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RESEARCH ARTICLE/ÉTUDE ORIGINALE

Throughput Legitimacy and the Duty to Consult: The Limits of the Law to Produce Quality Interactions in British Columbia's EA Process

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Abstract

The duty to consult mandates that the Crown must consult affected Indigenous parties when Crown action may negatively impact Aboriginal rights or title claims. The Supreme Court of Canada (SCC) has emphasized that the duty should be characterized by honourable dealings and good faith negotiations. This article argues that the concept of throughput legitimacy can help evaluate the Crown's conduct in consultation. By analyzing 131 British Columbia Environmental Assessments (BC EAs), this article finds that the Crown struggles to uphold throughput legitimacy from the perspective of Indigenous peoples, particularly in the areas of transparency, accountability and effectiveness.

Résumé

L'obligation de consulter impose à la Couronne de se concerter avec les parties autochtones intéressées lorsque son action peut avoir un impact négatif sur les droits ancestraux et issus de traités. La Cour suprême du Canada (CSC) a souligné que cette obligation doit être caractérisée par des relations honorables et des négociations de bonne foi. Le présent document soutient que le concept de légitimité du rendement peut contribuer à évaluer la conduite de la Couronne en matière de consultation. En analysant 131 évaluations environnementales de la Colombie-Britannique (BC EAs), ce document constate que la Couronne lutte pour maintenir la légitimité du rendement du point de vue des peuples autochtones, en particulier dans les domaines de la transparence, de la responsabilité et de l'efficacité.

Keywords: Aboriginal Rights; duty to consult; Indigenous-Crown relations; Environmental Assessment; legitimacy

Mots-clés : droits ancestraux; obligation de consulter; relation entre les Autochtones et la Couronne; évaluation environnementale; légitimité

Introduction

In Canada, the duty to consult is a constitutional obligation under s. 35 of the *Constitution Act, 1982*. When proposed Crown conduct may adversely affect an Aboriginal right or rights claim, the Crown is required to consult the affected Indigenous party and, if appropriate, detail accommodation measures to address the negative impact on rights or rights claims. The duty to consult indicates that the Supreme Court of Canada (SCC) values the role of a meaningful process to identify and accommodate rights. The SCC has stressed that there is no corresponding duty to agree on a policy outcome (*Haida Nation v. British Columbia* [*Ministry of Forests*], 2004 at para 42), further emphasizing the process of decision making as the main vehicle to resolve rights disputes. The process needs to be perceived as meaningful by Indigenous peoples and not simply a means to "blow off steam" before a decision maker (*Mikisew Cree* v. *Canada* [*Minister of Canadian Heritage*], 2005 at para 54). Since the SCC has not clearly outlined standards to ensure a meaningful process, a set of criteria is needed to evaluate the Crown's conduct in consultation. Based on the criteria chosen, it is possible to assess the Crown's performance when consulting Indigenous peoples.

In this article, I argue that "throughput legitimacy" is a useful framework to evaluate the interactions of actors in the decision-making process. The Crown's consultative efforts can achieve a high degree of throughput legitimacy when the quality of interaction between actors meets four criteria: inclusiveness, accountability, transparency, and effectiveness (Schmidt, 2013: 6). I apply these criteria to analyze 131 projects from 2000–2018 that underwent a British Columbia Environmental Assessment (BC EA) process and find that consultation within this process struggles to attain throughput legitimacy from the perspective of Indigenous parties. Specifically, accountability, transparency and effectiveness are not upheld consistently. I further argue that the challenges to attain a high degree of throughput legitimacy can be explained by the way in which the duty to consult case law restricts deliberative dynamics between policy actors. The content of the jurisprudence gives Crown decision makers extensive discretion to unilaterally structure consultative processes. Moreover, the threat of litigation prevents the Crown from reforming contested aspects of the process in favour of using the process to manage legal risks and uncertainty. Low throughput legitimacy in the BC EA process puts at risk the goal of honourable decision making between Indigenous peoples and the Crown, and ultimately the pursuit of reconciliation.

Legitimacy in Decision Making and the Unique Status of the Duty to Consult

Questions about legitimacy in the policy process arise when traditional government decision making is transformed, such as when the locus of authority is expanded or shifts to include additional actors (Skogstad, 2003: 955–56). Canadian and European governance literature have analyzed how networks, as novel forums of decision making, can maintain legitimacy. Fritz Scharpf (1999) distinguishes different types of legitimacy, specifically input and output legitimacy. Input legitimacy is gained when the process of decision making is responsive to citizen preferences "as a result of participation *by* the people" (Schmidt, 2013: 2). In contrast, output

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legitimacy refers to "when the outputs of governing … meet social standards of acceptability and appropriateness" (Skogstad, 2003: 956). In addition to input and output legitimacy, Vivien Schmidt introduces throughput legitimacy. This type of legitimacy signifies the quality of interactions between actors in the policy process (Schmidt, 2013: 6), and evaluating this type of legitimacy requires considering how governance arrangements work in practice (Schmidt and Wood, 2019: 728). The processes of decision making have thus become an emerging area of inquiry in Canadian and European governance contexts (for example, Doberstein and Millar, 2014; Howlett, 2000; Iusmen and Boswell, 2017; Levesque, 2012; van Meerkerk et al., 2015).

The network governance literature is somewhat divorced from questions concerning the role and quality of participatory mechanisms (van Meerkerk et al., 2015: 460). This oversight is surprising since participatory instruments such as consultation are directly related to the objective of obtaining more legitimacy in the decision-making process (Catt and Murphy, 2003: 416–18; Pierre, 1998: 146). The scholarship examining participatory instruments mainly focuses on aspects of input legitimacy, such as suggesting that consultees should be representative of their group (Catt and Murphy, 2003: 408–9; Pierre, 1998: 150; Pratchett, 1999: 630–31; Rowe and Frewer, 2000: 12–13) and that equal participation opportunities should include the provision of adequate resources (Hulbert, 2014: 60; Jackson, 2001: 145–46; Patten, 2001: 237; Pratchett, 1999: 629; Rowe and Frewer, 2000: 15–17). There is less discussion about how to structure consultative processes to garner legitimacy apart from the broad suggestion that transparent rules and expectations should be established at the outset (Patten, 2001: 237; Rowe and Frewer, 2000: 15–17).

Apart from the structure of consultation, the potential for participatory instruments to produce legitimacy depends on the interaction dynamics between participants. For instance, it is suggested that principles of deliberation, such as communicative rationality, are ideal (Pratchett, 1999: 629; Ratner, 2008: 148), which are also identified as important qualities to produce throughput legitimacy (Doberstein and Millar, 2014: 266; Goodin and Dryzek, 2006). Nevertheless, it is acknowledged that consultation may also resemble utility maximizing bargaining or may be guided by organizational templates that are not amenable to learning or change (Montpetit, 2003: 98). These existing criteria to evaluate effective consultation can contribute to operationalizing throughput legitimacy, but these characteristics may need to be amended to consider the unique legal context that structures Indigenous–Crown relations in Canada.

The duty to consult mandates the Crown to consult with Indigenous parties affected by a proposed Crown action. The scope and development of the duty has been thoroughly analyzed (for example, Isaac and Knox, 2003; Lawrence and Macklem, 2000; Newman, 2014, 2017; Potes, 2006), including its relationship with administrative law (for example, Charowsky, 2011; Mullan, 2011; Promislow, 2013; Sossin, 2010; Wicks, 2009) and its potential economic ramifications (for example, Fidler and Hitch, 2007; Gilmour and Mellet, 2013; Newman, 2016, 2018; Papillon and Rodon, 2016). Of interest here is the ideal that the honour of the Crown can help legitimate Crown decision making to advance reconciliation with Indigenous peoples. Under the duty, the Crown has a constitutional

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obligation to act honourably toward Indigenous peoples during consultative processes. Only honourable actions from the Crown, such as meaningfully trying to consider Indigenous peoples' rights-based concerns, are viewed by the Court as legitimate (Beaton, 2018: 31). The honourable fulfilment of the duty can advance both legal and political reconciliation (Macklem and Sanderson, 2016: 5–6): the duty requires the Crown to acknowledge that Indigenous nations may have various historically based rights, which is a core element of legal reconciliation; then, the Crown must make decisions in a manner that protects the contemporary exercise of those rights, which helps advance the political project of reconciliation to resolve the inequalities between Indigenous and non-Indigenous peoples.

The SCC does not clearly define standards to evaluate the Crown's good faith efforts when consulting with Indigenous peoples. A framework is needed to evaluate how this process, including the quality of Indigenous peoples' participation, affects the quality of the Crown's governance (Iusmen and Boswell, 2017: 460). The criteria of throughput legitimacy can help evaluate the consultative process to identify whether the inclusion of Indigenous participants is linked in some meaningful way to the outcomes of the Crown's decision making, which is precisely the intent of the duty to consult. Moreover, throughput legitimacy presents a set of criteria to help evaluate the issues with the administration of a complex decision-making process and the behaviours of these actors throughout the process (Schmidt and Wood, 2019: 730). For these reasons, throughput legitimacy is a useful framework to evaluate whether the implementation of the duty facilitates a meaningful process to identify and mitigate impacts to Aboriginal rights.

Although the duty is meant to advance reconciliation between Indigenous and non-Indigenous interests, there are limits to how proceduralism can resolve serious political conflict (Steffek, 2019). Indigenous peoples experience a deep distrust of state institutions and processes as a result of Canada's state-sanctioned assimilatory efforts. Moreover, within the duty to consult case law, the Court does not radically challenge Crown sovereignty (for example, Christie 2006; Hamilton and Nichols, 2019), and the SCC is generally reticent about recognizing Indigenous nations' legal authority (for example, Alfred, 2005; Asch, 2004; Borrows, 2010; Coulthard, 2014; MacCrossan and Ladner, 2016). The refusal of state institutions to acknowledge Indigenous jurisdictional authority is a significant obstacle to the advancement of reconciliation from the perspective of Indigenous peoples. Procedures on their own cannot resolve Indigenous–Crown relationships, as fair processes may not be able to compensate for bad policies and decisions. Nevertheless, the project of reconciliation may still benefit from establishing a clear process to begin important negotiations to sort conflicting rights. The SCC has been clear that mandating procedural safeguards can help ensure that the Crown practices honourable and legitimate decision making by engaging with Indigenous rights at the outset. But a dysfunctional implementation of such a process can prompt participants to fundamentally challenge the validity of policy outputs and the extensiveness of their participation (Schmidt, 2013: 3). As a first step toward opening fruitful negotiations about Aboriginal rights, it is important to assess whether the Crown acts honourably in its decision-making role.

Legal and Political Setting

This article evaluates throughput legitimacy in duty to consult processes by analyzing British Columbia's EA process. A project may require an EA certificate depending on the type of activity being proposed and whether it meets a designated threshold. These thresholds broadly correspond to the scope of the project and their intended output, such as production levels or capacity. Industrial, mining, energy, water management, waste disposal, food processing, transportation and tourist destination resort projects are reviewable. Forestry practices and exploratory drilling or mining are notable exemptions.

After a project is deemed reviewable under the EA Act, the executive director of the EA has the discretion to determine "the scope of the required assessment" and "the procedures and methods for conducting the assessment" (*Environmental Assessment Act* [SBC 2002] Chapter 43, s. 11[1]). Once the scope of the assessment is determined and approved by the Environmental Assessment Office (EAO), the proponent must submit his or her application for review by the EAO, relevant stakeholders, government agencies and Indigenous groups. The proponent's application is under review for 180 days. During this review period, the proponent is expected to consult with Indigenous groups, identify the rights of Indigenous groups, and address any concerns or issues regarding the project's potential adverse impacts on those rights. Indigenous parties are expected to raise concerns about potential adverse impacts on asserted and claimed rights. During the end of this review period, the EA director makes a recommendation to provincial ministers regarding whether the project should be approved for an EA certificate. At this time, Indigenous parties may also make submissions that detail their positions and whether they believe their rights have been appropriately identified and accommodated. The provincial ministers have 45 days to decide to either approve the project, ask for further assessments, or reject the project. The duty to consult is ideally fulfilled throughout the entire EA process, although the focus of this article is to assess consultation in the application review phase.

As stated by the SCC, the Crown has discretion to devise regulatory processes to discharge the duty (*Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 at para 56). EAs have become a key forum where the duty to consult is fulfilled by the Crown when major projects are proposed. Moreover, most Indigenous nations in British Columbia have not signed any historic treaties with the Crown, so the Crown understands Aboriginal rights and title claims in this context as unproven. The duty was first articulated to address this very context of unproven claims, so it is useful to analyze the duty in a province where this situation frequently arises.

There is a significant body of scholarship that analyzes Indigenous peoples' experiences and participation in the EA process. Much of this scholarship addresses the common challenges Indigenous peoples face and details best practices or recommendations to address these challenges (for example, Booth and Skelton, 2011a; Kirchoff et al., 2013; Krupta et al., 2015; Lambrech, 2013; Noble and Udofia, 2015; O'Faircheallaigh, 2007). This scholarship also focuses on specific EA jurisdictions, most notably the north (for example, Armitage, 2005; Galbraith et al., 2007; Noble et al., 2013; Noble and Hanna, 2015; O'Reilly, 1996) and the west (for example, Baker and McLelland, 2003; Booth and Skelton, 2011b) or

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specific components in the EA process, such as the role of traditional knowledge (for example, Arsenault et al., 2019; Ellis, 2005; Eyporsson and Thuestad, 2015; Paci et al., 2002; Tollefson and Wipond, 1998; Usher, 2000) or private agreements (for example, Noble and Fidler, 2011; O'Faircheallaigh and Corbett, 2005). This research helps identify the parts of the EA process that are most likely challenged by Indigenous participants. Although this literature is expansive, there remains an opportunity to analyze the EA as a forum for governance where issues of legitimacy are a concern. Relatedly, this literature has not systematically assessed how the scope of the duty to consult case law influences the way in which actors behave in the EA process. Finally, the findings of this literature generally are not directed at measuring variation in Indigenous peoples' experiences across projects and over time.

Methodology

This article analyzes BC EA reports from 2000–2018 for a total of 131 EA reports. These 131 assessments out of a possible 309 assessments were chosen, as the duty to consult was clearly triggered in these cases. The analysis will also only analyze the application review phase, as there are insufficient records of the pre-application phase over time. In the application review phase, documents such as correspondence, minutes of working group meetings, and tracking tables, are relied upon to identify the perspectives of Indigenous peoples regarding the process of consultation and accommodation.

The analysis is further supplemented with findings from 28 semistructured elite interviews. Interviewees include representatives, land planners, negotiators, lawyers, officials, and consultants with legal, technical or regulatory review expertise. The majority of the interviews are from the perspective of Indigenous parties, as it was difficult to access Crown actors. As a result, only four interviews were conducted that involved individuals who worked for the Crown side, including one lawyer, one consultant and two EAO officials. In contrast, 28 interviews were conducted from the Indigenous side, including three Chiefs, seven officials, eight legal representatives and six consultants. Each interview was conducted to protect the anonymity and confidentiality of its participants. The interviewees were recruited and participated according to the terms outlined by a university research ethics board and relevant Indigenous government protocols.

Building off Schmidt's criteria of throughput legitimacy (2013: 6–7), the following indicators were used to code the assessments to determine whether consultation processes attained high levels of throughput legitimacy. Table 1 summarizes the indicators of the four characteristics of throughput legitimacy in the context of the duty to consult. Inclusiveness or openness in the consultative process will include the following criteria.[1] First, it will be assessed whether Indigenous consultees were treated as constitutional rightsholders throughout consultation. Ensuring that Indigenous parties' distinct status is recognized upholds inclusiveness because Indigenous participants have different participatory expectations and privileges than other stakeholders, such as recreational users or private landowners. Key words used to identify this aspect of throughput legitimacy are "stakeholders," "land users," "rights-holders," and "interest groups." Another aspect of

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Table 1. Characteristics of Throughput Legitimacy and Corresponding Indicators

Inclusiveness	Transparency	Accountability	Effectiveness
Agreement on status of indigenous consultees	Accurate identification and documentation of indigenous concerns	Indigenous knowledge and feedback are included	Participation feels meaningful
Relevant actors are present during meetings	Clear rationale or explanation regarding the methodology to assess scope of rights and impacts on rights	Each participant has clear roles and responsibilities regarding the duty to consult	

inclusiveness is that relevant participants with the appropriate mandates and powers are present and meeting in a timely fashion. Key words such as "missing," "absent," "presence," "attendance," "mandate," and "authority" help identify issues of actors being present in consultation proceedings.

In order to uphold transparency, the Crown and proponent should accurately identify and document the interests and concerns of Indigenous parties throughout the EA process. Key words like "(mis)represented," "(mis)characterized," "error," and "communication" are used to flag issues relating to record-keeping. An additional factor of transparency is that the methodologies used for assessing both the scope of rights among affected Indigenous parties and the project's potential impacts on those rights are clearly explained. Key words such as "(un)clear," "(in)sufficient," "(dis)agreement" and "diligent" in the context of the EAO's explanations can reveal Indigenous peoples' positions on this matter.

Accountability is attained when the EAO ensures that each actor in the process has clearly defined responsibilities. Key words like "(un)clear," "confusion," "role," "process" and "stage(s)" in the context of actors' behaviours are useful to identify any issues with actors' responsibilities to fulfill consultation. Another factor of accountability is to note whether Indigenous people's feedback during both information-gathering exercises to identify the scope of Aboriginal rights and the project's impacts on those rights are included throughout the process. Key words to help identify whether Indigenous parties had their feedback incorporated include "(in)sufficient," "missing," "knowledge," "perspective," integrate," "listen," "incorporate" and "request."

Finally, effectiveness is achieved when the process is viewed by Indigenous parties as being meaningful. Meaningfulness includes feeling like participation had an impact on the final decision. Although the duty does not mandate a specific outcome, it is imperative that Indigenous parties perceive their participation has the potential to change the Crown's decision. Meaningfulness is emphasized by the SCC as a key defining feature of the duty to consult (*Haida Nation* v. *British Columbia* [*Ministry of Forests*], 2004: para 42). Some key words that helped identify Indigenous peoples' experience in consultation include "(un)meaningful," "acknowledge," "partner(ship)," "(dis)respect," "relationship," "dealing," "(good or bad) faith" and "engage(ment)."

Each of the 131 assessments was read and analyzed using the identified indicators that correspond to inclusiveness, transparency, accountability and effectiveness

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in the application review phase. A project was counted if at least one participating Indigenous nation explicitly expressed its dissatisfaction with a part of the EA process that corresponds with one of the indicators of throughput legitimacy. This helps maintain consistency, as no inferences are made regarding an Indigenous participant's position; issues must be explicitly stated for it to be counted. Moreover, if at least one Indigenous nation expresses dissatisfaction, it is counted to avoid inconsistent judgements regarding the strength of an Indigenous nation's claim and how severe a project impacts those rights claims. As such, challenges to throughput legitimacy were coded in a binary fashion, as either exhibiting an issue or not. One assessment can be counted multiple times if an assessment exhibits different challenges across the indicators of throughput legitimacy. Unless otherwise stated, only outstanding issues that remained by the end of the EA process were counted. The final decision documents were useful to examine, as Indigenous parties often listed their outstanding concerns in their final letters to the EAO or decision-making Minister. The rest of the available documentation was also cross-referenced to ensure that all the outstanding issues were counted. The documents in each assessment were coded by a single coder with Microsoft Excel after reading each document sequentially. Passages relating to Indigenous consultation, accommodation, and interests were more scrutinized. Although 131 assessments were analyzed, 23 assessments were either terminated or withdrawn, so a total of 108 assessments demonstrate the entire consultation and accommodation processes. The results found are likely a conservative estimate of the grievances expressed by Indigenous parties, as the documentation likely does not catalogue all the interactions between policy actors.

Throughput Legitimacy in the BC EA Process

Inclusiveness

The first indicator to help measure inclusiveness includes assessing whether Indigenous parties were treated according to their status as constitutional rights-holders. There are only nine instances out of 131 assessments where Indigenous parties explicitly stated their concern that their status as rights-holders was not being respected. In these instances, Indigenous groups stressed that they were not to be considered as other interest groups or members of the general public. There was also one instance where an Indigenous party voiced the concern that other users may have disproportionate influence in the EA process in comparison to primary land users such as Indigenous nations. Other than these cases, it appears that Indigenous peoples are treated as having distinct status in the EA process.

Another indicator for inclusiveness is ensuring that all the relevant parties, including the proponent and Crown actors, are available to both exchange information and negotiate. Based on the EAO reports, Indigenous parties were concerned with the level of inclusiveness of actors in 22 projects of the 108 projects that underwent a full assessment. This is far from a majority of cases, revealing that the EAO largely upholds its responsibility to facilitate discussions with relevant actors throughout the EA process. The main concern expressed in these 22 assessments by Indigenous parties is that relevant provincial or federal representatives are not

always present, even though they are better positioned than the EAO and proponent to negotiate meaningful accommodation measures. This problem is especially the case for federal government representatives (Anonymous, personal communication, December 10, 2018), even though these actors may be able to change legislation or practices in response to Indigenous peoples' interests beyond a specific project. A related issue is the concern that the Crown actors present in the EA process do not have the mandate to negotiate responsive accommodation measures (Anonymous, personal communication, December 21, 2017; Anonymous, personal communication, April 24, 2018; Anonymous, personal communication, December 10, 2018; Gray, 2016). The Federal Court of Appeal objected to the "note-taker" approach to consultation in the *Tsleil-Waututh Nation* v. *Canada (Attorney General)* case, stating that, "Canada [is] obliged to do more than passively hear and receive the real concerns of the Indigenous applicants" (2017: para 603). Although there are some instances of this issue occurring, the EA process appears to be upholding inclusivity as a factor of throughput legitimacy.

Transparency

In addition to having the relevant parties present and interacting with one another, it is also important that the proponent and EAO are reliably and accurately documenting the positions and concerns of Indigenous parties. There are only 12 instances out of the completed 108 assessments where Indigenous parties noted that there were issues with accurate record-keeping of their comments. This low number indicates that the EAO is quite successful at documenting the positions of Indigenous groups.

Once information regarding the project and Indigenous peoples' interests are gathered, assessing the potential effects occurs next. At this stage, the EAO should transparently communicate the rationale underpinning the assessment of both Indigenous groups' strength of claim and the significance of impacts on Indigenous peoples' rights. Yet there is a total of 57 reported instances out of 108 completed assessments where at least one Indigenous party was concerned with the EAO's level of transparency when explaining the proposed project's impacts to Aboriginal rights. These instances are also spread out over time, indicating that this issue has persisted regardless of changes in the duty to consult case law (Gray, 2016; Plate et al., 2009). In terms of fulfilling the duty, this lack of transparency is problematic, as the Court has stated that the Crown, as part of honourable dealings, must provide "written reasons to show that Indigenous concerns were considered and to reveal the impact they had on their decision" (*Haida Nation* v. *British Columbia* [*Ministry of Forests*], 2004: para 44). Explaining the rationale between the data about the project's effects and the seriousness of the impact is a key area where the Crown should show how Indigenous concerns are considered. The lack of transparency in the EAO's rationale to determine impacts to Aboriginal rights is a major area of contention for Indigenous peoples.

Although the importance of written reasons is established by the case law, the SCC has not extensively commented on what the Crown's written reasons should entail. In *Chippewas of the Thames*, the SCC appeared to defer to tribunals' expertise regarding how they assess impacts to Aboriginal rights. The Court only stated

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that the National Energy Board (NEB) "assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal" (*Chippewas of the Thames First Nation* v. *Enbridge Pipelines Inc*., 2017: para 64). There was no further comment on the substance of the NEB's justification. Furthermore, the SCC does not require boards to give a full *Haida* analysis in their decision-making (*Chippewas of the Thames First Nation* v. *Enbridge Pipelines Inc*., 2017: para 63; Graben and Sinclair, 2015), meaning that boards do not have to explicitly explain the scope of rights and the corresponding impacts on those rights. Although it may not be legally required for the EAO to provide a specific form of justification regarding their decision making, the lack of transparency in this part of the assessment process decreases the overall perception of throughput legitimacy from Indigenous participants.

Accountability

The next main principle of throughput legitimacy is accountability. Accountability involves incorporating feedback from Indigenous participants, such as traditional knowledge and perspectives, as the project's impacts are identified. Sixty-two out of the completed 108 assessments revealed that Indigenous parties' concerns regarding the project data were not incorporated. Common issues include omissions of important information; issues with the quality of the data being used, such as its accuracy, whether it is up-to-date and its credibility (Anonymous, personal communication, April 6, 2018); and the interpretation of the data. A persistent issue concerning the omission of data lies in how the proponent and EAO incorporate Indigenous traditional knowledge and perspectives. Indigenous parties are troubled that their knowledge is not systematically used throughout the assessment, beyond studies that outline specific Aboriginal rights, such as Traditional Use Studies (Anonymous, personal communication, April 24, 2018; Carrier Sekani Tribal Council, 2007: 2–3). It appears the EAO has the discretion to decide the degree to which Indigenous feedback and perspectives are included in the assessment, which limits the ability of Indigenous peoples to hold other actors, notably the proponent, to account when questions arise.

With regard to the timing of the data collection, Indigenous parties expressed a concern that collecting relevant data should not be a project condition after the EA certification is granted, as data needs to be gathered beforehand to assess the project's impacts (Anonymous, personal communication, December 21, 2017). Otherwise, the collected information cannot effectively be used to justify changing the project to limit or avoid negative impacts. Moreover, information that is collected beyond the timeframes of decision phases in the EA process may be unfairly dismissed or overlooked due to the preference of other actors to complete the EA process in a timely fashion (Anonymous, personal communication, April 19, 2019). These types of concerns regarding the content and collection of data are expressed by Indigenous parties in 57 per cent of completed assessments. The pervasiveness of this issue indicates that Indigenous parties cannot consistently hold actors to account throughout the assessment when disagreements about the data emerge.

Concerns with accountability are also apparent when the EAO determines the scope of Aboriginal rights at stake and the impacts to those rights. The main

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issue when identifying the scope of aboriginal rights is that the EAO makes the initial determination, but then places the onus on Indigenous actors to provide data if Indigenous parties disagree with the Crown's position. There are 14 instances out of the completed 108 assessments where Indigenous parties explicitly challenged the EAO's strength of claim analysis. This is expected to be a significant underestimation, as sensitive evidence to support Indigenous peoples' rights and title claims would not be documented in the EA process for confidentiality reasons. Interviews from lawyers, officials and consultants representing Indigenous nations expressed frustration regarding how the Crown's strength of claim assessment is incomplete or rudimentary (Anonymous, personal communication, April 6, 2018; Anonymous, personal communication, April 25, 2018; Anonymous, personal communication, October 18, 2018). It is unclear why the Crown unilaterally decides the scope of rights (Gray, 2016), especially since the case law does not assert that this determination needs to be made solely by the Crown.

Moreover, the Crown places the onus on Indigenous parties to conduct studies to prove the validity of their rights claims when disagreements arise (Anonymous, personal communication, October 2, 2018; Anonymous, personal communication, October 17, 2018), even though the duty was established to protect unproven rights claims (Anonymous, personal communication, December 21, 2017). This burden creates a perverse effect, whereby nations that suffer most from the effects of colonialism are also the least well-positioned to have the resources and evidence to present adequate proof to substantiate rights claims (Anonymous, personal communication, April 6, 2018). This onus placed on Indigenous nations to provide specific kinds of data to change the strength of claim assessment shifts the burden of accountability away from the Crown.

The high burden of proof faced by Indigenous peoples to change the EAO's position is due to the standards by which the EAO bases its assessment of rights and title. The EAO relies on legal tests established by SCC decisions such as in *R. v. Van der Peet* and *Delgamuukw v. British Columbia* that have been critiqued for characterizing rights, land use and occupation from a Eurocentric perspective (Anonymous, personal communication, January 24, 2018; for example, Asch, 2000; Eisenberg, 2009; Macklem, 2001; Murphy, 2001). For instance, Aboriginal rights are arbitrarily limited, as rights must be distinctive and integral to the culture of the Indigenous group at the time of first contact with Europeans (*R.* v. *Van der Peet*, 1996: para 191), and title claims must demonstrate exclusive occupation (*Delgamuukw* v. *British Columbia*, 1997: para 155). The more recent *Tsilhqot'in* v. *British Columbia* case changed how title claims should be assessed, as the SCC granted the Tsilhqot'in Nation title over land that did not have permanent settlements (2014, at para 66). Nevertheless, the Tsilhqot'in Nation could demonstrate its exclusive use of the land, which may not be applicable to all Indigenous peoples' land use patterns. If the EAO uses these strict standards to judge Aboriginal rights and title claims, then Indigenous sources of evidence to change the Crown's position about the scope of Aboriginal rights at stake may not be readily accepted, indicating an additional barrier to Indigenous peoples' ability to hold Crown actors to account when disputes emerge.

This concern about privileging Eurocentric understandings of rights and title is also corroborated by the evidence from the EA reports. From the identified 14 cases

where the strength of claim assessment was identified as an issue of contention, Indigenous parties also expressed that the EAO relied on inaccurate ethnographic, archeological and historical data. A reason for this perception of inaccuracy is due to the largely Western sources and literature that the government uses, which prioritize written accounts of Indigenous land use patterns and activities (Anonymous, personal communication, April 17, 2018; Anonymous, personal communication, October 17, 2018; Anonymous, personal communication, December 12, 2018).

The process of determining impacts to Aboriginal rights also faces issues of attaining accountability. The EAO directs its assessment of impacts on the area where the project will be developed and the area where the project's impacts are likely to occur. In contrast, Indigenous peoples consider the overall patterns of development in the region, as well as fact that the exercise of rights has already been degraded or taken away (Anonymous, personal communication, December 21, 2017; Anonymous, personal communication, October 17, 2018; Anonymous, personal communication, October 18, 2018; Anonymous, personal communication, December 21, 2018; Carrier Sekani Tribal Council, 2007: 8; Plate et al., 2009). Some confusion remains regarding how past infringements and cumulative effects on Aboriginal rights and title should be considered during consultation (Anonymous, personal communication, February 27, 2018). In *Rio Tinto Alcan Inc.* v. *Carrier Sekani*, the SCC states that since the duty is forward looking, it cannot be invoked to address past infringements to rights; other remedies like compensation are more suited to this objective (2010: para 83). Seven years later in *Chippewas of the Thames*, the SCC asserts that project impacts cannot be fully understood without considering the larger context, such as ongoing projects and the historical context (2017: 42). In the EAO reports, the EAO reiterates that the EA process is not amenable to compensating for past infringements. Due to the vague expectations of the case law, the EAO has discretion to decide the scope of the cumulative effects assessment and to avoid being held accountable when Indigenous parties disagree with this scope. For instance, issues related to regional planning would be resolved outside of the EA process without clear accountability mechanisms to ensure that this discussion takes place with the relevant government entities before the EA process ends.

A final issue related to accountability involves the roles and responsibilities of each party to fulfill the duty. The case law states that the Crown can delegate procedural aspects of the duty to proponents (*Haida Nation* v. *British Columbia* [*Ministry of Forests*], 2004: para 53). Only five instances out of 108 completed assessments contained this issue. In contrast, interview data suggest that the Crown exhibits an overreliance on proponents to reach agreements with Indigenous groups, as the duty can be more easily discharged when Indigenous nations support the project (Anonymous, personal communication, December 11, 2017; Anonymous, personal communication, February 27, 2018; Anonymous, personal communication, December 21, 2018). This indicates that proponents are fulfilling more than the procedural elements of consultation, thus challenging the goal of the duty as a mechanism to foster reconciliation specifically between the Crown and Indigenous nations (Anonymous, personal communication, January 24, 2018; Anonymous, personal communication, October 23, 2018). Representatives from the British Columbia EAO dispute this charge, as they state

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that the EAO has a strong incentive to ensure that the proponent fulfills their part of consultation because one of the Crown's priorities is to avoid litigation (Anonymous, personal communication, January 9, 2019; Anonymous, personal communication, March 1, 2019). The different roles of the EAO and proponent to fulfill the duty may be a source of frustration on the part of Indigenous parties, but due to the low number of recorded instances in the assessments, it does not appear to be a major point of contention for the attainment of accountability.

Effectiveness

The final principle of throughput legitimacy is effectiveness. Effectiveness refers to whether the Indigenous parties perceive consultation and the process of negotiating accommodation measures as meaningful. Evaluating the perception of meaningfulness is a good representation of whether Indigenous parties perceive consultation as meeting the objectives of honourable conduct and good faith negotiations. Indigenous parties were explicitly dissatisfied with the meaningfulness of consultation 43 times. This number is higher than the number of times when Indigenous parties opposed a project, indicating that this concern also extends to assessments where Indigenous parties were supportive of the proposed project. Even when Indigenous parties achieve a result that addresses their interests, the dissatisfaction with the meaningfulness of the process and the participants erodes the confidence of Indigenous peoples in using the EA as a means to protect their rights. This sentiment of a lack of meaningfulness is expressed either throughout the review process or in Indigenous peoples' own separate submissions to the Minister.

It appears from the assessments that Indigenous parties determined the process to be effective and meaningful if it met the other characteristics of throughput legitimacy, such as transparency and accountability. This suggests that perceptions of effectiveness are linked with the attainment of the other characteristics of throughput legitimacy, demonstrating that these characteristics should be treated holistically rather than as a simple checklist.

Conclusion and Future Research

Focusing on the importance of legitimacy in decision making provides an insightful lens to evaluate the Crown's consultation efforts with Indigenous peoples. This approach is advantageous, as a legitimacy framework can help operationalize the Court's prescription for good-faith negotiations from Crown and Indigenous actors. But unlike typical government decision making, whereby legitimacy is an objective to attain good governance, the Crown's very honour and legitimacy to assert sovereignty are at stake in dealings with Indigenous peoples. Legal obligations between the Crown and Indigenous peoples raise the stakes for the Crown to attain legitimacy when interacting with Indigenous peoples throughout the decision-making process. The application of Schmidt's framework (2013: 6–7) in this article demonstrates that the model has the potential to capture the complexities of governance in settler-colonial states apart from supranational and local multilevel governance contexts. As settler-colonial states are coming to terms with recognizing the rights claims of Indigenous nations, it is important to analyze the

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administration of state decision making and to evaluate the varying processes that directly impact how the state chooses to recognize the exercise of Aboriginal rights.

The criteria outlined in throughput legitimacy reveal that British Columbia's EA process appears to be susceptible to a lack of transparency, accountability and effectiveness from the perspective of Indigenous participants. During the application review phase, Indigenous participants perceive a lack of transparency regarding the rationale used to explain the project's impacts to Aboriginal rights. There are several accountability issues, most notably the inconsistency in which Indigenous feedback in multiple stages of the application review phase is incorporated. Finally, Indigenous parties perceive the EA process to lack effectiveness and meaningfulness as a result of the shortcomings in transparency and accountability. The provisions in the duty to consult case law give the EAO a wide degree of discretion regarding the extent to which Indigenous feedback and perspectives are incorporated in the assessment and the level of specificity when communicating its decision making. When Indigenous parties cannot equally hold other actors to account or understand other actors' decision making, equal deliberation on core issues is compromised. Moreover, past judicial decisions in Aboriginal rights and title cases influence how the Crown adjudicates Aboriginal rights claims, which then influences the scope and style of negotiations throughout consultation.

This article also draws attention to how the motivation to improve legitimacy in decision making can have an independent influence on the behaviour of actors within participatory processes. The fact that the duty to consult is a constitutional obligation that is justiciable in a court of law changes the behaviour of Crown actors in consultation. Rather than viewing the various characteristics of throughput legitimacy holistically, where all four factors are important to maintain legitimacy (Schmidt and Wood, 2019: 731), the Crown's primary interest is to discharge the duty to manage legal risks. This is corroborated by the interview data and other studies (Boyd and Lorefice, 2018). Given this understanding of the law, Crown actors are not likely to use the duty as an opportunity to create new relationships with Indigenous peoples. The potential of the duty to foster new relationships with Indigenous peoples is lost when the Crown emphasizes the avoidance of litigation rather than the opportunity to change decision-making processes (Anonymous, personal communication, December 11, 2017; Anonymous, personal communication, December 21, 2017; Anonymous, personal communication, February 27, 2018). The Crown's close following of the law to avoid litigation while Indigenous parties build their own record for a possible legal challenge creates an adversarial environment that does not facilitate collaborative decision making (Anonymous, personal communication, December 21, 2018).

The threat of litigation can help some Indigenous parties negotiate more favourable accommodation measures (Anonymous, personal communication, April 6a, 2018; Anonymous, personal communication, April 6b, 2018; Anonymous, personal communication, April 17, 2018; Anonymous, personal communication, April 24, 2018; Anonymous, personal communication, April 27, 2019). However, this threat does not improve the process of decision making, which is the duty's intention. Indigenous peoples may feel dissatisfied that the process does not facilitate the Crown's honourable conduct if threatening litigation is the primary way to change Crown behaviour. This flaw is also significant since the SCC conceived of the duty

as a process to avoid litigation (*Haida Nation* v. *British Columbia* [*Ministry of Forests*], 2004: para 14). Indeed, litigation may not be pursued by the parties at all if the process exhibits throughput legitimacy.

Since the duty to consult also applies to Indigenous nations with modern and historic treaties, and all provinces have their own EA processes, this study can be replicated in other jurisdictions. The duty is practiced differently in treaty contexts because the interpretation of recognized rights or title is a key element of the consultation process rather than assessing the validity of Aboriginal rights claims. Moreover, each jurisdiction may structure its EA process differently, with varying requirements in each decision point. There is an opportunity to compare across provinces to reveal whether certain jurisdictions are employing different measures within the EA process to garner legitimacy from the perspective of participating Indigenous nations. The research design employed in this article can identify the possibly varied actions taken by different policy actors when practicing consultation, contributing to a greater depth of knowledge of provincial governance of Indigenous rights issues.

The duty to consult mandates a process to manage Indigenous–Crown relations in order to advance reconciliation, but the implementation of this process has not resulted in Indigenous peoples perceiving that the Crown acts honourably. Indigenous parties perceive that the EAO represents the Crown's interests to advance certain projects (Anonymous, personal communication, May 30, 2018; Anonymous, personal communication, October 2, 2018; Carrier Sekani Tribal Council, 2007: 5–6), despite the EAO's intended impartial status (for example, Jacobs, 2013). If the EA process is discredited as being disadvantageous toward Indigenous participants, then the legitimacy of this regulatory review process to help identify and protect constitutional rights is cast into doubt. Since the Crown continues to rely on regulatory review to discharge the duty to consult, the Crown should consider how this process can consistently uphold the honour of the Crown and act as an instrument to begin important rights-based negotiations.

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Note

1 For the purposes of this article, the principles of openness will be subsumed into the principle of inclusiveness. Although Schmidt (2013) differentiates these two principles, operationalizing openness is not distinct from the other principles outlined.

References

Alfred, Taiaike. 2005. *Wasáse: Indigenous Pathways of Action and Freedom*. Toronto: University of Toronto Press.

Armitage, Derek. 2005. "Collaborative Environmental Assessment in the Northwest Territories, Canada." *Environmental Impact Assessment Review* **25** (3): 239–58.

Arsenault, Rachel, Carrie Bourassa, Sibyl Diver, Deborah McGregor and Aaron Witham. 2019. "Including Indigenous Knowledge Systems in Environmental Assessments: Restructuring the Process." *Global Environmental Politics* **19** (3): 120–32.

https://doi.org/10.1017/S000842392000027X Published online by Cambridge University Press

Asch, Michael. 2000. "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*." *Review of Constitutional Studies* **5** (2): 119–37.

Asch, Michael. 2004. "Post-Calder, Canada's Judiciary Struggles to Reconfigure Native Rights." *Cultural Survival Quarterly* **28** (1): 1–6.

Baker, Douglas, and James McLelland. 2003. "Evaluating the Effectiveness of British Columbia's Environmental Assessment Process for First Nations' Participation in Mining Development." *Environmental Impact Assessment Review* **23** (5): 581–603.

Beaton, Ryan. 2018. "*De Facto* and *De Jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada." *Constitutional Forum* **27** (1): 25–33.

Booth, Annie, and Norm Skelton. 2011a. "Improving First Nations' Participation in Environmental Assessment Process. Recommendations from the Field." *Impact Assessment and Project Appraisal* **29** (1): 49–58.

Booth, Annie, and Norm Skelton. 2011b. "Industry and Government Perspectives on First Nations' Participation in the British Columbia Environmental Assessment Process." *Environmental Impact Assessment Review* **31** (3): 216–25.

Borrows, John. 2010. *Canada's Indigenous Constitution*. Toronto: University of Toronto Press.

Boyd, Brendan, and Sophie Lorefice. 2018. "Understanding Consultation and Engagement of Indigenous Peoples in Resource Development: A Policy Framing Approach." *Canadian Public Administration* **61** (4): 572–95.

Carrier Sekani Tribal Council. 2007. *First Nations Perspectives on the BC Environmental Assessment Process*. Prince George: Carrier Sekani Tribal Council.

Catt, Helena, and Michael Murphy. 2003. "What Voice for the People? Categorizing Methods of Public Consultation." *Australian Journal of Political Science* **38** (3): 407–21.

Charowsky, Zena. 2011. "The Aboriginal Law Duty to Consult: An Introduction for Administrative Tribunals." *Saskatchewan Law Review* **74** (2): 213–30.

Christie, Gordon. 2006. "Developing Case Law: The Future of Consultation and Accommodation." *UBC Law Review* **39** (1): 139–84.

Coulthard, Glen. 2014. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. Minneapolis: University of Minnesota Press.

Doberstein, Carey, and Heather Millar. 2014. "Balancing a House of Cards: Throughput Legitimacy in Canadian Governance Networks." *Canadian Journal of Political Science* **47** (2): 259–80.

Eisenberg, Avigail. 2009. *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims*. Oxford: Oxford University Press.

Ellis, Stephen. 2005. "Meaning Consideration? A Review of Traditional Knowledge in Environmental Decision Making." *Arctic* **58** (1): 66–77.

Environmental Assessment Act [SBC 2002].

Eyporsson, Einar, and Alma Elizabeth Thuestad. 2015. "Incorporating Traditional Knowledge in Environmental Impact Assessment: How Can It Be Done?" *Arctic Review on Law and Politics* **6** (2): 132–50.

Fidler, Courtney, and Michael Hitch. 2007. "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice." *Environments Journal* **35** (2): 49–69.

Galbraith, Lindsay, Ben Bradshaw and Murray Rutherford. 2007. "Towards a New Supraregulatory Approach to Environmental Assessment in Northern Canada." *Impact Assessment Project Appraisal* **25** (1): 27–41.

Gilmour, Brad, and Bruce Mellet. 2013. "The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations." *Alberta Law Review* **51** (2): 385–400.

Goodin, Robert, and John Dryzek. 2006. "Deliberative Impacts: The Macro-Political Uptake of Mini-Publics." *Politics and Society* **34** (2): 219–44.

Graben, Sari, and Abbey Sinclair. 2015. "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board." *University of Toronto Law Journal* **65** (4): 382–433.

Gray, Bryn. 2016. *Building Relationships and Advancing Reconciliation Through Meaningful Consultation*. Report to the Minister of Indigenous and Northern Affairs, Canada.

Hamilton, Robert, and Joshua Nichols. 2019. "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult." *Alberta Law Review* **56** (3): 729–60.

Howlett, Michael. 2000. "Managing the 'Hollow State': Procedural Policy Instruments in Modern Governance." *Canadian Public Administration* **43** (4): 412–31.

Hulbert, Margot. 2014. "Evaluating Public Consultation in Nuclear Energy: The Importance of Problem Structuring and Scale." *International Journal of Energy Sector Management* **8** (1): 56–75.

Isaac, Thomas, and Anthony Knox. 2003. "The Crown's Duty to Consult Aboriginal People." *Alberta Law Review* **41** (1): 49–77.

Iusmen, Ingi, and John Boswell. 2017. "The Dilemmas of Pursuing 'Throughput Legitimacy' through Participatory Mechanisms." *West European Politics* **40** (2): 459–78.

Jackson, Laurie Skuba. 2001. "Contemporary Public Involvement: Toward a Strategic Approach." *Local Environment* **6** (2): 135–47.

Jacobs, Laverne. 2013. "Caught Between Judicial Paradigms and the Administrative State's Pastiche: 'Tribunal' Independence, Impartiality, and Bias." In *Administrative Law in Context*, ed. Colleen Flood and Lorne Sossin. Toronto: Emond Montgomery Publications.

Kirchoff, Denis, Holly Gardner and Leonard Tsuji. 2013. "The Canadian Environmental Assessment Act 2012 and Associated Policy: Implications for Aboriginal Peoples." *International Indigenous Policy Journal* **4** (3): 1–16.

Krupta, Joel, Lindsay Galbraith and Sarah Burch. 2015. "Participatory and Multi-Level Governance: Applications to Aboriginal Renewable Energy Projects." *Local Environment* **20** (1): 81–101.

Lambrech, Kirk. 2013. *Aboriginal Consultation, Environmental Assessment and Regulatory Review in Canada*. Regina: University of Regina Press.

Lawrence, Sonia, and Patrick Macklem. 2000. "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult." *Canadian Bar Review* **79** (1): 252–79.

Levesque, Mario. 2012. "Mapping a Way Forward: Interest Group Selection and Roles Performed in Engagement Processes." *Canadian Public Administration* **55**: 531–52.

Macklem, Patrick. 2001. *Indigenous Difference and the Constitution of Canada*. Toronto: University of Toronto Press.

Macklem, Patrick, and Douglas Sanderson. 2016. "Introduction: Recognition and Reconciliation in Indigenous-Settler Societies." In *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, ed. Patrick Macklem and Douglas Sanderson. Toronto: University of Toronto Press.

McCrossan, Michael, and Kiera Ladner. 2016. "Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power." *Canadian Journal of Political Science* **49** (3): 411–31.

Montpetit, Eric. 2003. "Public Consultations in Policy Network Environments: The Case of Assisted Reproductive Technology Policy in Canada." *Canadian Public Policy* **29** (1): 95–110.

Mullan, David. 2011. "The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?" *Canadian Journal of Administrative Law and Practice* **24** (3): 233–60.

Murphy, Michael. 2001. "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?" *Canadian Journal of Political Science* **34** (1): 109–29.

Newman, Dwight. 2014. *Revisiting the Duty to Consult Aboriginal Peoples*. Saskatoon: Purich Publishing Ltd.

Newman, Dwight. 2016. "Consultation and Economic Reconciliation." In *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights*, ed. Patrick Macklem and Douglas Sanderson. Toronto: University of Toronto Press.

Newman, Dwight. 2017. "The Section 35 Duty to Consult." In *The Oxford Handbook of the Canadian Constitution*, ed. Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers. New York: Oxford University Press.

Newman, Dwight, ed. 2018. *Business Implications of Aboriginal Law*. Toronto: LexisNexis Canada.

Noble, Bram, and Courtney Fidler. 2011. "Advancing Indigenous-Community Corporate Agreements: Lessons from Practice in the Canadian Mining Sector." *Oil Gas & Energy Law* **9** (4): 1–30.

Noble, Bram, and Kevin Hanna. 2015. "Environmental Assessment in the Arctic: A Gap Analysis and Research Agenda." *Arctic* **68** (3): 341–55.

Noble, Bram, Skye Ketilson, Alec Aitken and Greg Poelzer. 2013. "Strategic Environmental Assessment Opportunities and Risks for Arctic Offshore Energy Planning and Development." *Marine Policy* **39** (1): 296–302.

Noble, Bram, and Aniekan Udofia. 2015. *Protectors of the Land: Toward an EA Process that Works for Aboriginal Communities and Developers*. Ottawa: MacDonald-Laurier Institute.
O'Faircheallaigh, Ciarian. 2007. "Environmental Agreements, EIA Followup and Aboriginal Participation in Environmental Management: The Canadian Experience." *Environmental Impact Assessment Review* **27** (4): 319–42.
O'Faircheallaigh, Ciarian, and Tony Corbett. 2005. "Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements." *Environmental Politics* **14** (5): 629–47.
O'Reilly, Kevin. 1996. "Diamond Mining and the Demise of Environmental Assessment in the North." *Northern Perspectives* **24** (1): 1–4.
Paci, Chris, Ann Tobin and Peter Robb. 2002. "Reconsidering the Canadian Environmental Impact Assessment Act: A Place for Traditional Environmental Knowledge." *Environmental Impact Assessment Review* **22** (2): 111–27.
Papillon, Martin, and Thierry Rodon. 2016. "Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada." *Environmental Assessment Review* **62** (1): 216–24.
Patten, Steve. 2001. "Democratizing the Institutions of Policy-Making: Democratic Consultation and Participatory Administration." *Journal of Canadian Studies* **35** (4): 221–39.
Pierre, Jon. 1998. "Public Consultation and Citizen Participation: Dilemmas of Policy Advice." In *Taking Stock: Assessing Public Sector Reforms*, ed. Guy Peters and Donald Savoie. Montreal and Kingston: McGill-Queen's University Press and Canadian Centre for Management Development.
Plate, Elmar, Malcolm Foy and Rick Krehbiel. 2009. *Best Practices for First Nation Involvement in Environmental Assessment Reviews of Development Projects in British Columbia*. West Vancouver, BC: New Relationship Trust.
Potes, Veronica. 2006. "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" *Journal of Environmental Law and Practice* **17** (1): 27–45.
Pratchett, Lawrence. 1999. "New Fashions in Public Participation: Towards Greater Democracy?" *Parliamentary Affairs* **52** (4): 616–34.
Promislow, Janna. 2013. "Irreconcilable? The Duty to Consult and Administrative Decision Makers." *Constitutional Forum* **22** (1): 63–78.
Ratner, Robert. 2008. "Communicative Rationality in the Citizens' Assembly and Referendum Processes." In *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*, ed. Mark Warren and Hilary Pearse. Cambridge: Cambridge University Press.
Rowe, Gene, and Lyn Frewer. 2000. "Public Participation Methods: A Framework for Evaluation." *Science, Technology and Human Values* **25** (1): 3–29.
Scharpf, Fritz. 1999. *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press.
Schmidt, Vivien. 2013. "Democracy and Legitimacy in the European Union Revisited: Input, Output *and* 'Throughput'." *Political Studies* **61** (1): 2–22.
Schmidt, Vivien, and Matthew Wood. 2019. "Conceptualizing Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance." *Public Administration* **97** (1): 727–40.
Skogstad, Grace. 2003. "Who Governs? Who Should Govern? Political Authority and Legitimacy in Canada in the Twenty-First Century." *Canadian Journal of Political Science* **36** (5): 955–73.
Sossin, Lorne. 2010. "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights." *Canadian Journal of Administrative Law and Practice* **23** (1): 93–113.
Steffek, Jens. 2019. "The Limits of Proceduralism: Critical Remarks on the Rise of Throughput Legitimacy." *Public Administration* **97** (1): 784–96.
Supreme Court of Canada. *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507.
Supreme Court of Canada. *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010.
Supreme Court of Canada. *Haida Nation* v. *British Columbia* (*Ministry of Forests*), [2004] SCC 73.
Supreme Court of Canada. *Mikisew Cree* v. *Canada* (*Minister of Canadian Heritage*), [2005] SCC 69.
Supreme Court of Canada. *Rio Tinto Alcan Inc.* v. *Carrier Sekani*, [2010] SCC 43.
Supreme Court of Canada. *Tsilhqot'in Nation* v. *British Columbia*, [2014] SCC 44.
Supreme Court of Canada. *Chippewas of the Thames First Nation* v. *Enbridge Pipelines Inc.*, [2017] SCC 41.

Tollefson, Chris, and Karen Wipond. 1998. "Cumulative Environmental Impacts and Aboriginal Rights." *Environmental Impact Assessment Review* **18** (4): 371–90.

Usher, Peter. 2000. "Traditional Knowledge in Environmental Assessment and Management." *Arctic* **53** (2): 183–93.

van Meerkerk, Ingmar, Jurian Edelenbos, and Erik-Hans Klijn. 2015. "Connective Management and Governance Network Performance: The Mediating Role of Throughput Legitimacy. Findings from Survey Research on Complex Water Projects in the Netherlands." *Environment and Planning C: Government and Policy* **33** (4): 746–64.

Wicks, Anthony. 2009. "Beyond Audi Alterum Partem: The Duty to Consult Aboriginal Peoples in Canada and New Zealand." *Journal of South Pacific Law* **13** (1): 40–46.

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