indigenous governance system or a hybrid of both systems is in place<sup>137</sup>. As explained by Graben, Cameron and Morales, this pluralistic mode of legal governance means both arrangements (Band Council and Hereditary) are legally constructed to deliver consent on behalf of the community, and to confer authority to move forward with the IBA negotiation process<sup>138</sup>. However, in practice, the legal boundaries of consent and authority become complicated in pluralistic First Nation governance arrangements, as questions arise concerning what lands—traditional territory, boundary or reserve lands—are involved and who holds jurisdiction over what lands? The nested nature of governance structures can lead to community conflicts, both within and beyond the community, and transforms the negotiation away from community members' interests and towards the technical drafting of the IBA, which is primarily focused on economic development not Indigenous women's social-welfare concerns<sup>139</sup>.

Graben, Cameron and Morales rely upon the Pacific NorthWest LNG decision to illustrate how women's interests were overshadowed when a community conflict emerged within a pluralistic mode of governance<sup>140</sup>. The Pacific NorthWest LNG project created a deep division between the

134. T. Brettel Dawson, *Women, Law and Social Change: Core Readings and Current Issues*, 5th ed., Concord, Captus Press, 2009.

135. J. Green, *supra*, note 1. See also: S.M. Hill, *supra*, note 17; L. Betasamosake Simpson, *supra*, note 17.

136. Louise McDonald, "Keynote Speech", *World Indigenous Law Conference*, November 18-21, 2018 [unpublished].

137. S. Graben, A. Cameron and S. Morales, *supra*, note 4.

138. *Id.*

139. J. Hunter and others, *supra*, note 112.

140. S. Graben, A. Cameron and S. Morales, *supra*, note 4.

Band Council and Hereditary Chiefs about the siting of a liquefied natural gas plant project and “1.2 billion dollar benefit-sharing [agreement] offer<sup>141</sup>”. The Hereditary Chiefs claimed that the elected Band Council had no jurisdiction to make decisions concerning traditional lands beyond the reserve. Graben, Cameron and Morales raise this contentious governance dispute to highlight how easily women’s IBA concerns can become overshadowed in complex community conflicts where multiple governance structures are in play, and the economic benefits to the community are significant. Indigenous women’s governance responsibilities and their contribution to resolving the dispute appear to be overlooked.

Arguments for the gendering of IBA law-making bring forward the issues of effective leadership and governance institutions. Effective leadership in IBA law-making can be achieved by placing greater emphasis on the key leadership role that Indigenous women hold through their governance function of speaking for water, a function that aligns with a pluralistic mode of governance and can revitalize women’s authority as decision-makers in IBA law-making. In order to engage with Indigenous women’s IBA experiences and interests, attention must be given to women’s traditional governance roles within their Nation—roles that can differ between Nations, but which promote Indigenous women’s water governance function. While Graben, Cameron and Morales advance an intersectional feminist analysis that directs the discussion to governance regimes by asking questions—such as, what is the communities’ legal order? How are women’s legal governance responsibilities, decision-making authority and power structured under her communities’ legal order<sup>142</sup>?—their gendered approach can be strengthened by turning first to bolstering Indigenous women’s water governance function. The gendering of an IBA can be advanced through the acknowledgement of the equalitarian<sup>143</sup> nature of Indigenous governance structures and the revitalization of the proposition put forth by Indigenous water governance scholars that Indigenous women hold a leadership role with respect to governing water<sup>144</sup>. As Indigenous water governance scholars explain, Indigenous women’s responsibilities for water is tied to the life-giving powers that women and Mother Earth hold as

141. *Id.* Also see: G. SLOWEY, *supra*, note 110. Slowey contends economic development based on “The Mikisew Model” requires “money, geography and industry” to establish self-governance and a self-sustaining community.

142. G. SLOWEY, *supra*, note 110, p. 15; G. GIBSON and C. O’FAIRCHEALLAIGH, *supra*, note 3. The IBA Toolkit raises questions regarding Indigenous women’s participation.

143. J. GREEN, *supra*, note 1; S.M. HILL, *supra*, note 17.

144. A. CRAFT, *supra*, note 26; D. MCGREGOR, *supra*, note 1; K. ANDERSON, *supra*, note 17.



water flows and circulates through women's bodies and the Earth<sup>145</sup>. This Indigenous worldview of women's special relationship to water effectively structures Indigenous governance institutions and confers the responsibility on women to take the lead on decisions concerning aquatic systems<sup>146</sup>. This Indigenous women's water governance perspective easily falls within the reform agenda advanced by Graben, Cameron and Morales's gendered approach to IBA law-making.

Restructuring governance based on Indigenous laws and the inclusion of women is not new in Canada. Graben, Cameron and Morales offer the Voisey Bay agreement, a mining project in Labrador that lies within the overlapping territories of the Inuit and Innu, as an example of where negotiations were organized to include women, and where an Indigenous woman held the key role of chief negotiator. Research on the Voisey agreement revealed that the Inuit insisted on the inclusion of gender-equality provisions in the IBA<sup>147</sup>. However, some scholars have begun to contest the gains experienced by women in the negotiation of Voisey IBA.

Cox and Mills' in-depth case study of the Voisey Bay Mine negotiations illustrates the importance of a deeper, gendered analysis that links key legal instruments in order to understand how gender played out in all three processes and regulatory industry practices. These scholars reviewed three processes: the environmental assessment (EA), the IBA, and the collective agreement (CA). Cox and Mills' research exposed the fragmented EA-IBA-CA negotiation process. Their research confirms that women participated in EA-IBA processes, and that the Inuit women's views shaped the IBA negotiation process, resulting in a hiring policy targeting Indigenous women<sup>148</sup>. But, Cox and Mills' findings further revealed a limited "participation effect" of the women. In their research, they report that only three of the 107 of the EA Panel's recommendations referenced women, and the women's social concerns for child and elder care were ignored. Moreover, the final IBA did not address women's concerns about employment targets for women and special training needs. The subsequent negotiation of the mine's CA, negotiated by the United Steel Workers (USW), failed to incorporate the IBA's employment adequacy clause, a provision negotiated by the women earlier in the IBA

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145. *Id.*

146. *Id.*

147. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4. See also: Ciaran O'FAIRCHEALLAIGH, "Women's absence, women's power: indigenous women and negotiations with mining companies in Australia and Canada", *Ethnic and Racial Studies*, vol. 36, n° 11, 2013, p. 1789.

148. D. COX and S. MILLS, *supra*, note 1.

process. Cox and Mills' gendered analysis illustrates that the restructuring of women's political representation through institutionalized, interrelated IBA processes created unforeseen implications for women's participation. The question still remains as to why the women's interests were compromised in the USW negotiation?

## 2.2 Women's Participation in IBA Negotiations

Graben, Cameron and Morales's gendered approach addresses a gap in the literature relating to how gender is animated in IBA negotiations and shapes IBA outcomes<sup>149</sup>. These scholars argue Indigenous women's lack of participation in the negotiation leads to "gender-neutral terms" framing the agreement and social equities experienced by women. A gendered IBA is illustrated by the inequitable benefits received by women and by how women are viewed as "beneficiaries" where their involvement in the mining development project is limited to IBA contract provisions that address "employment and contracting prioritization or whether they receive royalties or compensation<sup>150</sup>". Generally, gender diversity in IBA law-making is negotiated through employment equity provisions targeted at increasing the number of women in the workforce without regard to the socio-economic concerns raised by women. Instead Indigenous women's IBA interests should be understood through a holistic view of relationships with and responsibility to all beings of Creation. Anderson describes how a community's Creation story situates an Indigenous women's worldview, centres her spirituality and her power within the community, and can be a normative framework supporting a value system of relationship, connection and balance<sup>151</sup>. Anderson contends that many Indigenous women do not separate spirituality from their engagement in business, politics, health, social and family matters<sup>152</sup>.

Characterizing Indigenous women's concerns within an IBA as an employment equity problem disconnected from women's worldview is a restricted and culturally misaligned view. The challenge when adopting a gendered approach is to understand how the dominant business case analysis of the employment requirements of a mining project can be expanded to include the social-welfare concerns of Indigenous women and a worldview of interconnectedness. It is well-documented that Indigenous

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149. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

150. *Id.*

151. K. ANDERSON, *supra*, note 17, p. 47-50. Also see: P.A. MONTURE, *supra*, note 17, at page 158.

152. K. ANDERSON, *supra*, note 17, p. 47.

women are concerned with broader socio-economic issues and the impacts of mining within their communities (for example, domestic violence against women and children, poverty, health issues, insufficient housing and work patterns that are disruptive to family structures), including women's employment opportunities that are generally offered at lower pay scales and replicate the domestic sphere (for example, administrative and housekeeping work)<sup>153</sup>. However, the notion of social development within a corporate negotiation may be viewed by the mining company as the responsibility of federal government and beyond the terms of the contract, but possibly could be accommodated through a "socioeconomic monitoring agreement"<sup>154</sup>. In effect, within the private IBA negotiation, it appears socio-economic concerns are viewed in economic terms—as a negative externality to the contract transaction. Indigenous women are not a direct party to the transaction beyond their status as an employee and therefore have no voice in the IBA negotiation to express their concerns and worldview of interconnectedness. Even though, collectively and individually, Indigenous women directly experience the negative effects of the mining development. Thus, the question remains: Who should be responsible for resolving the negative social-welfare effects of a mining project—industry or the state or the First Nation? The challenge remains to develop a gendered approach to reconcile the business case approach to Indigenous women's social-welfare concerns.

Exploring the circumstances surrounding Indigenous women's participation and how their participation influences IBA negotiations and outcomes is a key aspect of a gendered approach. Graben, Cameron and Morales contend Indigenous women influence resource development beyond the negotiation, through groups such as the First Nations Women Advocating Responsible Mining (FNWARM). However, Indigenous women's advocacy for social justice and environmental protection plays out in the political and economic milieu of the extractive sector where the mining industry prevails on the national economic agenda and is directed at global markets. In the natural-resource sector, a neo-liberal orientation is dominant and advances deregulation, self-regulation, free markets and "virtues of individualism, competitiveness and economic self-sufficiency"<sup>155</sup>. Where the state has retreated from the "welfare state"<sup>156</sup> concerned with social programming and has shifted to a "minimalist state" where "federal policy" is directed at "developing First Nation economic

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153. *Supra*, note 6.

154. K.J. CAINE and N. KROGMAN, *supra*, note 3, at page 87.

155. E. CAMERON and T. LEVITAN, *supra*, note 110, at page 30.

156. *Id.*

independence and political freedom” that is consistent with neo-liberal agenda<sup>157</sup>. In contradistinction to the neo-liberal normative values underpinning an IBA negotiation, it would be expected that Indigenous women may bring forward into the IBA law-making values of being connected or in relationship with all beings of Creation that is informed by an “ethic of responsibility” to all human and non-humans<sup>158</sup>. Creating space in the IBA law-making for reconciling the tension between neo-liberal values upheld by the industry, the retreat of state in structuring social welfare programs and the push for community based values by Indigenous women could be explored further in a gendered approach.

In gendering the IBA law-making, consideration should also be given to the influence of the early stages of a mining project where the neo-liberal ideology is first displayed and upheld through the historical “free-entry” system that still legally structures the exploration activities in some provinces and is in conflict with Indigenous law<sup>159</sup>. The free-entry mining regime is premised on the idea that the highest and best use of the land is mining and confers “mining companies with rights to gain unrestricted access to territory with mining potential, to acquire a claim to the territory and to obtain a mineral lease<sup>160</sup>”. In 2017, FNWARM relied on social media to highlight the ease of staking a claim online, and the vulnerability of First Nations in the claim process where their consent is not required. FNWARM registered a claim online where “[i]t took less than an hour for a group of indigenous women to stake a claim on a Cranbrook property owned by Minister Bill Bennett<sup>161</sup>”. Besides illustrating that neither had prior consent been achieved nor had the First Nation had been consulted, the regulatory regime’s online procedure directly conflicted with FNWARM’s position that mining should uphold benefit-sharing, including principles of respect and partnership: “Where mining is allowed, it must be done properly and with the prior and informed consent of First Nations, and in a respectful, equal partnership. Where mining is allowed, it must be for the benefit of all, not just companies and their investors<sup>162</sup>”. An Indigenous

157. G. SLOWEY, *supra*, note 110, p. 18 and 19. Also see: G. PETERSON ST-LAURENT and P. LE BILLON, *supra*, note 3.

158. D. MCGREGOR, *supra*, note 43.

159. Karen DRAKE, “The Trials and Tribulations of Ontario’s *Mining Act*: The Duty to Consult and Anishinaabek Law”, (2015) 11 *McGill J. Sustainable Dev. L. & Pol’y* 184.

160. *Id.* See generally paragraphs 10 to 12 for a discussion of free-entry system. See also: G. PETERSON ST-LAURENT and P. LE BILLON, *supra*, note 3.

161. FIRST NATIONS WOMEN ADVOCATING RESPONSIBLE MINING, “This Space Here: Interview with Jacinda Mack”, 2018, p. 7, [Online], [ojs.library.ubc.ca/index.php/bcstudies/article/view/190023] (April 3<sup>rd</sup>, 2019).

162. *Id.*, p. 8.

law perspective challenges an IBA reform proposal, such as a gendered approach, to consider how consent and access to natural resources can be underpinned by a normative frame of an ethic of respect, benefit-sharing and care while problematizing participation within the dominant neo-liberal ideology. Perhaps, the values that are upheld in Secwépemc law, and expressed in the “How the Coyote Broke the Ice Dam” water story, offer an entry point to critique the dominant industry norms.

Emerging research on Indigenous women's role in an IBA negotiation, however, is bringing into question the literature's dominant theme of Indigenous women's disenfranchisement from spaces of decision-making power in the extractive sector<sup>163</sup>. This emerging research points to a turn toward the revitalization of women's decision-making authority that is grounded in their Indigenous legal orders. O'Faircheallaigh's case study on the role of Indigenous women in negotiations with representatives of the Argyle Diamond Ltd in Australia demonstrated how the persistent participation of Indigenous women in the IBA negotiations minimized negative cultural and environmental impacts and resulted in the inclusion of the “No means No” cultural heritage rule in the final IBA<sup>164</sup>. O'Faircheallaigh recounts the effective negotiating strategy adopted by the women in response to the cultural loss of the communities' “barramundi dreaming” site. In reaction to the loss of the spiritual site, women in the community organized, and were successful in negotiating a “No means No” rule to protect their cultural heritage. Since the negotiation of the Argyle 2005 agreement, O'Faircheallaigh reports, several Indigenous groups have negotiated a similar rule in their final agreements. This research demonstrates women's agency in negotiating their control over spiritual sites.

By drawing on the experiences of women at the Century Mine in northern Queensland, Australia, Parmenter's research also highlights the empowerment of women through employment, and the responsiveness of mine management policies to Indigenous women's cultural practices<sup>165</sup>. In response to cultural concerns, mine policies were drafted to ensure Indigenous women avoided the handling of “red ochre (hematite)”, a mineral that is prevalent at the open pit site. Culturally, the mineral is viewed

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163. Andrea CORNWALL, “Women's Empowerment: What Works?”, *Journal of International Development*, vol. 28, n° 3, 2016, p. 342; Kuntala LAHIRI-DUTT, “The Feminization of Mining”, *Geography Compass*, vol. 9, n° 9, 2015, p. 523; C. O'FAIRCHEALLAIGH, *supra*, note 147; Joni PARMENTER, “Experiences of Indigenous Women in Australian Mining Industry”, in Kuntala LAHIRI-DUTT (ed.), *Gendering the Field. Towards Sustainable Livelihoods for Mining Communities*, Canberra, ANU Press, 2011, p. 67.

164. C. O'FAIRCHEALLAIGH, *supra*, note 147.

165. J. PARMENTER, *supra*, note 163, at page 67.

as falling within the ceremonial domain of men. For some Indigenous communities, red ochre is viewed as dangerous for women to handle<sup>166</sup>. In response to these cultural practices, Century Mine management enacted policies to ensure Indigenous women could avoid “haul[ing] the material in their trucks, and it has to be ‘sheeted’ before a woman [would] drive over it” in the open pit mine<sup>167</sup>. Parmenter’s research demonstrates a shift toward gender equality and empowerment in the masculinized mining sector, a shift that is advanced through hiring policies and culturally informed management procedures.

Together, O’Faircheallaigh’s and Parmenter’s research in Australia represents a turn in the literature and corporate practices within the extractive sector where women’s empowerment and agency in the IBA negotiation has been taken into account. This research illustrates that Indigenous women’s cultural and employment interests can be taken into account in the final agreement as well as operationalized into management practices further offering a way forward in implementing the TRC’s (2015) recommendations.

### 2.3 Methods of Reform and Resistance

Indigenous women’s decision-making authority is grounded in their Indigenous legal orders<sup>168</sup>. To identify Indigenous women’s authority one must consider the leadership roles they hold within a First Nation and have always held since time immemorial<sup>169</sup>. Graben, Cameron and Morales argue Western political constructs of democracy fail to recognize diverse Indigenous political arrangements and constitutional norms underpinning Indigenous forms of governance<sup>170</sup>. Western concepts of authority, representative democracy and political participation have informed the substantive and procedural elements of an IBA<sup>171</sup>. However, an Indigenous governance worldview and Indigenous women’s resistance practices are overlooked in the western-based normative structure underpinning existing IBA processes.

In practice, Indigenous women may choose to organize themselves in public spaces away from the private IBA negotiation table<sup>172</sup>. Indigenous

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166. *Id.*, at page 75.

167. *Id.*

168. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

169. See generally, *supra*, note 17.

170. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

171. *Id.*

172. *Id.*

water governance scholar Deborah McGregor's research highlights how Indigenous women often organize themselves in public spaces by carrying out resistance practices to fulfill their responsibilities to water, as legitimized by women's jurisdiction for water, and understood through a Creation story. In her research, she offers the women of Anishnaabe-Kwe of Bkejwanony Territory and their actions as an example of a resistance practice<sup>173</sup>. These women organized themselves to speak to a water pollution issue in their territory that was causing birth defects and changes in animals (for example, the snapping turtle meat had turned yellow)<sup>174</sup>. McGregor points to another well-known example of Indigenous leaders organizing themselves in the public domain—Anishnaabe Grandmothers, the late Josephine Mandamin and Irene Peters and their "Mother Earth Water Walk[s]"<sup>175</sup>. In order to raise awareness on the declining condition of the Great Lakes waters, these Indigenous leaders' conducted the water walks to illustrate how women perform their responsibility to water by establishing a relationship with the water and its alive nature through the action of walking, carrying water and an eagle feather staff, speaking for the water, and learning water's lessons. McGregor presents these Indigenous leaders as examples of women not waiting for permission from a government entity to participate in water governance<sup>176</sup>. Rather, these women organized themselves, informed by their Indigenous law responsibilities to water that are set out in their traditional governance protocols. Some non-Indigenous observers may view these types of collective actions as protest rather than understand that Indigenous women view these actions as a responsibility, and as a way of gathering active knowledge of the living nature of water and its spirits<sup>177</sup>. These water governance examples illustrate the empowerment of Indigenous women and their identity as one of leadership, informed by Indigenous law responsibilities. These examples of organizing practices are offered to expand the gendering of IBAs beyond the negotiation table and into public spaces, and to ask how, and if it is culturally appropriate to bring these women and their concerns to the negotiation table. These examples also, importantly, show the need to reconstruct Indigenous women's identity to characterize women as skilled Indigenous leaders, who can and should actively negotiate IBAs<sup>178</sup>.

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173. D. MCGREGOR, *supra*, note 1.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Bonita LAWRENCE, "Gender, Race, and the Regulation of Native Identity in Canada and the United States; An Overview", *Hypatia: A Journal of Feminist Philosophy*, vol. 18, n° 2, 2003, p. 3.



Gendering IBA processes through the recognition of resistance practices should be based on a First Nations' worldview of law as a responsibility to others — non-human and human. While Indigenous law is recognized as a gendered enterprise, as a legal order it is viewed as organic and responsive to contemporary issues, enabling the law to move forward but remain grounded in Indigenous legal traditions<sup>179</sup>. Graben, Cameron and Morales rely upon Indigenous scholars Kim Anderson's and Aimee Craft's research to demonstrate the responsiveness of Indigenous law. Anderson discusses "the equality-balancing mechanisms in Anishnaabeg law<sup>180</sup>" that represent the law's organic nature and responsiveness to contemporary problems where solutions are guided by traditional legal principles<sup>181</sup>. Craft's research on water governance clarifies the difference between rights and responsibilities<sup>182</sup>. As Craft explains, Indigenous women view their water governance function as an expression of a woman's responsibility to water<sup>183</sup>. Unlike the common law focus on rights, an Indigenous worldview does not hold a view of "rights over resources<sup>184</sup>". Rather, an Indigenous worldview is grounded in a responsibility to all living and non-living entities in Creation<sup>185</sup>. Relying on the gendered research of Indigenous law scholars Anderson and Craft, including the momentum toward the recognition of Indigenous legal orders, Graben, Cameron and Morales anticipate that existing IBA processes will be altered through "indigenization<sup>186</sup>". Indigenization will require institutional changes to IBA processes, such as the inclusion of a "specialized council" to take into account gendered roles that might include environmental stewardship and the Indigenous law view of responsibilities for, not rights over resources<sup>187</sup>.

While the significance of Indigenous women's governance role as water stewards is a promising trend in the literature, the IBA negotiation scholarship has yet to consider Indigenous women's environmental governance roles. In the Cree tradition, women hold a special relationship with the environment, in particular with water. Relying on interviews with First Nation Grandmothers, Anderson's research reveals the spiritual view of water, and how water is viewed as "life" for Indigenous

179. V. NAPOLEON, *supra*, note 55. Also see: J. BORROWS, *supra*, note 54; V. NAPOLEON and H. FRIEDLAND, *supra*, note 27.

180. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

181. K. ANDERSON, *supra*, note 17, chap. 10.

182. A. CRAFT, *supra*, note 26.

183. *Id.*

184. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

185. D. MCGREGOR, J.-P. RESTOULE and R. JOHNSTON (eds.), *supra*, note 14, p. 3.

186. K.L. LADNER, *supra*, note 10.

187. S. GRABEN, A. CAMERON and S. MORALES, *supra*, note 4.

women and their communities<sup>188</sup>. As explained by a Cree Grandmother, “spring waters” hold “cleansing and awakening powers”, and water is key to “[t]he relationship between women, [and] Mother Earth<sup>189</sup>”. Indigenous water governance scholar, Deborah McGregor’s research also emphasizes women’s stewardship and spiritual governance roles with respect to water. In her work, McGregor recounts the meaning of water for Indigenous women: “Everyone has a responsibility to care for the water. Women, however, carry the responsibility to talk *for* the water<sup>190</sup>”. In the negotiation of an IBA agreement, Indigenous women’s invisibility in the law-making process means these women experience a silencing effect of their perspective of holding a responsibility for water, and the diminishment of their governance roles as environmental stewards.

Taken together, Anderson, Craft and McGregor’s research underscores the importance of creating a space for Indigenous women at the IBA negotiating table. In a mining project, water and aquatic systems are impacted by the development project and extraction activities. However, in the IBA’s law-making process, women’s water governance role is typically coalesced and presented as a concern of a women’s group, and is commodified to align with the extractive industry’s marketplace of transactional negotiations resulting in a gendered IBA<sup>191</sup>. In short, women’s governance roles are glossed over, as argued by Graben, Cameron and Morales, which leaves open the pressing question: In Canada’s robust mining sector, what opportunities and barriers exist in the empowerment of Indigenous women water-knowledge holders and their knowledge within an IBA?

### Conclusion: Gendering IBA Law-Making Process

This article highlighted the well-documented absence of Indigenous women in natural resources decision-making regimes. This article advanced the case for Indigenous women’s representation in the mining sector’s IBA law-making by way of engaging with Indigenous women’s water stories as a means to revitalize Indigenous women’s governance role with respect to the responsibility to speak for water. As argued, Indigenous women and water and mining are connected. This connection places the focus in IBA law-making in the mining sector on Indigenous governance, and

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188. K. ANDERSON, *supra*, note 26, p. 7.

189. *Id.*, p. 12 and 13.

190. D. MCGREGOR, *supra*, note 1, at page 28. McGregor attributes the statement to Ann Wilson.

191. Sari GRABEN, “Assessing Stakeholder Participation in Sub-Arctic Co-Management: Administrative Rulemaking and Private Agreements”, (2011) 29 *Windsor Y.B. Access Just.* 195.

centers Indigenous women as key participants in IBA law-making because of their governance role as water-knowledge holders, as long argued by Indigenous water governance scholars. Graben, Cameron and Morales's gendered approach to strengthening Indigenous women's participation in IBA law-making begins the conversation and raises the concern that without Indigenous women's participation, it is questionable that the First Nation has conferred consent with respect to the IBA.

In this article, I presented another way forward in gendering an IBA, which is to begin with Indigenous women's governance function as water-knowledge holders. Acknowledgement of the Indigenous water governance restores Indigenous women's authority and raises questions of consent under Indigenous law. Indigenous scholars advance Indigenous stories as a source of law suggesting stories signify a method to establish the legitimacy for Indigenous women's representation at the IBA negotiating table. However, gendering the IBA law-making process, from beginning to end, requires creating the space to reconcile the neo-liberal orientation underpinning natural resource development and the IBA law-making processes. Increasing Indigenous women's participation through the IBA representation and warranties clause raises the tension within the agreement and the challenges presented by the confidentiality and non-compliance clauses, which may limit Indigenous women's ability to carry out their responsibilities for water in a transparent and public manner. The notion of institutional equality and representation of Indigenous women requires a sensitivity to the cultural misalignment of Western views of equality. Ultimately, effective leadership in IBA law-making could benefit by crafting an inclusive process whereby Indigenous women's worldview and their special relationship to water is considered an organizing principle of the negotiation and the IBA.