

Indigenous Homelands and Environmental Assimilation: Canada's Impact Assessment Act (2019), and the Public Interest Determination

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Abstract

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Keywords

Indigenous homelands, reserve lands, environmental assimilation, Canada's Impact Assessment Act (2019), pan-Indigenous perspectives, development, public interest, colonialism, wellbeing

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Indigenous Homelands and Environmental Assimilation: *Canada's Impact Assessment Act (2019)*, and the Public Interest Determination

“What is done to our land is done to our people” (Nishiiyu Council of Elders, undated; p. 1)

The British Crown held the belief that Indigenous (or Aboriginal) Peoples of North America held land rights, and Indigenous homelands could only be surrendered to the British Crown with Indigenous Peoples' consent through cession or purchase (King George III, 1763). It follows that there was a need for treaties with the North American Indigenous Peoples, especially after the formation of the Dominion of Canada in 1867, to allow for the settlement and development of the Indigenous homelands by the colonizers (Tsuji, L. J. S. & Tsuji, S. R. J., 2021). The period from 1870 to 1930 was of particular importance because 11 treaties were signed between the Government of Canada and various First Nations groups that covered much of Canada; these nation-to-nation agreements were referred to as the numbered treaties (Figure 1) (King George III, 1763; Tsuji, L. J. S. & Tsuji, S. R. J., 2021).

From a common law perspective, the First Nations groups “ceded” their homelands to the crown, but from an Indigenous perspective, the agreement was to share the land: the Indigenous people could not cede what they did not own (Long, 2010; Tsuji, L. J. S. & Tsuji, S. R. J., 2021; Tsuji, S. R. J. & Tsuji, L. J. S., 2021). In addition, First Nations Peoples were placed on reserve lands; these tracts of land were to be used exclusively by First Nations people and became known as First Nations (Tsuji, S. R. J. & Tsuji, L. J. S., 2021). Treaties divided Indigenous spaces into two categories from a non-Indigenous perspective: pre-treaty Indigenous ancestral homelands, and treaty-created reserve lands (Tsuji, S. R. J. & Tsuji, L. J. S., 2021).

With respect to the numbered treaties, there is a specific passage that later became known as the “taken-up clause” (Long, 2010):

“Her Majesty further agrees with Her said Indians [note that historically the Indian term was used in government documents to refer to First Nations Peoples] that they, **the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered** [i.e., Indigenous ancestral homelands] as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and **saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada** [added emphasis], or by any of the subjects thereof duly authorized therefor by the said Government.” (Treaty No. 3, 1873)

A similar passage can be found in Treaty No. 4 (1874), Treaty No. 5 (1875), Treaty No. 6 (1876), Treaty No. 7 (1877), Treaty No. 8 (1899), Treaty No. 9 (1905), Treaty No. 10 (1906), and Treaty No. 11 (1921). When the numbered treaties were signed, almost all First Nations signatories could not speak, read, or understand English, so translators were employed to interpret the treaty text and convey the treaty commissioners' words (Long, 2010). The reality of what was explained to First Nations' signatories has been debated (Long, 2010). For example, with Treaty No. 9, little was explained about future land use (Armstrong, 2013), and no evidence suggests that the taken-up clause had been

explained to the First Nations’ signatories (Long, 2010; Loutit, 2010). The Government of Canada largely maintains the written version as the official version of the treaty, while First Nations maintain that the oral promises made by the treaty commissioners as the real version of what was agreed to in the treaty (Long, 2010). It should also be mentioned that First Nations’ signatories of the numbered treaties were not enfranchised; thus, after the treaties were signed, First Nations people had no right to vote and no voice in the development on their homelands until enfranchised (Tsuji, 2021).

From the beginning First Nations people were not considered part of the Canadian “public” and would never be the public. Indigenous people were not ordinary citizens of Canada; over time, Canadian Indigenous Peoples were considered “Citizen Plus” by some (Hawthorn, 1966; Hawthorn, 1967; Indian Chiefs of Alberta, 2011), which is to say Indigenous people possessed certain additional rights compared to ordinary Canadian citizens. Aboriginal (i.e., First Nations, Inuit, and Métis) rights and treaty rights became entrenched in the repatriated Canadian Constitution Act (1982). Despite this, federal and provincial levels of government had the ability to circumvent these constitutionally protected rights to promote development on Indigenous homelands when in the government’s interest and/or public interest (Tsuji, 2021; Gardner et al., 2012).

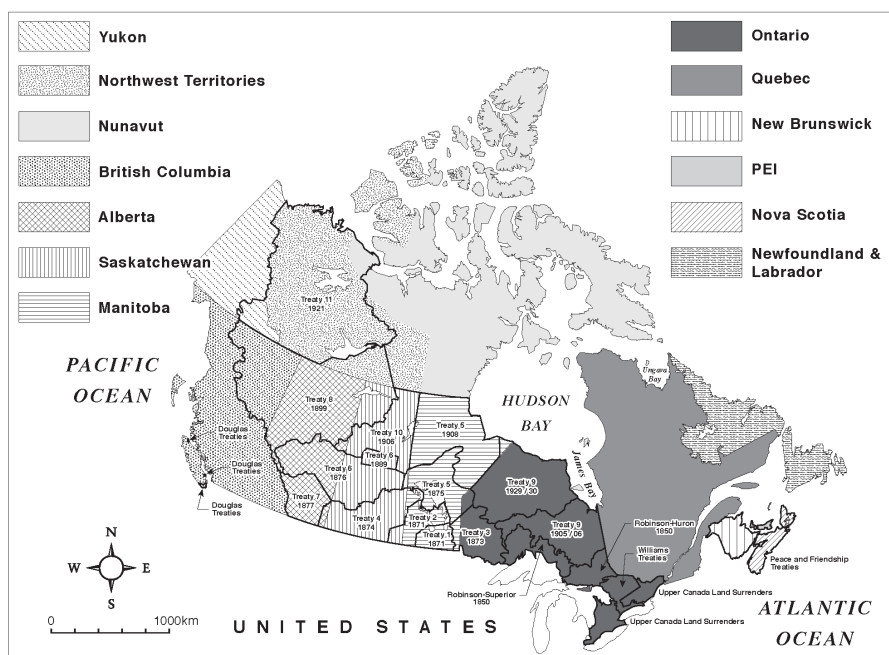


Figure 1. The historical treaties of Canada including the numbered treaties, and the provinces and territories of Canada.

In Canada, legislation passed by the Province of Ontario allowed (or would allow) for development on Indigenous homelands when in the best interest of the Government of Ontario and/or “in the public interest” (Tsuji, 2021). The “Except” stipulation in the Mining Amendment Act (2009), the “Exemption Orders” in the *Far North Act* (2010), and the unilateral streamlining or exemption of development

projects in the Green Energy and Green Economy Act (2009) and the COVID-19 Economic Recovery Act (2020) all overrode important clauses in the Acts or amended other pieces of legislation in Ontario that protected Indigenous homelands and Indigenous rights to traditional pursuits (Tsuji, 2021; Tsuji et al., 2021). These pieces of legislation posed threats, and still pose threats (except for the Green Energy and Green Economy Act (2009) which was repealed in 2019; Tsuji, 2020) to First Nations homelands while perpetuating historical-colonial-assimilative-and-development policy through environmental assimilation. The term environmental assimilation was introduced and defined by Tsuji (2021; p. 2) as: “changes to the environment through development, to the extent whereby the environment can no longer support Indigenous cultural activities either partially or fully.” Aamjiwnaang First Nation—one such example—is an Ojibway community on reserve land surrounded by more than 50 industrial facilities (Figure 2) (Cryderman et al., 2016); effectively, a First Nation island community in a sea of colonial development (Tsuji, 2021).



Figure 2. Imagery illustrating environmental assimilation from Tsuji (2021). Notice how development on Aamjiwnaang First Nation homelands has fully surrounded the community and lies contiguous to the boundaries of Aamjiwnaang First Nation’s reserve lands in southern Ontario (Google Maps Imagery © 2021 CNES/Airbus, First Base Solutions, Landsat/Copernicus, Maxar Technologies, U.S. Geological Survey, USDA Farm Service Agency Map data © 2021).

Herein, I will examine the Government of Canada statute, Bill C-69 in the context of development on Indigenous homelands, environmental assimilation, and the national public interest. I will be focussing on the Canadian Impact Assessment Act (2019) portion of Bill C-69 but will refer to other parts of Bill C-69 when appropriate. A brief background section will be given concerning Canadian-historical-assimilative policies followed by a short description of Bill C-69 (2019) and the public interest context. Next, methods will provide the geographical and cultural scope of the present study, as well as data collection and analyses details. Subsequently, results and discussion based on the research aim and analyses will be presented, including: pan-Canadian Indigenous perspectives on the environment and

development on their homelands, the *Impact Assessment Act* and the public interest tests, and the way moving forward. These sections will be followed by the conclusions.

Background

Canada's Historical Policies of Assimilation

Canada's extensive legal assimilation efforts, with respect to Indigenous Peoples, has been widely documented (Truth and Reconciliation Commission of Canada, 2015a). Dating back to pre-confederation, an "Indian civilization" agenda (Leslie, 2002) was aimed at the relinquishment of Indian title and the dissolution of First Nations reserve lands (Tsuji, 2021). These strategies would be ratified at confederation, in the Canadian Constitution Act (1867: Section 91(24)) with several additional acts (Gradual Enfranchisement Act (1869), Indian Act (1876)) and clauses that specified blood-quanta standards (Lawrence, 2003; Schmidt, 2011; Spruhan, 2018) and university degrees and/or clergy positions (Assembly of First Nations, undated; Dominion of Canada, 1920). Despite multiple attempts at assimilation, policy-based assimilation was a failure (Brownlie, 2006; Cannon, 2007). Even the sweeping Statement of the Government of Canada on Indian Policy (1969)—the "White Paper"—was met with a scathing rebuttal in the form of the Citizen Plus document, also known as the "Red Paper" (Indian Chiefs of Alberta, 2011) that emphasized that First Nations people were not just Canadian citizens but held the standing of "Citizen Plus" (Hawthorn, 1966; Hawthorn, 1967), as Canada's First Peoples. In the decades that followed, amendments to the Indian Act attempted to address injustices of the statute: in 1985, Bill C-31 (1985) allowed women and their children to regain (or gain) their "Indian" status (Clatworthy, 2004); and in 2017, Bill S-3 (2017) addressed other known gender-based inequities.

Cultural assimilation—the loss of characteristics that distinguished a cultural group (Cannon, 2007)—was also a method that was utilized through the infamous residential school system (Truth and Reconciliation Commission of Canada, 2015a; Truth and Reconciliation Commission of Canada, 2015b) and the "sixties scoop" (Cardinal, 2016; Sinclair, 2016). Despite the extensive intergenerational impacts (Bombay et al., 2020), Indigenous cultures continued to survive (Truth and Reconciliation Commission of Canada, 2015a; Truth and Reconciliation Commission of Canada, 2015b). Canadian Indigenous Peoples still maintain their identities, communities, and assert both their inherent and treaty rights (Truth and Reconciliation Commission of Canada, 2015c) even after enduring Canada's aggressive assimilation policies. However, "law must cease to be a tool for the dispossession and dismantling of Aboriginal societies." (Truth and Reconciliation Commission of Canada, 2015a; p. 205)

Canada has refocused its attention to the development of ancestral Indigenous homelands external to the reserve lands (Tsuji, 2021). It will be shown in the present study that Bill C-69 facilitates the continuation of Canada's colonial assimilative processes through environmental assimilation.

Bill C-69, An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts

In 2019, Canada passed Bill C-69 that significantly changed environmental assessment at the federal level to an impact assessment process (Impact Assessment Act, 2019). An environmental assessment is “a process to predict the environmental effects of proposed [development] initiatives before they are carried out. An environmental assessment . . . identifies possible environmental effects; proposes measures to mitigate adverse effects; and predicts whether there will be significant adverse environmental effects, even after the mitigation is implemented” (Canadian Environmental Assessment Agency, 2011; p. 3). Meanwhile, impact assessment “means an assessment of the [positive and negative] effects of a designated project that is conducted in accordance with this Act.” (Truth and Reconciliation Commission of Canada, 2015a; p. 6) As the environment was not explicitly mentioned in the Canadian Constitution Act (1867), the legislative responsibility for the environment was, and is, shared by the federal and the provincial governments of Canada (Kirchhoff et al., 2013). Thus, there are separate federal and provincial and several other types of environmental assessments on the far-right side of the multi-jurisdictional-environmental-assessment process spectrum, while on the far-left end of the spectrum absolute substitution (i.e., where a law or process in one jurisdiction is substituted for a law or process in another jurisdiction) with all the others between (Kwasniak, 2017).

Bill C-69 was an omnibus bill that enacted new laws—the Impact Assessment Act (2019) and the Canadian Energy Regulator Act (2019)—and amended several other existing laws (e.g., the title Navigation Protection Act was altered to the Canadian Navigable Waters Act (2019), along with significant changes within the Act itself). Due to the lack of trust in the existing environmental assessments processes by the public and Indigenous Peoples (Gelinis et al., 2017), the consultation process was extensive prior to the introduction of Bill C-69 (2019) (Government of Canada, 2017). The Government of Canada (Government of Canada, 2017; p. 3) was committed to environmental assessment and regulatory processes that would: “regain public trust, protect the environment, introduce modern safeguards, **advance reconciliation with Indigenous Peoples** [added emphasis], ensure good projects go ahead, and resources get to market.” Bill C-69 (2019) was still controversial and in the Canadian Senate went through unprecedented review (Wright, 2020); 188 amendments were included in the revised Bill C-69, and about half were adopted by the House of Commons before Royal Assent (Hunsberger et al., 2020).

There was a change in the decision-making process of the Canadian Environmental Assessment Act (2012) from preventing/minimizing significant adverse environmental effects to an impact assessment process based on a public interest determination described in the Impact Assessment Act (2019). Decision-making by the Minister of the Environment and the Governor in Council of whether a development project is in the public interest is based on five components: sustainability; adverse significant effects; mitigation measures; impacts on Indigenous Peoples and their constitutionally-embedded rights; and climate change (Impact Assessment Act, 2019). A Governor in Council appointment is made by the Governor General of Canada—that is, the British Queen’s representative in Canada—on the advisement of the British Queen’s Privy Council of Canada (i.e., the Cabinet Ministers of Canada; Government of Canada, 2021).

Public Interest

Although the Government in Council's decisions with respect to the Impact Assessment Act are based on the public interest, the term public interest is not defined in the Act itself, similar to previous cases at the provincial level in the Green Energy and Green Economy Act (2009) (Tsuji, 2020). Other statutes in Canada also leave the phrase "in the public interest" undefined (Tsuji, 2021; Low, 2011). However, public interest has been defined elsewhere, such as: "a general term connoting matters which legally are of common concern" (Hamilton, 1930; p. 1092); "government actions that most benefited the whole society" (Downs, 1962; p. 2); "[t]he indivisible collective interests of a community or society as judged by the commentator" (Oxford Reference, 2021); and "the welfare or well-being of the general public" (Collins Dictionary, 2021). The ambiguous nature of the term public interest (Cassinelli, 1958; Lewis, 2006; *R v. Sparrow*, 1990; Sorauf, 1957)—some would say flexible nature (Low, 2011)—allows it to be used in many different fields of endeavor worldwide (e.g., accounting, Killian & O'Regan, 2020; political science, Douglas, 1980; law, Cahn & Cahn, 1970; and planning, Oravec, 1984). Nevertheless, to use such a nebulous metric as "in the public interest" in the Impact Assessment Act in a supposed effort to make decision-making more transparent and "advance reconciliation with Indigenous Peoples" (Government of Canada, 2017; p. 3) is problematic, as will be shown.

Methods

Geographical and Cultural Scope

In Canada, Indigenous people are not a homogeneous population; each group has their own distinctive history, culture, language (Statistics Canada, 2017), and homelands (Tsuji, L. J. S. & Tsuji, S. R. J., 2021). First Nations people reside on-reserve in over 600 unique First Nations as well as off-reserve (Statistics Canada, 2017). Métis people mostly live in Ontario and the western provinces and almost two thirds live in an urban setting (Statistics Canada, 2017). The Inuit are North America's First Peoples of the arctic region inhabiting their homeland of Inuit Nunangat (Statistics Canada, 2020). Inuit Nunangat is made up four Inuit regions of Canada: Inuvialuit; Nunavut; Nunavik; and Nunatsiavut (Inuit Tapiriit Kanatami, 2021). The total Indigenous population of Canada has been estimated at 1,673,785 or approximately 4.6% of the total Canadian population (Statistics Canada, 2017; O'Donnell & LaPointe, 2019). The reported disaggregated data were as follows: 977,230 First Nations people; 587,545 Métis; 65,025 Inuit; 21,310 people with multiple Aboriginal identities; and 22,670 people of Indigenous identity not included in the other categories (Statistics Canada, 2017). The Indigenous population in Canada is growing relatively rapidly (Statistics Canada, 2017; O'Donnell & LaPointe, 2019), but immigration to Canada (Statistics Canada, 2019) will maintain the Indigenous population around the 4% level of the total Canadian population (Tsuji, 2021).

Data Collection and Analyses

After Bill C-69 (2019) was introduced at the First Reading to the Government of Canada's House of Commons, Bill C-69 (2019) was available for general viewing (Parliament of Canada, 2021a). After the Second Reading, Bill C-69 (2019) went to the Standing Committee on Environment and Sustainable Development for hearings (Parliament of Canada, 2021a). This Standing Committee invited the

“public”—noted, the “public” included Canadian Indigenous governing bodies, Indigenous organizations, and Indigenous Peoples in this case—to submit written briefs up to 10 pages in length (Parliament of Canada, 2021b). One-hundred-and-forty-six written briefs were received by the Standing Committee varying in length from a couple of pages to 28 pages in length. 117 witnesses were selected representing 71 groups/organizations/individuals to give presentations to the Standing Committee on Bill C-69 (Parliament of Canada, 2021b).

To gain a pan-Canadian Indigenous perspective on the environment and development in their homelands, written submission and testimonies to the Standing Committee on Environment and Sustainable Development for Bill C-69 (2019) were examined. All English language submissions and Hansard verbatim transcripts of the Standing Committee hearings constitute existing data and were read in their entirety. The Standing Committee submissions and “public” hearing transcripts provided a window into how the politicians, public, and Indigenous Peoples viewed the environment, development, and the issues in Bill C-69 (2019) under review. Primary data collected were coded by hand using a template approach based on the themes reported in Tsuji (2021) for northern Ontario’s First Nations. Following this deductive thematic approach, the data were examined inductively whereby themes emerged from the data itself (Tsuji, 2021). With respect to Bill C-69 (2019) and the Acts contained therein, the Acts themselves were examined as well as the Hansard verbatim transcripts of the Standing Committee public hearings and debates to identify relevant passages related to environmental assimilation and the public interest determination. Written submissions and witness testimonies refer to Bill C-69 (2019) at First Reading—the 2018 document prior to Royal Assent. Only those statements from the written submissions and witness commentaries that were still relevant with respect to Bill C-69 (2019) at Royal Assent in 2019—after specific amendments were accepted and incorporated into the 2018 document—were commented upon in the present study. Lastly, Google Maps Imagery was used to visually identify several examples illustrating environmental assimilation across Canada.

Results and Discussion

A Pan-Canadian Indigenous Perspective on the Environment

It has been suggested that when there is more than one way of viewing the environment, then all viewpoints should be considered to allow for a better understanding of complex environmental issues, and more informed decisions (Tsuji, 2021; Tsuji et. al, 2021; Tsuji & Ho, 2002; Moose Cree First Nation, 2009). As T. Teegee (Regional Chief, British Columbia Assembly of First Nations, BC First Nations Energy & Mining Council (Teegee, 2018) has emphasized: “The Government of Canada and the Province of British Columbia need to understand the Indigenous world view prior to any major project being given the green light.” Furthermore, politicians and non-Indigenous Canadians need to understand that there is a “plurality” of Indigenous nations across Canada (Federation of Sovereign Indigenous Nations, 2018). It follows that it is inappropriate to assume that “all Indigenous Peoples of Canada have a common understanding of cultures, traditional knowledge, or perspectives in [all] particular areas” (Coastal First Nations, 2018; p. 11); habitation of a geographical space is an important underlying factor (Dene Tha First Nation, 2018; Okanagan Nation Alliance, 2018). Nonetheless, there were consistent themes that emerged from the pan-Canadian Indigenous Peoples’ Bill C-69 (2019) written submissions and committee testimonies, such as the importance of inherent rights as described

below by the Assembly of First Nations (Assembly of First Nations, 2019; p. 9), the national political body of Canadian First Nations:

First Nations are rights holders, who hold inherent and constitutionally-protected rights set out in their own governance and legal systems, as well as under *Section 35* of the Constitution. In practice, this means that First Nations rights cannot be undermined by colonial interpretation of their rights (i.e. s.35). Instead, First Nations must first interpret and describe their inherent rights, grounded in Indigenous law, Indigenous legal traditions, and customary law. These legal orders, which lay the foundation for First Nations' concepts of self-determination and sovereignty, are essential to starting true "Nation-to-Nation" dialogues and expressing the respect for our rights and title. For the millennia, prior to contact with European explorers, First Nations exercised control over their territories through their own governance authorities.

Similarly, regional and community-level Indigenous leaders and organizations were adamant about their inherent jurisdiction over their traditional homelands (e.g., Atlantic Policy Congress of First Nations' Chiefs Secretariat, 2018; British Columbia Assembly of First Nations, 2018; Dene Nation, 2018; Federation of Sovereign Indigenous Nations, 2018; Kebaowek and Wolf Lake First Nations, 2018; Native Women's Association of Canada, 2018). These inherent rights were described in detail by some Indigenous nations:

The Wolastoqey are signatories of Peace and Friendship Treaties [i.e., historical treaties], which did not involve or purport to involve the ceding or surrendering of our rights to lands, waters or resources that were traditionally used or occupied. As such, we retain Aboriginal title to our lands, waters and resources. These rights have the potential to be impacted by development, energy regulation and the regulation of navigable waterways. We are entitled to have a say in matters affecting our lands, waters and rights. (Wolastoqey Nation in New Brunswick, 2018; p.1)

Inherently, our lands and waters are part of the Anishinaabe Aki, a vast territory [of unceded land] surrounded by the Great Lakes in North America. For centuries we have relied on our lands and waterways for our ability to exercise our inherent rights under our own system of customary law and governments known as *Ona'ken'age'win*. This law is based on our mobility on the landscape, the freedom to hunt, gather, and control the sustainable use of our lands and waterways for future generations. (St-Denis, 2018; p. 12)

It should be emphasized that from an Indigenous perspective, Indigenous Peoples are "connected" to the land (Fort McKay First Nation, 2018; Manitoba Métis Federation, 2018) and water (Manitoba Métis Federation, 2018; Cold Lake First Nations Lands and Resources, Consultation Department, 2018). Indigenous people have acted and still act as "stewards" (Athabasca Chipewyan First Nation, 2018; Dene Nation, 2018; Federation of Sovereign Indigenous Nations, 2018) or "keepers of the land" (Kebaowek and Wolf Lake First Nations, 2018), and "custodians" of the waterways (Algonquins of Ontario, 2018; Haymond, 2018; Tseil-Waututh Nation, 2018). There is a responsibility to protect (Mikisew Cree First Nation, 2018) and preserve the environment for future generations (Dene Tha First Nation, 2018; St-Denis, 2018). In this regard, Indigenous Peoples of Canada have cared for and

used their homelands wisely for “millennia” (Dene Tha First Nation, 2018; Lower Fraser Fisheries Alliance, 2018) or “time immemorial” (Kebaowek and Wolf Lake First Nations, 2018; Duncan’s First Nation, 2018). North America was not “discovered” by Europeans, because well-established societies of Indigenous Peoples already occupied the land (St-Denis, 2018). To the point, M. Thomas, Chief of Tsleil-Waututh Nation (Tsleil-Waututh Nation, 2018, p.1) stated that:

Our people occupied, governed, and acted as stewards of our territory prior to contact, at contact (AD 1792), at the British Crown’s assertion of sovereignty (AD 1846), and continue to do so today . . . Tsleil-Waututh holds a sacred, legal obligation and responsibility to our ancestors, current, and future generations to protect, defend, and steward the water, land, air, and resources of our territory. Our stewardship obligation includes **the need to maintain and restore conditions** [added emphasis] that provide the environmental, cultural, spiritual, and economic foundation for our nation and community to thrive. The Tsleil-Waututh Nation does this through actively asserting and exercising its stewardship and governance rights.

Additionally, some Indigenous organizations accounted for a gendered perspective:

The economies and cultures of Indigenous Peoples is inseparably woven with their lands and natural resources . . . Land lies at the heart of social, cultural, spiritual, political, and economic life for Indigenous women. The survival of Indigenous communities, their well-being and empowerment depend on their relationship to the land and waters, and the environmental abilities of Indigenous women to transmit their knowledge. Any changes to the environment will directly affect Indigenous women’s and girls’ health, wellbeing, and identity, including national and international policies and regulations on lands and resources . . . Indigenous women’s relationship to the environment is inseparable from their cultural knowledge, teachings, and identity. Their unique identities are often shaped by time spent, knowledge learned, and gifts given from the land. (Native Women’s Association of Canada, 2018; p. 7)

Thus, resource development proponents must move beyond using solely “biophysical indicators as proxies” of effects on Indigenous inherent and Treaty rights (Dene Tha First Nation, 2018; p. 7), because this approach “ignores the interrelated nature of the environment from the Indigenous perspective, and the cultural and spiritual aspects of our rights” (Okanagan Nation Alliance, 2018; p. 7).

A Pan-Canadian Indigenous Perspective on Development in their Homelands

Colonizers, worldwide, generally view the biophysical environment as a commodity to be owned, with resources to be developed (Tsuji, 2021; McGregor et. al, 2020). From this perspective, it is not surprising that phrases like “exploitation” are used with reference to resources in Canadian statutes (e.g., the Canadian Energy Regulator Act, 2019; p. 107-108), but there are consequences associated with the exploitation of natural resources. E. Bellegarde (2018; p. 2) bluntly asserted that: “The status quo of pretending that major projects are being proposed in a pristine environment that result in zero impacts and play no role in shaping upstream and downstream impacts is fanciful and self-deluding.” As eloquently presented by R. Willson, Chief of West Moberly First Nations during the Standing Committee hearings (Wilson, 2018; p. 10):

“Air We Cannot Breathe” . . . we have signs up all over the place about sour gas, and oil and gas activities . . . “Fish We Cannot Eat” . . . All of the fish in the reservoir system have high concentrations of methylmercury, and a fish this size is very unhealthy to eat . . . “Land we Cannot Use to Hunt or Trap” . . . There are signs throughout the whole area that restrict our activity . . . “Animals We Cannot Eat” . . . a female caribou . . . a species-at-risk animal . . . was eating contaminated soil in a lease site that hadn't been cleaned up. She died . . . “Water We Cannot Drink”. Areas . . . not affected by the Williston Reservoir and the methylmercury have coal mines on them, with high levels of selenium being dumped into them. There are signs . . . [warning] not to drink the water or eat the fish . . . “Forests we Cannot Use To Camp” . . . signs are up that restrict us from camping . . . sloughing has been happening since they flooded and went to full pool on the Williston Reservoir . . . It has been 40 years and it's still sloughing there.

The impacts of unsustainable development on the environment and Indigenous Peoples occur Canada-wide, and can take the form of pollution and habitat fragmentation (Boucher, 2018a; Fort McKay First Nation, 2018; Mikisew Cree First Nation, 2018); these detrimental effects and others bring about rapid and disruptive social-cultural changes to Canada's First Peoples (Algonquins of Ontario, 2018; Namagoose, 2018; Peguis First Nation, 2018). Moreover, basic human rights include access to clean water, uncontaminated food, and breathable air (Cold Lake First Nations Lands and Resources, Consultation Department, 2018).

Despite this, as noted by Canadian Member of Parliament E. Fast (2018a; p. 22) during Bill C-69 (2019) hearings: “There's an underlying assumption amongst many Canadians that First Nations are opposed to development. That's not true, correct?” In response, Chief E. Crey (Indigenous Co-Chair, Indigenous Advisory and Monitoring Committee for the Trans Mountain Pipelines and Marine Shipping, 2018; p. 25) gave his opinion:

Here's my observation. At this time in Canada . . . often Aboriginal people are cast in the role of folks adamantly opposed all the time to development. As we know . . . Canada is a resource rich nation and . . . a leading nation at a high level of development . . . and yet at the same time has certain values that it wants to protect and uphold around the environment . . . If there isn't any investment in Canada in major projects . . . [the result] plays out in our community in high levels of unemployment, poor housing . . . a lack of infrastructure improvement and maintenance in our communities . . . we want to make sure that they [Indigenous children] enjoy the same living standards . . . along with other Canadians.

While many Canadian Indigenous groups may not be against development *per se* (Bellegarde, 2018; Dene Tha First Nation, 2018; Peguis First Nation, 2018), any development must be guided by sustainable practices; that is, planning for the present and the future (Coastal First Nations, 2018; Darling, 2018; Okanagan Nation Alliance, 2018). There must also be short and long-term benefits for the Indigenous Peoples impacted by the development (Native Women's Association of Canada, 2018; Peguis First Nation, 2018; St-Denis, 2018). This outcome should be the result of shared stewardship of the environment (Inuvialuit Regional Corporation and Inuvialuit Game Council, 2018; Mi'gma'we'l

Tplu'taqnn, 2018); sharing is foundational to Canadian Indigenous culture (Tsuji & Nieboer, 1999; Tsuji et al., 2020; Natcher et al., 2020; Natcher et al., 2021). However, “What we once knew and shared on our territories under treaties of peace and friendship [treaties made prior to the numbered treaties] with Europeans has been abused. Our ancestors never contemplated our territories to be industrial, nor has government legislation ever adequately protected us from industrial development.” (St-Denis, 2018; p. 12) With the sharing of their Indigenous homelands, there should have been the sharing of decision making by the Government of Canada with the Indigenous Peoples of Canada (Mainville, 2018).

Environmental Assimilation

As mentioned previously, most of the numbered treaties had a specific clause in them that allowed for the taking up of lands by the Crown for development purposes; this has been a contentious issue because of negative impacts of development on the Indigenous way of life (Duncan's First Nation, 2018) and their wellbeing (Fort McKay First Nation, 2018). In the Indigenous homelands covered by Treaty No. 6, Cold Lake First Nations Lands and Resources, Consultation Department (2018; p. 2) in northern Alberta reported:

Our Nation lives in the heart of SAGD [steam assisted gravity drainage] operations in Alberta—our lands are crisscrossed with a spider web of pipelines, access to lands is limited by fences and gates, and seismic exploration lines have completely decimated our old growth forest and caribou habitat . . . Alberta continues to licence industrial operators . . . to withdraw fresh water from Cold Lake and other lakes within our traditional territory on a massive scale for industrial uses. Water is sacred to us. We need fresh, clean water to live and to support the environment upon which we all depend.

Similarly, in the Treaty No. 8 area, Fort McKay is located at the centre of oil sands development in northeastern Alberta (Boucher [Chief of Fort McKay First Nation], 2018a; p. 1). It has been estimated that:

Over 75 percent of Fort McKay's Traditional Territory has been leased by the Government of Alberta to the oil sands industry; 98 percent of traplines [i.e., hunting and trapping territories] held by community members are within those leased areas and many have been irrevocably lost to oil sands development. Fort McKay's residential Reserves, 174 and 174D [see Figure 3], are entirely surrounded by mining activity, and there are more than 20 large-scale industrial projects currently operating in its Traditional Territory . . . plus multiple roads, pipelines, transmission lines, quarries, and other land disturbances [exist] . . . and more are being planned.

Along with Fort McKay's main residential settlements in Reserves 174 and 174D (Figure 3)—there are the culturally designated Reserves 174A and 174B (Figure 4) also called the “Moose Lake Reserves” which are the last relatively-pristine reserve lands in their Traditional Territory—and Reserve 174C (Figure 5) (Fort McKay First Nation, 2018). All five of Fort McKay's reserves are enclosed by oil sands leases, and *in situ* developments do not require federal environmental assessment review (Fort McKay First Nation, 2018). The five Fort McKay reserves show varying levels of environmental assimilation in their surrounding traditional lands: environmental assimilation around the residential Reserves 174 and

174D (Figure 3), and Reserve 174C (Figure 5) is quite extensive; Reserves 174A and 174B (Figure 4) appear relatively pristine. However, with oil sand leases already granted for the surrounding areas of Reserves 174A and 174B, this relatively untouched appearance with respect to development will change in the near future when oil sand development begins. This movement along the environmental assimilation spectrum in relation to Indigenous homelands, due to cumulative effects, has been called “death by a thousand cuts” (R. Willson, Chief of West Moberly First Nations 2018; Dene Tha First Nation, 2018) or something similar (Athabasca Chipewyan First Nation, 2018).



Figure 3. Imagery illustrating environmental assimilation. Notice how development has surrounded the residential Reserves 174 (red outline) and 174D (red outline) of Fort McKay First Nation in Alberta, Canada (Google Maps Imagery © 2021 TerraMetrics, Map data © 2021).



Figure 4. Imagery illustrating the relatively pristine, culturally-designated Reserves 174A (red outline) and 174B (red outline) of Fort McKay First Nation in Alberta, Canada (Google Maps Imagery © 2021 TerraMetrics, Map data © 2021). Note that oil-sand leases have already been granted for most of the areas surrounding Reserves 174A and 174B (Fort McKay First Nation, 2018), but are not indicated in the figure.



Figure 5. Imagery illustrating environmental assimilation of reserve land of Fort McKay First Nation (red outline) in Alberta, Canada. Notice how development is quite extensive in some areas, and the other “pristine areas” are enclosed by oil sand leases (Fort McKay First Nation, 2018), but included in the present image (Google Maps Imagery © 2021 TerraMetrics, Map data © 2021).

Environmental assimilation is also an important issue with respect to Indigenous Peoples who were not part of a numbered treaty. For example, in Quebec, the Mohawk community of Kahnawake “has been heavily impacted by its close proximity to Montreal and the infrastructure that has been built on and through its territory” (Mohawk Council of Kahnawake, 2018; p. 5; Figure 6). In British Columbia, the Tsleil-Waututh community is “central to a highly urbanized region, and we are a tiny little piece of property there. We are so impacted by the human element, by industry. There are so many things that impact our well-being” (Maureen Thomas, Chief of Tsleil-Waututh Nation, 2018b; p. 13). Also in British Columbia, the Musqueam Indian Band (2018; p. 1) described how the “cumulative effects of urbanization and industrialization, from diking to container shipping to oil and gas pipelines, have severely impacted Musqueam’s territory and eroded our ability to exercise our Aboriginal rights” (Figure 7). It has been assumed by proponents, non-Indigenous politicians, and the general public that Indigenous people can exercise their rights elsewhere, in “alternative areas” to the place needed for development, but this is not true and/or acceptable (Okanagan Nation Alliance, 2018; Lower Fraser Fisheries Alliance, 2018). There is not an equivalency in land, because of the special connection Indigenous people have to their homelands; language, oral traditions, sustenance, and inherent obligations to the environment are area specific (Coastal First Nations, 2018). This contrasts sharply with the non-Indigenous perspective of space rather than place (Artelle et al., 2018; Robertson & Ljubicic, 2019; Wilson, 2003; Windsor & McVey, 2005).



Figure 6. Imagery illustrating environmental assimilation of land surrounding the reserve land of Kahnawake (red outline) governed by the Mohawk Council of Kahnawake in Quebec, Canada (Google Maps Imagery © 2021 TerraMetrics, Map data © 2021).



Figure 7. Imagery illustrating environmental assimilation of land surrounding the reserve land of Musqueam Indian Band (red outline) in British Columbia, Canada (Google Maps Imagery © 2021 TerraMetrics, Map data © 2021).

Lastly, as brought up by J. Boucher (Chief of Fort McKay First Nation, 2018b; p. 3-4) development on non-reserve Indigenous lands impacts reserve lands and its people directly and/or indirectly through transboundary effects:

Noise, light, industrial traffic and odours are sources of daily and significant stressors on the social, health, and mental well-being of the community. The breach of a single tailings pond would have devastating health and environmental impacts . . . significant risk to water quality . . .

Air emissions from these mines are known to frequently cause harmful air quality exceedances at Fort McKay's Reserves.

Clearly, the federal government must take more jurisdictional responsibility through environmental assessments/impact assessments with respect to development on Traditional Territories/Indigenous homelands and concomitantly protect reserve lands across Canada (Fort McKay First Nation, 2018). The federal government has a fiduciary (ethical and legal) duty to the Indigenous Peoples of Canada (Boucher, 2018b; Constitution Act, 1867; Tsuji, 2021).

Enactment An Act Respecting a Federal Process for Impact Assessments and the Prevention of Significant Adverse Environmental Effects (short title: Impact Assessment Act, 2019)

“Environmental assessment [and now Impact Assessment] is one of the key processes that engages Indigenous Peoples in resource development planning and decision-making, and has been a flashpoint for resource conflict and litigation throughout” Canada (British Columbia Assembly of First Nations, 2018; p. 2-3)

The No-Go Alternative. In Canada, there was a general distrust of the environmental assessment processes by both Indigenous groups and the Canadian public (Gelinas et al., 2017; Skeena Fisheries Commission, 2018). This distrust from an Indigenous perspective stemmed in part from the top-down-colonialist approach (Makivik Corporation, 2018), the lack of transparency of the assessment process (Fort McKay First Nation, 2018), and the carrying out of an environmental assessment “as if the project was a done deal” (Kebaowek and Wolf Lake First Nations, 2018; p. 11). It has been reported that 99.9% of federal environmental assessments reviewed were approved under the original Canadian Environmental Assessment Act (1992) over a six-year period (Boyd, 2018). As documented in the Final Report of the Expert Panel for the Review of Environmental Assessment in Canada (2017), it was reported that many of the presenters believed that: “the decision in favour of a project was always a foregone conclusion, and that there was no place in the process for a finding of ‘no-go’ [alternative to the project] . . . [and] that participation in the EA [environmental assessment] process was a waste of time and effort” (Gelinas et al., 2017; p. 14). Indigenous groups from across Canada suggested that all alternatives to a project must be considered (Mi’gma’we’l Tplu’taqnn, 2018; Wilson, 2018), and that the environmental assessment process must be more than “a paper exercise” (Fort McKay First Nation, 2018; p. 8). The no-go alternative (i.e., refusing or denying a project) must be a potential option considered by decision makers (Cold Lake First Nations Lands and Resources, Consultation Department, 2018; Mohawk Council of Kahnawake, 2018). In the Impact Assessment Act (2019) alternatives to an undertaking were one of the factors to be considered (22(f)) in the impact assessment of a designated project; however, the not proceeding with a project (Alberta Wilderness Association, 2018) or the no action alternative must be explicitly mentioned in the statute to be effective, which has not been the case in Canada (Boyd, 2018).

It should be emphasized that prior to Canadian Environmental Assessment Act (2012), the no-go option was considered in the federal environmental assessment process. For example, the Joint Review Panel for the Mackenzie Gas Project considered “alternatives to” the project, and one alternative was that “the Project not proceed at all—the null alternative” (Dolphus et al., 2010a; p. 86). In the

Mackenzie Gas Project Review Panel report, an explanation was given of the factors considered and the trade-offs with respect to the null alternative, before it was concluded that the null alternative was not desirable (Dolphus et al., 2010b; p. 614). At the provincial level, in Ontario for example, one of the 10 alternatives to the 407 East highway project was the “Do Nothing” alternative or “the status quo” option (Ontario Ministry of Transportation, 2009; p. 5). Nowhere in the Impact Assessment Act (2019) was the no-go alternative to a project explicitly mentioned. Without considering the no-go alternative to an undertaking, the Government of Canada and representative federal authorities would not be meeting their self-described Impact Assessment Act (2019) Mandate (s.2) of applying the precautionary principle, and their often-stated goal of reconciliation.

Reconciliation and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP). Although the Government of Canada’s goal of reconciliation with the Indigenous Peoples of Canada for past transgressions was not mentioned in the Impact Assessment Act’s Mandate or Objective sections, reconciliation was mentioned in the Preamble: “Whereas the Government of Canada is committed . . . to ensuring respect for the rights of the Indigenous Peoples of Canada recognized and affirmed by section 35 of the Constitution Act (1982), and to fostering reconciliation and working in partnership with them” (Impact Assessment Act, 2019; p. 2). This is surprising because reconciliation between the Government of Canada (and non-Indigenous Canadians) with Canada’s First Peoples was mentioned throughout the environmental assessment expert panel report and Government of Canada documents (Gelinas et al., 2017), with the Prime Minister of Canada promising to do what it takes to achieve reconciliation (Dene Nation, 2018). As noted by the Nunatsiavut Government (Nunatsiavut Government, 2018; p. 2): “There is a disconnect between the Preamble to Impact Assessment Act and its provisions . . . We do not see our understanding of either reconciliation or partnership in the provisions of the IAA [Impact Assessment Act].” Furthermore, First Nations Chiefs asserted that “it has been easy for governments to talk about reconciliation, but more difficult to translate those words into action” (Boucher, 2018a; p. 18)—and there was a need to “start living those words” (Thomas, 2018b; p. 13). Indigenous rights and title must not be subsumed under a colonial interpretation of reconciliation (Kebaowek and Wolf Lake First Nations, 2018). From an Indigenous perspective, UNDRIP and free, prior, and informed consent must be incorporated into the Impact Assessment Act to advance reconciliation in Canada (Assembly of First Nations, 2018; Athabasca Chipewyan First Nation, 2018; First Nations Fisheries Council of British Columbia, 2018; Haymond, 2018; Native Women’s Association of Canada, 2018; Nunatsiavut Government, 2018; The First Nations Major Projects Coalition, 2018), lest there will be a risk of committing environmental injustices not limited to procedural dimensions (Tsuji, 2022). However, it should be emphasized that in Canada, the duty to consult and accommodate is nuanced, and originated with the repatriation of the Canadian Constitution Act (1982) and subsequent domestic law rather than international law (Bankes, 2020).

It must also be noted, UNDRIP was not mentioned in Bill C-69 (2019) at First Reading in parliament (Assembly of First Nations, 2018). After Bill C-69 (2019) was amended, UNDRIP was referred to in the Preamble: “Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples” (p. 2). Despite this, the requirement to obtain Indigenous Peoples’ free, prior, and informed consent in some form was still absent in Bill C-69 (2019); free, prior, and informed consent should have been explicitly mentioned (Coastal First Nations, 2018;

Okanagan Nation Alliance, 2018; Lower Fraser Fisheries Alliance, 2018). From an Indigenous perspective with respect to free, prior, and informed consent: “there isn't a one-size-fits-all. There needs to be dialogue among governments and Indigenous Peoples to establish how free, prior, and informed consent will be obtained and respected” (K. Adamek, Interim Regional Chief of the Yukon Region, Assembly of First Nations, 2018; p. 21). From a Government of Canada perspective: “Under FPIC [free, prior, and informed consent], there have been three different types of descriptions of what FPIC actually means. It could mean good faith without really obtaining it, a type of consensus-oriented process, which is called collaborative consent, or a veto.” (Mike Bossio, Liberal Party Member of Parliament, Bossio, 2018; p. 16))

In the Public Interest

In a recent review of Canadian statutes and regulations, it was reported that the public interest test was widely employed in Canadian environmental law; Nunavut was the only jurisdiction that did not have a public interest test for infrastructure development (Goodday et al., 2020). The term public interest was rarely defined in the statutes and regulations—supposedly allowing for the definition to evolve with changing public values—and the decision-making process was ambiguous (Goodday et al., 2020). Since the regulators and courts take the public to be the population that the decision-makers mandate applies (Goodday et al., 2020), this creates tension between governments when there is joint jurisdiction, such as with the environment. For example, in the Impact Assessment Act (2018) “in the public interest” would include all non-Indigenous Canadians or the “national interest” (CanadaWest Foundation and Natural Resources Centre, 2018; Embridge, 2018). Likewise for the National Energy Board (forerunner of the Canada Energy Regulator), the public interest mandate (Hodgson, 2018) was inclusive of all Canadians (National Energy Board, 2015; National Energy Board 2016) because of its federal tribunal status (Goodday et al., 2020). Meanwhile, in the case of the Alberta Energy Resources Conservation Board, “in the public interest” would be in the interests of all Albertans (Low CA, 2011; Freedman & Hansen, 2009), but not Indigenous Peoples. Correspondingly, when the Government of Ontario statutes mentions “in the public interest,” this is a reference to all Ontarians but not Indigenous Peoples (Tsuji, 2021). Clearly, the meaning of “in the public interest” is statute dependent (i.e., federal vs. provincial vs. territorial) which creates problems with multi-jurisdictional environmental assessments/impact assessments.

In the Impact Assessment Act (2019), decision making by the Minister of the Environment (s. 60(1)) and the determination by the Governor in Council (s. 62) of whether a development project is in the public interest gives consideration to the following factors: (Bill C-69, 2019; Part 1, s 63:43):

- (a) the extent to which the designated project contributes to sustainability;
- (b) the extent to which the adverse effects within federal jurisdiction . . . of the designated project are significant;
- (c) the implementation of the mitigation measures that the Minister or the Governor in Council . . . considers appropriate;

d) the impact that the designated project may have on any Indigenous group and **any adverse impact that the designated project may have on the rights of the Indigenous Peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*** [added emphasis]; and

(e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet . . . its commitments in respect of climate change.

While Indigenous and Treaty rights were part of the public interest determination, the use of the public interest tests in decision-making were red flags for Indigenous leadership (Table 1). When the public interest was not defined in Bill C-69 (2019), too much latitude was given to the decision makers to rationalize infringements on Treaty and Aboriginal rights (Bellegarde, 2018; Duncan's First Nation, 2018). With the elimination of the standing test in the Impact Assessment Act (2018), the public interest was no longer those potentially directly affected by an undertaking (Environmental Defence Canada, 2018; Olszynski, 2018; Réseau Canadian Environmental Network, 2018), but now open to all Canadians (Imperial, 2018; Suncor Energy, 2018). For Indigenous Peoples, this approach must be viewed cautiously because the rights of Indigenous Peoples could be superseded by the rights of the larger Canadian public (Mi'gmawe'l Tplu'taqnn, 2018). In fact, Indigenous groups have already "borne a profound risk [e.g., contamination from development projects] on behalf of all Canadians, presumably to advance the national interest" (Fort McKay First Nation, 2018; p. 9).

When decisions are to be made by the Minister or Governor in Council in the national interest, no guidance is contained within the Impact Assessment Act (2018) on how the public interest factors are to be weighed against each other (Musqueam Indian Band, 2018); trade-off rules and criteria would improve clarity (Green Action Centre, 2018). Adding to this decision-making opacity, ambiguous wording can be found in certain sections of the Impact Assessment Act (2018) with respect to public interest decisions (e.g., s. 60, s. 61, s. 62). Clear and explicit borders are required for: "whether the Minister or Governor in Council is to determine whether the adverse effects of the project are in the public interest or whether the project is in the public interest despite the adverse effects" (Native Women's Association of Canada, 2018; p. 6). This is why several organizations questioned: "how projects can be in the public interest if they are causing severe environmental and health effects" (Keepers of the Athabasca, 2018; p. 1). The Yellowstone to Yukon Conservation Initiative (Yellowstone to Yukon Conservation Initiative, 2018) have suggested a drafting error in s. 60(1) and similar sections in the Impact Assessment Act. The lack of transparency in the decision-making process of the Impact Assessment Act (2018) is further compounded by the "political dimension of project approval . . . [through an] assessment of 'public interest' with no apparent way of injecting Indigenous norms" (British Columbia Assembly of First Nations, 2018; p. 13). The vagarity of the public interest mandate leaves it open to lobbying and political influence (Church, 2017) and puts the public interest test into conflict with Indigenous rights (Freedman & Hansen, 2009).

Table 1. Pan-Canadian Indigenous concerns with Bill C-69 (2019; Part 1, the Impact Assessment Act) that were not addressed in the Impact Assessment Act (2019) that received Royal Assent. These included the unilateral powers given to the Minister and the Governor in Council if in the public interest, and the Constitutionally-protected rights of Indigenous Peoples being considered just another factor in the public interest determination (bold used for added emphasis).

Theme	Representative Quotes
Discretionary Decision-Making Power	<p>Issues such as maintaining ministerial or cabinet [i.e., Governor in Council] decision-making and approving major projects using a public interest test remain red flags for First Nations and the proposed nation-to-nation relationship . . . Indigenous lawyers are discussing how the bill could be strengthened to assist the inevitable judicial reviews because of the continuing use of a public interest test and the regulatory choice of a project list. (K. Adamek, Interim Regional Chief of Yukon Region, Assembly of First Nations, 2018; p. 14-15)</p>
	<p>Under the IAA [Impact Assessment Act], final determinations made by the Minister (in cases of standard assessments) and by the Governor in Council (in other cases, including panel reviews) turn on whether the designated project and its adverse effects is in the public interest “in light of the factors referred to in section 63” . . . Indigenous Peoples know that encroachments on their territories, resources and rights are always justified as being in the Canadian public interest. (Nunatsiavut Government, 2018; p. 8)</p>
	<p>[T]he need to limit discretionary decision-making and to ensure that decisions are fully transparent about the way in which Indigenous rights and interests have been traded off in determining what impacts are in the public interest. (Nunatsiavut Government, 2018; p. 3)</p>
Consideration	<p>Under section 36 (1), the Minister “may” decide if it is in the “public interest” to refer the designated project’s impact assessment to a review panel. (Assembly of First Nations, 2018; p. 20)</p>
	<p>This vener of “consideration” masks a lack of respect for Indigenous perspectives that, if continues, will undermine many of the IAA’s [Impact Assessment Act] purposes and impede Canada’s efforts to build a framework to recognize and implement Indigenous rights. (Mikisew Cree First Nation, 2018; p. 3)</p> <p>[T]he MCK does not believe that the Minister’s obligation to consider project impacts on Indigenous “groups” as part of a public interest determination (Section 63) is sufficient . . . The MCK vigorously opposes this approach . . . this approach does not respect Indigenous consent or decision making as to what is an “acceptable” impact to Indigenous rights and lands. The Act only acknowledges Canada as the exclusive decision making authority to make such a determination as part of the public interest test . . . impacts to the rights of Indigenous Nations should not be weighed against other interests (economic interests of Canada or local communities, etc.) in a manner that does not respect the very nature of the Indigenous rights which are at stake . . . the Act should . . . separate impacts to established Indigenous rights from the public interest test of Section 63. (Mohawk Council of Kahnawake, 2018b; p. 2-4)</p>

Theme	Representative Quotes
Transparency and Trade-offs	[A] “Public Interest test” . . . there needs to be clear provisions outlining how the decision-maker (i.e. Minister or Agency) plans to balance constitutionally-protected rights with economic benefits. (Assembly of First Nations, 2018 p. 19)
	Throughout Part I of C-69 [Impact Assessment Act], there is a general lack of transparency and accountability on how decisions are made . . . in sections 60-64 . . . there is no requirement for the Minister to state how these rights have been considered in relation to the other considerations listed in s.63 or the “public interest” . . . the Minister, or Governor in Council, can trade off s. 35 Indigenous rights, but he/she has no requirement to state how or why these rights have been traded off to the “public interest” . Leaving discretionary power in the hands of the Minister or Governor in Council is certainly not transparent nor accountable, is prejudiced against the Indigenous Peoples of Canada . . . not in the spirit of reconciliation (Makivik Corporation, 2018; p. 3)
	Assurances are unacceptable. Decisions under the act should explain how the minister accounted for all the proposed section 63 factors , including explicitly for any substantive effects the determination may have in relation to an affected indigenous group. The minister must be required to explain any trade-offs between impacts that the designated project may have on an indigenous group or their rights. (A. Hoyt, Nunatsiavut Government, 2018; p. 4)
	[Need for] real clarity on what the public interest test is? (K. Hodgson-Smith, MétisNational Council, 2018; p. 12)
	Project approval appears to remain a “political decision.” Indeed, s. 63 . . . identifies factors to help determine the public interest, including adverse effects to Indigenous groups and their Rights. (Fort McKay First Nation, 2018; p. 5)
Indigenous Rights Just Another Factor	Bill C- 69 . . . include[s] Indigenous rights and interests in the public interest assessment (s. 63) . This notion brings its share of interpretation . . . Integrating Aboriginal issues into the public interest could mean that this assessment would be to our disadvantage . Our rights are unique and constitutionally protected, and can not be viewed as less in the face of other rights and interests, and above all, in the face of a short-term vision of economic development. (Assembly of First Nations Quebec-Labrador, 2019; p. 9)
	The decision to approve a project lies with the Minister or the Governor in Council (ss. 60-62), who are to apply a “public interest test” . Section 63 establishes the public interest factors that must be “considered” in their decision , with impacts on Indigenous groups and Indigenous rights constituting just one of these factors . . . inconsistent with . . . the Crown’s constitutional duties. (British Columbia Assembly of First Nations, 2018; p. 6)
	Mi’gmawe’l Tplu’taqnn has significant concerns about the fact that the focus of the decision making in the IAA [Impact Assessment Act] seems to have shifted from a determination as to whether a project causes significant adverse effects . . . to a determination of whether the project is in the “public interest” . While consideration of impacts on Indigenous groups and their constitutionally protected rights is now explicitly required, it has been incorporated as a factor in the public interest determination . . . our constitutionally protected rights as just another interest that has to be weighed in the balance by government, and not as rights which the government has an obligation to uphold, and which cannot be infringed without lawful justification. (Mi’gmawe’l Tplu’taqnn, 2018; p. 4-5)

Theme	Representative Quotes
	<p>[C]oncerned that Indigenous rights are subsumed under “factors to consider” in s.16, 22, and 63. This appears to reduce the nation-to-nation relationship between Indigenous groups and the Crown, and enables the Crown to weigh equally Indigenous rights against other factors. The constitutionally-protected nature of Indigenous rights requires a significantly higher threshold of protection and due consideration than other factors listed. Bill C-69 requires further clarity as to how Indigenous rights will be considered as a factor. . . At the moment, we are concerned that the consideration of Indigenous rights is discretionary to the point of being ineffectual [need] . . . trade-off rules in the Act or by regulation. (M. Thomas, Chief of Tsleil-Waututh Nation, 2018a; p. 4-5)</p>

Ministerial and Governor-in-Council Discretionary Decision-Making Powers. In general, Bill C-69 (2019) and the Acts contained therein rely upon a large number of upstream discretionary decision-making powers with respect to the federal government or their representatives (Dene Tha First Nation, 2018; Assembly of First Nations, 2018; Lower Fraser Fisheries Alliance, 2018; Mohawk Council of Kahnawake, 2018). There was a call to remove this broad, non-transparent federal government discretionary power and control over the decision-making process (Coastal First Nations, 2018) after First Reading of Bill C-69 (2019). Similarly, provincial governments (Government of Saskatchewan, 2018; Legislative Assembly of Alberta, 2018), non-governmental organizations (Alberta Wilderness Association, 2018; Equiterre, 2018; Nature Canada, 2018), lawyers (CELA, 2018; Environmental Law Centre, 2018; West Coast Environmental Law, 2018), academics (Boyd, 2018; Doelle, 2018; Elgie, 2018; Wright, 2018), and industries (Enbridge, 2018; CN, 2018) had concerns about the overreliance on broad-discretionary decision making and the politicization of the decision-making process. However, these concerns fell on deaf ears and the sections of Bill C-69 (2019) that described and granted the federal government and their representatives broad-discretionary decision-making powers remained in Bill C-69 (2019) when it became law.

Certain sections of the Impact Assessment Act (2018) were of particular concern to Indigenous Peoples. Specifically, Section 16 granted the Impact Assessment Agency the power to exempt a designated project from an impact assessment. This defeats the purpose of the project list that requires designated projects to undergo an impact assessment. In essence, the statutory requirement of conducting an impact assessment of a designated project on the project list can be circumvented, and the requirement becomes a political Ministerial decision (Fort McKay First Nation, 2018; Hoyt, 2018; O'Connor, 2018). As rightly asserted by the British Columbia Assembly of First Nations (British Columbia Assembly of First Nations, 2018; p. 4): "If a project is potentially impactful enough to warrant being on the Project List, the IA [impact assessment] should not be optional." By contrast, Section 9 of the Impact Assessment Act (2018) gave the authority to the Minister to require an impact assessment for an otherwise exempted project. Again, the requirement to complete an impact assessment is a political Ministerial decision (Fort McKay First Nation, 2018). This Ministerial discretion was part of the Canadian Environmental Assessment Act (2012), but there has been resistance to use this power (Mikisew Cree First Nation, 2018). Evidence is seen in the Ministerial denial on two occasions with respect to requests from Fort McKay First Nation (Fort McKay First Nation, 2018) with respect to *in situ* developments. The opportunity to designate an exempted project through Ministerial discretion is illusionary.

The Impact Assessment Act (2018) also gave the Minister discretionary authority to approve a substitution of an environmental impact assessment for the federal impact assessment process (s. 31) and refer a designated project to a more rigorous Impact Assessment review process (i.e., a review panel), if in the public interest (s. 36). Likewise, Section 109 of the Impact Assessment Act (2018) gave broad discretionary power to the Minister to decide through regulations what is included as a designated project/physical activity; the Minister's sweeping discretionary powers were disconcerting (Dene Nation, 2018; Métis Nation British Columbia, 2018). Section 114 of the Impact Assessment Act (2018) was also of concern due to Ministerial discretion deciding whether an Indigenous governing body will be recognized as having decision-making authority, albeit limited, under the Impact Assessment Act (2018)

(Lower Frase Fisheries Alliance, 2018; Mi'gmawe'l Tplu'taqnn, 2018). The issue is that Canada's Indigenous Peoples contend that they do not need to be granted decision-making authority by the Canadian government over their homelands, because Indigenous rights are inherent (Coastal First Nations, 2018; Okanagan Nation Alliance, 2018; Atlantic Policy Congress of First Nations Chiefs Secretariat, 2018; Lower Fraser Fisheries Alliance, 2018). The recognition of Indigenous groups as jurisdictions is a starting point (Thomas, 2018b) not the endpoint of the process.

Other Pan-Indigenous Concerns with the Impact Assessment Act (2018). The use of discretionary decision-making phrases in the Impact Assessment Act (2018) – such as, “consider adverse impacts” (s.9), “take into account” (s.16), and “consideration” (s. 36) —does not fully protect Indigenous Peoples' inherent and Treaty rights affirmed in Section 35 of the Canadian *Constitution Act* (1982) (Assembly of First Nations, 2018; Atlantic Policy Congress of First Nations Chiefs Secretariat, 2018; Wolastoqey Nation in New Brunswick, 2018; Wilson, 2018; Adamek, 2018). Without a reduction in excessive discretionary decision-making powers in the Impact Assessment Act (2018), there is no assurance that Indigenous Peoples' inherent and constitutionally protected rights will not be overridden by the public interest determination (Assembly of First Nations, 2018; see Table 1 for a more detailed description). This type of discretionary decision-making “undermines the nation-to-nation relationship and the Crown's reconciliation objectives” (Assembly of First Nations, 2018; p. 12). Discretionary decisions are opaque providing little transparency on how these decisions are made; these decisions are also susceptible to political lobbying (Lepine, 2018). When the Minister, Governor in Council, and Impact Assessment Agency are under no obligation to provide reasons for a decision and justify their decision with evidence, then there is little confidence in the impact assessment process. For transparency and legitimacy reasons, “any trade-off between factors deemed to be in the public interest and impacts on Indigenous people or their rights” (Nunatsiavut Government, 2018; p. 8) must be explained in light of reconciliation (Table 1). Decision-making should not occur in “a black box” (Nunatsiavut Government, 2018), especially when Indigenous rights are being considered as a factor in the public interest determination.

It must be emphasized that Indigenous rights should not be considered just another factor in the public interest determination (Table 1). As the Supreme Court of Canada has stated:

“Put simply, Canada's Aboriginal Peoples were here when Europeans came, and **were never conquered** [added emphasis]. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably . . . the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.” (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC, 2010; 43:669)

The Supreme Court of Canada elaborated further that: “The constitutional dimension of the duty to consult gives rise to a special public interest” (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010; 43:682). As well, the Supreme Court of Canada has asserted that: “The duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically

considered by tribunals tasked with assessing the public interest. A project authorization that breaches the constitutionally protected rights of Indigenous Peoples cannot serve the public interest.” (*Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* 2017 SCC, 2017; 40:1071) It is unfortunate that the phrase “a special public interest” was used in the Supreme Court of Canada rulings, because Indigenous interests and the public interests are distinct as described earlier in this paper, and the use of this term has led to some confusion. The phrase “special interest” would have been more appropriate.

Regional Assessment and Strategic Assessment. There was general agreement among academics, practitioners, and stakeholders that the use of regional and strategic assessments would be a positive step forward (Doelle, 2018), but areas of improvement were identified by many Indigenous groups. In the Preamble to the Impact Assessment Act (2019; p. 3), it was stated that: “the Government of Canada recognizes the importance of regional assessments in understanding the effects of existing or future physical activities and the importance of strategic assessments in assessing federal policies, plans or programs that are relevant to conducting impact assessments.” Allowing for the fact that provisions were made in the Impact Assessment Act (2018) for Regional (s. 92) and Strategic (s. 95) Assessments, the Ministerial authority to initiate these types of important assessments was discretionary (Coastal First Nations, 2018; Dene Tha First Nation, 2018; Lower Fraser Fisheries Alliance, 2018; Okanagan Nation Alliance, 2018). Indigenous Peoples were concerned that no regional assessments would be realized under the Impact Assessment Act (2018), because these types of assessments did not occur under the Canadian Environmental Assessment Act (2012) and its predecessor (Boyd, 2018), which had a similar clause (Fort McKay First Nation, 2018). Another related issue was that in Bill C-69 (2019, the Impact Assessment Act) there were no requirements or triggers with respect to when a regional and/or strategic assessment would be required (Bellegarde, 2018; Mohawk Council of Kahnawake, 2018; Musqueam Indian Band, 2018).

The regional-and-strategic assessment approach would be a welcome change from the individual project-after-project approach that Indigenous communities have endured year-after-year, taking into account the technical, financial, and human resources capacity issues they have faced (Duncan’s First Nation, 2018). By viewing impact assessment regionally and/or strategically, better planning will ensue, and cumulative effects can be accounted for in the context of historic, current, and future interactive stressors (Musqueam Indian Band, 2018). Regional and strategic assessments and planning would lead to improved decision making at the meta-project level (Almeida et al., 2019), “and can be a key planning tool to allow for sustainable development within a landscape” (Nunatsiavut Government, 2018; p. 10). In the same way, there must be meaningful Indigenous engagement, and ecological limits must be identified through the regional assessment process (British Columbia Assembly of First Nations, 2018), along with cultural limits with respect to sustainability. Using this type of approach – considerations and decisions can be made in advance – “reducing the pressure of timelines, increasing opportunities for meaningful engagement between jurisdictions, and facilitating cooperation between Indigenous groups and the Crown” (Thomas, 2018b; p. 7). The study area also needs to be the entire traditional territory defined by the Indigenous group (Dene Tha First Nation, 2018); that is, for First Nations groups, not just reserve lands but their traditional homelands (Boucher, 2018a). Lastly, M. Thomas (Chief of Tseil-Waututh Nation, 2018b; p. 2) has asserted that: “there can be no reconciliation without addressing cumulative effects . . . with the federal government.”

Moving Forward

The way forward requires respect for multiple perspectives and the complementary use of different knowledge systems to address complex resource-development issues (Tsuji & Ho, 2002; Moose Cree First Nation, 2009). Additionally, evidence-based decision making and transparency from the federal government would restore some confidence in the impact assessment process. If the sweeping discretionary powers of the Minister and Governor in Council were removed, regional and strategic assessments would hold great potential for sustainable development on Indigenous homelands. Imperatively, the Government of Canada would have to recognize inherent Indigenous rights to self-determination in statutes; this would be needed for any type of reconciliation.

The Government of Canada has initiated a new Indigenous Rights process that: “will recognize Indigenous lawmaking power; their inherent rights to land; and, in many instances, title within their traditional territories” (Crown-Indigenous Relations and Northern Affairs Canada, 2018; no pagination). There has been mounting Indigenous interest in this initiative with more than 390 Indigenous communities participating in approximately 80 Recognition of Indigenous Rights and Self-Determination Discussion Tables with the Government of Canada (Crown-Indigenous Relations and Northern Affairs Canada, 2019). Additionally, Bill C-15 (An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples) (2021) received Royal Assent on 21 June 2021, which has the potential to improve the relationship between Canada and its First Peoples (Department of Justice Canada, 2021a; Department of Justice Canada, 2021b), and put a stop to the assimilation of Canada’s First Peoples and their homelands through legislation and development. Lastly, the United Nations Human Rights Council (United Nations Human Rights Council, 2021) recently recognized “the human right to a clean, healthy and sustainable environment” (p. 1); ideally, Canada should respect this right through legislation that benefits the Indigenous Peoples of Canada.

Conclusions

For Canada’s First Peoples, stipulations in the numbered treaties and recent legislation, such as Canada’s Impact Assessment Act (2019) represent threats to their homelands, ways of life, and the health and wellbeing of their Peoples. Passages in these Canadian legislative documents allow for unsustainable development in Indigenous homelands when in the interest of the government and/or “in the public interest” (Tsuji, 2021). The “taken-up” clause in the numbered treaties, the unilateral exemption stipulation for designated projects, and other discretionary decision-making powers of the Minister and Governor in Council in the Impact Assessment Act (2019) override important sections in these documents or impact other pieces of legislation safeguarding Indigenous homelands, ways of life, and inherent and treaty rights. Reconciliation cannot be achieved if Indigenous inherent rights are not recognized and respected in practice (Athabasca Chipewyan First Nation, 2018; Adamek, 2018). The numbered treaties and legislation using an “in the public interest” determination practically represent a perpetuation of historical-assimilative policy that these types of Acts enable through environmental assimilation of Indigenous homelands without meaningful dialogue or consent (Tsuji, 2021).

The “public interest” determination results in tension between the Canadian public and Indigenous Peoples of Canada, because Indigenous Peoples will never be considered “the public” in Canada, and

will never be in a majority (Tsuji, 2021). The environmental assimilative process described for Canada is apparent in other countries around the world, where there are treaties (e.g., US; Brewer & Dennis, 2019) and especially where there are no treaties with Indigenous nations (e.g., Australia), which is not surprising because the public interest mandate is used worldwide for governmental decision making (Goodday et al., 2020). This is especially true with COVID-19 recovery legislation in Canada (Tsuji et al., 2021), which streamlines the approval process for development projects on Indigenous homelands “in the public interest” (Tsuji, 2021). One can hope the revelation of the importance of Indigenous homelands to conservation and climate change efforts will temper development (Fa et al., 2020; Garnett et al., 2018; O’Bryan et al., 2020).

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