

Land Back

A Yellowhead Institute
Red Paper

OCTOBER 2019

ABSTRACT

The Red Paper follows a tradition of Indigenous analysis and agenda-making reports, like the first Red Paper released in 1970 by the Indian Association of Alberta in response to Canada's 1969 White Paper. Our report, "Land Back," breaks down the current status of land dispossession in Canada, focusing on alienation through resource extraction. We examine various forms of redress and recognition by governments and industry to incentivize Indigenous participation in resource development, while pointing to the gaps in these models. Finally, we consider meaningful Indigenous economies outside of federal and provincial policies and legislation to foreground examples of land reclamation. This report is ultimately about Indigenous consent.

KEYWORDS

Indigenous rights, settler colonialism, mining, recognition, consultation, consent, injunction, jurisdiction, climate change

PARTNERSHIPS



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ILLUSTRATION CREDIT

The illustrations featured in Land Back: A Yellowhead Institute Red Paper are by Cree-Métis artist, illustrator and author, Julie Flett. While the Red Paper includes a discussion of state violence, it is our hope that it also expresses a commitment to Indigenous life. For us, that's what Julie's work represents.

Images are from the following books:

A Day With Yayah by Nicola Campbell (Author), Julie Flett (Illustrator) Tradewind Books (2017) (*front cover*)

The Girl and the Wolf by Katherena Vermette (Author), Julie Flett (Illustrator) Theytus Books (2019)

Dragonfly Kites by Tomson Highway (Author), Julie Flett (Illustrator) Fifth House Publishers; Bilingual edition (2018)

We All Count: Book of Cree Numbers, Art by Julie Flett, Images courtesy of Native Northwest (2014)

Black Bear Red Fox: Colours in Cree, Art by Julie Flett, Image courtesy of Native Northwest (2017)

A NOTE ON AUTHORSHIP

While the analysis in this Red Paper was driven by the Yellowhead network of research collaborators and supported by a team of researchers (mentioned in the acknowledgments) the authors of the report are primarily Yellowhead Institute Directors, Shiri Pasternak and Hayden King. A breakdown of authorship by section:

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The Spectrum of Consent Hayden King and Shiri Pasternak	The Continuation of Life Hayden King
Alienation Shiri Pasternak	

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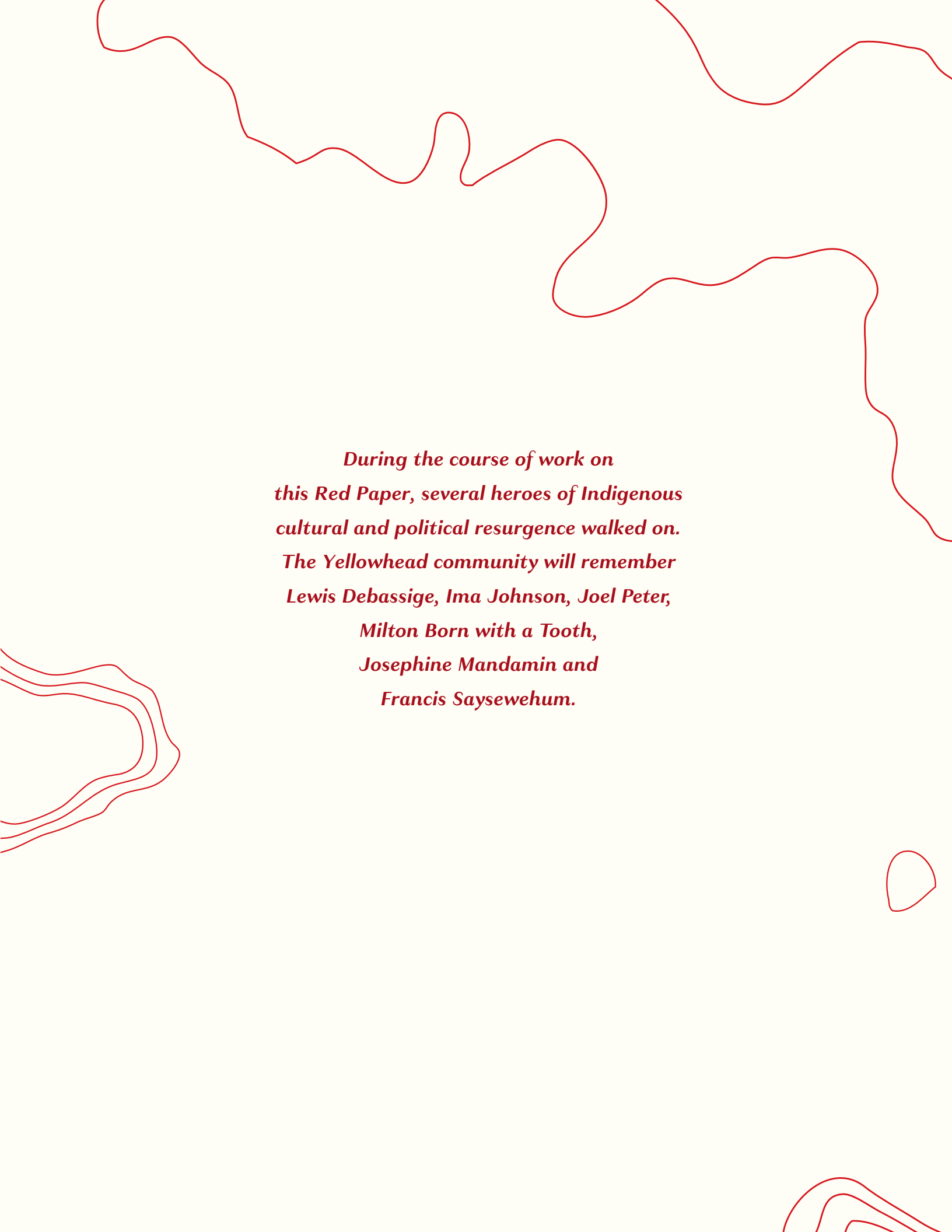
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LEARN MORE

This report is accompanied by several online and downloadable tools, including a glossary of terms, accessible at:

redpaper.yellowheadinstitute.org



*During the course of work on
this Red Paper, several heroes of Indigenous
cultural and political resurgence walked on.
The Yellowhead community will remember
Lewis Debassige, Ima Johnson, Joel Peter,
Milton Born with a Tooth,
Josephine Mandamin and
Francis Saysewehum.*

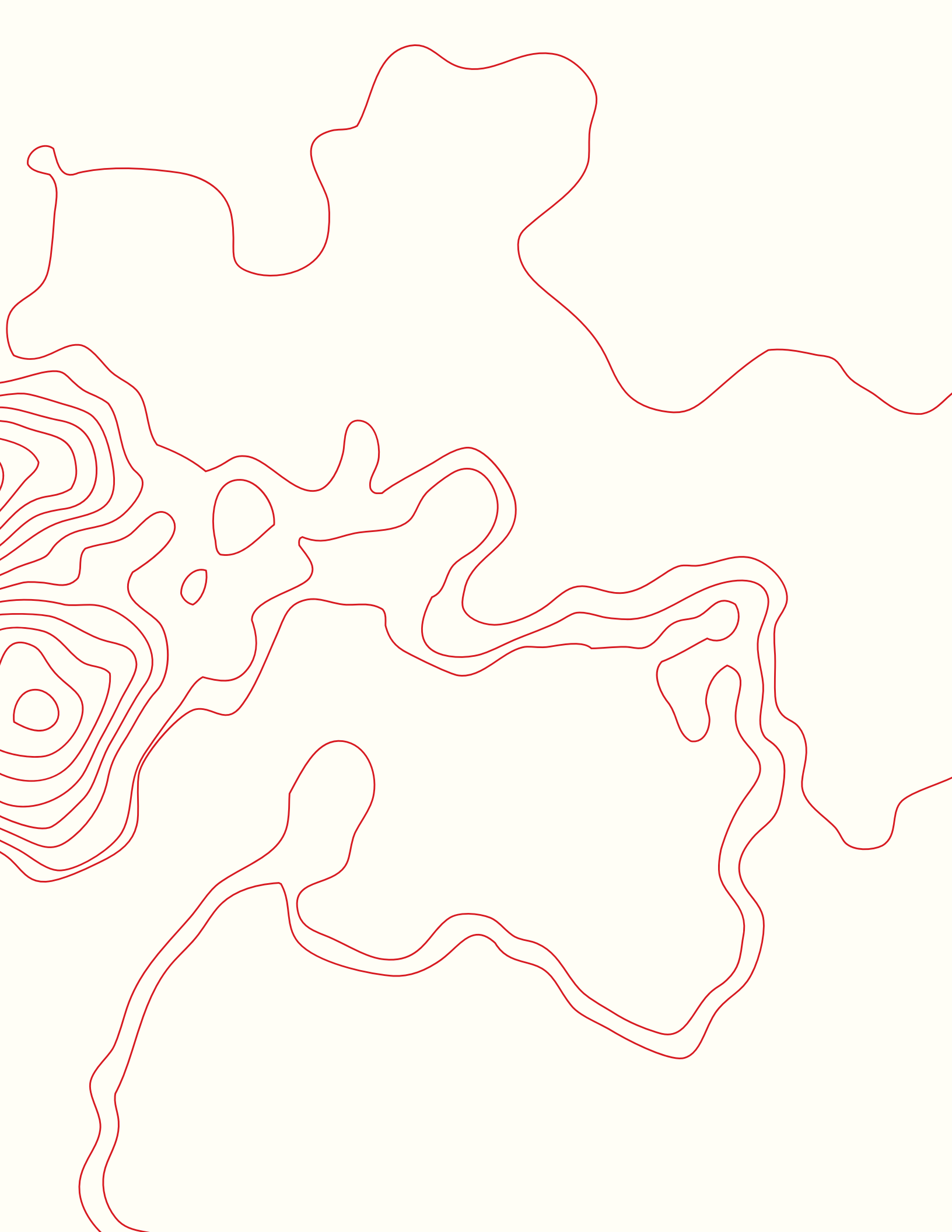


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Preface

FROM 1968 TO 1969, the Federal Liberal government led by Pierre Trudeau drafted a new Indian policy. As a response to the activism of Indigenous leaders, the document proposed a shift away from oppressive and discriminatory government policies, rooted in equality, or as Trudeau put it, “a just society.”

These were revolutionary times for many; some demanded inclusion in a polity that had marginalized so many for so long, while others formed social movements that questioned the legitimacy of capitalism and the nation state altogether. But the struggle meant something different for Indigenous people. It was a demand for integrity from Canadians: honouring of treaty rights, restitution, and self-determination. The White Paper, as the new policy became known, betrayed those demands and prescribed political and legal assimilation into Canadian society. This, of course, was more of the same.

In response, First Nation leaders in Alberta drafted *Citizens Plus* in 1970 (known as the Red Paper). The Red Paper was a constructive alternative to Canada’s vision. While this history is well-known, including the policy debate that has followed the White and Red Papers into the present, Yellowhead Institute is inspired by the notion of the Red Paper as a productive vision of Indigenous futures that critically engages with Canadian frameworks.

In the case of our Red Paper, we aim to link Canadian policy prescriptions more closely to land and resource management, and to outline the corresponding Indigenous alternatives. Like the 1970 original, we aim to support communities with additional information, ideas, and tools to respond to federal plans on their own terms.

But as we worked to craft *Red Paper: Land Back*, our discussions with experts in this area revealed a clear vision of an alternative that we weren’t necessarily expecting, one rooted in cultural resurgence. We had been planning for a very technical report revolving around legal and regulatory dispossession. Instead, our colleagues framed alienation from the land and water in terms that were decidedly more spiritual. They spoke of assimilation and how patriarchy and greed have infected our communities, taking us away from more authentic ways of relating to the land and each other.

Harold Cardinal, critical to the creation of the first Red Paper, recognized this nearly fifty years ago, writing in *The Unjust Society* that, “the old religion of the Indian’s forefathers slowly twisted into moral positions that had little relevance to his

environment, twisted to fit seemingly senseless concepts of good and bad.”¹ Whether through residential schools, Indian Agents, or Christianization, this “twisting” manifested itself in dismantling the power of women, evacuating ceremony meant to honour the animals we hunted, and the rise of homophobia and lateral violence.

Self-determination and land back will only be effective, fair, and sustainable if we reverse these trends. This is not deterministic process of one before the other, but rather as a simultaneous re-weaving ourselves back together. The infrastructure to “legally” steal our lands is important to understand, and so are the concrete and promising practices to re-assert jurisdiction, but without including a discussion on how the latter is being done in a good way, we’ll keep getting it twisted. This report has been drafted with attention to those speaking back against the Western, masculine, and exclusionary politics and values that many in our communities have adopted and practice. We hope this follows the tradition of Indigenous women who challenged the leadership of the IAA during the era of the original Red Paper.²

Throughout the report we focus attention on the processes of those exclusions, and in the final section, we have identified cases of land and water reclamation that centre women, and to a lesser extent, queer and/or Two-Spirit individuals. We have more work to do to amplify these perspectives and experiences. After all, as our board member Emily Riddle has taught us, Indigenous governance is actually pretty gay.³ We have also tried to recognize young Indigenous leaders as well. The title of this report, *Land Back*, is a nod to the wave of emerging artists and memers finding new ways to communicate old demands.

Our times, too, are revolutionary. While tragically little has changed since 1968–1970, there are also emerging debates to reflect on and work through together. We continue to grapple with federal and provincial bureaucrats and/or industry on rights, title, and jurisdiction, but we are increasingly turning inward and are having productive conversations about what reclaiming land and water might look like, for all of us.

¹ Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1969/1999), 71.

² Nellie Carlson, Linda Goyette and Kathleen Steinhauer, *Disinherited Generations: Our Struggle to Reclaim Treaty Rights for First Nations Women and Their Descendants* (Edmonton: University of Alberta Press, 2013).

³ Emily Riddle, “(Indigenous) Governance is Gay,” *Guts Magazine*, December 10, 2018, gutsmagazine.ca. [<http://gutsmagazine.ca/indigenous-governance-is-gay/>]



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Executive Summary

One of the loudest and most frequent demands of Indigenous people in the relationship with settlers is for the return of the land.

THERE ARE MOUNTAINS OF evidence that describe the theft of Indigenous territories, and even more mountains that testify to the harms that followed and the need for restoration.

Despite this, in the supposed era of reconciliation there can appear to be progress: legal “victories,” proliferating negotiation tables, land codes development, impact benefit agreements, and so on. For some, these may be enough. But for others, particularly those asserting rights and jurisdiction outside of reserve or settlement boundaries, they do not go far enough.

That is because there is a stubborn insistence by Canada, the provinces and territories, that they own the land. For many Indigenous communities, this is a deep violation of their consent to determine what happens on unsundered lands, but also a violation of the broader assertion that they have jurisdiction over those lands.

This is the focus of Yellowhead Institute’s first Red Paper. We consider in very specific detail the existing land and resource strategies of federal and provincial governments, with reference to their interface of Indigenous law and Aboriginal rights and title. We ask a number of broad questions:

- **WHAT REGIMES** of consent have been practiced by Canada, if any, and what does land restitution look like for First Nations in the context of these regimes?
- **HOW DO THE** Crown and industry dispossess Indigenous peoples of land and waters today?
- **WHY ARE THE CROWN’S** current consent regimes failing to protect Indigenous interests in the land?
- **HOW CAN INDIGENOUS PEOPLE** re-assert jurisdiction to lands and waters outside of reserve boundaries?

- **WHAT MODELS** of Indigenous governance centre community-based decisions on land/water use and cultural resurgence?

This analysis finds that there are three approaches to consent being practiced in Canada toward Indigenous jurisdiction and they fall along a spectrum of denial, recognition, and reclamation. Each of these approaches, described in greater depth below, provide the framework of this report:

PART ONE: SPECTRUM OF CONSENT

A framework to understand how Indigenous consent ignored, coerced, negotiated, or enforced.

PART TWO: DENIAL

The strategies deployed to dispossess Indigenous people of the land.

PART THREE: RECOGNITION

The limited land management rights offered to Indigenous peoples by the Crown and industry.

PART FOUR: RECLAMATION

Community-based strategies of consent-based jurisdiction.

CONCLUSION: THE CONTINUATION OF LIFE

An argument for why Indigenous jurisdiction matters in the midst of an ongoing climate crisis.

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**Ultimately, we assert that land restitution for First Nations requires political and economic transformation.**  
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Land theft is currently driven by an unsustainable, undemocratic, and fatal rush toward mass extinction through extraction, development, and capitalist imperatives. It is further enabled by a racist erasure of Indigenous law and jurisdiction. As Yellowhead Research Fellow Sákéj Henderson has noted, this fatal rush functions as a kind of malware released into our ecological system. Indigenous legal orders embody critical knowledge that can relink society to a healthy balance within the natural world. This change must begin on the ground: Canada ceding real jurisdiction to Indigenous peoples for this transformation to happen. With or without Canadians, Indigenous people will continue to exercise it because responsibility demands it.

Part One: The Spectrum of Consent

AN UNDERLYING QUESTION driving our work revolves around consent: how is Indigenous consent ignored, coerced, negotiated, or enforced? A consensus on the practice of consent in relation to decisions about land and water use has yet to be realized in any regional or national context. Instead, there seem to be competing conceptions of consent along a spectrum of denial, recognition, and then reclamation. This section offers a contextual overview of each of these broad trends.

On the spectrum of consent, we analyze how the land tenure regime in Canada is structured upon the denial of Indigenous jurisdiction through the creation and enforcement of legal fictions. This is followed by limited recognition, which includes an evolving notion of the Duty to Consult and corresponding government and industry responses. Today while states are encouraged to adopt the principle of Free Prior Informed Consent (FPIC) at the international level, in the Canadian context, since 2007 when the UN's *Declaration on the Rights of Indigenous Peoples* was first presented, there has been state opposition to a fulsome implementation of free, prior, and informed consent. More than that, Canada has attempted to convince the international community, and Indigenous peoples, that consultation is effectively consent. Canada's submission to the Expert Mechanism on the Rights of Indigenous Peoples asserts, "Canada already has significant experience with implementation of the principle of free, prior and informed consent as found in the Declaration."

Finally, Indigenous conceptualizations of consent are articulated in theory but also in practice through the recent actions of a range of Indigenous communities across Canada. These conceptualizations flow from the ongoing re-constitution of Indigenous law and governance, and in some cases is a manifestation of them. This generalized version of Indigenous consent has four distinct elements, building on the existing notion of free, prior, and informed consent:

- **RESTORATIVE:** Promotes the active and intentional centering of Indigenous models of governance and law and moving away from Western frameworks and definitions. This does not necessarily exclude band councils or tribal councils but promotes the revitalization of authentic governance practices and institutions.
- **EPISTEMIC:** Accepts Indigenous knowledge frameworks and languages for understanding relationships to the land. This may include Indigenous science, land management customs,

obligations to the land and waters, or recognizing the land as having agency. This knowledge can be embedded in Indigenous law and governance.

- **RECIPROCAL:** Ensures that Indigenous people are not merely being asked to grant consent, but are determining the terms of consent. This is an active and enduring condition whereby consent may be revoked or the terms changed depending on the ability of outsiders to abide by the terms in good faith. This is less a process of governments obtaining consent, but an active maintenance of Indigenous authority.
- **LEGITIMATE:** While community politics can be fraught, decisions about granting or withholding consent generally require representatives perceived as legitimate by the community, and with a stake in the decision (whether band council, hereditary council, youth, elders, all genders, and urban populations) to participate or be accommodated. A decision should not be made until the legitimate authorities consent.

While these constitute an evolving and generalized form of consent (many nations often have their own models and principles), we see this conceptualization emerging from Indigenous-led consent-based practices that de-centre state authority, revitalize Indigenous knowledge, law and custom, and promote inclusion within and even across communities.

Part Two: Denial

THIS SECTION OF THE REPORT focuses on a particular kind of dispossession called alienation. Here we set out to understand how common alienation practices of provincial and federal authorization for extraction and development on Indigenous territories take place without Indigenous consent.

In Canada, 89 percent of lands have been roughly divided between the federal and provincial governments.⁴ These so-called "Crown Lands" are an artefact of the "doctrine of discovery" and enable a machinery of government authorization to alienate lands to third-parties. We look at how the courts and government policy uphold this power of discovery and permit no recourse to Indigenous jurisdiction without significant caveat.

⁴ V.P. Neimanis, "Crown Land," *The Canadian Encyclopedia*, December 16, 2013, [theCanadianencyclopedia.ca](https://www.thecanadianencyclopedia.ca/en/article/crown-land). [https://www.thecanadianencyclopedia.ca/en/article/crown-land]

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**Land alienation is linked to the broader political economy of Canada that relies to a significant extent on its natural resource sector to secure jobs and investment. Thus, land alienation is a major economic driver of the Canadian economy.**

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When First Nations contest the authority of the province or the regulatory processes, like environmental assessment, that fail to acknowledge their lack of consent, companies take advantage of a legal system built to protect the interests of property. After reviewing over almost 100 cases of injunctions, our team of researchers found that this legal tool reinforces the impossibility of choices First Nations must make when they appear before Canadian courts. The sad final tally was that 76 percent of injunctions filed against First Nations by corporations were granted, while 81 percent of injunctions filed against corporations by First Nations were denied. Perhaps most tellingly, 82 percent of injunctions filed by First Nations against the government were denied.

However, alienation is not simply a process of straight theft because it often requires the compliance of First Nation governments. Colonization has transformed internal social relationships and governance systems through the cumulative impacts of assimilation. This report looks at literal and figurative types of cumulative impact, including the ways environmental destruction compounds the traumatic loss of life through colonization. We also consider how, without proper measures and consideration for the cumulative impacts of extraction, Indigenous peoples cannot consent to third-party land use of their territories.

Land and water alienation must also be understood through gender dynamics, which are instrumental to how land loss and dispossession unfold and impact people's lives. Gender is also critical to the ways in which the right to consent is denied to Indigenous peoples. Women, transgender, queer, and Two-Spirit people were never the intended beneficiaries of new distributions of power introduced through colonization. Rather, they were targeted and disempowered with the intention of removing them from leadership and minimizing any confrontation or challenge they posed to the patriarchy of Western systems of governance. This patriarchal system was internalized by many Indigenous communities and has been reproduced through misogyny in First Nation governments. We look at the impacts of patriarchy to decision-making authority around land and water, as well as the gendered impacts of resource extraction.

Part Three: Recognition

IN RESPONSE TO THE RESURGENCE of Indigenous political and legal orders and the ongoing protection of land, waters, and peoples that has persisted through centuries of land alienation and dispossession, the state and industry have developed strategies to address the demands Indigenous peoples: consultation processes have been crafted, revenue sharing policies have been introduced, and ownership stakes offered.

But how do these measures meet Indigenous demands? What are the limits to their recognition? In what ways are Indigenous people willing to compromise or negotiate social values and jurisdiction? For many Indigenous people, the recognition of Aboriginal rights in Canada has meant the continuation of colonization through new means. That is because the terms of recognition have tended to reinforce the state's monopoly on power.

Further, is the goal simply that Indigenous people make decisions about how to participate in Western social, economic, and political systems? Or must this mean a challenge to these very systems, which have threatened Indigenous existence as nations and as people who live in relation to their own laws?

While there is potential reduction of harm for First Nation communities through government policy and industry concessions—such as gaining expanded access to capital and some avenues of sanctioned disruption through duty to consult, contracts with companies, resource revenue sharing from provinces, and participation in regulatory processes—we see much of this unfolding through a weak recognition of Indigenous jurisdiction.

The report begins here with an overview of changes to the landscape of Aboriginal rights over time and the legal precedents that came to define their constitutional rights.

But these changes also ushered in the introduction of new strategies to manage Aboriginal rights. One way that governments have sought to manage the assertion of Aboriginal rights has been to download their responsibilities—especially the duty to consult—to the private sector. A primary vehicle for this is through the encouragement of bilateral commercial contracts with

resource companies. Impact and Benefit Agreements (IBAs) are private commercial contracts that are increasingly being negotiated between Indigenous peoples and industry in the consultation phase of a project. Further, IBAs raise significant legal questions about the proper rights and title holders in communities undertaking the negotiating process. On the matter of fairness, we examine how the shares of these profits are calculated and redistributed.

IBAs and private agreements like them are considered “downstream” projects because they involve the run-off from agreements already brokered with governments. Given the experience First Nations have had with governments, negotiating directly with companies can offer greater autonomy, opportunity, and strength. Ownership stakes, or “upstream” opportunities also implicitly recognize the authority of First Nations to negotiate and derive direct benefits from economic activity on their territories. They are also, critically, a way to raise cash to cover essential services and infrastructure on reserves, and even generate surplus for financial and community security.

There are several concerns here, regarding the large-scale extractive projects support cultural revitalization. While certainly not embracing a frozen-rights approach to Indigenous culture, recognizing the importance of First Nation participation in the market economy, and trying to avoid any form of essentialism, we press the question: can capitalism coexist with decolonization? We strike a cautionary note on nonrenewable resources when this investment is a choice and not a necessity. As Winona LaDuke argues, “across the continent, corporations and governments are trying to pawn off bad projects on Native people.”⁵ Even renewable energy projects like hydroelectricity and transmission lines can negatively impact First Nations and their land and waters through poorly scoped projects and the cumulative impacts of damming.

This section also considers Government Resource Revenue Sharing (GRRS) schemes, surveying different jurisdictions across the country. GRRS is exclusively limited to mining, forestry, and oil and gas across all jurisdictions so far. Decoding the fine print of how these figures are calculated across jurisdictions, we ask whether these schemes uphold Crown obligations.

⁵ Winona LaDuke, “Reconciliation Pipeline: How to Shackle Native People,” APTN National News, July 13, 2019, aptnnews.ca. [<https://aptnnews.ca/2019/07/13/reconciliation-pipeline-how-to-shackle-native-people/>]

In this section, we also examine how alienation can advance through regulatory processes, specifically in the way “harm” and cumulative impact are defined and measured as well by examining barriers to Indigenous participation in these regulatory processes.

Part Four: Reclamation

THE FINAL SUBSTANTIVE SECTION of this report chronicles examples of First Nation efforts at land and water reclamation. By reclamation, we mean an assertion of jurisdiction beyond reserve boundaries and corresponding efforts to enforce that assertion. In some cases enforcement fails, in others it leads to negotiation, and yet in some cases, reclamation results in the tangible exercise of Indigenous jurisdiction on Indigenous territories. It is through these efforts that we have gleaned the characteristics of Indigenous models of consent-based jurisdiction.

They are organized in this report by “type” of consent-based jurisdictional practice. The first of these, corresponding to the earliest stage of development, are environmental assessment processes. The Tsleil Waututh, Mi'gawewi Mawiomí Secretariat, and Secwepemc cases, which involve assessing oil pipeline and transport projects and mining, are the best examples of delaying or even stopping an unwanted development and asserting rigorous and evidence-based claims for their decisions. In other words, in these instances Indigenous groups refused consent and backed their refusal with evidence that policy-makers and investors could understand. A variation of environmental assessment occurs post-development or post-disaster, as in the case of the Heiltsuk and the Nathan E. Stewart spill.

A second type of consent-based jurisdiction consists of formal protocols for providing consent, and then by extension a formal permitting system once consent has been provided. It often occurs during or immediately following development proposals. Neskantaga First Nation, Saugeen Ojibway Nation, and Sagkeeng First Nation have all developed a consent process for proponents of development in their territories. It is not surprising that each of these communities are, at the time of writing, facing large scale and potentially transformative projects. A variation of this type of jurisdiction comes from the T̓silhqot̓'in in a simple but effective local permitting system established for mushroom picking in their territory that applies to all harvesters.

A third, and perhaps more provocative type of assertion revolves around physical reclamation or occupation of lands and waters. While the examples discussed so far emerge from community-based “official” leadership (at least

geographically), there are a number of cases of community members, in some cases working across national boundaries, attempting to extend jurisdiction by simply occupying and using the land. And while they may disrupt Canadian jurisdiction, each also provides a service to the community. The Tiny House Warriors offer low-impact housing solutions, the Uni'sto'ten Healing Centre provides mental health and substance abuse treatment and Nimkii Aazhibikong offers land-based education. A final example does not exactly follow this trend. The efforts of Sylvia and Curtis McAdam Saysewahum to prevent logging in their family's territory in Treaty 6 clashed with the interests of other Indigenous economic objectives. This is not an uncommon case.

While there is much to celebrate in the examples gathered in this section, they also demonstrate there are some important considerations. First, it should be noted that many of the communities featured here are, by and large, also communities with very strong title claims and as such levels of government and industry are more likely to negotiate. Second, in assembling these examples, we are not making a structural argument that reclamation efforts must be separate and distinct from Canadian legal, political, and economic frameworks and discourses. Nor are we making a case for stopping all development, though there are important debates on these issues on a community-by-community basis. Finally, the case studies in this section are not an exhaustive list. Perhaps these examples can be thought of as “promising practices” in consent-based jurisdiction across each of these three areas described here.

Conclusion: The Continuation of Life

THE STAKES OF THIS STRUGGLE are immense. Of course, while Indigenous land and life are the focus here, the life of our species and of the planet are at risk from the type of economic philosophy and practices perpetuated by capitalism and settler colonialism. So much so that in May 2019, the UN's *Global Assessment Report on Biodiversity and Ecosystem Services* found that human activities are rapidly stripping the planet of biodiversity, contributing to the ecological devastation wrought by climate change. One million species are at risk of extinction.

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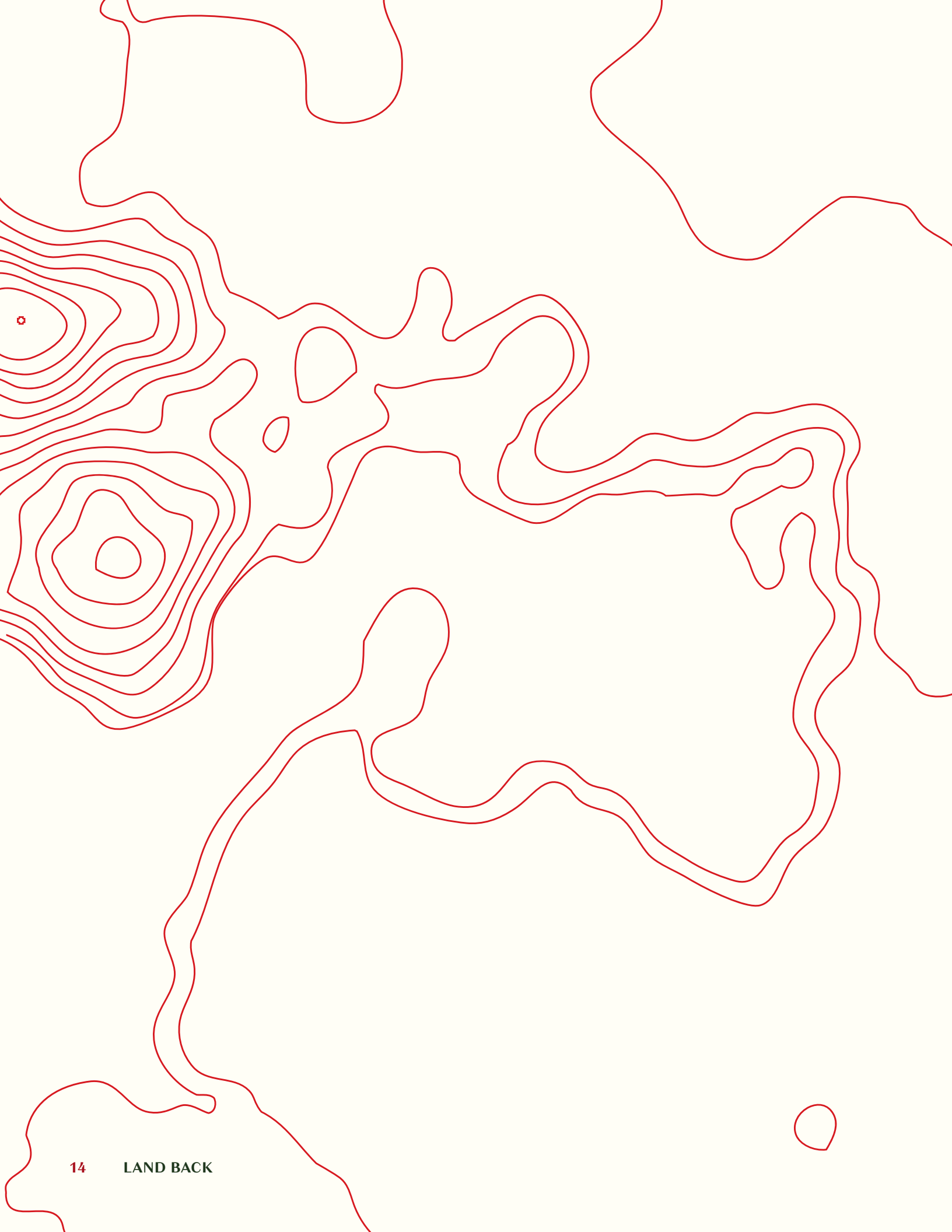
**While an apocalyptic future certainly awaits without transformational change, the report—the largest of its kind ever produced—finds some hope in the land management practices of Indigenous peoples globally.**

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So the matter of land back is not merely a matter of justice, rights or “reconciliation”; like the United Nations, we believe that Indigenous jurisdiction can indeed help mitigate the loss of biodiversity and climate crisis. In the Canadian context, the practices and philosophies profiled here as case studies contain answers to global questions. Canada—and states generally must listen.

In fact, the UN report includes recommendations for state governments to strengthen Indigenous management. These include: advancing knowledge co-production including recognizing different types of knowledge that enhances the legitimacy and effectiveness of environmental policies; promoting and strengthening community-based management and governance, including customary institutions and management systems; and co-management regimes involving Indigenous peoples and local communities. States can also recognize Indigenous land tenure, access, and resource rights regimes in accordance with national legislation; and the application of free, prior, and informed consent.

These are helpful suggestions that we truly hope are heeded. And yet given the denial of the climate crisis and ongoing erasure of Indigenous jurisdiction by states, and especially settler states, we also have to acknowledge that solutions might have to be realized outside of state processes. In fact, they may be more conducive to asserting alternative futures for life on this planet.





PART ONE

The Spectrum of Consent

This report, and the discussion of land alienation, rights recognition, and reclamation, are framed by the concept of consent.

IN OTHER WORDS, we see these three trends unfolding along a spectrum of consent from: 1) complete disregard for, and theft from, Indigenous people by industry and the Crown, to 2) limited recognition of Indigenous rights and Indigenous participation in decision-making, to 3) assertion and in some cases enforcement of Indigenous models of consent. The spectrum has emerged over time and continues to be dynamic. The first, for instance, is a historical phenomenon that endures into the present (we describe how it can be enacted at “fast” and “slow” speeds); the second is more recent, being validated and encouraged by Canadian courts; while the third has materialized more recently, building on waves of Indigenous resistance. These conceptions of consent mirror the organization of our report and provide the contextual framework for what follows.

The Infrastructure of Theft

The history of colonization in North America is a relatively short episode in the story of Indigenous people. That being said, despite its brevity, there have been cataclysmic consequences extending into the present. Many of those consequences can be traced back to the clashes that followed colonizers’ initial attempts to subsume Indigenous people to foreign rule, or to convince them to abandon responsibility for their homelands. Of course, Indigenous people resisted. The colonizers, intent on domination, then realized that it would take the use of force to compel Indigenous peoples to give up their lands and jurisdiction.

This force took many forms, but for the purposes of this report, we can conceptualize two main paths: one that is winding and slow, and another that is faster and more direct. The shorter, faster path has been taken using blunt instruments designed to remove Indigenous peoples from their lands: physical dislocation, relocation, centralization, and dispossession. These direct forms of dispossession are enforced by the threat of incarceration and criminalization. This force also relies on a certain kind of containment. Throughout the nineteenth and twentieth centuries, Indigenous people were uprooted from their vast territories and planted onto reserves, which became the new Indian lands to the colonizers. This was done through the treaty

process, legislation, and informal policy. When Indigenous people asserted their jurisdiction off-reserves—or sometimes simply sought to travel or visit or live elsewhere—they suffered extremely high rates of surveillance, policing, and violent attack. This pattern continues today.

The longer, slower path also relies on forms of containment, but this path is taken through social institutions like residential schools and child welfare, Indian registration rules, mass incarceration, the Sixties Scoop, and *Indian Act* rules. Kiera Ladner calls this path a form of political genocide through legislation and “slow moving poison.”⁶

The slower path is not a secondary force to physical removal and land loss, nor is it any less violent: it is intersecting. Its impacts may not be as immediately apparent or visible, though, and its connections to dispossession are more complex.

For example, under the *Indian Act* Indigenous women who married non-Indigenous men lost their status, impacting generations of Indigenous children to come who could not go home. And foster children who were abducted from Indian reserves through residential school and child-welfare programs have suffered extremely high rates of abuse, creating legacies of street involvement, cultural alienation, and imprisonment.

Both paths, the slow and the fast, are meant to arrive at the same place eventually: the replacement of independent, self-determining Indigenous nations with a population of individuals who either assimilate into settler society or die away. The tactics used on both paths work in tandem, reinforcing and upholding each other and the desired impacts of colonization. And whether the violence comes slow or fast, they operate through force toward the erasure of Indigenous law. This is the infrastructure of theft discussed here.

Alienation

In property law, alienation is land used, sold, or transferred from one entity to another. It is often land transferred to third parties by the Crown. Canadian law defines this transfer as voluntary, but in Parts Two and Three of our report, we set out

6 Kiera L. Ladner, “Political Genocide: Killing Nations through Legislation and Slow-Moving Poison,” *Colonial Genocide in Indigenous North America*, ed. Woolford, Benvenuto, and Hinton (Durham: Duke University Press, 2014), 226–245.

to interrogate the regimes of consent and coercion that govern alienation of Indigenous territories.

Extraction, industrial development, and conservation regimes significantly limit the exercise of inherent Indigenous jurisdiction on their territories. These forms of land use fence off access points to traplines and waterways, impede access to sacred and ceremonial sites, erode sensitive areas, and fragment the land base, prohibiting the establishment of viable and sustainable economies.

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**These are daily, ever-present forms of land alienation that people experience, and they conjoin with all forms of slow violence in ways we will unpack.**  
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The assertion of *discovery* and demand for surrender as the basis of Crown sovereignty is the overt form of colonization in Canada. This claim to discovery is enacted every day through ongoing forms of land alienation on the territories of Indigenous nations. Each of these enactments performs a denial of Indigenous authority over their lands and waters.

The specific history of *alienation* as it applies to Canada-First Nations relations draws from the terms of the *Royal Proclamation* of 1763 issued by King George III. The royal prerogative lays out strict rules that make it illegal for Indigenous people to sell land to third parties unless they are first ceded to the Crown. These rules of alienation are “pre-emptive,” meaning that Britain secured an exclusive, *future* right for colonial powers in *discovered lands*, or lands that would eventually be categorized as underlying Crown title lands.

First Nations negotiated treaties with representatives of the British Crown and then with the successor state of Canada with a very different understanding of the authority vested in the Crown. To them, these were sacred and honourable agreements that did not include the possibility of surrender. However, these treaty territories have been interpreted by Canadian law as *alienated lands* under the jurisdiction of provinces, in cases from *St Catharines Milling and Lumber Co. v. R*, 1888, all the way up to the more recent *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014, decisions.

This erasure of Indigenous jurisdiction has been structured into Crown-First Nations relations through both the courts and public policy. In 1930, the Natural Resources Transfer Agreement (NRTA) unilaterally transferred jurisdiction over natural resources to Manitoba, Saskatchewan, and Alberta

from the federal government, without a single discussion with any First Nation despite the numbered treaty relationship in the prairies. Indian reserves and “Indians” remained under federal jurisdiction.

Indigenous nations and bands who did not sign treaties have also been presumed to live under Canadian law on Crown Lands, despite the fact that they did not “alienate” their lands under the provisions of the Royal Proclamation. This is the legacy of the Crown’s assumed discovery and pre-emptive rights. On treaty and non-treaty lands, Indigenous territorial authority has been extremely compromised, conditioning the possibilities of massive extractive regimes.

Alienation in relation to resource management is intrinsically tied to the erasure of Indigenous law. As Yellowhead advisory board member Kris Statnyk writes, “the efficacy of traditional knowledge is dependent on respecting the force and weight of the Indigenous legal traditions that are an integral aspect of Indigenous knowledge systems.”⁷ State assertions of jurisdiction over Indigenous lands impact Indigenous people’s ability to care for their territories, and to practice their law through this management. If Indigenous legal traditions are not recognized to have standing in decision-making on resource management, the result is alienation; a non-consensual land theft that structures much of Indigenous-state relations into the present.

The Emergence of Consultation

In response to Indigenous resistance to the processes of alienation described above, the law began to change. In 1982, the Canadian Constitution was patriated and included Aboriginal and treaty rights as *constitutional*. Specifically, Section 35 ensures that “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”⁸ While many First Nations rejected what they saw as the subordination of their rights under Canadian federalism, others sought to leverage this new tool. Regrettably, it was unclear how Canada would interpret these rights and political discussions to elaborate ultimately failed. In the intervening years, it has been left to the courts to slowly elaborate on the definition of Section 35 rights.

Since 1990, courts have interpreted Section 35 to distinguish between different kinds of constitutional rights. The courts invented new legal categories called “Aboriginal rights,”

⁷ Kris Statnyk, *Throwing Stones: Indigenous Law as Law in Resource Management* (prepared for a program hosted by Pacific Business & Law Institute, Vancouver, January 20, 2016), 8.

⁸ Section 35, Part III of the *Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, canlii.ca/t/ldsx.

Secwepemc leader George Manuel's vision for constitutional rights was for a deep return to Indigenous governance. He was president of the Union of British Columbia Indian Chiefs when he stated, in 1980:

“Sovereignty is the supreme right to govern yourselves, to rule yourselves. Indians used to be able to control and exercise that right, now we have to work to get that right back.”⁹

Manuel, among others, organized the “Constitution Express” in 1980, self-financed and organized, and two trains were chartered that traveled from the west coast to Ottawa to press for constitutional rights.

⁹ “Canim Lake Elders Talk,” *Indian World* 2, no. 9 (1980): 18; cited in Madeline Knickerbocker and Sarah Nickel, “Negotiating Sovereignty: Indigenous Perspectives on the Patriation of a Settler Colonial Constitution, 1975–83,” *BC Studies* no. 190 (Summer 2016): 1.

“Treaty rights” and “Aboriginal title.” Each category of right is important to understand, given the varying nature of the practices they recognize and the corresponding Crown obligations that arise. The logic of how these legal categories were invented and defined is the order in which they came before the courts. So, while it is logical that Aboriginal title and treaty rights would be established early—dealing with Indigenous rights to the land—it was the meaning of Aboriginal rights that came before the courts first, diminished to merely activity-based rights. Treaty rights were likewise dealt with as activity-based rights on treaty lands. Aboriginal title is the only Aboriginal right to the land itself and it comes with incidental rights to govern, manage, and enjoy economic benefits.

A key legal principle regarding consent, or rather consultation, was established in the Supreme Court cases *Haida Nation v. British Columbia (Minister of Forests)*, 2004; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004; and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005. These cases established that the federal and provincial governments have a duty to engage with First Nations when their established or asserted constitutional or treaty rights may be impacted by government actions. This was seen as an interim measure to protect Aboriginal rights before they could be proven in the courts or through negotiation with the Crown. The depth of these consultations varies along a spectrum of perceived impact to the First Nation and any impacts then result in a requirement for accommodation. But no so-called “veto” power was ever established by the Supreme Court, though the more recent *Tsilhqot’in* decision introduced a higher threshold of consent for development on Aboriginal title lands.¹⁰

Going further than Canadian domestic law is the international legal convention developed at the United Nations: The *Declaration on the Rights of Indigenous Peoples* (UNDRIP). The Declaration contains several clauses ensuring Indigenous people’s right to free, prior, and informed consent (FPIC), which is tied to a universal human right to self-determination. In Article 19, it is written: “States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” In 2016 at the United Nations Permanent Forum on Indigenous Issues, Indigenous and Northern Affairs Canada Minister Carolyn Bennett committed to full implementation of UNDRIP, including FPIC, but insisted on

¹⁰ *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, paras 76–77, scc-csc.lexum.com. [https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do]

further qualification stating that FPIC must be interpreted through domestic legal and constitutional frameworks.

Indeed, in July 2017, Canada published its *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*,¹¹ consisting of ten commitments for the new nation-to-nation relationship that Prime Minister Justin Trudeau promised Indigenous people. While the Justice Department that authored the Principles notes the importance of UNDRIP, stating, “Government will fulfil its commitment to implementing the UN Declaration through the review of laws and policies, as well as other collaborative initiatives and actions,” Canada does not recognize FPIC and maintains a non-consensual approach. On FPIC specifically, Principle 7:

Reaffirms the central importance of working in partnership to recognize and implement rights and, as such, that any infringement of Aboriginal or treaty rights requires justification in accordance with the highest standards established by the Canadian courts and must be attained in a manner consistent with the honour of the Crown and the objective of reconciliation. This requirement flows from Canada’s constitutional arrangements. Meaningful engagement with Indigenous peoples is therefore mandated whenever the Government may seek to infringe a section 35 right.

In other words, while the Principles, and by extension the Crown, recognizes UNDRIP, they are not prepared to recognize even the UN’s notion of state-sanctioned FPIC.

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**Recognizing Indigenous rights and title but reserving the right to infringe does not constitute consent, no matter if the threshold is high.**

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We have seen recent examples of infringement or proposed infringement with the plans for the Site C dam¹² and of

¹¹ “Principles Respecting the Government of Canada’s Relationship with Indigenous People,” Department of Justice, Government of Canada, accessed October 13, 2019, justice.gc.ca. [https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html]

¹² Sarah Cox, “United Nations Instructs Canada to Suspend Site C dam Construction over Indigenous Rights Violations,” *The Narwhal*, January 9, 2019, thenarwhal.ca. [https://thenarwhal.ca/united-nations-instructs-canada-to-suspend-site-c-dam-construction-over-indigenous-rights-violations/]

course, the Coastal Gaslink¹³ pipeline through Wet'suwet'en territory, among many other examples.

Beyond the Principles, the current government has also worked to resist FPIC in legislation. As we wrote in Yellowhead's *Canada's Emerging Indigenous Rights Framework: A Critical Analysis*,¹⁴ while the Expert Panel on Environmental Assessment promoted a version of collaborative consent for the new Impact Assessment legislation, Cabinet rejected that advice and ignored any semblance of FPIC.¹⁵ Instead, Indigenous feedback in consultation processes must merely be considered. Efforts to bolster a more expansive notion of consultation include incorporating Indigenous knowledge in provincial, territorial, and federal land management practices. Examples range from land use planning, to marine conservation, and perhaps most notably in the recently amended federal Fisheries Act and new federal Impact Assessment Legislation.

While states are encouraged to adopt FPIC at the international level, in the Canadian context, since 2007 when the UN's *Declaration on the Rights of Indigenous Peoples* was first presented, there has been state opposition to a fulsome implementation of free, prior, and informed consent. More than that, Canada has attempted to convince the international community and Indigenous peoples that consultation is effectively consent. Canada's submission to the Expert Mechanism on the Rights of Indigenous Peoples asserts, "Canada already has significant experience with implementation of the principle of free, prior and informed consent as found in the Declaration."¹⁶

¹³ Jimmy Jeong, "The Wet'suwet'en and B.C.'s Gas-Pipeline Battle: A Guide to the Story So Far," *Globe and Mail*, January 9–11, 2019, theglobeandmail.com. [<https://www.theglobeandmail.com/canada/british-columbia/article-wetsuweten-bc-lng-pipeline-explainer/>]

¹⁴ Hayden King and Shiri Pasternak, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis*, Yellowhead Institute (June 5, 2018), yellowheadinstitute.org. [<https://yellowheadinstitute.org/rightsframework/>]

¹⁵ Johanne Gélina et al., *Building Common Ground: A New Vision for Impact Assessment in Canada*, Canadian Environmental Assessment Agency (2017), canada.ca. [<https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>]

¹⁶ "Government of Canada Input to the United Nations Expert Mechanism on the Rights of Indigenous Peoples – Call for Submissions on Free, Prior and Informed Consent," as submitted to the Expert Mechanism on the Rights of Indigenous Peoples

An Indigenous Consent Framework

While there are concerns with the ultimately limited extent to which consultation and even consent protocols and principles are operationalized in Canada, Indigenous people can and do use them in discourse, negotiations, and increasingly in court to assert jurisdiction. Indeed, there is a growing policy literature on the use of FPIC in Canada.¹⁷ While this literature conforms to a traditional version of FPIC, it nonetheless points to a positive trend in state recognition of Indigenous jurisdiction.

At the highest level, FPIC is defined in the following ways:

FREE – consent given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations, or timelines that are externally imposed.

PRIOR – consent is sought sufficiently in advance of any authorization or commencement of activities.

INFORMED – the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.

CONSENT – collective decision made by the rights holders and reached through the customary decision-making processes of the communities.

While the principles espoused by the UN as well as corresponding manuals developed for proponents—such as those developed by the UN's Food and Agriculture Organization¹⁸ or the Boreal Institute in Canada—are helpful,

(available on the website of the Office of the United Nations High Commissioner for Human Rights, accessed October 13, 2019), ohchr.org. [<https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx>]

¹⁷ Ginger Gibson Macdonald and Gaby Zezulka, *Understanding Successful Approaches to Free, Prior, and Informed Consent, Part I: Recent Developments and Effective Roles for Government, Industry, and Indigenous Communities*, Boreal Leadership Council in partnership with the Firelight Group (September 2015), boreal-council.ca. [http://borealcouncil.ca/wp-content/uploads/2015/09/BLC_FPIC_Successes_Report_Sept_2015_E.pdf]

¹⁸ Free Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities, Food and Agriculture Organization of the United Nations (October 2016), foa.org. [<http://www.fao.org/3/a-i6190e.pdf>]

there is also an emerging practice of FPIC in Canada that adds definition to the practice. These innovations are drawn from some of the case studies below.

Indigenous conceptualizations of consent are articulated in theory but also in practice through the recent actions of a range of Indigenous communities across Canada (elaborated in the “Reclamation” section of this report). These conceptualizations flow from the ongoing re-constitution of Indigenous law and governance, and in some cases is a manifestation of them. This generalized version of Indigenous consent has four distinct elements, building on the existing notion of free, prior, and informed consent:

RESTORATIVE – Promotes the active and intentional centering of Indigenous models of governance and law and moving away from Western frameworks and definitions. This does not necessarily exclude band councils or tribal councils but promotes the revitalization of authentic governance practices and institutions.

EPISTEMIC – Accepts Indigenous knowledge frameworks and languages for understanding relationships to the land. This may include Indigenous science, land management customs, obligations to the land and waters, or recognizing the land as having agency. This knowledge can be embedded in Indigenous law and governance.

RECIPROCAL – Ensures that Indigenous people are not merely being asked to grant consent, but are determining the terms of consent. This is an active and enduring condition whereby consent may be revoked or the terms changed depending on the ability of outsiders to abide by the terms in good faith. This is less a process of governments obtaining consent, but an active maintenance of Indigenous authority.

LEGITIMATE – While community politics can be fraught, decisions about granting or withholding consent generally require representatives perceived as legitimate by the community, and with a stake in the decision (whether band council, hereditary council, youth, elders, all genders, and urban populations) to participate or be accommodated. A decision should not be made until the legitimate authorities consent.

While these constitute an evolving and generalized form of consent (many nations often have their own models and principles), we see this conceptualization emerging from Indigenous-led consent-based practices that de-centre state authority and obligations, revitalize Indigenous knowledge, law and custom, and promote inclusion within and even across communities.

As a general framework of consent, there are of course significant challenges to putting these principles into practice. These include:

- **DIVISION BETWEEN AND WITHIN NATIONS**, which is exploited by state governments;
- **EXCLUSION OF COMMUNITY MEMBERS** by decisions made by “official” leadership;
- **TIME AND RESOURCE CAPACITY** to build community visions of consent;
- **LACK OF ENFORCEMENT POWERS** for communities who withhold consent.

Of course, these challenges exist under the traditional forms of FPIC as well, though are muted when it comes to state consultation processes. Often, “official” forms of Indigenous governance such as the band council or self-governing First Nation are recognized and consulted with, resources are often provided for consultation, and in some cases compliance measures are included in any formal agreements like IBAs.

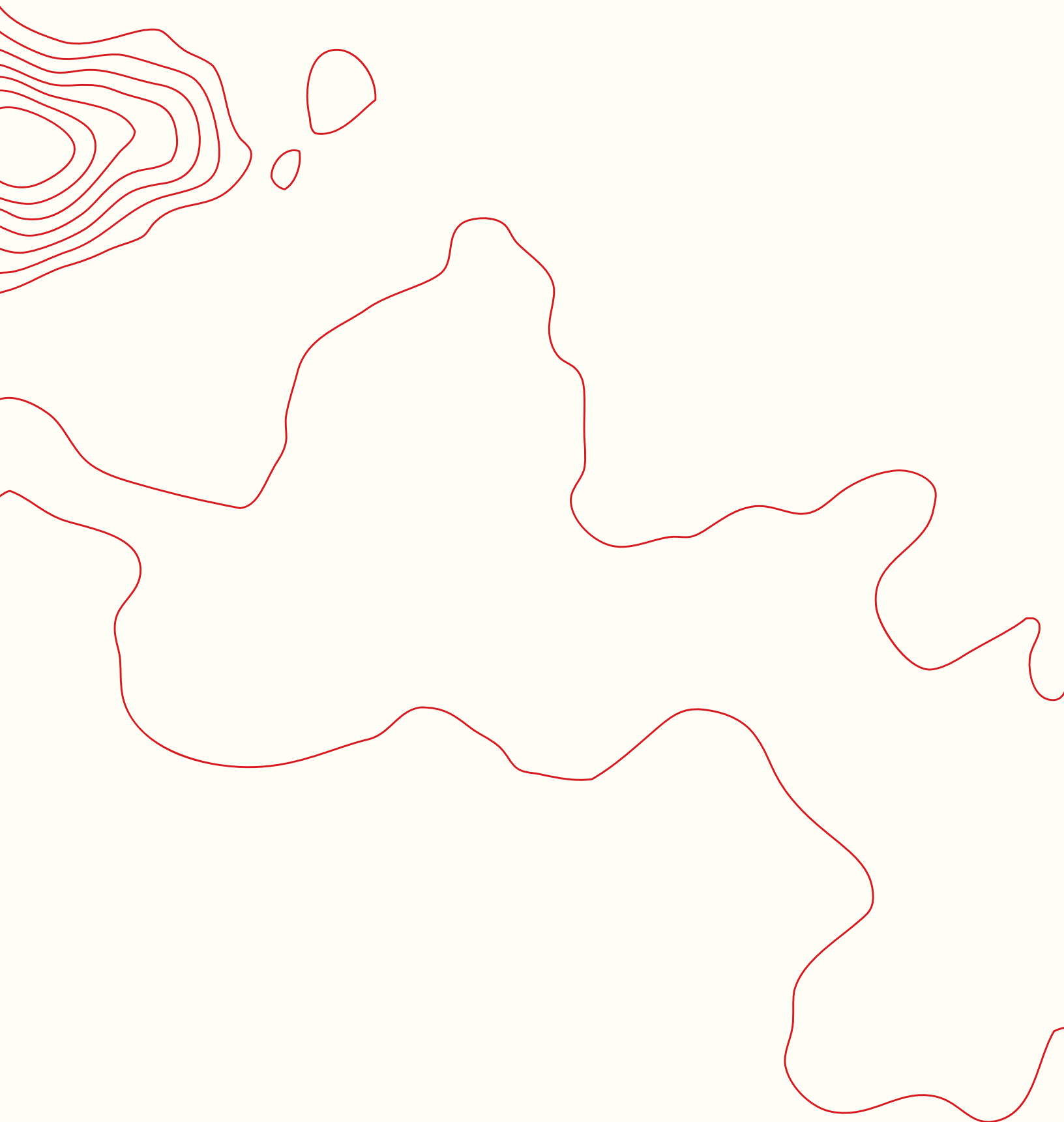
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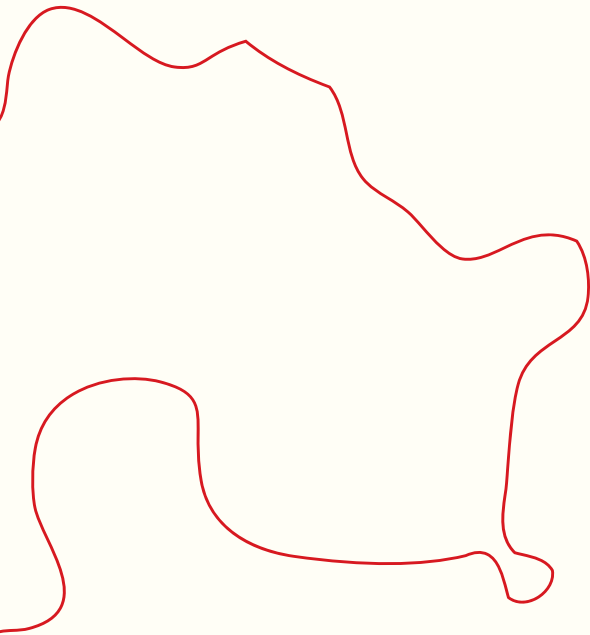
**In sum, the challenges above are magnified in Indigenous-led consent protocols because there is most often an adversarial relationship between the community and governments or industry.**

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This translates to a lack of material support, reinforcing difficulties in community engagement and consensus building.

It is important to note that the case studies used to support this framework of Indigenous-led consent vary by nation and region, though many come from the B.C. context. They do not include modern treaty contexts, where the terms of consent have largely been negotiated. They also exist on a spectrum of strategies that exist at different “stages” of development and the degree of compliance (i.e. enforcing consent or requesting consent). This spectrum is further divided by a diverse set of jurisdictional practices. Finally, while this framework *can* be prescriptive, it is less an attempt to shape government policy and law, and more a description of how communities around the country are operationalizing their vision of consent-based jurisdiction.





PART TWO

Denial

Eighty-nine percent of the land in Canada has been roughly divided between the federal and provincial governments, with territories primarily falling under federal influence.

THE PROBLEM OF “CROWN LAND”

Indian reserves also fall under federal jurisdiction, both in the sense that “Indians, and the Lands reserved for Indians” are federally governed, but also because reserves are lands held “in trust” by the federal government. Reserves occupy 0.02 percent of the national land base, a tiny fraction of the 10 million square kilometres of mostly Crown Land.¹⁹ In British Columbia, for instance, 94 percent of the province is claimed as Crown Land.²⁰ The remainder of lands in Canada are held privately in fee simple tenure or as “settlement” lands, controlled by Indigenous people via comprehensive land claim settlements.

But what is “Crown Land” and how can Indigenous peoples get it back?

The concept of “Crown Land” derives from an eleventh-century British law that established that only the Crown could properly “own” land. This tenure regime became Canadian law through the doctrine of reception—another British legal framework, this one premised on the idea that a *void* of law existed in the colonies into which British subjects filled the

vacuum with their common law.²¹ In other words, British law could be universal here because no Indigenous law existed, according to the racist decree.

This was imperial policy. On the ground, things were different. Indigenous law was very real, as colonizers quickly realized when they tried to gain access to lands and trade routes within Indigenous territories and failed to gain consent. A diplomatic culture of Indigenous treaty-making was adopted and governed by the protocols and laws of Indigenous nations. But the imperial dream to exercise full control over land in the colonies did not die.

As Canada gradually formed into a national state, the mythologies of Crown Land solidified. To this day the “Crown”—an entity that has changed radically since first contact (both in Britain and Canada)—presumes to hold underlying title to all lands in the country. Therefore, that is how the treaties are interpreted by the courts and governments, and that is how lands that have not been treated are interpreted, too.

The doctrine of discovery is fundamental to the existence of Crown Land in Canada. And Crown Land stands as a foundational roadblock to the possibility of land restitution. Even where Indigenous nations have proven in court the continuity of their occupation, use, and unceded title from pre-contact to the present, according to Canadian law, there is no legal pathway to resume full jurisdiction and governance authority over Indigenous lands. As Chief Justice McLachlin, writing unanimously on behalf of the Supreme Court of Canada, held in the *Tsilhqot’in Nation* case, the “content of the Crown’s underlying title is what is left when Aboriginal title is subtracted from it.”²² This amounts to a fiduciary duty (effectively a trust-like relationship) owed to the First Nation but also a right to encroach on this Indigenous land if the government can pass the infringement test under Section 35 of the *Constitution Act*, 1982.²³

¹⁹ Canada Year Book, Statistics Canada, Geography Division (2011), statscan.gc.ca. [<https://www150.statcan.gc.ca/n1/en/pub/11-402-x/2012000/pdf/geography-geographie-eng.pdf?st=7224KLPJ>]; “Reports – Canada,” Indigenous and Northern Affairs Canada, Government of Canada, accessed October 13, 2019, aadnc-aandc.gc.ca. [<https://www.aadnc-aandc.gc.ca/eng/1100100034846/1100100034847>]

²⁰ *Crown Land: Indicators & Statistics Report*, Ministry of Forests, Lands and Natural Resource Operations, Province of British Columbia (2011), gov.bc.ca. [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown_land_indicators__statistics_report.pdf]

²¹ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2000); Kent McNeil, “Exclusive Occupation and Joint Aboriginal Title,” *University of British Columbia Law Review* 48 no. 3, (October 2015): 821–872.

²² *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, para 70, scc-csc.lexum.com. [<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do>]

²³ Kent McNeil, “Aboriginal Title and the Provinces after *Tsilhqot’in Nation*,” *Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 71 (2015): 67–89, digitalcommons.osgoode.yorku.ca. [<https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/4>]

Even those Indigenous nations that have proven title may also still be subject to provincial regulation of land and resources on their territories due to the underlying Crown title claim.²⁴

While Parts Three and Four of this report will examine more closely the ways Indigenous people are strategically using and politicizing aspects of Aboriginal jurisprudence and policy to leverage rights, this section examines how Canadian legal mechanisms are used to deny recognition of Indigenous people's inherent rights in order to better understand Crown motivations and techniques to dispossess Indigenous peoples.

This section unfolds by examining where alienation of Indigenous lands and waters fits into the broader Canadian political economy through the invention of Crown Lands. Then it focuses on how one common legal strategy—the injunction—is used to remove Indigenous peoples from their lands when communities contest the authority of provinces or territories to regulate, exploit, or sell lands without Indigenous consent. We then look at the cumulative impacts of resource extraction, both in terms of the long-term impacts of development on ecological sustainability, but also on the cultures, laws, languages, and gender relations of Indigenous communities.

Resource Nation

Nearly every major study addressing abolition of the colonial relationship in Canada advocates for compensation or reparation in the form of land redistribution. That is because in order to more fully regain and exercise self-determination generally, Indigenous people require significant economic bases and sources of revenue to pull out of generations of systemic impoverishment. This is also a matter of economic justice.

Crown Lands have long catalyzed economic growth for this country. On a national scale, the *Dominion Land Acts* of 1872 allocated massive amounts of land to the Canadian Pacific Railway for the transnational line. The Act also worked as immigration policy for settlers seeking farmland in the Western provinces, allocating 160 acres for only \$10, provided that within three years they cultivated the land and built a home.²⁵

Crown Lands also fueled the industrialization of the country in the nineteenth and twentieth centuries, which required tremendous energy as lumber and grist mills sprouted up

²⁴ Ibid, 84.

²⁵ James M. Richtik, "The Policy Framework for Settling the Canadian West 1870–1880," *Agricultural History* 49, no. 4 (October 1975): 613–628.

along waterways and mines were drilled into the landscape.

This also included dams, which were created to supply power and which have grown into massive hydroelectric infrastructure. Today, Canada is the third-largest producer of hydro-electricity in the world.²⁶ The vast majority of natural resource extraction is based on the leasing, permitting, and licensing of Crown Land.

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**These "user rights" grant access to state corporations and private companies to build hydro and energy corridors and transportation infrastructure, and enable mining, forestry, and oil and gas development. They also alienate Indigenous peoples further from the land and water.**  
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The stakes of land alienation are high for settler states, industry, and citizens, since they form the basis of the Canadian economy. For example:

- **CANADA LEADS** in mining extraction globally, producing over 60 minerals and metals, with total domestic exports valued at \$81.4 billion per year. This amounts to over 20 percent of total national exports.²⁷
- **THE FOREST SECTOR** generated \$24.6 billion to Canada's GDP in a single year, \$24.2 billion to Canada's trade balance, and 186,838 jobs in 2017, not counting all the secondary industries to which it contributes.²⁸
- **FOSSIL FUEL PRODUCTION** is high, comprised by crude oil (41.4 percent), natural gas (36.5 percent), and coal (9.2 percent),²⁹ where by far the largest supply of crude comes from the Alberta tarsands.

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²⁶ Kara Webster et al., "Impacts and Prognosis of Natural Resource Development on Water and Wetlands in Canada's Boreal Zone," *Environmental Reviews* 23, no. 1 (2015): 102.

²⁷ *Important facts on Canada's Natural Resources (as of October 2011)*, Natural Resources Canada, (2011), publications.gc.ca. [http://publications.gc.ca/collections/collection_2012/rncan-nr-can/M2-6-2011-eng.pdf]

²⁸ "Statistical data," Natural Resources Canada, 2015–2017, cfs.nrcan.gc.ca. [http://cfs.nrcan.gc.ca/statsprofile/economicimpact/ca] (updated September 4, 2019).

²⁹ Ibid.

- **PULP AND PAPER** in 2010 pumped \$9.8 billion in exports from newsprint and wood pulp into the Canadian economy.³⁰
- **CANADA CONSISTENTLY** ranks near the top of global newsprint and wood pulp production that derives from boreal forests.³¹
- **IT IS NOT ONLY** the land that is being exploited. Natural resource sectors were responsible for around 84 percent of total water consumption in Canada in 2005.³²

While the vast areas of Crown Land depicted on most maps convey empty and unoccupied space—save for some Indian reserves (if they appear at all), small settlements, and an urban population strung out along the southern U.S.-Canada border—mapping extractive industries offers a much more revealing depiction of the scale of contemporary resource development, land alienation, denial of Aboriginal rights, and erasure of Indigenous law. Mining claims alone darken “Crown Lands” with encumbrances, fencing off and fragmenting Indigenous territory into islands of extraction and development.

Much analysis of the colonial relationship tends to focus on the role of the federal government, due to the nation-to-nation relationship between Indigenous governments and Canada.

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**But the provinces exercise considerable power when it comes to Indigenous lands.**

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Under Section 92a of the *Constitution Act*, 1867, provinces have jurisdiction over “Non-Renewable Natural Resources, Forestry Resources and Electrical Energy.” Provincial Crown Lands are managed by their respective Ministries of Natural Resources. Despite juggling multiple roles that include sustainable land management strategies, the revenue-

generating and job-promising roles of these ministries rotate around resource extraction and development. In B.C., for example, the energy, utilities, and residential sectors account for 58 percent of tenures on Crown Land, amounting to around 13 percent of total annual provincial government revenue.³³

This state-industry complex that motivates land alienation is a major economic driver of the Canadian economy. It is the basis of settlement in the country and a central organizing force of capitalism. It is also in many cases the major destructive force of Indigenous economies.

Land alienation must also be understood through gender dynamics, which are instrumental to how land loss and dispossession unfold and impact people’s lives. They are also critical to the ways in which the right to consent is denied to Indigenous peoples.

Through colonial processes, and often, learned patriarchy, Indigenous men have been vaulted into positions of authority. The *Indian Act* for many years only allowed men to be elected and run in elections. The *Indian Act* Chief and Council system and larger aggregate groups such as tribal councils, provincial territorial organizations, and the national organizations have historically, and continue to be, dominated by men.

The harms of colonization, dispossession, residential schools, and other forms of oppression affected men as well, but they also helped produce and reinforce particular forms of Indigenous masculinity in the model of white patriarchy, which promotes and embraces men in a role of power and domination. Women, queer, transgender, gender diverse, and Two-Spirit people have never been the beneficiaries of these new distributions of power through colonization. Rather, they have been targeted and disempowered, removing the challenge they posed to the patriarchy of Western systems of governance. This system was in many cases internalized by Indigenous communities and often reproduced through misogyny in Indigenous governments.

When their integrity, value, and safety is compromised by these systems, women, girls, queer, transgender, gender diverse, and Two-Spirit people often have to choose between protecting their rights by speaking out or

30 Ibid.

31 The figures in this list were all originally cited by Webster et al., 2015.

32 “Human Activity and the Environment: Freshwater Supply and Demand in Canada,” Statistics Canada, 2010, statcan.gc.ca. [https://www150.statcan.gc.ca/n1/pub/16-201-x/16-201-x2010000-eng.htm] (cited in Webster et al., 2015, 88).

33 *Crown Land: Indicators & Statistics Report*, Ministry of Forests, Lands and Natural Resources, Province of British Columbia (2011), gov.bc.ca. [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown_land_indicators__statistics_report.pdf].

protecting themselves by remaining silent, or by leaving their communities altogether. Women, Two-Spirit and queer Indigenous people are then further *excluded* from management, jurisdiction, and decision-making in contemporary policy and politics, which results in, amongst other things, environmental (and sexual) violence.

Prior to colonization, many Indigenous communities accepted sexually diverse and gender variant individuals, in some cases with specialized ceremonial roles. Notably, the inclusion of these perspectives served a key facet of jurisdictional activities and decision-making processes in some Indigenous communities.³⁴ The erosion of recognition for women's governance roles in their communities has led directly to high levels of violence against them, both within First Nation communities but also when this violence forces an out-migration and further marginalization in towns and cities. The *Red Women Rising* report from Downtown Eastside Vancouver calls these cycles the "Cumulative Impacts of Gendered Colonialism" and cites multiple statistics on the higher likelihood of Indigenous women to be killed, sexually assaulted, and incarcerated than white women and Indigenous men.³⁵ The report attributes this vulnerability to a loss of self-determination on their homelands, among other things.

Women, Two Spirit and queer Indigenous people can then be further excluded from participating in internal governance because of their identities, and they suffer higher impacts of environmental violence from the consequences of these decisions taken without them. They also encounter multiple forms of discrimination and barriers. The Native Women's Association of Canada (NWAC) emphasizes the relationship between patriarchy and resource extraction, stating that, "the marginalization of Indigenous women from the discussions and negotiations related to industrial projects, even exploration activities, highlights the gender inequity that is perpetuated when industry and governments fail to adequately engage with them on these matters."³⁶

³⁴ Alex Wilson, "Our Coming In Stories: Cree Identity, Body Sovereignty and Gender Self-Determination," *Journal of Global Indigeneity*, 1(1), 2015. [<https://ro.uow.edu.au/jgi/vol1/iss1/4>]

³⁵ Carol Muree Martin and Harsha Walia, *Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside*, Downtown Eastside Women's Centre (2019), 42, dewc.ca. [<http://dewc.ca/wp-content/uploads/2019/03/MMIW-Report-Final-March-10-WEB.pdf>].

³⁶ Adam Bond and Leah Quinlan, *Indigenous Gender-based Analysis for Informing the Canadian Minerals and Metals Plan: Policy Paper*, Native Women's Association of Canada (October 2018), 4, minescanada.ca. [https://www.minescanada.ca/sites/default/files/indigenous-gender-based-analysis-cmmp_.pdf]

Other reports show that health statistics alone "do not tell the story of how the extractive industry, fueled by corporate and governmental greed, furthers colonial and patriarchal systems by eroding traditional Indigenous governance systems and the role of women in these communities."³⁷

There is also evidence linking extractive industries to conditions that lead to gender-based violence, such as increased levels of crime, drug, and alcohol use.³⁸ "Man camps," in particular, have been linked to domestic violence, sexual assault, rape, and sex trafficking. This is another form of slow violence that is linked to processes of alienation of Indigenous land.

Man camps are temporary base camps for men involved in construction, most often around major development projects. Sometimes called "industrial camps," they are populated by a mix of specialized workers and low-skilled labourers.

³⁷ Erin Marie Konsmo and A.M. Kahealani Pacheco (Kanaka Maoli), *Violence On The Land, Violence On Our Bodies: Building an Indigenous Response to Environmental Violence*, Women's Earth Alliance and Native Youth Sexual Health Network (June 2016), 12, landbodydefense.org. [<http://landbodydefense.org/uploads/files/VLVBReportToolkit2016.pdf>]

³⁸ *Out of Sight, Out of Mind: Gender, Indigenous Rights, and Energy Development in Northeast British Columbia, Canada*, Amnesty International (2016), amnesty.ca [<https://www.amnesty.ca/outof-sight>]; Clarice Eckford and Jillian Wagg, *The Peace Project: Gender Based Analysis of Violence against Women and Girls in Fort St. John*, Fort St. John Women's Resource Society (revised February 2014), thepeaceprojectfsj.wordpress.com [https://thepeaceprojectfsj.files.wordpress.com/2014/03/the_peace_project_gender_based_analysis_amended.pdf]; Sari Horwitz, "Dark Side of the Boom," *Washington Post*, September 28, 2014, washingtonpost.com [https://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom/?noredirect=on&utm_term=.fd282807cfcc]; Brandi Morin, "Pipeline 'Man Camps' Loom over B.C.'s Highways of Tears," *Canada's National Observer*, September 21, 2017, nationalobserver.com [<https://www.nationalobserver.com/2017/09/21/news/pipeline-man-camps-loom-over-bcs-highway-tears>]; Rebecca Adamson, "Vulnerabilities of Women in Extractive Industries," *ANTYAJAA: Indian Journal of Women and Social Change* 2, no. 1 (June 2017): 24–31; Konstantia Koutouki et al., "A Rights-Based Approach to Indigenous Women and Gender Inequities in Resource Development in Northern Canada," *Review of European, Comparative & International Environmental Law* 27, no.1 (April 2018): 63–74.

FOX LAKE CREE FIRST NATION:

“The revival of our culture, our language and tradition is so important to our healing, and these were things that the Hydro developments took away from us.

I know it may seem hard to understand and make the connection of how Hydro took this away, but if you sit with us and *listen with your hearts*, the stories of our people’s homes being bulldozed to make way for Hydro, the sexual assault on our women carried out by the workers, the violence and the crime left 18 years undocumented, you will understand.”

Manitoba Clean Energy Commission,
Regional Cumulative Effects Assessment,
Community Meeting, Fox Lake Cree First Nation,
Transcript of Proceedings

Held at Best Western Hotel, Winnipeg MB,
Friday Jan. 19, 2018, p. 153.

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**For decades, Indigenous women have been reporting cases of sexual assault by men imported into their homelands to work in resource sectors, but these reports have been largely ignored.**

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Recently, reports surfaced about Manitoba Hydro workers around the town of Gillam who, from the 1960s through the 1980s, terrorized women in nearby northern communities. As transcripts show, women experienced rampant sexual assault not only by hydro workers, but also by RCMP officers who would detain and assault women at the station.³⁹

This cumulative sexual violence continues to this day in northern Manitoba, with a recent spate of sexual assaults against Indigenous women reported at the Keeyask dam—725 kilometres north of Winnipeg—where workers have returned to expand dam construction.⁴⁰

Today, one of the key struggles against man camps is being fought by the Tiny House Warriors in Secwepemc territory in south-central British Columbia. The Blue River camp is preparing for an influx of 1,000 workers; Indigenous activists are concerned it will raise rates of violence against women.⁴¹

The Tiny House Warriors, who are building tiny houses along the proposed Trans Mountain pipeline routes to block its development, released a statement against man camps in 2018. It reads: “Today, wherever man camps are set up, we face exponential increases in sexual violence. As development results in the destruction of our land base and our food sovereignty, it also drives up food and housing prices. This further intensifies our economic insecurity and we are forced into even more vulnerable conditions.”⁴²

³⁹ *Regional Cumulative Effects Assessment: Community Meeting, Fox Lake Cree First Nation* Manitoba Clean Energy Commission (transcript of proceedings held at Best Western Hotel, Winnipeg MB, January 19, 2018), 153, cecmanitoba.ca. [<http://www.cecmanitoba.ca/resource/hearings/42/Transcript%20webredact-CECFOXLAKE.pdf>]

⁴⁰ Marina von Stackelberg, “9 Cases of Sexual Assault Investigated at Keeyask Dam Site since 2015 ‘Tip of Iceberg,’ Says Prof,” *CBC News*, January 26, 2019, cbc.ca. [<https://www.cbc.ca/news/canada/manitoba/keeyask-sexual-assaults-1.4994561>]

⁴¹ Sacred Earth Solar, “Sacred Earth Solar x Tiny House Warriors,” Whaea Productions (April 22, 2019), youtube.com. [https://www.youtube.com/watch?time_continue=6&v=qiG7_UX1Ci0]

⁴² “Women’s Declaration Against Man Camps,” Secwepemculecw Assembly, November 2017, secwepemculecw.org. [<https://www.secwepemculecw.org/women-s-declaration>]

Already, Tiny House Warriors are facing daily harassment and surveillance.

Indeed, it is a trend to be harassed when speaking out against man camps. In September 2018, when Iqaluit-based Mi’igma researcher TJ Lightfoot testified about the dangers of man camps in Nunavut before the MMIWG Inquiry, both the Nunavut and NWT Chamber of Mines sought to have her disciplined at her workplace, and even fired. She also faced scrutiny in the media and subsequent personal attacks.⁴³

Injunctions & the Police

When Indigenous people contest the authority of the province or the regulatory processes that fail to acknowledge their lack of consent, companies can take advantage of a legal system built to protect the interests of property. One legal mechanism in particular—the injunction—is often used to expedite the use of force against First Nations.

Injunctions have worked as a blunt instrument in opposition to Indigenous law, as well. For example, in December 2018, Coastal GasLink Pipeline Limited (CGL), a subsidiary of TransCanada Pipelines Ltd, served an injunction to the Unist’ot’en clan associated with the Yikh Tsawwillggis (Dark House) of the C’ilhstëkhyu (Big Frog Clan) of the Wet’suwet’en Nation (one of thirteen hereditary Yihks or clans). The company sought access to these lands for a liquified natural gas (LNG) pipeline to transport diluted bitumen (or “dilbit”) from Northern B.C. to the Kitimat port. Two members of the Unist’ot’en are named in the action—spokesperson Freda Huson and Chief Smogelgem—and they filed a response to the injunction stating that under Wet’suwet’en law they were under no obligation to offer access to their territory. They write: “Trespassing on house territories is considered a serious offence.”⁴⁴ Yet the province had permitted the use of their lands to CGL for a project that the Wet’suwet’en hereditary chiefs unanimously opposed. With injunction in hand, CGL got an enforcement order and Unist’ot’en had to remove the gate to their encampment and allow the company and the Royal Canadian Mounted Police (RCMP) access to their territory or risk arrest and uncertain violence.

⁴³ Kent Driscoll, “Iqaluit Researcher says mining executives struck back for MMIWG testimony,” *APTN National News*, June 5, 2019, aptnnews.ca. [<https://aptnnews.ca/2019/06/05/iqaluit-researcher-says-mining-executives-struck-back-for-mmiwg-testimony/>]

⁴⁴ Chantelle Bellrichard, “Defendants Accuse Coastal GasLink of Trying to ‘Subvert Authority’ of Wet’suwet’en Hereditary Chiefs,” *CBC News*, February 21, 2019, cbc.ca. [<https://www.cbc.ca/news/indigenous/wet-suwet-en-coastal-gaslink-injunction-court-filings-1.5028237>]

Yet at trial CGL wanted struck from the record any affidavit attesting to the hereditary system. Since they had approval of the band system they fought to ensure that the hereditary governance system could not discredit their claims to have local First Nation consent. Even by settler law, the Unist’ot’en had an Aboriginal right to be on their lands, since the Wet’suwet’en (and Gitskan) nations forced the courts to set out a test for Aboriginal title in 1997 in the *Delgamuukw* decision. In that decision – the first acknowledgement of Indigenous peoples’ proprietary interest in the land – the Supreme Court of Canada recognized *the nation* as the collective title and rights-holder, not the band council.

In plain terms, an injunction is a legal tool that restrains someone from doing something. Indigenous peoples and industry alike use injunctions to intervene in urgent matters. But injunctions are frequently used to override the lack of consent by Indigenous peoples to development on their lands. In *Reconciliation Manifesto*, Secwepemc leader Arthur Manuel called injunctions a “legal billy club” because they are designed to move rightful title-holders off their land through force when they refuse to comply with decisions that deny their inherent rights.

For this report, Yellowhead established a research team to comprehensively count and analyze every injunction served against First Nations, as well as injunctions brought by First Nations against companies or the Crown. The team collected over 100 cases from every jurisdiction across Canada involving First Nations, removing cases that were between First Nations themselves and keeping Inuit and Métis cases separate, for further study.

After poring over the injunction cases, the team found that this legal tool reinforces the impossible choices First Nations must make when they appear before Canadian courts. For example, the team found that the courts expect First Nations to commit to lengthy, costly litigation to secure protection for their lands and waters. But companies can more or less get injunctions if there is any whiff of economic loss.

The sad final tally was that 76 percent of injunctions filed against First Nations by corporations were granted, while 81 percent of injunctions filed against corporations by First Nations were denied. Perhaps most tellingly, 82 percent of injunctions filed by First Nations against the government were denied.

Cumulative Impact

While extraction is approved one project at a time, its impacts compound over time. The loss from earlier periods of land alienation and ecological destruction—from railway expropriation to dam flooding—increases the ecological instability of regions and watersheds. This is known as the cumulative impact on Indigenous territories and their well-being. It is a crucial aspect of land alienation.

In the scientific literature, cumulative impact refers to changes in the environment that result from significant interactions and human activities over time in a particular place. Since these impacts can be multiple and compound with one another, a common method for studying these effects is through baseline studies that establish the normal functioning of ecosystems prior to industrial development. Oral history is one example of baseline knowledge and is a form of scientific monitoring. There are also many quantitative scientific methods for determining cumulative impact.

Why are cumulative impacts important to discussions of alienation?

First and foremost, the issue of cumulative impacts is a matter of consent. If the total impacts of development are not transparent, how can First Nations make informed decisions about extraction on their territories? Our Mine Sweeper Map is an intervention that seeks to politicize this problem: while First Nations receive consultation letters on block-by-block numbered plots of land for extractive projects, the scale of how these encumbrances fit together is often hidden from view.

For example, in 2007, and again in 2014, Biigtigong Nishnaabeg First Nation undertook an Alienation and Cumulative Effects Study for the lands within their ancestral territory. This mapping study showed that 65 percent of their exclusive title area had been alienated (due to mining, forestry, conservation areas, parks, etcetera) since the early 1980s at the launch of their Aboriginal title and land claim case. Approximately 6,500 cultural features were identified within those alienated lands, which provided the First Nation with data to show significant impact to their way of life. The Alienation and Cumulative Affects Study proved to be very important and supported the immediate need for Biigtigong to assert their inherent rights to sovereignty and jurisdiction over continued development occurring in their lands.

“Discussion around gender are often centred around either violence against women, or gender inequality in the *Indian Act* — both worthy causes, but the discussion cannot end here.

I see the expression of heteropatriarchy in our communities all the time—with the perpetuation of rigid (colonial) gender roles, pressuring women to wear certain articles of clothing to ceremonies, the exclusion of LGBTQ2 individuals from communities and ceremonies, [and] the dominance of male-centred narratives regarding Indigenous experience...”

Leanne Simpson, “Queering Resurgence: Taking on Heteropatriarchy in Indigenous Nation Building”

Second, when cumulative impacts are not understood, it creates a legal and policy problem. A lack of legitimate cumulative effects assessment abounds in the regulatory process (elaborated in Part Three). The courts have not been much better. For example, the Supreme Court of Canada decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010, sets a bad precedent on cumulative impacts. In effect, the court suggested that cumulative impacts are not relevant in duty to consult cases if the project is a new or “novel” use of an existing project, ignoring the compounding impacts of development.⁴⁵ Some progress has been made in the courts since then, but not substantively.

Third, and perhaps most importantly, cumulative effects intersect and compound the impacts of colonization. The result of this development and encroachment is not merely an issue of shifting land tenures. Denial of Indigenous rights and access to the land is tied to assimilation, language, and cultural loss. The Minnesota Chippewa explain it this way:

“Cumulative impacts to tribal cultures are a combination of pre-existing stressors (existing conditions or co-risk factors) and any other contamination or new activity that affects environmental quality. Characterizing risks or impacts [...] entails telling the cumulative story about risks to trust resources and a cultural way of life [...]. This requires improvements in metrics based on an understanding of the unbreakable ties between people, their cultures, and their resources.”⁴⁶

Incorporating this understanding to assess the impacts of a pipeline through their territory, the Minnesota Chippewa included multiple forms of cumulative impact in their community-led assessment, including the legacy of degradation on their lands, historical and current trauma, and subsequent mental and physical health issues. Further, they believe that “any impact is not examined alone but understood in the context of the Anishinaabe responsibility to land and relations and the impact of the historical trauma the Anishinaabe people have faced.”⁴⁷

⁴⁵ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, para 48, scc-csc.lexum.com. [https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7885/index.do]

⁴⁶ *Anishinaabe Cumulative Impact Assessment on the Proposed Enbridge Line 3 Expansion and Abandonment Plan*, prepared by Honor the Earth for the Minnesota Chippewa Tribe, 2017, 2, mn-chippewatribe.org. [http://www.mnchippewatribe.org/impact_assessment.html]

⁴⁷ *Ibid.*, 8.

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**Alienation must be understood then both within the historical and cumulative context of colonialism and within the Indigenous context of consent that usually centres responsibility to the land and water.**

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We also do not have to look very far to see the gendered impact of cumulative impact. For example, in the southern Ontario community of Aamjiwnaang, an Anishinaabe First Nation located in a “Chemical Valley” where a concentration of chemical processing facilities is located, a study conducted from 2004 to 2005 found that 39 percent of the women had suffered at least one stillbirth or miscarriage. The Women’s Earth Alliance and Native Youth Sexual Health Network commented on this study, stating that “[t]his environmental violence is a form of *sterilization* that is often not discussed.”⁴⁸ Inuk advocate Sheila Watt-Cloutier, former Chair of the Inuit Circumpolar Council, has also written about and campaigned internationally on persistent organic pollutants that accumulate in breast milk and affect the health of children in the Arctic,⁴⁹ as has Brittany Luby, regarding methylmercury poisoning in breast milk as a result of contaminated fish from hydroelectric damming on the Winnipeg River.⁵⁰

Cumulative impacts have also been a major focus of Indigenous food sovereignty movements across the country, as food sources dwindle and face extinction due to the long-term impacts of industrial infrastructure, extraction, habitat loss, and human settlement. The crucial fisheries of Mik’maq territory were mismanaged by the Department of Fisheries and thus depleted; today, though, Mik’maq are reinvigorating *netukulimk*, their laws of procurement that honour prosperity for past and future generations.⁵¹ Likewise, the harvesting of *manoomin* by Anishinaabe is a philosophical

⁴⁸ Komsmo and Pacheco (2016) [emphasis added], landbodydefense.org. [http://landbodydefense.org/uploads/files/VLVBReportToolkit2016.pdf]

⁴⁹ Sheila Watt-Cloutier, *The Right to Be Cold: One Woman’s Story of Protecting Her Culture, the Arctic and the Whole Planet* (Minneapolis: University of Minnesota Press, 2018).

⁵⁰ Brittany Luby, “From Milk-Medicine to Public (Re)Education Programs: An Examination Of Anishinabek Mothers’ Responses To Hydroelectric Flooding In the Treaty #3 District, 1900–1975,” *Canadian Bulletin of Medical History* 32 no. 2 (Fall 2015): 363–389.

⁵¹ Kerry Prosper et al., “Returning to Netukulimk: Mi’kmaq Cultural and Spiritual Connections with Resource Stewardship and Self-Governance,” *International Indigenous Policy Journal* 2 no. 4 (2011): 1.

and economic practice, as well as an act of food sovereignty. Traditional foods are not just about sustenance, but medicine and education as well. For example, the Kwakwaka'wakw, Haida, and Nuuchahnulth nations eat many kinds of wild berries, but also apply them medicinally for their antibacterial properties.⁵² These teachings risk endangerment by the Indian Residential School system, Sixties Scoop, and the child welfare system today, if they cannot be passed down.

We must understand that cumulative impacts are a key factor in diversity loss throughout the country.⁵³ Indigenous communities are restoring damaged and alienated lands through food sovereignty, but toxins that have compounded in foodstuffs and rivers over time must be cleaned and relations renewed. Extinction is the untenable alternative to this incredible reclamation and exercise of Indigenous law.

Conclusion

There are three broad areas of alienation described here. First, there are the legal fictions created by the Crown to empower itself to legally steal Indigenous lands. These have, over a very short period, gestated a regulatory maze that Indigenous people are today forced to understand and navigate. What were once lands and waters that Indigenous people exclusively managed in accordance with their own laws and governance systems are now an overlapping mix of private lands, mining permits, forestry licenses, conservation zones, transmission corridors, and so on. With each come specific rules that further marginalize and create disconnections for Indigenous people from their lands, waters, and each other.

Second, are the impact of these activities on the land and on Indigenous cultures and worldviews. Discussing these cumulative impacts with members of the Yellowhead research network, assimilation and loss of culture are often cited as barriers to effective land restitution. Underwriting these losses is the attempted erasure of Indigenous law.

⁵² Stephen Penner, *Indigenous Food Sovereignty in Canada: Policy Paper 2019*, Rural Policy Learning Commons (2019), rplc-capr.ca. [<http://rplc-capr.ca/wp-content/uploads/2019/02/Penner-Keavaney-Longboat-2019-Indigenous-Food-Sovereignty-in-Canada-Policy-Brief.pdf>]

⁵³ Chris J. Johnson et al., “Witnessing Extinction: Cumulative Impacts across Landscapes and the Future Loss of an Evolutionarily Significant Unit of Woodland Caribou in Canada,” *Biological Conservation* 186 (June 2015): 176–186.

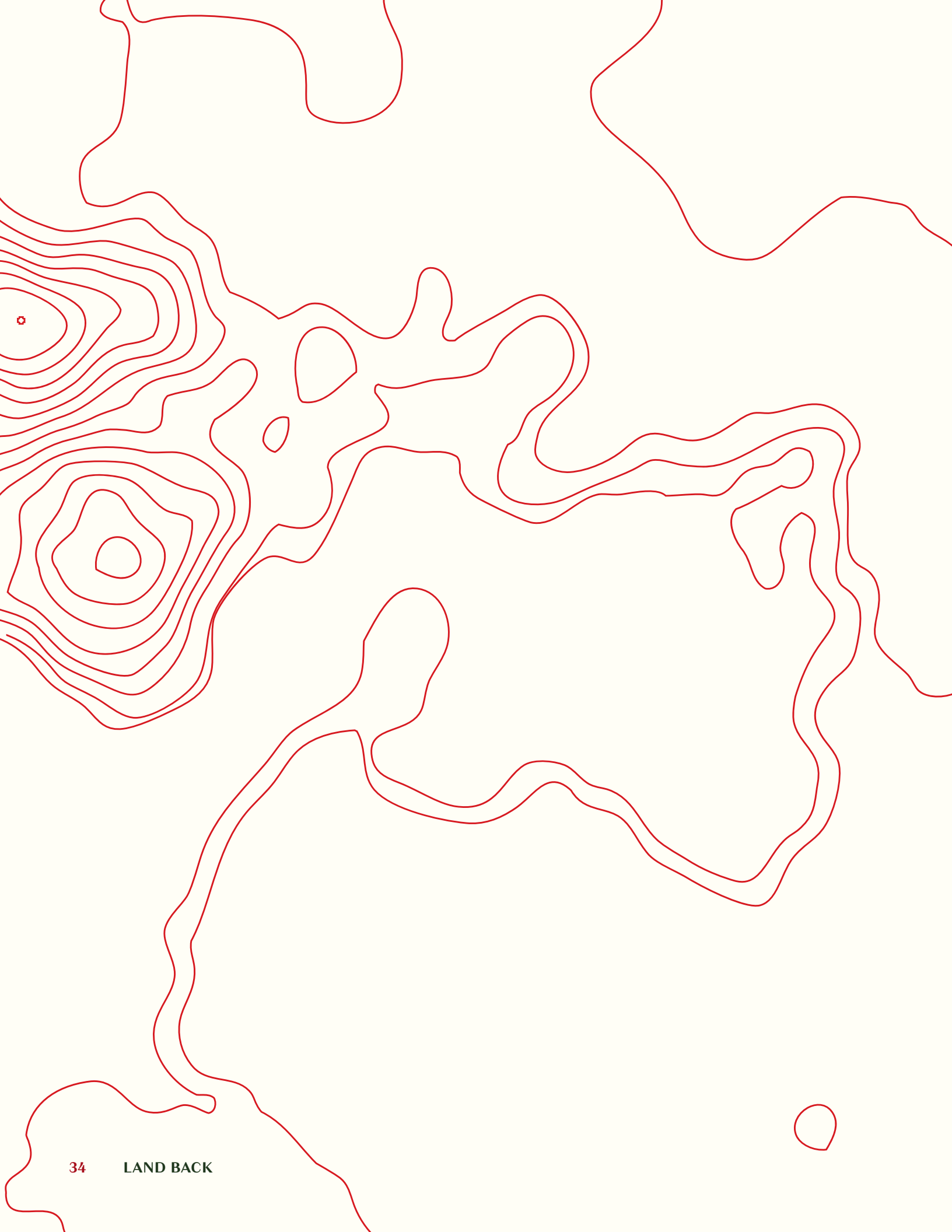
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**Indeed, how can Indigenous people reclaim the land without the language to do so? More, how can Indigenous people reclaim the land when often so little of it remains in good health?**  
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These are the questions that drive much of our conversations around land alienation. In other words, while the legal fictions and regulatory regimes are the practical, technical strategies of alienation, the impacts of colonization at legal and cultural levels, and on the land, are part of the cumulative impacts that amplify alienation.

Finally, it is increasingly clear how uneven this alienation is. In other words, Indigenous women, Two-Spirit and queer individuals are impacted in unique and often more violent ways. This ranges from being excluded from “new” forms of Indigenous governance that privilege men, suffering from the environmental consequences of toxins in the land and in their bodies, and the emergence of “man camps” that accompany industry development and which lead to violence in the lives of Indigenous women specifically.

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**This is all the more devastating—though not surprising—considering it is often women and Two Spirit Indigenous peoples who are leading land reclamation efforts.**  
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Of course, this is not a comprehensive catalogue of the strategies of dispossession but a summary of the general themes identified by our research. They are worth considering as the report turns to the next section, which revolves around state responses to Indigenous resistance to all of the above. It is not the case that Indigenous people willingly accept alienation. Resistance to state strategies of dispossession and marginalization have actually produced incremental gains in the discussion of consent. The next section considers the shape and content of these gains, as well as some of the lingering limitations.





PART THREE

Recognition

The resurgence of Indigenous political and legal orders and their ongoing relationships to land and waters have persisted through centuries of land alienation and dispossession.

INDIGENOUS JURISDICTION, SINCE CONTACT, has been a threat to colonization and creates massive economic uncertainty for this country. In response, the state and private industry have developed strategies to address Indigenous demands in ways that maintain the status quo for Canadians. Of course, these strategies shift and change over time in response to Indigenous resistance. In contemporary Canada, strategies have pivoted to “recognition.”

For example, resource revenue sharing policies have been introduced by companies and governments, and ownership stakes offered on major infrastructure development. But how do these measures meet Indigenous demands? What are the limits to their recognition? In what ways are Indigenous people willing to compromise or negotiate their jurisdiction?

For some, the *recognition* of Aboriginal rights in Canada has meant the continuation of colonization through new means. That is because the terms of recognition have tended to reinforce the state’s monopoly on power: First Nations are radically constrained in negotiations for their rights, but also by the oppressive socio-economic structures of settler society, where politics are very often driven by the interests of industry. As Yellowknives Dene scholar Glen Coulthard describes in *Red Skin, White Masks*, through participation in state institutions Indigenous people are induced to identify with harmful ideologies and practices that undermine their self-determination.

While this report does not focus on policy and legislative changes that perpetuate this “politics of recognition” (mostly due to lack of space), the Yellowhead Institute has prioritized analyzing settler governance with an eye toward answering these exact questions. Elsewhere, we have broken down the land claims and self-government policy and the First Nations Land Management Act, and in our briefs we have published

on policies and laws that have the effect of undermining Indigenous jurisdiction.

But our focus in this report is on the lesser-known and seen techniques of dispossession. By making these visible, we hope to raise critical questions about the content of self-determination. For example, is it enough that Indigenous peoples simply make decisions about how to participate in the resource economy and Canadian politics? Or, in contrast, does Indigenous jurisdiction inherently mean a challenge to these systems that have threatened not only Indigenous existence as nations, but really, all of humanity?

This is a deeply complicated conversation that this report lacks the space to fully address. But asking questions at the outset, regarding the revitalization of Indigenous legal traditions under these circumstances, can help frame how communities choose to respond to the often impossible questions put to them by government and industry.

There is no doubt that legal recognition of rights has offered Indigenous people negotiating power, leverage, and expanded by degrees Aboriginal and treaty rights. In some cases, this has translated into some decision-making power and material benefits such as gaining expanded access to capital, contracts with companies, resource revenue sharing from provinces, and participation in regulatory processes.

But this is unfolding through a relatively weak recognition of Indigenous jurisdiction. Hence, it is a trade-off for incremental change.

In this section, these forms of incremental change through which Indigenous peoples are granted measures of control over their lands, territories, and resources are analyzed. They are assessed for how far they go from the perspective of inherent jurisdiction, considering as best as possible, the promise of these policies and practices against the realities and pragmatics of settler-driven alienation.

Impact and Benefit Agreements (IBAs)

One way that governments seek to manage any assertion of Aboriginal rights has been to download their responsibilities—especially the duty to consult and accommodate—to the private sector. Impact and Benefit Agreements (IBAs) are private commercial contracts that are increasingly being negotiated between Indigenous peoples and industry in the accommodation phase of a project. IBAs go by many names, including partnership agreements,

benefits agreements, access and benefit sharing agreements, accommodation agreements, participation agreements, exploration agreements, or mutual understanding agreements.

They can involve resource revenue sharing (in some cases with a promise to not disrupt operations), but they also increasingly include First Nation input on project design and define decision-making structures and processes between the company and community, as well as training programs and hiring quotas and prioritize First Nations for business opportunities, often through procurement contracts.

IBAs raise many concerns with respect to the duty to consult. This duty is a legal precedent established in 2004 in both the *Haida First Nation v. British Columbia (Minister of Forests)*, 2004, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004, Supreme Court of Canada decisions. These cases established that the federal and provincial governments have a duty to engage with First Nations when their rights are in danger of infringement, to protect them from being “run roughshod” (para 27). The duty to consult and accommodate is a constitutional right, protected under Section 35 of the *Constitution Act*, 1982, though the courts have treated consultation and accommodation as separate rights, rather than conjoined.

The first concern IBAs raise regarding the duty to consult is that Indigenous and human rights obligations apply directly to governments, not industry. Therefore, the government of Canada, provinces, and territories should commit to implementing *higher* standards than industry, instead of offloading these international legal duties. Canada also has international obligations under United Nations covenants.⁵⁴

But rather than engaging with Indigenous peoples as nations with inherent responsibilities to govern their territories, governments have sought to manage the uncertainty of Indigenous land rights by encouraging industry, in essence, to supply much-needed social investments in communities (the promise of infrastructure, jobs, capital) in exchange for social license to develop Indigenous lands.

⁵⁴ These international obligations include Canada’s commitment to the United Nations Committee on the Elimination of Racial Discrimination, the United Nations Declaration on the Rights of Indigenous Peoples, the International Covenant on Civil and Political Rights, the Vienna Convention on the Law of Treaties, and of course, the international treaties made between the Crown and Indigenous peoples according to the national protocols of Indigenous legal orders.

IBAs represent the recognition of Aboriginal rights, insofar as these agreements were compelled by court precedents. But Aboriginal rights in Canadian law do not give Indigenous people rights – they merely recognize Crown obligations.

And the extent to which inherent Indigenous laws are recognized through the IBA is highly questionable. The standard procedure of companies is to negotiate these agreements with Indigenous communities where development will negatively impact their rights or territories. But the problem of transparency around *what* communities are signing remains an issue.

IBAs include three main types of benefits:

01. HIRING QUOTAS AND SERVICE CONTRACTS

These are often the most important and desirable outcomes of an IBA from the perspective of community leadership. First Nation band councils often prioritize employment for youth and the accompanying experience of training, education, skill-development, and opportunity to make wages and build self-esteem. This is especially true in remote areas where the job opportunities are fewer and come along rarely.

In terms of service contracts, First Nations are offered preference in the procurement process with first bid on servicing contracts, like catering or road clearing. In some cases, these are sole-source contracts. These contracts can sometimes be more lucrative than financial distributions from mines that turn out unproductive or take years to generate profit. However, the caveat to these contracts is that if communities lack the capacity and infrastructure to take them on themselves, they must enter into partnerships with mostly non-Indigenous companies. These subcontracting agreements quickly become funnels, with only small revenues trickling down to Indigenous peoples at the bottom.⁵⁵ In order to benefit from these contracts, communities need capacity, expertise, and infrastructure.

02. PARTICIPATION IN ENVIRONMENTAL ASSESSMENT REPORTING

Federal and provincial governments (in some cases territories) have jurisdiction to legislate aspects of the mining industry, e.g. the protection of fish habitat by the federal government

⁵⁵ Sonia Grochain and David Poithily, *Sous-Traitance Minière en Nouvelle-Calédonie: Le Projet Koniambo*, working document n. 4 of the Programme Gouvernance Minière, produced by CNRT Nickel (June 2011), cnrt.nc. [<http://www.cnrt.nc/wp-content/uploads/2016/03/DocTrav-n%C2%B04-04-2011-Grochain-Poithily-sous-traitance-Koniambo.pdf>]

is covered under the Fisheries Act. But they also have jurisdiction under the Impact Assessment Act, recently amended and renamed from the Environmental Assessment Act. IBAs sometimes contain language prescribing the kind of participation First Nations will have in such processes. They run the range of requiring communities to commit to not object to company submissions⁵⁶ to including a requirement by the First Nation for mining companies to undertake an environmental assessment in the case of mine expansion.⁵⁷

03. FINANCIAL PARTICIPATION

There are millions of dollars to be made in benefit sharing deals for First Nations when companies want access to their territories.

There are a number of issues involved here that are broken down below.

Governance & Jurisdiction

Negotiations between industry and First Nations may begin at any point in the project process, including prior to provincial or federal authorization. Even when these negotiations and consultations begin pre-approval, they generally do not come into effect until after a project has been approved. Without control over the authorization of permits and licenses on their lands, First Nations are left with a narrow band of decision-making power over how they would like to participate in development. There are opportunities during the environmental regulatory processes to weigh in on the decision, as discussed later in the report, but participation is often as any other stakeholder, which does not ensure First Nations' authority regarding projects taking place on their lands.

Further, IBAs are private law contracts that do not rise to the legal standard required for consent at the public law or nation-to-nation level because they do not require collective

decision-making. Many times, due to confidentiality clauses in the agreements, chief and councillors are prohibited from speaking to the community about what they are negotiating. Once the agreements are signed, even if the community is informed, they remain confidential documents that cannot be shared for the benefit of other communities

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**These imposed conditions on Indigenous governance may also contravene core principles of Indigenous governance and accountability.**

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According even to settler law, at least on title lands, Indigenous nations are “the proper title and rights holder.” This was affirmed by the Supreme Court of Canada in the Delgamuukw and Tsilhqot’in decisions. Though the courts have been shy to admit it at times, the fact of collective land rights held at the level of the nation implies their governing authority. Therefore, the proper title and rights holders should be making decisions on issues affecting the territory, which bears on the legality and legitimacy of IBA negotiations. What does it mean, in terms of compliance with Canadian Aboriginal law, in cases where decisions are being made one band at a time for major infrastructure projects like diamond mines and pipelines, without consulting with the proper rights and title holders of the land?

In the case of treaty nations presented with private commercial contracts that do not uphold the nation-to-nation relationship, do not respect their territorial authority to authorize development, and do not recognize their governance structures, there are reasons to be cautious when choosing whether or not to sign. There are also some First Nations that are part of historic treaty nations who believe that IBAs are a domestication of the international status of treaties, since they do not recognize the decision-making body recognized in international law as sovereign.

Fair Sharing?

The economic incentive of multi-million-dollars in new revenue with little federal government interference is an incentive for First Nations, particularly in light of sparse options outside of transfer payment agreements for generating necessary additional funding to pay for infrastructure, better health access, and education, all of which have been underfunded by the state for generations.

⁵⁶ “BHP Ekati Mine [i]n consideration for [the company] entering into this Agreement, the [group in question] will not object to the issuance of any licenses, permits, authorisations or approvals to construct or operate the Project required by any regulatory body having jurisdiction over the Project.” Janet Marie Keeping, *Local Benefits from Mineral Development: the Law Applicable in the Northwest Territories* (Calgary: Canadian Institute of Resources Law, 1999), 77.

⁵⁷ Irene Sosa and Karyn Keenan, *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: Their Use in Canada* (October 2001), 17–18, metisportals.ca. [http://metisportals.ca/MetisRights/wp/wp-admin/images/Impactpercent20Benefit-percent20Agreementspercent20-percent20Mining.pdf]

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**In this case, what is on the table for First Nations financially? How does it measure up against the ecological and cultural costs of extraction to First Nations? Even for communities not motivated by need, but considering development: is the risk versus benefit evenly distributed among stakeholders?**

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To begin by stating the obvious, companies themselves benefit enormously from First Nations' buy-in to their projects. The risks of Indigenous proprietary interests are well-known and are a matter of great concern for companies doing business in Canada. IBAs offer companies social license, economic certainty, predictable timelines, reputational and operational protection, and cost management guarantees.

But one of the biggest challenges regarding First Nations' financial participation is confidentiality. Communities go into negotiations without knowing the percentage of revenues typically allocated in these agreements. The industry negotiators and lawyers, on the other hand, will have been part of dozens and maybe hundreds of deals and will have the upper hand in these cases.

There are also multiple mechanisms for companies to underreport earnings, many of which are outlined by Joan Kuyek in her book, *Unearthing Justice*. If IBAs promise fair sharing, it is important for First Nations to see how much of this revenue they are actually accessing and at what percentage of total company profits. A number of financial mechanisms shift profits between subsidiaries to hide earnings, and they are a problem globally. Another key way the industry hides earnings is by creating "tax assets" through converting losses into credit to claim future mining taxes. For example, using data from ET SMA, the Narwhal calculated that in 2017 Barrick Gold extracted gold valued at almost \$250 million from its Helmo mine in northwest Ontario and paid \$14.4 million in taxes, amounting to a mere 5.8 percent of the gold's market value.⁵⁸

The federal government controls some areas of taxation for mining through corporate income tax, which is currently set at 15 percent of net income. Companies also claim substantial expenses and deductions with carry-through provisions, and

⁵⁸ James Wilt, "Canada's mining giants pay billions less in taxes in Canada than abroad," *The Narwhal*, July 16, 2018, [thenarwhal.ca. \[https://thenarwhal.ca/mining-pay-less-taxes-canada-abroad/\]](https://thenarwhal.ca/mining-pay-less-taxes-canada-abroad/)

pay very little federal tax, GST, payroll levies, excise taxes, or custom duties. Therefore, whatever the calculation of payments for sharing resource revenues, it will be based on drastically understated profits and likely constitute only a few percentiles of the millions and billions of dollars of wealth potentially drawn from successful mines.

Government Resource Revenue Sharing (GRRS)

Wrapped up in the recognition paradigm, a trend has developed over the past decade in which provinces share resource revenues with First Nations—revenue that flows from extraction on First Nation lands.

But how far do these sharing agreements actually go in recognizing Indigenous jurisdiction and consent?

There are four provinces in Canada that have resource revenue sharing (RRS) policies for First Nations (British Columbia, Manitoba, Ontario, and New Brunswick) and they all differ in allocation formulas and application. The policies are legal contracts negotiated between provincial and territorial Crowns with individual bands, tribal councils, treaty groups, or clusters of regionally-affected bands. In addition, Quebec, Newfoundland and Labrador, Northwest Territories, Nunavut, and Yukon all have GRRS policies that were negotiated through comprehensive claim agreements with modern treaty organizations or Indigenous governments.

GRRS through comprehensive claims work differently than for other First Nations, both in terms of rationale and implementation. Indigenous governments that have signed modern treaties may also claim a share of company revenues collected by governments, but this only applies in lands that fall under Indigenous jurisdiction (generally ten percent of their total lands). The overall basis of negotiation is laid out in the Final Agreements of these treaties. The same issue concerning companies' financial disclosure and confidentiality described above pertains. However, to single out one exceptional IBA negotiated in Nunavut, though unrelated to resource revenue sharing, is the establishment of the Tallurutiup Imanga National Marine Conservation Area, which supports Inuit stewardship for the benefit of ecological sustainability and conservation. It is a *public* agreement that anyone can access.⁵⁹ Whether it will be exceptional in more ways than its public accessibility, we will see.

⁵⁹ "National Marine Conservation Areas: Inuit Impact Benefit Agreement," Parks Canada, Government of Canada, accessed October 13, 2019, [pc.gc.ca. \[https://www.pc.gc.ca/en/amnc-nmca/cnamnc-cnmca/tallurutiup-imanga/entente-agreement\]](https://www.pc.gc.ca/en/amnc-nmca/cnamnc-cnmca/tallurutiup-imanga/entente-agreement)

GRRS is exclusively limited to mining, forestry, hydro, and oil and gas across all jurisdictions so far.⁶⁰ Government-allocated RRS for mining usually works by percentage of provincial or territorial tax payments, never from the value of the commodities or company profits. Forestry shares are more likely to be calculated directly from company profits. Like IBAs, the percentage of revenue shared must be closely examined to determine whether in fact this government-allocated RRS represents “fair sharing” and on what basis governments are redistributing some of this wealth accrued on First Nation lands.

In B.C., for example, the province first introduced an RRS policy in October 2008. The provincial rationale for the new policy was First Nations’ demand, but it was also linked to the New Relationship announced in 2005, a few months after the *Haida* decision came down.

The New Relationship redefined the language of “partnership” with First Nations to maintain exclusive authority over resource regulation and approvals. It partially did so through the creation of an RRS policy, where First Nations may share from the profits once the project is approved by the Ministry of Natural Resources.

While there are very few new or expanding mining projects in BC, almost 250 Forest Consultation and Revenue Sharing Agreements have been signed.⁶¹ The Conference Board of

⁶⁰ The Conference Board of Canada defines the scope of “Government Resource Revenue Sharing” or GRRS as such: “Any formal agreement between a Crown-representative national or subnational government and an indigenous community for the purposes of sharing government revenues generated from natural resource extraction or use. The revenues in question, that said governments may receive from various natural resource sector activities, differ across jurisdictions and may include royalties, taxes, fees, and so forth.” Kala Pendakur and Adam Fiser, *Options and Opportunities: Resource Revenue Sharing between the Crown and Indigenous Groups in Canada*, Conference Board of Canada (September 15, 2017), conferenceboard.ca. [https://www.conferenceboard.ca/e-Library/abstract.aspx?did=9083&AspxAutoDetectCookieSupport=1]

⁶¹ “Forest Consultation and Sharing Agreements,” Ministry of Indigenous Relations and Reconciliation, Province of British

Canada reports that these payments constitute approximately 10 percent of First Nations’ total annual revenues.⁶²

In addition, the B.C. *Clean Energy Act*, 2010, shares half of land and water rentals for new projects into a fund for First Nations. Three-quarters of revenues are available to First Nations whose territories are affected by these clean energy projects.⁶³ But of course, First Nations are unable to collect their land and water rents themselves.

In Ontario there is a fixed standard for GRRS; beginning in Fall 2019, partner First Nations could receive 45 percent of government revenues from forestry stumpage, 40 percent of the annual mining tax and royalties from active mines at the time the agreements were signed, and 45 per cent from future mines in the areas covered by the agreements.⁶⁴ There are currently 31 First Nation communities, represented by the Grand Council Treaty #3, Mushkegowuk Council, and the Wabun Tribal Council who have signed agreements with the Province. With the monies received through these agreements, First Nations cannot spend these funds for per capita distribution to community members, redistribute to other First Nation communities, use to cover any costs of litigation, or invest the money to accrue returns without first advancing five key areas: economic development, community development, cultural development, education, and health.⁶⁵

Columbia, accessed October 13, 2019, gov.bc.ca. [https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/forest-consultation-and-revenue-sharing-agreements].

⁶² Pendakur and Fiser (2017), 3, conferenceboard.ca. [https://www.conferenceboard.ca/e-Library/abstract.aspx?did=9083&AspxAutoDetectCookieSupport=1]

⁶³ *First Nations Clean Energy Business Fund: Guidelines for Funding*, Province of British Columbia (September 2015), gov.bc.ca. [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/fncebf_-_guidelines_-_2016-09-01.pdf]

⁶⁴ “Resource Revenue Sharing,” Ministry of Energy, Northern Development and Mines, Government of Ontario, accessed October 13, 2019, mndm.gov.on.ca. [https://www.mndm.gov.on.ca/en/mines-and-minerals/resource-revenue-sharing]

⁶⁵ “Ontario Will Share Resource Revenue with Certain First Nations in the North,” Fasken, May 8, 2018, fasken.com. [https://www.fasken.com/en/knowledge/2018/05/van-2018-05-07-indigenous-bulletin/]

What is the legal or political basis for this allocation of funds?

While formally these RRS deals are not meant to abrogate or interfere in any way with Aboriginal and treaty rights, do they reflect the demands for Indigenous jurisdiction, ownership, treaty, or sovereignty? In Ontario, for example, RRS is not a rights-based approach and it is certainly not based on restitution. According to the civil servants at the Ministry of Energy, Northern Development and Mining who negotiated RRS agreements with tribal and treaty groups, the rationale for the program is to undertake “strategic investments, reconciliation, and to build the relationship.” When pressed on why First Nations have these agreements and other communities do not, they strongly stated that these agreements in no way reflected Aboriginal treaty rights or historical reparation. In fact, the current Premier Doug Ford has promised that soon all northern municipalities will be privy to provincial RRS deals on aggregate licenses, stumpage fees, and mineral tax. Since Ford’s election, the RRS program rationale has also changed from the Liberal government’s promises of “closing socio-economic gaps” to the Conservative mantra of “economic prosperity.” But this program has remained virtually unchanged for now.

There is, of course, a strong treaty claim for GRRS, an example of which was recently won in Ontario Superior Court. The 2018 litigation around the Robinson Huron and Robinson Superior Treaties that highlighted the explicit language in the documents around benefitting from land use. The fact is there is an escalator clause for resource revenue sharing on treaty lands, indicating that annuities would rise based on Crown revenues. The court acknowledged that the province failed to raise revenues for annuities since the treaty was signed in 1874, thus creating a massive debt owed to communities.

Environmental Regulation

One check against land alienation through resource extraction is the environmental regulatory processes. In principle, mechanisms like Impact Assessment processes (federal, provincial, and territorial), as well as the Canadian Energy Regulator (formerly known as the National Energy Board), and legislation like the Species at Risk and Migratory Birds Act, were put in place to legally protect the natural environment from excessive harm.

Nonetheless, alienation can also take place through these processes, which distribute jurisdiction to a wide range of non-Indigenous parties and institutions. There are two issues that merit attention here with respect to environmental

regulation: the first, how “harm” is defined in the regulatory process, in particular the issue of cumulative impact raised in the previous section, and the second, Indigenous participation in these regulatory processes. The focus here is on the environmental assessment (EA) process.

What is the environmental assessment process? Until the Berger Inquiry (1974–1977), northern interests in Canada were overridden by southern Canadian imperatives (of course this is still often the case). But Indigenous resistance to unilateral resource development in Yukon and the Northwest Territories, on Indigenous lands, led to a consultation process for the proposed Mackenzie Valley pipeline.

While it had to be forced, the Berger Inquiry consisted of consultation that happened prior to development and led to unprecedented consideration of Indigenous life, culture, and livelihood.

A ten-year moratorium on construction was put in place to protect the caribou herds and other wildlife the Dene, Inuit, and Métis depend upon to live.

Since then, a growing body of Aboriginal and environmental case law has expanded Indigenous peoples’ relationship with resource extraction. In modern treaty areas (including some treaties that were created post-Berger Inquiry in NWT), treaty-mandated co-management regimes have been established. But elsewhere, the Canadian Environmental Assessment Act—introduced in 1992 (and in place until 2019)—was the legal basis for setting out responsibilities and procedures for carrying out EAs at the federal level. Its goals are sustainable development, integration of environmental factors into planning and decision-making, anticipating and preventing degradation of environmental quality, and facilitating public participation. EAs have now evolved to deal with First Nation issues as well, such as specific EA processes on land claims and settlement lands.

Cumulative Impact Assessment

Cumulative effects assessment (CEA) has become an important topic in regard to environmental regulation in recent years. A number of researchers have concluded that within the environmental assessment process, “CEA understanding remains weak, practice wanting and progress

“Heiltsuk’s inability to fully participate in the review process resulted in severe prejudice to Heiltsuk’s aboriginal rights and title. Throughout the review process Heiltsuk had sought information about the impact of a potential oil spill on, among of resources, its established Aboriginal right to a commercial herring spawn on Kelp Fishery. Heiltsuk continually advised the proponent and Canada [they] had the duty to provide this missing information and that the Heiltsuk did not have the capacity to obtain the missing information on its own”

— JESSIE HOUSTY AND CHIEF MARILYN SLETT, HEILTSUK (63).

“Now a company like Taseko says you’re just going to do this and that and they’re going to get all the resources and walk out of our territory. That area they proposed to turn into a tailings pond is where my people would go to obtain their powers, to obtain their gifts, if you want to call it that. It was a spiritual place. In our culture, that was our church. I would often tell people it would be like us going overseas and trying to turn the Vatican into a bingo hall. Why would you want— why wouldn’t you guys want us to do that? We’re going to create jobs, opportunity. Going to bring happiness. You can come play bingo. That’s our Vatican out there. We have to respect that.”

— JOE ALPHONSE (20)

“Expert Panel Indigenous Presentation Session Review of Environmental Assessment Processes,” Simon Fraser University (Wosk Centre for Dialogue), Vancouver, BC CEA Expert Panel Review, December 13, 2016

slow.”⁶⁶ For example, in the case of hydro-electric development in Manitoba, the EA process examined the generation and transmission aspect of the Wuskwatim dam development completely separately, without taking into account the complex hydro system in northern Manitoba to which they would likely become a part.

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**Though hydroelectricity is promoted as “clean energy,” the long-term impacts of hydropower include displacement, loss of fishing economies therefore poorer health outcomes, eroded fish spawning sites, methylmercury contamination, and extinction of species.**

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These cultural and human impacts are not taken substantively into account.

Indigenous participation in the regulatory process

The EA process is overwhelming, long, poorly funded for Indigenous participants, adversarial, dominated by scientific evidence that is not corroborated by Indigenous knowledge, unilateral, and Indigenous participation is included without guarantees of impact or influence on the final decision. For those who have spent months or years of their lives in the process, it is a toxic ecosystem of lawyers, environmental experts, bureaucrats, and professional negotiators.

Bill C-69 Impact Assessment Act (IAA), which was meant to address some of what was broken about the legislation, formed part of a slate of legislation that Liberal Prime Minister Justin Trudeau committed to “decolonizing” from previous Conservative versions drafted under former Prime Minister Harper. As discussed in Yellowhead’s *Emerging Indigenous Rights Framework report*⁶⁷ there were major structural flaws in the proposed legislation that limited Indigenous input and failed to enshrine Free, Prior, and Informed Consent for Indigenous peoples. The IAA (which replaces the Canadian Environmental Assessment Act) is one of the central mechanisms through which large-scale development is

regulated in Canada. It is therefore profoundly disappointing that though greater inclusion of “the traditional knowledge of Indigenous peoples” has been integrated into the process at various stages, and a general commitment to reconciliation and the protection of Section 35 rights now appear, these important renovations fail to enact meaningful consultation and consent regimes.

Ownership and Equity Stakes

IBAs are considered “downstream” agreements because they follow the authorization process by the province, territory, or federal governments. They are also negotiated as part of an industry process and financial assessment that does not include First Nations’ participation. First Nations are not privy to the financial processes internal to the company, their agreements have little binding power legally and subcontracting opportunities must be negotiated after budgets have already been cemented.

“Upstream” approaches include First Nation ownership stakes and joint ventures in companies or Crown corporations. Equity is an ownership position in projects where partners are entitled to dividends and distributions. These arrangements can be structured through limited partnerships or joint ventures. There are also multiple options for financing, including through capital markets or going to traditional banks to get loans.

An example of a First Nation equity deal was negotiated by the Mikisew First Nation for an ownership stake in the Suncor East Tank Farm oil storage project. Regarding the deal, Chief Waquan stated: “That is bringing in a lot for our First Nation, where we can at least develop our infrastructures, get our people well-educated, hopefully do more business. And hopefully when we do more business, we don’t have to rely on federal funds.”

In contrast to the experience First Nations have had with governments, negotiating directly with companies can offer greater autonomy and opportunity. Ownership stakes also implicitly recognize the authority of First Nations to negotiate and derive direct benefits from economic activity on their territories. It is also, critically, a way to raise cash to cover essential services and infrastructure on reserves, and even generate surplus for financial and community security.

⁶⁶ A. John Sinclair et al., “Looking up, down, and sideways: Reconciling cumulative effects assessment as a mindset,” *Environmental Impact Assessment Review* 62 (January 2017): 183–194.

⁶⁷ King and Pasternak (2018), yellowheadinstitute.org. [<https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>]

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**So strong is the push for First Nations to invest in these projects that governments are offering to bankroll Indigenous communities in order to circumvent private equity arrangements and gain legal certainty.**

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Alberta's Premier Jason Kenney announced legislation that will be tabled in fall 2019 to create a Crown corporation to broker First Nations participation in the energy sector.⁶⁸ The bill, set to commit one billion dollars, is likely targeted to promote literal buy-in for the Trans Mountain pipeline, which is slated to carry tar sands oil from Alberta to the Salish Sea.⁶⁹ Three First Nation coalitions are now seeking to buy the pipeline from the federal Crown, which they hope to dub the "reconciliation pipeline." Winona LaDuke responded to these efforts, writing that, "Indigenous people are best in control of our destiny when we control our land and water. This pipeline project is an exorbitant smallpox blanket, really."⁷⁰ She debunks the economic value of the pipeline and argues that, while dressed up as equity arrangements, "across the continent, corporations and governments are trying to pawn off bad projects on Native people."

Transmission lines and renewable energy projects occupy a grayer area in this debate. In 2018, Hydro One entered into a limited partnership with 123 First Nations (The Ontario First Nations Sovereign Wealth LP) a group that now owns

⁶⁸ Dean Bennett, "Kenney Is Bringing In a Bill that Will Help First Nations Invest in Energy Projects," *The Star*, June 10, 2019, thestar.com. [https://www.thestar.com/edmonton/2019/06/10/kenney-to-bring-in-bill-in-fall-to-help-first-nations-invest-in-energy-projects.html]

⁶⁹ Alberta also recently announced a \$10M litigation fund to support legal actions in favour of Alberta's natural gas development. AB govt ("Litigation Fund," Government of Alberta (updated September 25, 2019), alberta.ca [https://www.alberta.ca/litigation-fund.aspx] [https://www.jwnenergy.com/article/2019/8/alberta-launches-indigenous-litigation-fund-advance-oil-and-gas/])

⁷⁰ LaDuke, 2019, aptnnews.ca. [https://aptnnews.ca/2019/07/13/reconciliation-pipeline-how-to-shackle-native-people/]

2.4 percent of the corporation, which is worth \$260 million today.⁷¹ The deal is sweet as far as partnerships go—the government financed First Nations' purchase with a 25-year fixed-interest term loan and if for any reason the loan defaults, First Nations can walk away without incurring the debt. First Nations are also free to pursue historical grievances against Hydro One and the province. Indeed, transmission lines and stations cut through and have been built on Indigenous lands without consent for years and the company also charges extremely high rates for remote communities. In addition, with the investment, the First Nations are also now invested in increased energy production, and all that accompanies it.

Conclusion

There are clear financial benefits to participating in various stakes of resource projects, especially in light of the state's divestment from Indigenous people's wellbeing.

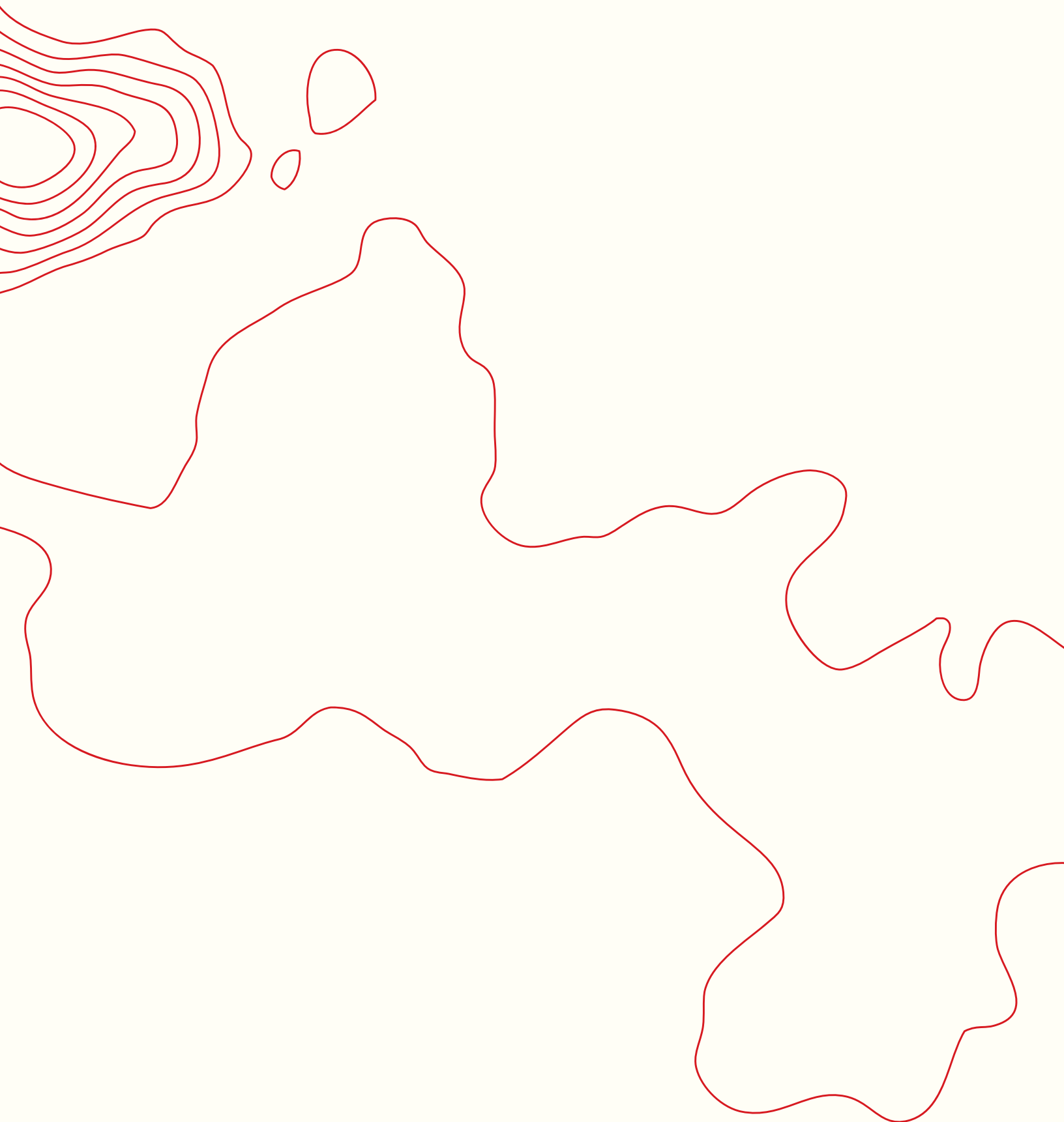
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**But can capitalism, and this type of extraction, be "Indigenized" in a way that maintains consistency with Indigenous worldviews and values?**

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This is an open question, and not one this report is meant to answer. Rather, the communities engaged in recognition-based resource development will hopefully have those discussions and decide amongst themselves. What this report can convey is that the types of benefits accruing from participation—IBAs, resource revenue sharing, and equity stakes—are mere incremental gains against the bar of fulsome Indigenous jurisdiction and inherent rights.

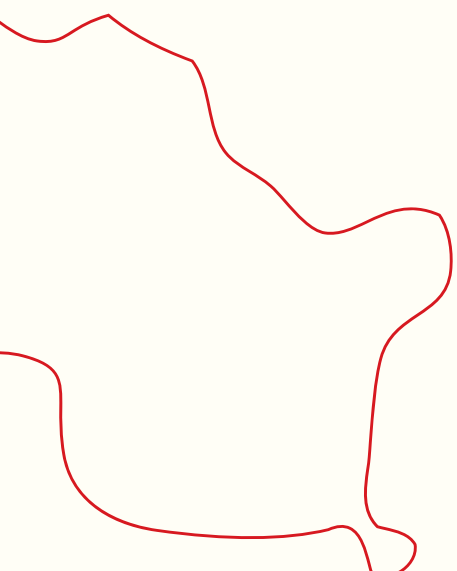
⁷¹ "Indigenous Relations," Hydro One, accessed October 13, 2019, hydroone.com. [https://www.hydroone.com/about/indigenous-relations]





PART FOUR

Reclamation



So far, we have outlined the strategies used to dispossess Indigenous communities.

THESE STRATEGIES FLOW FROM the constitutional division of powers and are reinforced in the courts and by subsequent iterations of provincial and territorial governments, not to mention the federal government. For Indigenous people in Canada, this has represented a multi-pronged attack on Indigenous jurisdiction invoking a variety of legal, policy, and effectively military strategies. The consequences of this attack, whether “slow” or “fast,” have amounted to cultural genocide and a subsequent adoption of patriarchal and misogynist attitudes in many communities.

Despite some shifts and contortions of these strategies of dispossession through time in response to Indigenous cultural and political resurgence, the continuity of Canada’s efforts to access and exploit Indigenous lands, while maintaining the authority to do so, is stark.

That is not to say that Indigenous people have universally, or willingly, accepted this state of affairs. Indeed, Part III of this report demonstrates some consequences of Indigenous intervention and resistance. As Crown strategies change and adapt, small spaces are made to permit incremental progress for Indigenous communities. And while these result in “recognized” rights and some power over lands and resources, they do not breathe life back into fulsome Indigenous jurisdiction, whether they are consultation protocols or IBAs. An unanswered question is whether or not they reinforce, validate, or resist settler authority and ongoing assimilation. At the least, it is clear to us that in many cases, recognition-based consultation brings Indigenous people into development as junior partners in resource management.

A third framework here is Indigenous reclamation. These are the consent-based efforts and strategies that are, perhaps, more provocative and deliberative in asserting Indigenous law.

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**On the spectrum of consent, they reject Crown alienation, and while exploiting Crown recognition where possible, also generally operate outside of accepted Canadian legal and institutional channels.**  
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More often than not, they take Indigenous-led consent processes as a responsibility, and are often led by Indigenous women with alternative visions of relationships to the land. While they may not be “recognized” as legitimate activities by the state, they can nonetheless produce the intended results of restoring Indigenous land and life.

The section below is organized by those practices: a) environmental assessment and monitoring, b) consent protocols and permitting, and, c) re-occupying the land. Taken together, they inform a general framework Indigenous-led consent processes.

Environmental Assessment & Monitoring

First, and at the earliest stage of development, are environmental assessment processes. Cases impacting the Tsleil Waututh, Secwepemc, and Miḡmawei Mawiomí Secretariat, which involved assessing pipeline and transport of oil and gas, are the best examples for delaying or even stopping an unwanted development and asserting rigorous and evidence-based claims for their decisions. In these instances, First Nations refused consent and backed their refusal with evidence that policy makers and investors could understand. A variation of environmental assessment may also be pursued post-development or post-disaster, as in the case of the Heiltsuk. But interestingly, environmental monitoring in this case evolved into prevention as well, as the Heiltsuk strive to ensure, via a variety of jurisdictional tools, that their consent is respected before the next project unfolds.

TSLEIL-WAUTUTH AND THE TRANS MOUNTAIN PIPELINE EXPANSION

In 2011, Kinder Morgan, the owners of the Trans Mountain pipeline, reached out to the Tsleil-Waututh Nation (TWN), a community of 500 located in Burrard Inlet, British Columbia.⁷² Kinder Morgan was seeking an agreement to allow for the expansion of an existing pipeline, but the expansion would cross their lands and waters with tremendous potential for environmental harm. After

⁷² “Our Story,” Tsleil-Waututh Nation, accessed October 13, 2019, twnation.ca. [<https://twnation.ca/our-story/>]

reviewing the project, and based on their laws and customs, the Tsleil-Waututh Chief and Council announced their opposition to the project. At a community meeting in May of 2012, a unanimous vote supported this decision.⁷³ Despite the opposition, Kinder Morgan proceeded with an application at the National Energy Board to expand the Trans Mountain pipeline and tanker traffic, which would “triple the volume of crude oil moved along the existing pipeline route” and through Tsleil-Waututh territory.⁷⁴

In response, the Tsleil-Waututh established the Sacred Trust Initiative “to stop the Kinder Morgan pipeline by any lawful means necessary.”⁷⁵ The foundation of their campaign was an environmental assessment to provide evidence of the environmental and cultural harm.⁷⁶

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**The assessment was developed from within Tsleil-Waututh law, policy, and knowledge, and then backed by Western archeological and anthropological evidence.**

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It drew on oral transcripts, community input, investor risk assessment, a record of Kinder Morgan’s spill history, and a holistic view of environmental management. Finally, the report found that there was no immediate economic benefit for the community or even the region, but that there was an imminent danger to the land, water, animals, and community if the expansion were to take place. With the assessment, the TWN undertook an “engagement with the federal and provincial governments, legal action in the courts, public and First Nation outreach, and investor dissuasion.”⁷⁷

73 Justine Hunter, “In the Trans Mountain Aeud, a B.C. First Nation Paves Its Own Path of Resistance and Prosperity,” *Globe and Mail*, September 28, 2019, theglobeandmail.com. [https://www.theglobeandmail.com/canada/british-columbia/article-in-the-trans-mountain-feud-a-bc-first-nation-paves-its-own-path-of/]

74 “Executive Summary,” *Tsleil-Waututh Nation Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal*, Tsleil-Waututh Nation (2015), 3, twnsacredtrust.ca. [https://twnsacredtrust.ca/assessment-report-download/]

75 “About Us,” Tsleil-Waututh Nation, accessed October 13, 2019, twnsacredtrust.ca. [https://twnsacredtrust.ca/about-us/]

76 *Tsleil-Waututh Nation Assessment*, Tsleil-Waututh Nation (2015), twnsacredtrust.ca. [https://twnsacredtrust.ca/assessment-report-download/]

77 “About Us,” Tsleil-Waututh Nation (2019), twnsacredtrust.ca.

In April 2015, Tsleil-Waututh sent a delegation led by women to the National Energy Board (NEB), which reviewed the TWN Assessment. While the NEB agreed that if a spill were to happen, it would be detrimental to the environment, it concluded that this was unlikely and so the project should be allowed to continue.⁷⁸ In 2017, TWN released a notice of legal risks to the Canadian government in their ongoing pursuit of Kinder Morgan.⁷⁹ Then a federal court decision in the summer of 2018 quashed Cabinet approval for the pipeline. In part, the court found that the community consultations and environmental assessment for the Trans Mountain project had been inadequate, as the TWN and other First Nations who were to be affected by the pipeline expansion had claimed.⁸⁰ Nearly a year later, the NEB once again granted approvals based on the Canadian government addressing the outstanding concerns.⁸¹ At the time of writing, the Federal Court of Appeal has agreed to hear TWN (among others) application for leave to determine if consultation has been adequate.⁸²

Despite this, the Canadian government purchased the pipeline and plans to continue pursuing the project (which means ongoing infrastructure construction), formal approvals were

[https://twnsacredtrust.ca/about-us/]

78 “Kinder Morgan’s Trans Mountain Pipeline Rejected by Tsleil-Waututh First Nation,” *CBC News*, May 26, 2015, cbc.ca. [https://www.cbc.ca/news/canada/british-columbia/kinder-morgan-s-trans-mountain-pipeline-rejected-by-tsleil-waututh-first-nation-1.3088387]

79 Peter O’Neil and Kelly Sinoski, “Kinder Morgan Underestimating Environmental, Health Risks of Pipeline Expansion – Report,” *Vancouver Sun*, May 27, 2015, vancouver.sun.com. [http://www.vancouver.sun.com/life/Kinder+Morgan+underestimating+environmental+health+risks+pipeline+expansion+report/11083737/story.html]

80 *Tsleil-Waututh Nation v. Canada (Attorney General)* 2018 FCA 153, decisia.lexum.com. [https://decisia.lexum.com/fca-caf/decisions/en/item/343511/index.do?r=AAAAAQAMMjAxOCBmYy2EgMTUzAQ].

81 “Pipeline Profiles: Trans Mountain,” Canada Energy Regulator, Government of Canada, accessed October 13, 2019, cer-rec.gc.ca. [https://www.cer-rec.gc.ca/nrg/ntgrtd/pplnprtl/pplnprfls/crdl/trnsmntn-eng.html]

82 Christopher Guly, “Federal Court of Appeal Provides Clarity on Leave Motions in Trans Mountain Ruling, Lawyer Says,” *Lawyer’s Daily*, September 11, 2019, thelawyersdaily.ca. [https://www.thelawyersdaily.ca/articles/15110]

delayed, and concerns addressed by the federal government and re-issued. Now there is yet another court battle. Representatives of the TWN have said that as per the findings in their assessment, they will pursue the issue through the courts, to the Supreme Court if necessary.⁸³

STK'EMLÚPSEMC TE SECWEPENC NATION AJAX MINE ASSESSMENT

In 2015, the Stk'emlúpsenc te Secwepenc Nation (SSN) filed a Notice of Civil Claim in the B.C. Supreme Court, directed at the B.C. government and KGHM Ajax Mining Inc.⁸⁴ Earlier that year, a proposal was put forward to the Canadian government to allow KGHM Ajax to build a 1,700-hectare open-pit gold and copper mine at Pípsell (Jacko Lake). Pípsell is located on unceded Secwepenc land, and is of immense cultural, historic, and ecological importance to the Secwepenc people,⁸⁵ in particular to Secwepenc women who use the site for sweats and connecting with each other.⁸⁶ The 2015 Notice highlighted this fact and asserted the Secwépeḿc's rights and title to the land and water. They requested a federal Independent Review Panel to conduct a full environmental assessment of the Ajax project. This request was denied.

In response, the Secwepenc decided to conduct a Secwépeḿc-led assessment of the mine, based in Secwepenc law, customs, and practices, and importantly including the voices of Indigenous knowledge keepers, youth, and community members at all stages of the process.⁸⁷ It focused on the interconnectedness of the land, water, sky, and community,

while also referencing Section 35 and UNDRIP, and when completed it was almost 300 pages long.

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**The Secwépeḿc's environmental assessment concluded that the Ajax mine, if approved, would have adverse effects on the land, water, and animals of Pípsell, in addition to the man camps required that would make women and girls vulnerable.**

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In 2017, in light of these conclusions, the SSN informed the Canadian and B.C. governments that it does “not give its free, prior and informed consent to the development.”⁸⁸

The SSN used the environmental assessment to build alliances and solidarity with neighbouring communities and political organizations like the Union of British Columbia Indian Chiefs, the BC Assembly of First Nations, and the Assembly of First Nations, as well as the City of Kamloops. Their evidence was grounded empirically utilizing both Secwepenc knowledge and Western science. Including community voices at every step of the assessment meant that there was a high degree of community consensus. Given the degree of near-unanimous opposition, investors in the mine began to raise concerns and in late 2017, the B.C. government rejected KGHM Ajax a certificate of approval and denied their permit for the mine. While B.C. cited the SSN and surrounding community's concerns as considerations, they were not listed as deciding factors.⁸⁹

HEILTSUK AND THE INDIGENOUS MARINE RESPONSE CENTRE

In October of 2016, the Kirby Corporation's tug-barge known as the Nathan E. Stewart spilled over 100,000 litres of pollutants into Heiltsuk territory off the northern coast of B.C., in an area that was used for food harvesting, as a village, and an important cultural site. Three years later, the Heiltsuk are still dealing with the consequences of lack of access to large parts of the area. While both the B.C. and Canadian governments have refused to do a post-spill environmental impact assessment in collaboration with the Heiltsuk, the latter have conducted an independent inquiry into the

⁸³ Jason Markusoff, “The Trans Mountain Expansion Will Struggle for Years—Even If It Gets the Green Light in 2019,” *Maclean's*, December 17, 2018, macleans.ca. [<https://www.macleans.ca/politics/trans-mountain-expansion-challenges-2019/>]

⁸⁴ Notice of Civil Claim, Chief Ron Ignace, Chief Shane Gottfriedson, Secwepenc Nation (Plaintiffs), and the Province of British Columbia, KGHM Ajax Mining Inc., and Canada (Attorney General) (Defendants), 2015, firstpeopleslaw.com. [https://www.firstpeopleslaw.com/database/files/library/Notice_of_Civil_Claim_Secwepenc_Nation_vs_BC_Sept_21_2015_.pdf]

⁸⁵ *Honouring Our Sacred Connection to Pípsell: Stk'emlúpsenc te Secwepenc says Yes to Healthy People and Environment*, Stk'emlúpsenc Te Secwepenc Nation (March 4, 2017), stkemlups.ca. [https://stkemlups.ca/files/2013/11/2017-03-ssnajaxdecisionsummary_0.pdf]

⁸⁶ *SSN Pípsell Report for the KGHM Ajax Project at Pípsell*, Stk'emlúpsenc Te Secwepenc Nation (May 16, 2017), 34. [<https://drive.google.com/file/d/0B92rPs-T5VkGWVpacENEWTM5MDA/view?usp=sharing>]

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Carol Linnitt, “B.C. Denies Ajax Mine Permit Citing Adverse Impacts to Indigenous Peoples, Environment,” *The Narwhal*, December 17, 2017, thenarwhal.ca. [<https://thenarwhal.ca/b-c-denies-ajax-mine-permit-citing-adverse-impacts-indigenous-peoples-environment/>]

incident, a legal analysis according to Heiltsuk law (known as *vi ás*), and in 2018 began legal proceedings against Canada, B.C., and the Kirby Corp., for damages from the spill.⁹⁰ Finally, they have called for the creation of an Indigenous Marine Response Centre in their territory to assess, prevent, and mitigate future spills.

More specifically, the assessment process, which was led by women,⁹¹ included a seventy-five-page investigative report detailing the causes of, responses to, and failures to address the 2016 spill. The process strived for substantive engagement in the community and was grounded in traditional legal frameworks. It was self-published and Heiltsuk protocols and knowledge were woven throughout. Chief Councillor Marilyn Slett described the process as an act of “defining who we are.”⁹²

The legal analysis, *vi ás*, meant to underwrite Heiltsuk jurisdiction and management, was overseen by members of the community, specifically representatives of the five Heiltsuk communities, including youth and elders.

These efforts built on a Declaration undertaken by Heiltsuk women in 2015, which identified women’s role in governance and rights to safety, health, and wellness.⁹³ While the legal analysis promoted restitution, it was framed around ensuring rights and jurisdiction as opposed to strictly compensation.

Finally, the Heiltsuk have proposed an Indigenous Marine Response Centre (IMRC) to monitor and respond to marine shipping accidents, protect the coast, and, at the least, mitigate

any harm to the water.⁹⁴ While the proposal was not granted funding by the federal government, the Heiltsuk instead partnered with Horizon Maritime, a company that supports industry marine operations, to form Heiltsuk Horizon Maritime Services Limited.⁹⁵ The partnership will allow the Heiltsuk to support the IMRC regardless of government funding and additionally lease two emergency towing vessels to the Canadian Coast Guard, operated by their Heiltsuk crews, who are trained in Canadian Coast Guard emergency response and search and rescue procedures.

MI’GMawei MAWIOMI SECRETARIAT AND CHALEUR TERMINALS

In 2015, the Mi’gmawei Mawiomi Secretariat (MMS), led by executive director Tanya Barnaby on behalf of communities on the Gaspé Peninsula in northern New Brunswick, took legal action against the New Brunswick government. They requested a judicial review, in the New Brunswick Court of Queen’s Bench, of the proposed oil terminal and related transportation infrastructure to bring crude oil from Alberta to New Brunswick on Mi’gmaq lands. They submitted this request on the grounds that the province failed to adequately consult with the Mi’gmaq before the project’s approval. Unfortunately, the Court determined that the Secretariat hadn’t submitted their request in an adequate amount of time from the project’s approval date (July 2014) and therefore, the request was denied and the case was lost.⁹⁶

Perhaps this is not surprising, given the low success rate of First Nations challenging resource developments in court, as noted in the previous section. However, the campaign to stop the terminals revolved around Mi’gmawei Mawiomi Secretariat’s extensive mapping and environmental management policies, specifically relating to salmon populations. They made their case both from a jurisdictional

⁹⁰ *Investigation Report: The 48 Hours after the Grounding of the Nathan E. Stewart and Its Oil Spill*, Heiltsuk Tribal Council (March 2017), heiltsuknation.ca. [<http://www.heiltsuknation.ca/wp-content/uploads/2017/10/HTC-NES-IRP-2017-03-31.pdf>]

⁹¹ “Heiltsuk Women’s Declaration,” May 15, 2015. [<https://drive.google.com/file/d/1pJivHaRKqU0LRDYDId8bIcHPr16r2WS4/view>]

⁹² Beth Leighton, “Heiltsuk First Nation Says Oil Spill Underlines Lack of Federal Commitment,” *CTV News*, April 6, 2017, ctvnews.ca. [<https://www.ctvnews.ca/canada/heiltsuk-first-nation-says-oil-spill-underlines-lack-of-federal-commitment-1.3358336>]

⁹³ “Heiltsuk Women’s Declaration,” 2015. [<https://drive.google.com/file/d/1pJivHaRKqU0LRDYDId8bIcHPr16r2WS4/view>]

⁹⁴ *Indigenous Marine Response Centre (IMRC): Creating a World-Leading Response System*, Heiltsuk Tribal Council (November 2019), heiltsuknation.ca. [http://www.heiltsuknation.ca/wp-content/uploads/2017/11/HTC_IMRC-Report_Nov-15-2017.pdf]

⁹⁵ “Heiltsuk Horizon Announces First Nations/Industry Partnership to Support World-Leading Protection of Canada’s Oceans and Coastal Communities,” Heiltsuk Horizon press release, May 11, 2018, heiltsukhorizon.ca. [https://heiltsukhorizon.ca/uploads/Heiltsukpercent20Horizonpercent20Announcementpercent20Release_EN_FINAL.PDF]

⁹⁶ Bridget Yard, “Mi’kmaq communities’ Chaleur Terminals Challenge Quashed,” *CBC News*, August 9, 2016, cbc.ca. [<https://www.cbc.ca/news/canada/new-brunswick/chaleur-terminals-challenge-dismissed-1.3713788>]

perspective but also an environmental assessment framework.⁹⁷

These arguments were sharpened during the court proceedings and helped to build solidarity with the non-Native community in New Brunswick. (It should be noted that this followed the Elsipogtog campaign against fracking in that province two years earlier and the 2013 Lac-Mégantic disaster in Quebec, which meant that the general public better understood the stakes). Indeed, many non-Indigenous organizations joined the campaign.⁹⁸

Despite losing the judicial review, the Mi'gmawei Mawiomi Secretariat also pursued a court action against the federal government for failing to ensure that consultation obligations were met. The high cost of those proceedings forced the Secretariat to abandon that strategy.⁹⁹ In the meantime, the Secretariat has developed a number of land management priorities, among them “getting control of resource development in Gespégewāgi.”¹⁰⁰ This includes work on negotiations with governments, completing a management plan of the region, strengthening their consultation program, and “permanently stop[ping] Chaleur Terminals Inc. from transporting their bitumen oil via rail.”¹⁰¹ Permanently, because at the time of writing, construction has yet to proceed but could resume at any time. While the Chaleur Terminal

project has provincial permissions, it has cited “market conditions” as the cause of delay.¹⁰²

Consent Protocols and Permitting

A second type of consent-based jurisdiction consists of formal protocols for providing consent, and then by extension a formal permitting system once consent has been provided. It often occurs during or immediately following development proposals. The Neskantaga First Nation, Saugeen Ojibway Nation, and Sagkeeng First Nation have each developed a consent process for proponents of development in their territories.

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**It is not surprising that each community is, at the time of writing, facing large-scale and potentially transformative projects that are putting their protocols to the test and outcomes are yet to be determined.**

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Yet another example comes from the T̄silhqot̄'in, concerning mushroom harvesting permits. While the scale of development is less invasive, it nonetheless points to a tool of jurisdiction that can be applied to a spectrum of resource and wildlife management, post consent.

NESKANTAGA'S DEVELOPMENT PROTOCOL

In May 2012, Cliffs Natural Resources (now Cleveland-Cliffs, Inc.) proposed to build a chromite mine in Northern Ontario, Treaty 9 territory.¹⁰³ Since then, the area has become known as the Ring of Fire (RoF) to denote the ring-like chromite deposit in the middle of nine First Nations.¹⁰⁴ Neskantaga First Nation is one of these nine communities who are organized into a Tribal Council called Matawa First Nations Management (MFNM). Soon after Cliff's investment in the mine on their land was announced, they created a protocol meant to guide

⁹⁷ Federal Court Notice of Application, Chief Darcy Gray, the Listuguj Mi'gmaq First Nation, and the Mi'gmawei Mawiomi Secretariat (Applicants) and Canada (Attorney General), the Minister of Transport, the Minister of Fisheries, Oceans, and the Coast Guard, the Minister of Environment and Climate Change, the Belledune Port Authority, and Chaleur Terminals Inc. (Respondents), July 20, 2016, firstpeopleslaw.com. [https://www.firstpeopleslaw.com/database/files/library/2016_07_20___Application___Federal_Court_T_1207_16.pdf]

⁹⁸ “Belledune Oil Terminal Project Faces Opposition in Quebec,” *CBC News*, July 6, 2015, cbc.ca. [https://www.cbc.ca/news/canada/new-brunswick/belledune-oil-terminal-project-faces-opposition-in-quebec-1.3140733]

⁹⁹ “Les Micmacs de la Gaspésie Abandonnent Leur Poursuite contre le Gouvernement Fédéral,” *Radio-Canada*, May 8, 2017, ici.radio-canada.ca. [https://ici.radio-canada.ca/nouvelle/1032192/poursuite-micmacs-gaspesie-gouvernement-federal-cha-leur-terminal-belledune]

¹⁰⁰ “Priority #2: Get Control of Resource Development in Gespégewāgi,” Migmawei Mawiomi Priorities, accessed October 13, 2019, migmawei.ca. [https://www.migmawei.ca/priority-2/]

¹⁰¹ Ibid.

¹⁰² “L'avenir du Projet Chaleur Terminals Est Incertain,” *Radio-Canada*, May 8, 2017, ici.radio-canada.ca. [https://ici.radio-canada.ca/nouvelle/1032199/avenir-projet-cha-leur-terminals-transport-petrole-train]

¹⁰³ “Cliffs Chromite Project,” Government of Ontario, published March 20, 2014, updated August 1, 2019, ontario.ca. [https://www.ontario.ca/page/cliffs-chromite-project]

¹⁰⁴ Jed Chong, *Resource Development in Canada: A Case Study on the Ring of Fire* (Ottawa: Library of Parliament, 2014), lop.parl.ca. [https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201417E]

“Our Gvilás directs us to balance the health of the land and the needs of our people, ensuring there will always be plentiful resources. We have honoured and maintained our traditions since time immemorial and continue this covenant today”

— THE HEILTSUK NATION

Heiltsuk Tribal Council, “*Dáduqvlá1 qntxv Ğvilásax*”:

To look at our traditional laws - Decision of the Heiltsuk (Haítzaqv) Dáduqvlá Committee Regarding the October 13, 2016 Nathan E. Stewart Spill, May 2018

“‘Give it back’ means to restore the livelihood, demonstrate respect for what is shared – the land – by making things right through compensation, restoration of freedom, dignity, and livelihood.”

— SYLVIA MCADAM SAYSEWAHUM

Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems
(UBC Press – Purich Publishing Ltd., 2015)

any development that would take place in their territory.¹⁰⁵ This has, in some cases, put them at odds with other First Nations prepared to proceed with the mine.

While Neskantaga has stated they are “a pro-development community” they do insist on ensuring their jurisdiction is respected and that they receive fair shared, benefits pending the outcomes of a proper environmental assessment. Their development protocol asserts that they are the rights and title holders of the land, despite what the Mining Act or other legislation may say. The protocol references the importance of consent that must be community derived and not just from the leadership, identifies Treaty 9 as affirming their rights to consent, and dismisses other colonial laws and policies such as the Ontario Mining Act and the 1947 trapline system, which could be used to undermine their rights and title to the land. Finally, Neskantaga has refused to allow meetings with developers in their community unless certain criteria have been met and suitable relationships have been built.

While the original mining firm, Cliffs Natural Resources, has suspended their activities in the Ring of Fire, Noront Resources has acquired 80 percent of claims in the Ring of Fire. They announced in 2019 that discussions are proceeding on a smelter location, road access, environmental assessment, and plans for construction. Many of these discussions include other First Nations in the MFNM. The CEO of Noront believes ore could be mined from the Ring of Fire as early as 2024.¹⁰⁶

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**Neskantaga continues to demand a proper environmental assessment and that community consent be given before construction begins.**  
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SAGKEENG LAWMAKERS AND MANITOBA HYDRO

In 1997, Sagkeeng negotiated the first Hydro Accord with Manitoba Hydro, which saw the company purchase annual licenses from Sagkeeng for use of the Winnipeg River to

power six generating stations.¹⁰⁷ Partially as a result of the negotiations, the Sagkeeng Lawmakers Assembly was established, comprised of community members who meet regularly to discuss traditional Anishinaabe laws that are to be translated into written laws (these often relate to land use). Once agreed upon by the Assembly and drafted, new laws are then brought to the Sagkeeng membership to be ratified. One of these laws is the O’na-katch-to’o-na-wa Onakonigawin (or, conservation law), is meant to outline how resource extraction should proceed in their territory.¹⁰⁸ With a re-negotiation of the Hydro Accord in 2018, the community ratified the law and voted against a new deal, citing limited compensation, an unfair negotiation process, and that not enough of the community was informed about the project.¹⁰⁹

O’na-katch-to’o-na-wa Onakonigawin is critical to Sagkeeng’s assertion of authority. It “sets out the terms on which Sagkeeng’s consent to activities or projects in Sagkeeng Traditional Territory or that affect Sagkeeng Rights or Sagkeeng values may be obtained.” Broadly, decisions must (a) honour the Creator through the conservation and protection of the natural environment; (b) honour our ancestors by protecting and enhancing the exercise of our inherent Aboriginal and Treaty rights; and (c) honour future generations by fostering economic development and opportunities within and around the Territory.

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**The protocol is signed by chief and council, women’s council, as well as the elder, youth, men’s councils. It also ensures that those community members who are most impacted by a development will be consulted with. Finally, enforcement of decisions includes a Consultation and Accommodation Protocol Team, who are responsible for ensuring adherence by all parties involved.**  
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¹⁰⁵ Neskantaga First Nation Development Protocol, Neskantaga First Nation (March 1, 2012). [http://s3.documentcloud.org/documents/3023248/NESKANTAGA-FIRST-NATION-Protocol-March-01-2012.pdf]

¹⁰⁶ Karen McKinley, “Noront CEO gives confident update on Ring of Fire development,” *SooToday*, February 25, 2019, sootoday.com. [https://www.sootoday.com/local-news/noront-ceo-gives-confident-update-on-ring-of-fire-development-1259907]

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¹⁰⁷ “Agreement & Accord between Sagkeeng Nation and Manitoba Hydro,” March 21, 1997, hydro.mb.ca. [https://www.hydro.mb.ca/community/indigenous_relations/pdf/sagkeeng-nation-settlement-1997.pdf]

¹⁰⁸ *Sagkeeng Anicinabe Consultation and Accommodation Protocol*, Sagkeeng Anicinabe (May 2018), sagkeeng.ca. [http://www.sagkeeng.ca/wp-content/uploads/2018/06/Sagkeeng-Consultation-Protocol-2018-Draft.pdf]

¹⁰⁹ “July Newsletter,” Sagkeeng First Nation (July 2014), sagkeeng.ca. [http://www.sagkeeng.ca/wp-content/uploads/2015/02/072014-N.pdf]

With a failed re-negotiation of the Accord for access to the Winnipeg River, there is another threat posed by Manitoba Hydro in the form of the Manitoba-Minnesota Transmission Project. The 213 kilometre transmission line would run from the Winnipeg area through Sagkeeng's territory, linking with another line across the Canada-U.S. border.¹¹⁰ To enforce the O'na-katch-to'o-na-wa Onakonigawin, Sagkeeng has filed for a judicial review challenging the province's consultation on the project and setting aside the environmental review that greenlit the project. With provincial and federal approvals obtained or pending, Manitoba Hydro plans to begin construction in fall 2019. As such, the First Nation has amended their filing in court to move up the date of a hearing with the hopes of having their jurisdiction recognized.¹¹¹

SAUGEEN OJIBWAY NATION AND NUCLEAR WASTE

The Saugeen Ojibway Nation (SON), made up of two First Nations, filed a claim in 2003 "seeking a declaration of Aboriginal title to portions of Lake Huron and Georgian Bay waterbeds."¹¹² While this builds on previous claims, it has also corresponded to Ontario Power Generation's (OPG) search for a site to build a deep geologic repository to store nuclear waste from the Bruce Power nuclear generating stations.¹¹³ In 2001, the town of Kincardine had approached OPG to host the site, but without discussion from SON. Indeed, the construction of nuclear facilities in their territory generally has been undertaken without the input of the Anishinaabeg in the region.

In response to this proposal, as well as a number of challenges relating to environmental management in the region, Neyaashiinigmiing and Saugeen First Nations created the Saugeen Ojibway Nation Environment Office in 2004 and

began to develop community processes and consent protocols for development in their region, with specific reference to the deep geologic repository.¹¹⁴ These include a four-phase community engagement process, as well as four principles of the community decision-making process (community driven, rooted in values, protective of rights, and long-term, "big picture" thinking).¹¹⁵ With these processes, effective lobbying, and a strong title claim, the OPG committed to obtaining the communities' consent before proceeding with any construction. They also committed to addressing long-standing consequences of energy projects in their territory.

Since the agreement was struck, the SON has worked closely with OPG and other regional partners to develop engagement and policy processes, gather as much information as possible about the proposal, and continues to monitor changes to it. While a three-member "joint review panel" has done an environmental assessment and approved the project to proceed,¹¹⁶ the SON is still one to two years away from a community decision. Meanwhile, SON's Aboriginal title case began in late April 2019 and is expected to conclude within the year.¹¹⁷

T̄SILHQOT'IN MUSHROOM PERMITS

The T̄silhqot'in Nation is comprised of six communities located in British Columbia. In May 2018, following a devastating forest fire, the T̄silhqot'in introduced regulations that required all non-T̄silhqot'in people to acquire a permit in order to harvest mushrooms on their land (the mushrooms

¹¹⁰ Joyanne Pursaga, "Sagkeeng Launches Legal Action against Hydro, Province," *Winnipeg Sun*, April 6, 2018, winniegsun.com. [https://winniegsun.com/news/provincial/sagkeeng-launches-legal-action-against-hydro-province]

¹¹¹ Tessa Vanderhart, "Manitoba Breached Its Consultation Rules on Transmission Line: Sagkeeng," *Winnipeg Free Press*, June 27, 2019, winniegsun.com. [https://www.winniegsun.com/local/manitoba-breached-its-consultation-rules-on-transmission-line-sagkeeng-511909292.html]

¹¹² Saugeen Ojibway Nation Environment Office, "Claims Update Newsletter, 2019" [https://www.saugeenojibwaynation.ca/wp-content/uploads/2018/02/Claims_Newsletter_2016.pdf?fbclid=IwAR2aO4_EIzDMCUww-EJysy2i1XqlBMAutYVD9o-JFMjjDOxaTb1Ar_mNVtY]

¹¹³ "Background on the Deep Geologic Repository," Ontario Power Generation, May 10, 2019, opg.com. [https://www.opg.com/strengthening-the-economy/our-projects/the-deep-geologic-repository/background-information/]

¹¹⁴ "About Us," Saugeen Ojibway Nation, accessed October 13, 2019, saugeenojibwaynation.ca. [https://www.saugeenojibwaynation.ca/about/]

¹¹⁵ "Why Are We Gathering?" Saugeen Ojibway Nation, 2018, saugeenojibwaynation.ca. [https://www.saugeenojibwaynation.ca/wp-content/uploads/2018/02/SONpercent20Stewardshippercent20andpercent20Nuclearpercent20Issuespercent20Posterpercent20Seriespercent201.pdf]

¹¹⁶ "Joint Review Panel: Deep Geologic Repository," Canadian Nuclear Safety Commission, Government of Canada, accessed October 13, 2019, nuclearsafety.gc.ca. [http://nuclearsafety.gc.ca/eng/the-commission/joint_review_panel/deep-geologic-repository/index.cfm]

¹¹⁷ "Saugeen Ojibway Nation Land & Aboriginal Claim Trial Set to Begin," Saugeen Ojibway Nation press release, April 24, 2019, saugeenojibwaynation.ca. [https://www.saugeenojibwaynation.ca/son-land-claim-press-release/]

grow in post-fire conditions).¹¹⁸ The permits cost \$20.00 for pickers and \$500.00 for buyers and are valid for ninety days in designated mushroom harvesting areas. Other areas are reserved for community harvesters or for conservation. The regulations also include a Leave No Trace policy, whereby individuals who camping and harvesting on their lands are not allowed to damage the land or waters. If they did, their permit would be revoked and they would be fined. Indeed, proceeds from the permits go directly to “ensuring designated campsites are kept clean with adequate facilities.”¹¹⁹

The decision to introduce such environmental regulations was community-based. T̓silhqot̓in use(d) their own governance structures to create, enforce, and amend the permitting system and eventually developed an online permitting process and accompanying maps of harvest areas.¹²⁰

After one harvesting season, the T̓silhqot̓in saw both compliance from non-Indigenous harvesters and economic benefits from the initiative.¹²¹

Revenue supported local contracts for outhouses and garbage bins. But in T̓silhqot̓in households, inter-family trade also increased and became a source of income for some community members.

The T̓silhqot̓in are also increasingly working to enforce jurisdiction around conservation and wildlife management. On the former, they have unilaterally created Dasiqox Tribal Park to protect the land and promote cultural revitalization

¹¹⁸ “Mushroom Harvesting in T̓silhqot̓in Territory,” T̓silhqot̓in National Government pamphlet, 2018, tsilqotin.ca. [http://www.tsilhqotin.ca/Portals/0/PDFs/PublicMushroomInformationPamphletDraft2_SG.pdf]

¹¹⁹ “T̓silhqot̓in Issue Permits for Mushroom Harvest in Territory,” T̓silhqot̓in National Government, accessed October 13, 2019, tsilqotin.ca [http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2018_05_18_MurshroomPermitPR.pdf]

¹²⁰ “Stewardship,” T̓silhqot̓in National Government, accessed October 13, 2019, tsilqotin.ca. [http://www.tsilhqotin.ca/Lands-Resources/Stewardship]

¹²¹ “Interior B.C. First Nation Government Pleased with 2018 Mushroom Harvesting Season,” *Williams Lake Tribune*, August 8, 2018, www.wltribune.com. [https://www.wltribune.com/news/interior-b-c-first-nation-government-pleased-with-2018-mushroom-harvesting-season/]

and sustainable economies.¹²² In response to declining moose population, paired with the aforementioned threat of wildfire, the T̓silhqot̓in have created an Emergency Moose Protection Law and formed an international alliance with the D̓akelh Nation to establish and enforce a moratorium on moose hunting for their own members.¹²³ In July, 2018, the Alliance announced a ban for non-Indigenous hunters, one that the province of B.C. has not recognized. As a consequence, court proceedings have begun to help extend the moratorium to non-Indigenous hunters taking moose from T̓silhqot̓in and D̓akelh territories in the early season.¹²⁴

Re-Occupying the Land

A third, and perhaps more direct, type of assertion revolves around physical reclamation or occupation of lands and waters. While the examples discussed so far emerge from community-based leadership (at least geographically), there are a number of cases of community members, in some cases working across national boundaries, attempting to exercise jurisdiction by occupying and using the land. And while they may disrupt Canadian jurisdiction, each also provides a service to the community. The Tiny House Warriors provide low-impact housing solutions, the Unist’ot̓en Healing Centre provides mental health and substance abuse treatment, and Nimkii Aazhibikong offers land-based education. The case of Sylvia McAdam Saysewahum, while somewhat of an exception, demonstrates some of the challenges encountered defending lands and asserting jurisdiction when coming up against other Indigenous interests.

THE TINY HOUSE WARRIORS

The Tiny House Project, a campaign to build ten “tiny houses” along the 518-kilometre route of the Trans Mountain pipeline as it crosses unceded Secwepemc land. If the pipeline construction goes forward, it would lead to the establishment of man camps, potential environmental harm, and violation of Secwepemc jurisdiction.¹²⁵ While some bands within the

¹²² “Our Story,” Dasiqox Tribal Park, accessed October 13, 2019, dasiqox.org. [https://dasiqox.org/about-us/our-story/]

¹²³ “Emergency Moose Protection,” T̓silhqot̓in Nation, August 27, 2018, twilqotin.ca. [http://www.tsilhqotin.ca/Portals/0/PDFs/TsilhqotinEmergencyMooseProtectionLaw_Signed_wScheduleA.PDF]

¹²⁴ “T̓silhqot̓in and Southern D̓akelh Announce Ban on Moose Hunt,” T̓silhqot̓in Nation and Southern D̓akelh Nation Alliance press release, September 5, 2018, tlaztennation.ca. [http://tlaztennation.ca/silqotin-and-southern-dakelh-announce-ban-on-moose-hunt/]

¹²⁵ “Home,” Tiny House Warriors, accessed October 13, 2019, tinyhousewarriors.com. [http://tinyhousewarriors.com/]

Secwepemc Nation have supported the expansion, many other groups have not (bands or otherwise).¹²⁶ As such, the Tiny House Project is not only a strategic reoccupation of Secwepemc territory to reassert jurisdiction but also provides housing for Secwepemc families—housing that is environmentally conscious and that can also be used as culture and language centres. The project is almost entirely funded by donations and is volunteer-run.

The project is led primarily by women in the Secwepemc Women's Warrior Society and its principles are grounded in Secwepemc law and responsibilities.¹²⁷ But its principles are also simply practical. As the Tiny House Warriors assert, "each tiny house will provide housing to Secwepemc families facing a housing crisis due to deliberate colonial impoverishment."¹²⁸

A response to a housing crisis, cultural loss crisis, and rights infringement crisis, the house construction is open to all community members who wish to participate, which in turn builds relationships across Secwepemc communities.

There is also reference to those most marginalized in Secwepemc society including two-spirit individuals. Finally, the project's use of social media and video-messaging makes their message and cause accessible and easy to disseminate.

The Tiny House Project remains active in its reoccupation and sharing of information about Secwepemc resistance to the Trans Mountain pipeline expansion and has gained many supporters. Last year The Union of BC Indian Chiefs passed resolution 2018-04 supporting the movement.¹²⁹ In

spring 2019, one of the tiny houses in North Thompson River Provincial Park was raided and Kanahus Manuel was charged with mischief. Soon after, while challenging a consultation session on the pipeline at Thompson Rivers University, the founders of the Tiny House Warriors, Snutetkwe Manuel, Mayuk Manuel, and Isha Jules, were arrested and charged. After their conditional release, they returned to what has become a "village" of land defenders blockading the construction of a man camp.¹³⁰ They have since expanded to Mount Robson Provincial Park, even holding a concert. The Park asserts they were "not contacted by organizers about plans to use the Park for a special event."¹³¹

UNIST'OT'EN HEALING CENTRE

The Unist'ot'en, a clan of the Wet'suwet'en, established the Unist'ot'en Healing Centre in 2015 on unceded Unist'ot'en territory outside Houston, British Columbia. This was in response to increasing development pressures on Wet'suwet'en territory as well as the need for "holistic healing for Indigenous families."¹³² So while a TransCanada subsidiary called Coastal Gaslink Pipeline Limited sought to build a pipeline for fracked gas just kilometres from the Healing Centre, over the past four years the Unist'ot'en expanded and welcomed a growing community of those seeking land-based healing. This is open to Indigenous women and Two-Spirit people who are made particularly vulnerable "by colonialism and structural racism."¹³³ The Unist'ot'en insist the camp is not a site of protest or demonstration but "an occupation and use of our traditional territory as it has for centuries."¹³⁴

The Unist'ot'en Healing Centre is run primarily by the Unist'ot'en community and allies. It is sustained through

¹²⁶ Simon Little, "We've Made Our Decision: B.C. First Nation Speaks Up for Trans Mountain Pipeline," *Global News*, April 24, 2018, globalnews.ca. [https://globalnews.ca/news/4165979/first-nation-support-trans-mountain-pipeline/]

¹²⁷ "Women's Declaration Against Kinder Morgan Man Camps," Secwepemculecw Assembly, accessed October 13, 2019, secwepemculecw.org. [https://www.secwepemculecw.org/women-s-declaration]

¹²⁸ "Home," Tiny House Warriors, accessed October 13, 2019, tiny-housewarriors.com. [http://tinyhousewarriors.com/]

¹²⁹ "Final Resolutions," Union of B.C. Indian Chiefs, February–22, 2018. [https://d3n8a8pro7vhmx.cloudfront.net/ubcic/pages/132/attachments/original/1522350786/UBCIC_CC02-21_Resolutions2018_Combined.pdf?1522350786]

¹³⁰ Justin Brake, "Tiny House Warriors Establish New Village to Resist Pipeline, Assert Secwepemc Sovereignty," *APTN National News*, July 19, 2018, aptnnews.ca. [https://aptnnews.ca/2018/07/19/tiny-house-warriors-establish-new-village-to-resist-pipeline-assert-secwepemc-sovereignty/]

¹³¹ "Tiny House Warriors Descend on Mount Robson," *Rocky Mountain Goat*, August 31, 2018, therockymountaingoat.com. [https://www.therockymountaingoat.com/2018/08/tiny-house-warriors-descend-on-mount-robson/]

¹³² "Healing Centre," Unist'ot'en Camp, accessed October 13, 2019, unistoten.camp. [https://unistoten.camp/come-to-camp/healing/]

¹³³ "Unist'ot'en Do Not Consent to Man Camps Increasing Violence against Our Women," Unist'ot'en Camp, accessed October 13, 2019, unistoten.camp. [https://unistoten.camp/mancamps/]

¹³⁴ *Heal the People, Heal the Land*, Unist'ot'en Camp (2019), unistoten.camp. [http://unistoten.camp/wp-content/uploads/2019/01/UZINE_View.pdf]

community support and the support of allies who contribute to the legal fund and maintenance efforts of the camp, pledge support for Unist'ot'en, and send supplies to the people and community at camp. The Unist'ot'en have rooted their work in the laws and traditions of their people, but also recognize and assert their rights under international laws and frameworks such as UNDRIP.

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**The Unist'ot'en FPIC protocol, for instance, takes the principle of FPIC but includes Unist'ot'en diplomatic protocols such as visiting and ensuring safety before any discussions begin. Those at the Centre have encouraged visitors to accept these laws.**<sup>135</sup>

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Regrettably, in December 2018, an injunction was granted to Coastal Gaslink to remove a blockade at Unist'ot'en, which was protecting the Healing Centre and access to the territory.¹³⁶ A few weeks later, in January, the RCMP enforced the injunction, dismantling the blockade, and arresting many of those at the nearby Gidim'ten Access Checkpoint. From there, they moved on the Unist'ot'en camp, where the local community declared the action trespass but opened the gate to avoid further violence, granting the company access.¹³⁷ Despite this, the conflict resulted in an outpouring of solidarity and sparked actions in over seventy cities around the world. The Healing Centre remains in operation today, accepting visits and support, and continues to run programming for women and youth integrating cultural healing practices.¹³⁸

¹³⁵ "Free Prior and Informed Consent Protocol," Unist'ot'en Camp, accessed October 13, 2019, unistoten.camp. [https://unistoten.camp/come-to-camp/fpic/]

¹³⁶ Karla Tait and Anne Spice, "An Injunction Against The Unist'ot'en Camp: An Embodiment Of Healing Faces Eviction," Yellowhead Institute, December 12, 2018, yellowheadinstitute.org. [https://yellowheadinstitute.org/2018/12/12/an-injunction-against-the-unistoten-camp/]

¹³⁷ Zoë Ducklow, "Nine Things You Need to Know about the Unist'ot'en Blockade," *The Tyee*, January 8, 2019, theyee.ca. [https://theyee.ca/Analysis/2019/01/08/LNG-Pipeline-Unistoten-Blockade/]

¹³⁸ "Unist'ot'en camp residents focus on life on the land, not protests," *Vancouver Sun*, February 3, 2019, vancouver.sun.com. [https://vancouver.sun.com/news/local-news/unistoten-camp-residents-focus-on-life-on-the-land-not-protests]

NIMKII AAZHIBIKONG

Nimkii Aazhibikong camp is located at Ompa Lake, north of Elliot Lake, Ontario. This is Anishinaabe *Aki* (land), but is considered Crown Land by the province. The camp was established on June 7, 2017 by Elders and community members from along the North Shore of Lake Huron and Manitoulin Island. It was the vision of Elders in the region who have always asserted that "one day we will return to the land." For the first two years, Anishinaabe Storyteller and Artist Isaac Murdoch and Métis artist Christi Belcourt, of the Onaman Collective, took the lead on fundraising. To date, the camp has been entirely built without government or organizational funding. Since June of 2017, "six cabins have been built, a community cook-house, and several traditional Anishinaabe lodge structures as well as a shower house, outhouses and storage sheds."¹³⁹ In 2020, they are proposing to add a large central language learning centre and art studio that visiting First Nations groups will be able to use, free of charge.

The camp's goal is to "connect young people with elders for arts and cultural land-based teachings, help to produce the next generation of fluent (Ojibway) speakers, and facilitate cultural resurgence of sustainable Indigenous practices and restoration of traditional Indigenous land and resource protection and management."¹⁴⁰ To quote Quinn Meawasige, a youth leader at the camp, "It's Anishinaabe people, doing Anishinaabe things, on Anishinaabe lands."

While Nimkii Aazhibikong is neither on recognized title lands, nor facing imminent threat of large-scale development, the reoccupation does not possess provincial permits or permissions and is responding to the broader crisis among Anishinaabek of language and culture loss. The camp is also concerned about an unsustainable economic system as a further threat to Indigenous land and life, and works to promote a vision of sustainable living that others can replicate. To this end, the camp's goal is to become zero-waste and use only "environmentally friendly technology."¹⁴¹

¹³⁹ "Nimkii Aazhibikong," Onaman Collective, accessed October 13, 2019, onamancollective.com. [http://onamancollective.com/research/]

¹⁴⁰ Ibid.

¹⁴¹ Erica Commanda, "Introducing Nimkii Aazhibikong: Culture Camp Forever," *Muskrat Magazine*, June 21, 2017, muskratmagazine.com. [http://muskratmagazine.com/introducing-nimkii-aazhibikong-culture-camp-forever/]

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**It is led by the visions and advice of elders and knowledge-keepers who advocate for a model of living distinct from the reserve system.**

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The camp also “empowers Indigenous youth to follow the traditional governance system and break models that the *Indian Act* has imposed on Indigenous people.”¹⁴² Like all of the case studies featured here, Nimkii Aazhibikong is a relatively new phenomenon, drawing on the very old.

SYLVIA MCADAM SAYSEWAHUM AND SAKĀW ASKIY MANAGEMENT INC.

In Sakāw Askiy Management Inc.’s 2014 forest management plan for the nearly three million hectares of land in the Prince Albert Forest Management Agreement Area of Saskatchewan, there are many mentions of Indigenous land use and consultation. Indeed, Sakāw counts among its major shareholders, the Meadow Lake Tribal Council and Montreal Lake Cree Nation.¹⁴³ That makes what is happening to lands Sylvia McAdam Saysewahum’s family has been working and living for generations all the more frustrating.

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**In response to increased logging by the company without her consent or meaningful input, McAdam Saysewahum, with the support of her brother Kurtis and others, began a campaign to prevent the clear-cut logging of her traditional territory on the shores of Stoney (Delaronde) Lake outside Big River First Nation. These are lands promised to her family in Treaty 6 negotiations.**

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This campaign followed Sylvia’s work in co-creating the Idle No More movement and numerous related campaigns, as well as publishing her first book, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems*.¹⁴⁴ Returning to her territory around the time of the new logging, Sylvia leveraged her networks to create solidarity among non-Indigenous

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¹⁴² Ibid.

¹⁴³ “Shareholders – Carrying Out Forest Management Activities,” Sakāw Askiy Management Inc., accessed October 13, 2019, sakaw.ca. [https://www.sakaw.ca/sam_shareholders.html]

¹⁴⁴ Sylvia McAdam Saysewahum, *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems* (Vancouver: UBC Press and Purich Publishing, 2015).

organizations like the Council of Canadians and began a letter-writing campaign to pressure Sakāw to stop logging,¹⁴⁵ organized locally and nationally to bring attention to the issue, established an annual Prayer Walk to end deforestation,¹⁴⁶ and in 2017 began moving trailers onto her family’s territory and constructing new cabins (previous family cabins had been burned down). Despite harassment and threats during these efforts,¹⁴⁷ Sylvia maintained a presence at the site and Indigenous land defenders and visitors from across the country occasionally gathered at the site to support one another.

While Sylvia was able to stall the clearcutting of some of her family’s lands, the province decided to issue a warning of non-compliance for refusing to vacate the lands and began dismantling and removing the family’s possessions. (The site is considered recreational and falls under the Saskatchewan *Parks Act*. Sylvia’s occupation was considered an “incompatible use”).¹⁴⁸ Refusing to leave, the province then undertook court action, effectively charging Sylvia and Kurtis with trespassing on their own lands. The case was heard in March 2019 in Prince Albert and ultimately dismissed.¹⁴⁹ The Crown did not appeal. In the midst of this conflict, Elders Juliette and Francis McAdam Seywehasum—Sylvia and Kurtis’s parents—both passed away. This has reaffirmed their commitment to return to the land.¹⁵⁰ Indeed, organizing efforts to challenge Sakāw Askiy Management Inc.’s forestry practices go on.¹⁵¹

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¹⁴⁵ “Saskatchewan Chapters Speak Against Clearcutting on Treaty 6 Lands,” Council of Canadians, August 31, 2016, canadians.org. [https://canadians.org/fr/node/14449]

¹⁴⁶ “4th Annual ‘Stop the Deforestation of Treaty 6 Lands Prayer Walk’” Facebook event, July 1, 2017, facebook.com. [https://www.facebook.com/events/1483474065017333/]

¹⁴⁷ Nickita Longman, “Deep Cuts,” *Briarpatch Magazine*, January 1, 2017, briarpatchmagazine.com. [https://briarpatchmagazine.com/articles/view/deep-cuts]

¹⁴⁸ Lenard Monkman, “Idle No More Founder in Sask. Court for ‘Unlawfully Occupying Park Land,’” *CBC News*, March 20, 2019, cbc.ca. [https://www.cbc.ca/news/indigenous/sylvia-mcadam-trial-cabin-land-1.5063051]

¹⁴⁹ Jason Kerr, “Charges Dismissed Against Idle No More Founders,” *Saskatoon Star Phoenix*, March 21, 2019, thestarphoenix.com. [https://thestarphoenix.com/news/local-news/charges-dismissed-against-idle-no-more-founders]

¹⁵⁰ “Charges Against Idle No More Co-Founder Dismissed,” *CBC News*, March 21, 2019, cbc.ca. [https://www.cbc.ca/news/canada/saskatchewan/idle-no-more-founder-charges-1.5066739]

¹⁵¹ Jayda Noyes, “‘We All Have an Air Addiction.’ Northern Sask.

Implementing Indigenous Models of FPIC: Considerations

This discussion on Reclamation has been written for Indigenous audiences. Non-Indigenous policy- and law-makers have a record of resisting these principles and practices and, as we have noted briefly, a record of convincing Indigenous leadership that state land tenure and economic development are the only options; that Indigenous alternatives are illegitimate and impossible. We hope that even this brief survey has indicated that there are indeed communities across the country imagining and breathing life into jurisdiction and consent-based relationships with industry and government that push back against the assimilation that has destroyed so many in Indigenous communities.

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**For us, we see this as a growing movement, away from alienation, dispossession and in some cases, even recognition.**  
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That being said, there are important considerations to note with respect to the case studies in this report.

First, it should be noted that the communities featured here are, by and large, also communities with very strong title claims. Some claims have been recognized by courts, or are likely to be. In that sense, it is not surprising that the majority fall within the province of B.C., where title lands are an ongoing conundrum for non-Indigenous policy makers. Strong claims mean that governments and industry, having absorbed the lessons of decades of legal losses, are wary of intervening in cases of effective Indigenous land and water management, including in cases where consent is enforced by First Nations. This is not to say that communities with “weak” claims (those in historic treaty areas primarily) cannot also enforce consent—it has been done in some of the cases cited here—but the tolerance by governments is less in these circumstances.

Second, and related, we hope it is clear that we are not making a strictly structural argument that reclamation efforts must exist separate and distinct from Canadian legal, political,

Residents Express Concern Over Forestry Practices, *Saskatoon Star Phoenix*, August 29, 2019, <https://thestarphoenix.com/news/local-news/we-all-have-an-air-addiction-northern-sask-residents-express-concern-over-forestry-practices>

and economic frameworks and discourses. While we do see space for expanding Indigenous jurisdiction beyond the reserve outside of state sanctioned processes, most of the communities profiled here engage in some form of state process or another, whether it is via co-management, court cases, or even negotiated agreements. We recognize that jurisdiction is ongoing and always subject to external pressures. So Indigenous people have and will continue to use whatever resources possible to assert community rights and responsibilities.

Third, these case studies do not exclusively aim to stop development. While Indigenous worldviews are often romanticized to prevent extensive land use, Indigenous people exploit the land, in the past and today. But historically it has been within limits. We accept that the Indigenous communities profiled here have regulated their activity to know where those limits are. And in some cases, consent frameworks permit development. Neskantaga First Nation, for instance, calls itself a “pro-development community.” In other cases, like that of the Secwépemc, opportunities for IBAs or mining revenue are not worth the scale of damage to the land.

The point is that Indigenous people make those decisions, enforce them in their territories, and have them respected by outsiders. This is the crux of jurisdiction.

While it is no doubt true that some communities do support and participate in development that may be ecologically unsound, the principles of consent-based jurisdiction offer an important opportunity for addressing biodiversity loss and mitigating climate change. The debates within Indigenous communities belong within Indigenous communities; it is not for outsiders to judge whether we are good or bad land “managers.” But it is the hope that those engaged in overconsumption and irreversible exploitation join the movement aiming to defend the land and waters and convince state governments, industry, and international institutions to support a change in our collective trajectory.

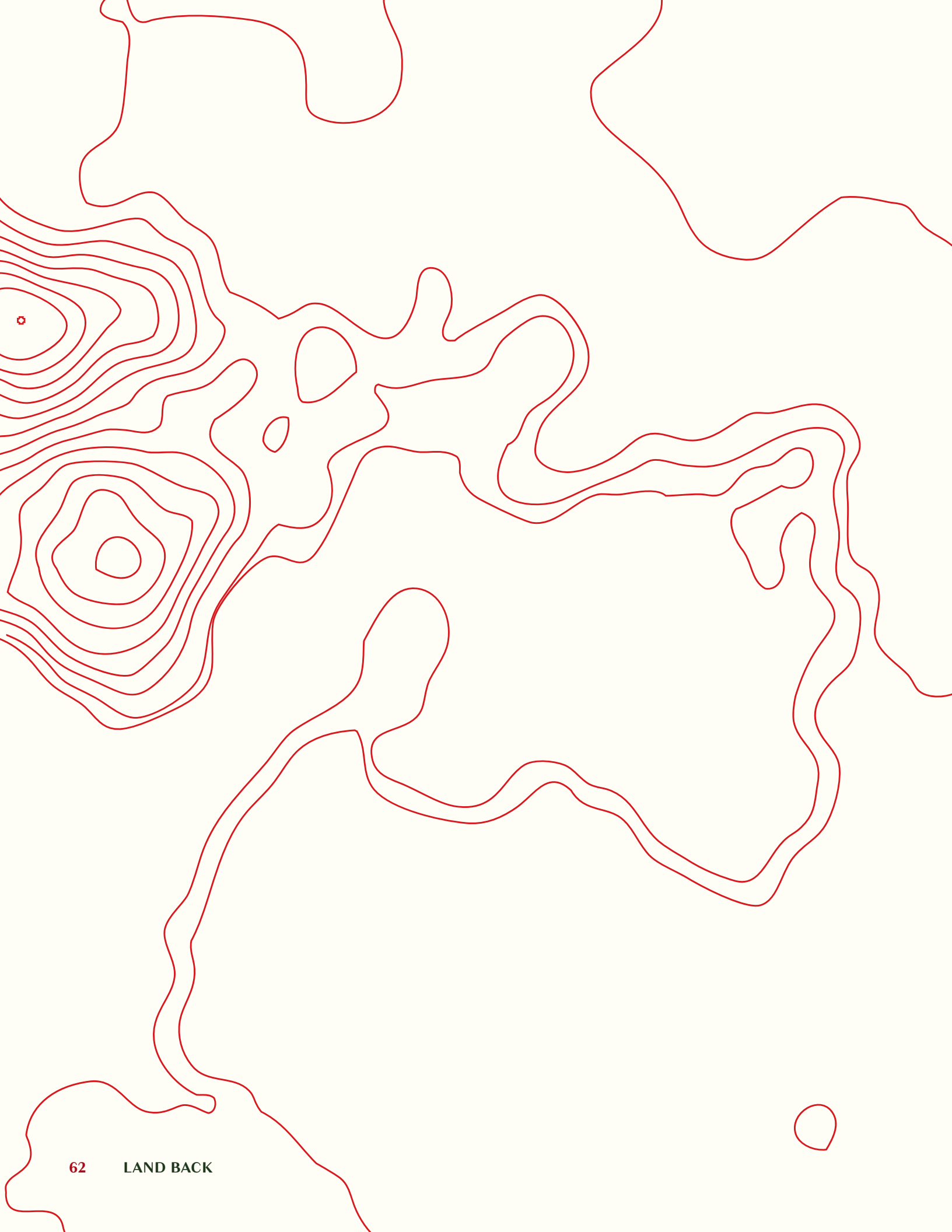
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**Indeed, these processes are wrapped up in the enduring and complicated conversations around the revitalization of Indigenous law and political transformation.**  
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How First Nations revitalize legal traditions in contemporary circumstances (as well as urban circumstances) and how we determine what is “authentic” through time, is not fully

understood. But history has shown that attempting to practice Indigenous law and governance when constituted through liberal and capitalist ways of relating to the land and each other produces formations that continue to exploit. Thus, reflecting on the “authentic” is an ongoing condition when it comes to reclamation.

Fourth, and relating to the latent economic development debate, there are other examples of conflict within communities. Whether these are tensions between band councils supporting development and hereditary leaders opposing it, or “official” leaders opposing the tactics of those considered activists, or the continuing exclusion of queer and Two Spirit community members, disputes often do arise. While government officials and industry tend to exploit perceived or real division, we see communities work to make the time and space to address disputes, instead of allowing the division to provide an alibi for external interests.

Finally, this list is not exhaustive. Perhaps these examples can be thought of as “promising practices” in consent-based jurisdiction, across each of these three areas. Not only are there many other Indigenous communities undertaking environmental assessment in traditional territories or reoccupying lands, there are strategies that we have yet to explore. These range from hunting and trapping regulations, to tribal conservation areas, Indigenous mapping strategies, official and “unofficial” land use planning practices. It is also worth noting, once again, that modern treaty settlement areas (and in some cases non-settlement areas) are not included in this discussion. They exist in a zone between “recognition” and “reclamation” and offer a number of lessons, practices, and philosophies of consent-based jurisdiction for a future Red Paper.





CONCLUSION

The Continuation of Life

The stakes of these struggles are immense. Of course, while Indigenous land and life are the focus here, the life of our species and of the planet are at risk from the type of economic philosophy and practices of perpetuated by colonialism and settler colonialism.

SO MUCH SO THAT IN MAY 2019, the UN's *Global Assessment Report on Biodiversity and Ecosystem Services* found that human activities are rapidly stripping the planet of biodiversity, contributing to the ecological devastation wrought by climate change. One million species are at risk of extinction.

While an apocalyptic future certainly awaits without transformational change, the report—the largest of its kind ever produced—finds some hope in the land management practices of Indigenous peoples globally. While biodiversity is declining in all parts of the world, it is declining much less rapidly in those lands still managed by Indigenous communities.¹⁵²

Indeed, in some of those areas there is actually an enhancement of conservation through Indigenous practices of land restoration and sustainable use of the land. Not

surprisingly, this also leads to improved quality of life.¹⁵³ The report finds that Indigenous people maintain so much biodiversity where others have not because they “often manage the land and coastal areas based on culturally specific world views, applying principles and indicators such as the health of the land, caring for the country and reciprocal responsibility.”¹⁵⁴

The ability to maintain traditional caretaking practices while simultaneously adapting to changing global landscapes and social conditions has also made these land management practices dynamic and largely sustainable over generations.

These remain compatible with, or actively support, biodiversity conservation by “accompanying” natural processes with anthropogenic assets.”¹⁵⁵ In other words, the long-term stewardship of the land allows for constant reassessment, planning, and adaptation. This is in contrast to the relatively narrow, short-term view of Western environmental policies and practices.

So the matter of land back is not merely a matter of justice, rights or “reconciliation”; Indigenous jurisdiction can indeed help mitigate the loss of biodiversity and climate crisis. In the Canadian context, the practices and philosophies profiled here as case studies contain answers to global questions. Canada—and states generally must listen.

Helpfully, and corresponding to this section of the Red Paper, the UN report includes recommendations for state governments to strengthen Indigenous management. These include:

- Advancing knowledge co-production and including and recognizing different types of knowledge, including Indigenous and local knowledge and education, that enhances the legitimacy and effectiveness of environmental policies.¹⁵⁶

¹⁵² Sandra Diaz, *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, IPBES (advance unedited version, May 6, 2019), 5, ipbes.net. [https://www.ipbes.net/sites/default/files/downloads/spm_unedited_advance_for_posting_htn.pdf]

¹⁵³ Ibid, 8.

¹⁵⁴ Ibid, 20.

¹⁵⁵ Ibid, 21.

¹⁵⁶ Ibid, 32.

- Promoting and strengthening community-based management and governance, including customary institutions and management systems, and co-management regimes involving Indigenous peoples and local communities.¹⁵⁷
- Recognition of land tenure, access, and resource rights in accordance with national legislation, the application of free, prior, and informed consent, and improved collaboration, fair and equitable sharing of benefits arising from the use, and co-management arrangements with local communities.¹⁵⁸

All of this being said, we do not believe the UN's recommendations go far enough. We depart from the Global Assessment Report on two important respects. First, the Global Assessment Report fails to provide a gender analysis or offer recommendations to support the work that is disproportionately shouldered by Indigenous women or women-identified individuals.

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**This is an oversight given the emphasis placed by our collaborators on the importance of recognizing the gender dynamics of reclaiming and asserting jurisdiction**

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Second, the UN is an organization of states that first and foremost defends the territorial integrity of sovereign states.¹⁵⁹ That means that states are the primary vehicle to address climate change and loss of biodiversity. Even while the UN recognizes the harms states perpetuate against Indigenous people (including denying consent), they cannot imagine non-state Indigenous-led solutions that may threaten the state system.

Indeed the Global Assessment Report report singles out state-imposed restrictions on Indigenous jurisdiction, some

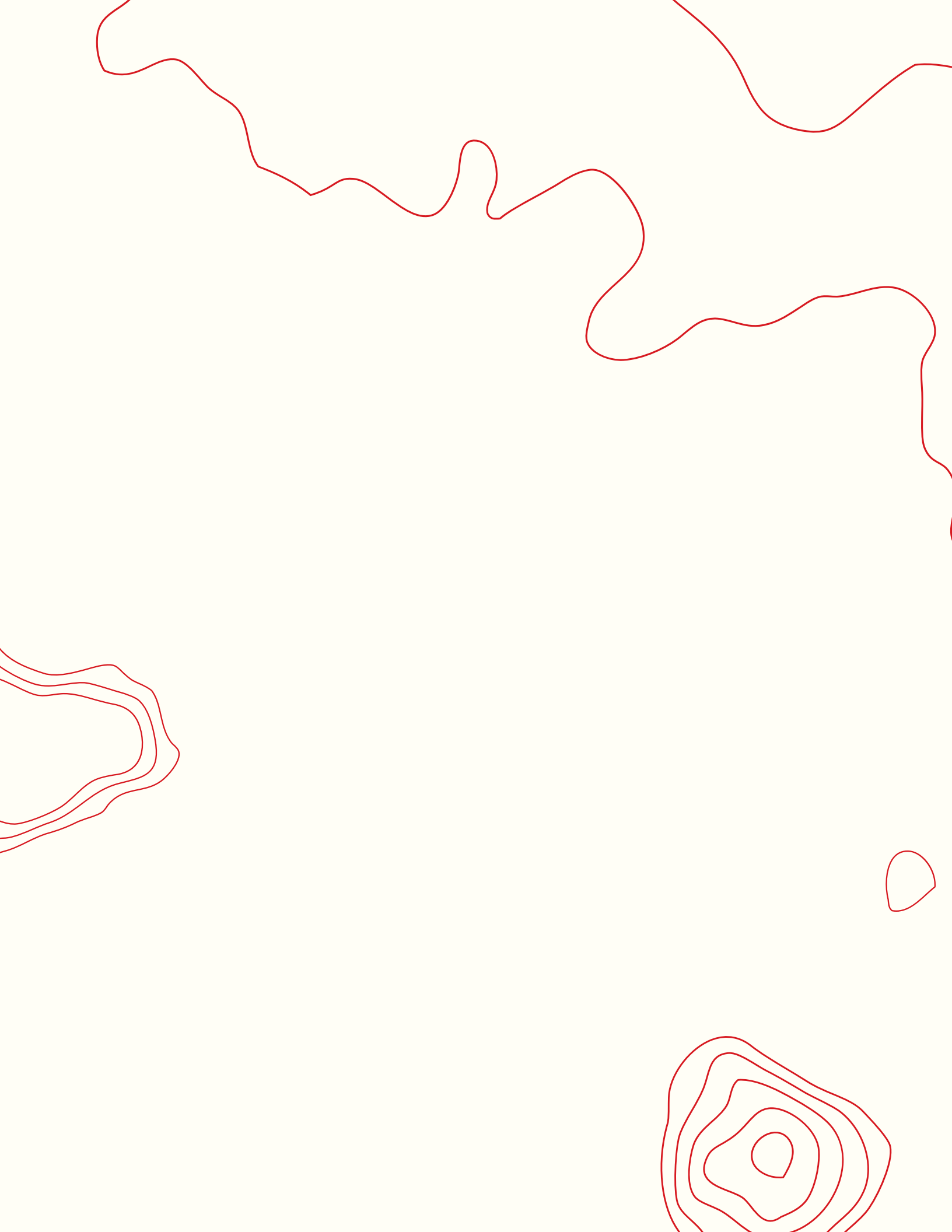
similar examples and strategies that have been outlined in the first section of this Red Paper. They include, at the general level, resource extraction, commodity production, mining and transport, and energy infrastructure. The negative impacts of state-led environmental pressures, predictably, threaten Indigenous knowledge systems, knowledge transmission, and land and resource management generally. So the contradictions here, between the UN recognizing the success of Indigenous jurisdiction regarding environmental stewardship on one hand, and states attempting to dismantle Indigenous jurisdiction on the other, are not lost on us. It is very likely the case that this conflict will endure in the short-term because of them.

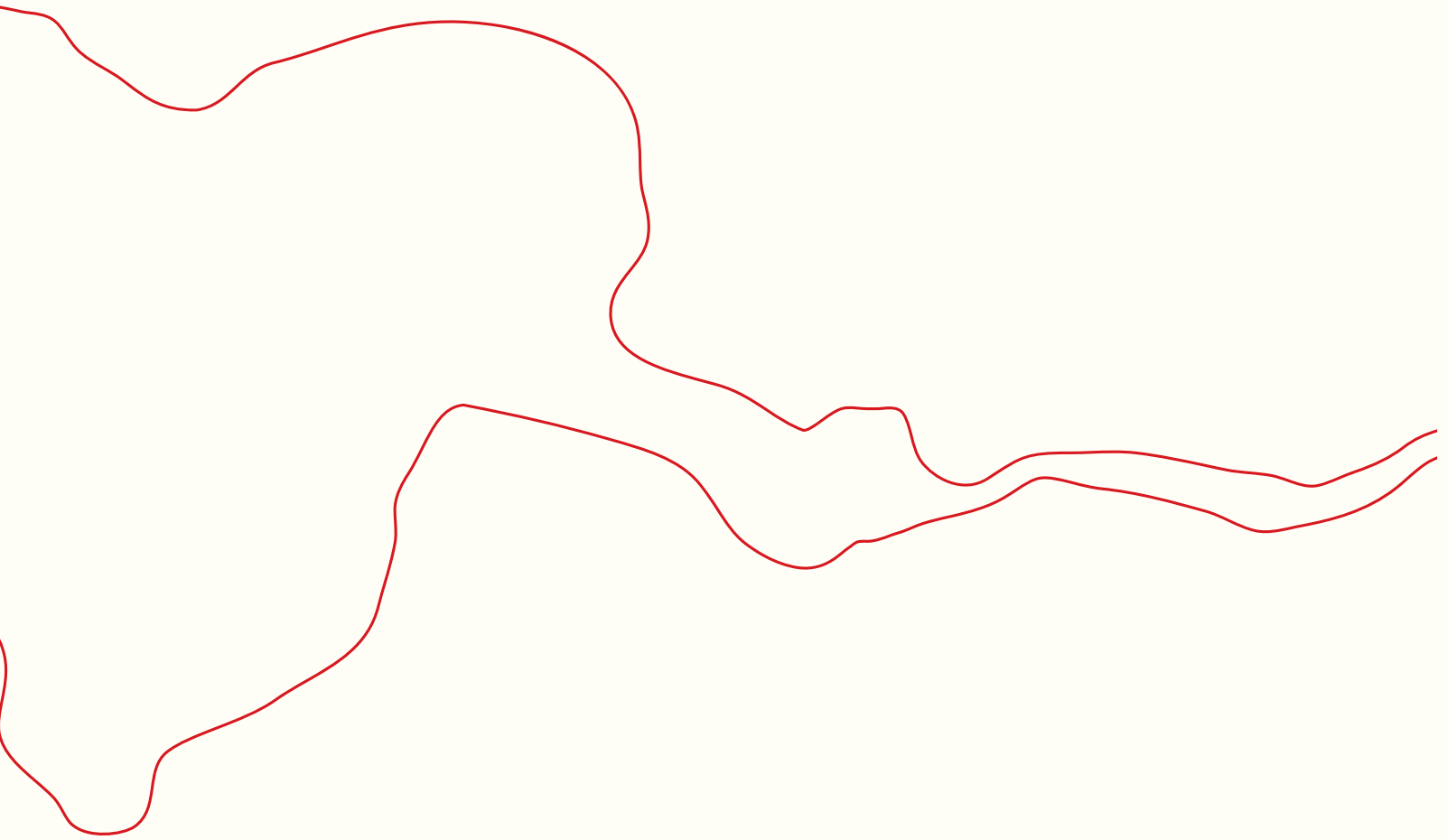
It is important to conclude this Red Paper reflecting the enormity and severity of the challenges we face, but also to consider some of the case studies included here as gestures toward a future, rooted in justice and consent. Indigenous-led solutions exist. While we all grapple with structural conditions that stall genuine transformations of our relationships to the land, water, and each other, there are signs Indigenous people are being heard. The efforts described here, to get land back, represent a movement towards hope.

¹⁵⁷ Ibid, 33.

¹⁵⁸ Ibid, 8.

¹⁵⁹ Hayden King, "UNDRIP's Fundamental Flaw," *OpenCanada.org*, April 2, 2019, <https://www.opencanada.org/features/undrips-fundamental-flaw/>







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