THE BOARD ROOM TRUMPS THE COURTROOM – RECONCILIATION THROUGH IMPACT AND BENEFIT AGREEMENTS

by

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ABSTRACT

This Thesis discusses how Impact and Benefit Agreements (IBAs) can reconcile First Nations to resource development in Canada. IBAs, as their name suggests, allocate *benefits* to an Aboriginal community in exchange for *impacting* their rights and/or land through resource development. This Thesis examines the degree of consultation and accommodation typically employed under legal doctrines and discusses how proponents, *albeit* with no legal obligation to do so, are using IBAs to partner with First Nations and offer innovative forms of accommodation. This Thesis argues that industries. through the use of IBAs, can maximize profits and expedite projects without opposition from nearby Aboriginal communities.

Because a monetary payment is a common feature of IBAs, this Thesis warns of the dangers and risks of managing resource revenue without strong governance and fiscal stability. Chapter Two analyzes how the "resource curse" might occur if a First Nation were to manage its resource revenue under the *Indian Act* and concludes that First Nations which gain control over their governance and finances, either by opting out of the *Indian Act* or by entering into a self-government agreement, are more likely to reap the intended benefits of an IBA.

This Thesis emphasizes the importance of maintaining a healthy relationship throughout the life of a resource project. Chapter Three examines provisions that are commonly used in IBAs to ensure the parties achieve their initial expectations, and discusses how the parties can monitor each other's compliance through ongoing communication. Lastly, this Thesis argues why non-monetary benefits are an essential component to achieve reconciliation between industries and First Nations.

DEDICATION

I dedicate this Thesis to my mother, Jackie Lovett who taught me that anything worth having is not easy to achieve, and who always went without so I could go, have, and excel.

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INTRODUCTION

The wonder of markets is that they reconcile the choices of myriad individuals.[1]

Canada possesses an abundance of natural resources. British Columbia is filled with forestry, the Prairie Provinces provide potash and oil, and the eastern provinces and northern Territories are rich with minerals and offer hydroelectric opportunities. Despite the abundance of natural resources, Canada cannot maximize its potential in the resource sector without reconciling the interests of First Nations. Canada's resource economy has been stagnated by opposition from First Nations who believe their rights are overlooked or unreconciled when proponents plan and commence projects near their communities. This results in delay and missed opportunity costs. Bill Gallagher described this gridlock cycle in his book, "Resource Rulers – Fortune and Folly on Canada's Road to Resources:"

> In a historical irony, the courtroom has become the battlefield, the boardroom has become the trading post, and it [is the] chiefs – not governors – who now recite winning judgements to the losing side…Still the [Crown and industries] fail to recognize the true cause of stock-drops and lost opportunity costs. It [is] almost as if these project risk factors are doomed to remain as perverse and hidden impediments to realizing the economic benefits of future projects…[2]

The Taseko Prosperity Gold-Copper Mine could have created thousands of jobs and generated billions of dollars for the province of British Columbia, but it, like many resource projects in Canada, never occurred because the Crown and proponent failed to reconcile the concerns of the Tsilhqot'in and Secwepemc Nations. A panel appointed under the *Canada Environmental Assessment Act, 2012* reviewed the project's potential environmental impacts and concluded that the project would, *inter alia*, result in significant adverse environmental effects on the current

[1] Quote by *William Easterly.*

[2] Bill Gallagher, *Resource Rulers Fortune and Folly on Canada's Road to Resources* (Charleston, SC, USA) at 2 [Gallagher].

use of lands and resources for traditional purposes by First Nations and on cultural heritage, and on certain potential or established Aboriginal rights or title.[3] Leaders from the Tsilhqot'in and Secwepemc Nations expressed to the panel that there was a lack of consultation and that their traditional knowledge was not adequately included in the project's environmental assessment.[4]

The failure to reconcile Indigenous peoples with resource development is not unique to Canada. Proponents were met with opposition from Native Americans in proposing the Dakota Access Pipeline. While the project ultimately received executive approval, it was delayed by protest and litigation because the Standing Rock Sioux believed that the federal government flouted its duty to engage in Tribal consultations under the *National Historic Preservation Act* and did not account for the Tribe's cultural values when assessing the project's potential impact.[5]

The cultural interests of a First Nation often conflict with the economic interests of a resource proponent. The former holds a spiritual attachment with land while the latter perceives land and its resources as an economic commodity.[6] This does not mean, however, that all First Nations are anti-development. Most First Nations welcome development and the economic

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[3] See generally Minister of the Environment, Federal Review Panel, Report on the Taseko Mines Limited's Prosperity Gold-Copper Mine Project (CEAA Reference No. 09-05-44811), (2 July 2010), online: < http://www.ceaa.gc.ca/050/documents/46911/46911E.pdf > (discussing the Mine's potential environmental impact).

[4] *Ibid*; see also Dwight G. Newman, *Revisiting The Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Limited, 2014) at 105-06 [Newman] (discussing that the Taseko Prosperity Mine failed to obtain regulatory approval because of sever impacts on Aboriginal cultural and spiritual values).

[5] Memorandum Opinion *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (2016) (No. 16-1534) [*Standing Rock Sioux Tribe*].

[6] See Canada, Royal Commission on Aboriginal Peoples, *Restructuring the Relationship*, vol 2 (Ottawa: Communication Group, 1996) (explaining that "Aboriginal people [hold a] special relationship to the land and its resources. This relationship…is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies…To Aboriginal people, land is not simply the basis of livelihood but of life and must be treated as such" at 438 -39).

opportunities it offers, but insist on receiving consultation and accommodation in a manner that acknowledges their rights and respects their cultural values.[7]

This Thesis offers an approach to align the interest of First Nations with those of a resource proponent. It argues that industries can utilize Impact and Benefit Agreements (IBAs) to reconcile First Nations to resource development in Canada. IBAs, as their name suggests, allocate *benefits* to an Aboriginal community in exchange for *impacting* their rights and/or land through resource development. Most scholars would agree that:

> an IBA is a formal contract outlining the impacts of the project, the commitment and responsibilities of both parties, and how the associated Aboriginal community will share in benefits of the operation through employment and economic development.
>
> IBAs are an essential part of corporate-Aboriginal relations. They are often a final, legally binding agreement that stems from an initial memorandum of understanding and are developed through consultation and negotiation between the [developer], Chief and Council of the [B]and and their respective attorneys. They may also be referred to as participation agreements or benefit plans.[8]

While the issue of enforceability is still emerging law, the dominant perception is that IBAs are commercial contracts and are enforceable under the principles of contract law.[9]

IBAs allow proponents to hear and adequately address a First Nation's concerns before commencing a project, and provide First Nations an opportunity to be included in Canada's resource sector. The doctrines embedded in Aboriginal law similarly strive to acknowledge and

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[7] Michael William Hitch, *Impact and Benefit Agreements and the Political Ecology of Mineral Development in Nunavut* (Doctor of Philosophy, University of Warterloo, 2006) at 103-04, online: <file:///C:/Users/tlovett/Downloads/mhitch2006.pdf> [Hitch] quoting Billy Diamond, Grand Chief of Cree (Cree Mining Conference address August 24, 1999).

[8] Online: miningfacts.org <http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/>.

[9] See generally Ginger Gibson & Ciaran O'Faircheallaigh, "IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements" (Toronto: Walter & Duncan Gordon Foundation, 2010), at 133-35, online: <http://www.ibacommunitytoolkit.ca> [Gibson & O'Faircheallaigh]; Sandra Gogal, Richard Riegert, & JoAnn Jamieson, "Aboriginal Impact and Benefit Agreements: Practical Considerations" (2005) 43:1 Alta L Rev 129 at paras 96-106 [Gogal] (discussing the enforceability of IBAs).

accommodate First Nations, but often leave companies and First Nations pitted against one another in a courtroom. Instead of enduring costly and lengthy litigation, IBAs offer all parties an alternative to negotiate and achieve a compromise within the private sector. The benefits from one project, if properly administered, could propel a First Nation out of poverty and enable them to sustain future generations – a vital component to all native cultures. Allocating benefits in exchange for impacts is the compromise that fosters reconciliation[10] between industries and First Nations. This is not selling out. This is First Nations seizing a more substantial role in Canada's economy and becoming the "Resource Rulers" they have been called.[11]

This Thesis is divided into the following Chapters.

I. CHAPTER ONE – *How Impact and Benefit Agreements Emerge within the context of Aboriginal Law*

Chapter One explains how IBAs can emerge within the context of Canadian Aboriginal law. I will provide an introduction to Aboriginal law and explain how treaties emerged between First Nations and the Crown. Through colonization came the *Royal Proclamation of 1763*, which sparked a nation-to-nation relationship between the Crown and First Nations that subsequently led to the historic treaty-making process. While treaties enabled Canada to expand westward, numerous First Nations were displaced from their traditional territories in exchange

[10] The repeated references to "reconciliation" throughout this Thesis is being used in a sense similar to which the Canadian Supreme Court employs the word, "reconciliation" in its duty to consult jurisprudence. See e.g. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, 3 SCR 511 [*Haida Nation*] (where the Court clarified that the Supreme Court's view of the "duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982* . This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people" at para 32).

[11] Bill Gallagher in his book *Resource Rulers Fortune and Folly on Canada's Road to Resources* describes First Nations as "Resource Rulers" because of their legal winning streak in the resource sector.

for a bundle of rights. The *Constitution Act, 1982*, along with the *Natural Resource Transfer Agreement, 1930*, acknowledges and preserves the rights that were allocated throughout this historic treaty era.

Chapter One also explains that many First Nations did not enter into treaties with the Crown, especially in the southern part of British Columbia and across the northern Territories. These First Nations either retain unextinguished Aboriginal rights or receive their bundle of rights through modern land claim agreements (MLCAs). Like the historic treaties, most MLCAs extinguish a First Nation's Aboriginal title and provide clear land boundaries between Indian land and non-Indian lands. Where treaties or MLCAs do not exist, Aboriginal law has left developers in a maze. Proponents often cannot determine whether a First Nation legally possesses an alleged right and if so, where?

A developer can face a degree of uncertainty even where a treaty or MLCA establishes boundaries between Indian land and non-Indian lands. First Nations in the Prairie Provinces, for example, can exercise hunting and fishing rights outside of reserve boundaries. This type of ambiguity coupled with today's proliferating land claims is why consultation is essential before an industry commences resource development near a First Nation's community. The legal doctrine, known as the *duty to consult*, obligates governments to consult First Nations when projects may infringe their rights and/or land.[12] Although the courts only bestow this burden on the Crown, the market encourages a joint approach where industries also participate in the consultation process.[13]

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[12] Further discussion on the Crown's duty to consult will be found at 24-27, below.

[13] See generally Newman, *supra* note 4 at 115-41 (for a discussion on how the day-to-day operations in the resource sector help morph the legal doctrine of consultation). Professor Newman contextualizes Roscoe Pound's concept of "law in books" and that of "law into action" with the doctrine of the duty to

Chapter One advocates for direct and proactive consultation between industries and First Nations. I argue that market principles will foster the optimal point of consultation. Because costly and lengthy litigation is not in industry's best economic interest, proponents will not neglect the consultation process. If First Nations are willing to negotiate, then IBAs can be structured to include them in the project and offer innovative forms of accommodation, such as partnership agreements. IBAs can provide accommodation above and beyond what is required by the law. Instead of proponents being stopped with injunctions and protests, IBAs can foster a working relationship between all stakeholders and achieve the compromise Canada severely needs to bring First Nations on board and progress in its natural resource sector.

II. CHAPTER TWO - *The Need for Strong Governance and Institutional Stability while Administering Resource Revenue in First Nation Communities*

Chapter Two explains how a substantial inflow of resource revenue can trigger unintended socio-economic consequences. States which are resource rich yet endure community turmoil experience a paradox known as the "resource curse." I will analyze how monetary benefits from an IBA can threaten a First Nation community with the resource curse and what Band leaders can do to institutionally manage resource revenue to avoid socio-economic hardships.

The resource curse arises because States administer their resource revenue with political and fiscal instability. The cure is for nations to manage their rents with political and fiscal accountability aimed towards diversifying and stabilizing their economies. Many First Nations face an uphill battle to implement this institutional policy. Politics within First Nation communities typically involve family factions that create internal corruption. First Nations often

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consult and explains that the "law in action" has led corporate stakeholders to adopt and adhere to consultation policies despite no legal obligation.

lack a strong private sector and are plagued by unemployment and poor education. This has led to a high state of dependency on the Band government. I argue that this internal corruption and constant distribution of goodies can be replaced with accountability, separation between politics and business, and policies that promote long-term benefits. Many First Nations will have to circumvent paternalistic legislation to accomplish this institutional strength. This Chapter will pierce the loop-holes of statutes that hinder First Nations from effectively combating the resource curse.

Once outside of paternalistic legislation, First Nations can utilize their political strength and resource revenue to stabilize and diversify their economies. Chapter Two concludes by analyzing how First Nations can administer monetary benefits through a trust fund or use their resource revenue to create a wholly-owned subsidiary to foster a private sector within their community.

III. CHAPTER THREE – *The Content of an IBA – Enforcement, Environmental, and Non-Monetary Benefits*

Chapter Three is split into three sections. Section One introduces provisions that can strengthen the partnership of a First Nation and a company. It explains how provisions in an IBA can provide certainty to protect industry's investment yet provide enough flexibility to allow the parties to respond to challenges that may arise throughout the life of a project. A non-objection clause balanced with the ability to amend portions of the agreement and an ongoing communication schedule will foster stability and help the parties maintain a healthy relationship throughout the life of a project. These provisions can equip the parties with the flexibility to reach internal solutions and avoid litigation.

Section Two explains how First Nations can use an IBA to supplement conventional environmental assessments to protect and maintain their spiritual relationship with land.

Through an IBA, First Nations can negotiate for a process that better aligns with their spiritual sensitivities. I argue that projects are likely to proceed without delay if an industry undertakes its environmental assessment with a First Nation and inclusive of its cultural perceptions.

The crux of Chapter Three argues that companies need to provide more than a financial payment in order to reconcile First Nations with resource development. Section Three discusses how non-monetary benefits can help improve the socio-economic conditions of a First Nation. Non-monetary benefits, such as employment and educational opportunities can offer members of a First Nation a participatory role in a project and reduce the high unemployment rates often prevalent in First Nation communities. Through IBAs, companies also often sponsor and participate in philanthropic initiatives that aim to improve the overall quality of life in a First Nation community.

IV. CONCLUSION

Where a project proposes significant impact on a First Nation, economic principles incentivize proponents to employ consultation and accommodation beyond what is required under the doctrine of the duty to consult and accommodate. Through IBAs, companies can partner with First Nations, which enables companies to maximize profits and avoid costly and lengthily litigation.

With proper management and strong governance, First Nations can use the benefits of an IBA to create vibrant economies and combat their poor socio-economic conditions. IBAs also enable First Nations to voice their cultural perspectives and maintain their spiritual attachment with land. In this sense, IBAs offer First Nations a double benefit – capitalism and environmental protection.

IBAs offer First Nations and industries a win-win solution to the stagnation that often occurs in Canada's resource economy – they expedite/maximize resource development and accommodate (i.e. reconcile) First Nations.

CHAPTER ONE

How Impact and Benefit Agreements Emerge within the Context of Aboriginal Law

This Chapter explains how IBAs can arise within Aboriginal law and can reconcile First Nations with resource development in Canada. Proactive consultation and good faith efforts to accommodate First Nations can produce IBAs and expedite projects without opposition from First Nations. IBAs are an effective means to reconcile First Nations because they can go further than the spectrum of consultation and accommodation required under the law.

Before explaining how IBAs can reconcile First Nations with resource development, a thorough understanding of the Crown-to-First Nation relationship is needed. Why do First Nations have special rights? Why does the Crown have a fiduciary obligation to consult First Nations before commencing a resource project? Does the Crown have to obtain a First Nation's consent before a project can proceed? The answers to these questions will clarify the need for reconciliation in the context of resource development in Canada.

Section One discusses the historic treaty-making process and explains why modern land claim agreements (MLCAs) continue to be negotiated today. After the British defeated the French in the Seven Year's War, the King issued the *Royal Proclamation of 1763* ("*Royal Proclamation*") to demonstrate the Crown's commitment to peace and develop a new remedial policy towards First Nations.[14] The *Royal Proclamation* acknowledged that First Nations held a legal right to *occupy* their lands, known today as Aboriginal title, and that they could cede their lands only to the Crown. This policy became the central feature of the eleven numbered treaties,

[14] See *Milestones: 1750-1775*, online: U.S. Department of State, Office of the Historian <https://history.state.gov/milestones/1750-1775/treaty-of-paris> (explaining that the British Crown underwent financial pressure to repay its creditors after the Seven Years War. Because of this financial debt, the King did not want to endure the cost of another conflict).

which extinguished Aboriginal title in exchange for a bundle of rights throughout most of Canada, in particularly the Prairie Provinces. Through the historic treaty-making process, the Crown established clear property lines between Indian and non-Indian lands, which was necessary for Canada to expand westward and achieve its version of Manifest Destiny.

First Nations which originally inhabited most of British Columbia, the northern Territories, and eastern Canada never surrendered their traditional lands to the Crown. These First Nations did not have their rights and/or land titles explicitly acknowledged by the Crown. This resulted in ambiguous land boundaries and creates confusion for project planners. Today, the Crown negotiates modern treaties, known as modern land claim agreements (MLCA), to acknowledge the rights held by First Nations which never underwent the historic treaty-making process. MLCAs extinguish a First Nation's Aboriginal title and establish clear land boundaries, which creates certainty for project developers.

Section Two explains how the courts have defined and interpreted Aboriginal rights. The Supreme Court distinguishes Aboriginal title as a distinct Aboriginal right that recognizes a pre-existing interest to land.[15] Aboriginal people have the right to control and manage the land to which Aboriginal title applies and to require project proponents to obtain their consent before commencing a project on Aboriginal titled land.[16]

Section Two also explains how Canada inherited from the Crown a trust-like relationship with First Nation peoples. This relationship burdens Canada with a fiduciary obligation to ensure First Nations are consulted and if warranted, accommodated before a developer commences a project which may infringe their rights and/or land. This aspect of Canada's

[15] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 73, 2 SCR 257 (Lexum) [*Tsilhqot'in Nation*].

[16] *Ibid* at 76.

fiduciary obligation is primarily upheld through a legal doctrine known as the "duty to consult and accommodate." An analysis of case law will explain how consultation and accommodation transpires differently when a project infringes a First Nation's definitive treaty right versus a First Nation's mere *prima facie* claim to a right (i.e., a right that has yet to be proven or explicitly acknowledged through a treaty).

Section Three explains how industries can help the Crown fulfill its fiduciary obligations to consult First Nations. The Supreme Court of Canada has held that the "Crown can delegate procedural aspects of consultation to industry proponents seeking a particular development."[17] I analyze provincial consultation policies to define what role industries can play in the reconciliation process and argue that direct consultation between industries and First Nations fosters a healthy relationship between project proponents and impacted First Nations.

In Section Four, I explain how IBAs can accommodate First Nations which may be impacted by a project. IBAs are a product of direct consultation between industries and First Nations. IBAs offer First Nations the chance to receive benefits beyond mere mitigation measures and to participate in Canada's resource sector. Although the law does not require industries to reach an agreement with First Nations, industries which strive to accommodate potentially impacted First Nations through an IBA foster reconciliation and help expedite resource development in Canada.

Section Five concludes this Chapter.

I. The Birth of Treaties

European settlers were foreign to the "New World." They struggled to survive off the land and often fell victim to starvation and various diseases. First Nations, unlike the Europeans,

[17] *Haida* Nation, *supra* note 10 at para 53.

were accustomed to the land. They hunted and survived off the land long before any newcomers walked ashore. First Nations' hunting and trapping skills facilitated the fur trade throughout this early era of settlement, which subsequently sparked tension between the French and English.[18] Conflicts between the French and English frequently arose to determine who could trade with the Indians. From this conflict, treaties emerged to govern the co-existence between European settlers and First Nations. These early treaties strictly governed commerce and peace alliances. They did not reserve land for First Nations nor did they acknowledge any rights held by First Nations.[19]

Land cession treaties did not evolve until after the British defeated the French in the Seven Years' War. Exhausted from war and enduring financial debt, the British Crown did not want to continue fighting with France's former native allies.[20] Instead of attempting to conquer the Indians through warfare, the King issued the *Royal Proclamation*, which acknowledged that First Nations held the right to occupy their hunting grounds and prohibited settlers from squatting and fraudulently purchasing their traditional territories.[21]

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[18] Bruce G. Trigger, "The Jesuits and the Fur Trade" in J.R. Miller, ed, Sweet Promises: A Reader on Indian-White Relations in Canada (Toronto: University of Toronto Press, 1991) at 3-16 (discussing how tension and warfare arose in response to the expansion of the fur trade).

[19] Despite the First Nations' pledge to keep peace, none of the Peace and Friendship Treaties conveyed rights to the First Nations. See W.E. Daugherty, "Treaties and Historical Research Centre, Maritime Indian Treaties in Historical Perspective" (Ottawa: Department of Indian and Northern Affairs Canada), online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/tremar_11001 00028967_eng.pdf> (stating that the [Peace and Friendship Treaties] were the outcome of a period of intense warfare. Designed for the immediate purpose of obtaining peace, clearing the way for colonization and as diplomatic tools to destroy French power, the[y] were not intended to, nor do they, provide the basis for [A]boriginal entitlement in the Maritimes).

[20] *Ibid* (explaining that the British Crown underwent financial pressure to repay their creditors after the Severn Years War).

[21] See *Royal Proclamation* (*1763*), RSC 1985, App II, No 1 [Royal Proclamation] (stating "[a]nd whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should

The *Royal Proclamation* was the Crown's attempt to recognize and respect *Aboriginal title*.[22] Aboriginal title will be discussed in detail below,[23] but for present purposes it should be noted that Aboriginal title is a distinct Aboriginal right that recognizes a First Nation's pre-existing legal right to *occupy* land.[24] The King mandated that lands occupied by Indians could only be ceded to the Crown through a formal process of assembly and lands not ceded to the Crown were *reserved to the Indians*, who *should not be molested or disturbed* so that they *may be convinced of the Crown's Justice* and intent to remain peaceful.[25] The *Royal Proclamation* recognized First Nations as autonomous political entities and gave birth to a nation-to-nation

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not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...") [emphasis added].

[22] See *R v Sparrow*, [1990] 1 SCR 1075 at para 49, 4 WWR 410 (WL) [*Sparrow*] (explaining that the *Royal Proclamation* was a policy based on respect for First Nations' right to occupy their traditional land).

[23] Further discussion on Aboriginal title will be found at 22-23, below.

[24] See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, at 574 (explaining that the Doctrine of Discovery diminished the right for Indians to own land; Indians only retain a mere usufructuary right to occupy land); see also Robert J. Miller, *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny* (Univ. Neb. Press: Praeger Publishers, 2006) at 21 (explaining that the Doctrine of Discovery is premised on the principle of *terra nullius* – Latin for vacant land. Because First Nations were uncivilized in the *westernized* sense, they could not assert sovereignty and ownership over the New World. Despite their presence and occupancy of the land, it was vacant land from the colonizer's eye. *Terra nullius* became the legal justification for colonizing the New World since Europeans could not "rely on papal grants to trump the rights of the native inhabitants").

[25] See *Royal Proclamation*, *supra* note 21 (stating "[a]nd whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie") [emphasis added].

relationship between the Crown and First Nations. It was the Crown's first step towards reconciliation in Canada.

In the Canadian Prairies, this process towards reconciliation evolved – in part – through the treaty negotiations that occurred between 1871 and 1923. Treaty commissioners established friendly relationships with First Nations and held assemblies to negotiate the "surrender of large tracts of land in return for annual cash payments and other benefits."[26] The rights reserved for First Nations varied from treaty to treaty and depended on negotiations, but despite the acute differences that distinguish the numbered treaties, there were many similarities. These similarities were succinctly summarized by Tom Flanagan in his book, "First Nations? Second Thoughts:"

- *A recognition of Canadian sovereignty*. Indians were styled as "subjects" in all the treaties.
- *An explicit surrender of Indian title to land*. Treaty 7, for example contained these words: "the said Indians…inhabiting the district hereinafter more fully described and defined, do hereby cede, release, surrender, and yield up to the Government of Canada for Her Majesty and the Queen and her successors forever, all their rights, titles and privileges whatsoever to the land included within the following limits." A similar statement was featured at the beginning of each of the Numbered Treaties. Extinguishing the Indian title and obtaining full rights over the land were clearly the federal government's chief objectives.
- *A state of the Indians' right to continue hunting on surrendered land*, "subject to such regulations as may, from time to time, be made by the Government of the country, acting under the authority of Her Majesty; and saving and

[26] Aboriginal proponents maintain that First Nations were primarily interested in preserving their nomadic ways of life, such as hunting, trapping, fishing, and gathering. First Nations claim they were open to "sharing the land," but wanted to ensure their traditional customs would not be altered by signing the treaty. See generally, Canada, Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol 1 (Ottawa: Communication Group, 1996) at148-149 (explaining how the land cession aspect of the numbered treaties may not have been understood by the First Nations since "legal and real estate concepts would have been incomprehensible to many Aboriginal people"). But see Tom Flanagan, *First Nations? Second Thoughts*, 2d ed (Montreal: McGill-Queen's University Press, 2008) at 157-65 [Flanagan] (explaining that disagreements over what was intended at the signing of the numbered treaties is the privilege of hindsight and the result of handed-down oral stories, which are often distorted and contradicted).

excepting such tracts as may be required or taken up from time to time for settlement, mining, trading or other purposes by her Government of Canada." The right to hunt was not mentioned in Treaties 1 and 2 but was included in all subsequent treaties.

- *Land reserves to be held by the Crown for the use and benefit of the Indians*. The [treaties established Indian reserves, whose size was determined by a formula of] 160 acres per family of five Treaties in 1, 2, and 5, and 640 acres per family of five in the other [numbered treaties]. In all cases, the reserves were to be held in trust for the Indians by the Crown.
- *A cash bonus to every man, woman, and child for signing, plus an annual payment thereafter*. [T]here was some room for variation in the size of the signing gratuities and the annuities and in the amount of extra money and goods provided for chiefs and headmen.
- *Educational assistance*. In the first six treaties, this benefit was phrased in terms of the government maintaining schools on the reserves; subsequently, it was described as the government paying teachers' salaries.
- *Assistance in earning livelihood*. Depending on the location and circumstances of the signatories, this could include agricultural implements, seed grain, and livestock, as well as supplies for hunting, fishing, and trapping.
- *A promise by the Indians to obey the law and keep peace with all other subjects of Her Majesty*.[27]

Through the numbered treaties, the Crown extinguished Aboriginal title throughout most of the Prairie Provinces (i.e., Manitoba, Saskatchewan, and Alberta) and enabled westward expansion at the cost of displacing First Nations onto reserves.

Because the Crown ceased its treaty-making process in 1923, some areas of Canada were settled without acknowledging the rights of its original occupants. First Nations throughout British Columbia, for example, did not undergo any treaty process and were left without protected rights and defined land reserves.[28] First Nations which have not surrendered their ancestral homelands to the Crown may possess Aboriginal title – if they can prove that they

[27] Flanagan, *supra* note 26 at 145-46.

[28] Further discussion on where MLCAs are negotiated will be found at 18, below.

occupied their ancestral homelands *continuously* and to the *exclusion* of others prior to European contact.[29]

In *Calder v Attorney-General of British Columbia* ("*Calder*"), members of the Nisga'a Nation argued that they held Aboriginal title to their ancestral homelands since it was never lawfully extinguished through a treaty as mandated by the *Royal Proclamation*.[30] The Supreme Court of Canada split three-to-three on whether the Nation's claim was valid.[31] Three members of the Court held that the Nation's title was extinguished prior to British Columbia joining the Confederation in 1871 because the Crown established the Colony through dominion legislation adverse to the right of Indian occupancy.[32] Three other members of the Court concluded that unless the Nation surrendered its ancestral homelands to the Crown, the Nation retained a usufructuary interest in its ancestral territory (i.e. Aboriginal title).[33] Despite this three-to-three split, both groups confirmed that the *Royal Proclamation* is not the sole source of Aboriginal title.[34] Aboriginal title exists because the New World was occupied by native inhabitants before

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[29] The test for proving Aboriginal title is more peculiar and distinct than the test for proving other Aboriginal rights. See *Tsilhqot'in Nation*, *supra* note 15 at para 50 (for a discussion on the test that a First Nation must satisfy in order to legally validate its claim for Aboriginal title).

[30] *Calder v Attorney-General of British Columbia*, [1973] SCR 313 at para 4, 4 WWR 1 (CanLII) [*Calder*].

[31] The Supreme Court of Canada ultimately dismissed the Nation's claim because the Court concluded that it lacked jurisdiction to make a declaration in the absence of a fiat from the Crown giving the Nation permission to bring its suit. For further discussion on this issue see Justice Pigeon's reasoning in paragraphs 184-93.

[32] Justice Judson with Justices Martland and Ritchie concurring in paragraphs 1-78.

[33] Justice Hall with Justices Spence and Laskin concurring in paragraphs 79-183.

[34] See *Calder*, *supra* note 30 (stating that "[w]hile the Nishga [sic] claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of [A]boriginal rights to possession and enjoyment of lands of [A]borigines precisely analogous to the Nishga [sic] situation here" at para 116).

Europeans arrived.[35] This legal validation placed insurmountable pressure on the federal government to resolve ongoing claims held by First Nations and to restore certainty in areas not governed by treaty.

A. Modern Land Claim Agreements

One year after the *Calder* case, Parliament rejuvenated treaty negotiations through MLCAs to reconcile unresolved rights and title claims held by First Nations which never underwent the historic treaty-making process.[36] MLCAs only occur in areas not governed by a treaty – mainly in the northern Territories, northern Quebec, Newfoundland and Labrador and recently in British Columbia. The Nisga'a Nation, while not successful at the Supreme Court, received recognition of its ancestral homelands through the process of negotiating a MLCA.[37] The Nisga'a Final Agreement acknowledges, *inter alia*, the sovereignty and authority of the Nisga'a Nation to make laws and govern within its own defined jurisdiction.[38]

MLCAs are significant not only because they reconcile claims unaddressed by the historic treaties, but because they restore clarity and establish clear property lines. Clarity

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[35] See *Ibid* (stating "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right" at para 26).

[36] See generally Canada, Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims*, (Ottawa: Minister of Indian Affairs and Northern Development, 1998), online: <http://www.afn.ca/uploads/files/sc/comp_-_1993_comprehensive_claims_policy.pdf> (for further discussion on Canada's policy on negotiating modern land claim agreements).

[37] But see Lisa Dufraimont, "Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty" (2002) 35 UBC L Rev 455-509 at 12 (explaining that the Nisga'a Nation would likely have satisfied the test, as articulated in *Delgamuukw v British Columbia*, for Aboriginal title).

[38] See *Nisga'a Final Agreement* (27 Apr. 1999) (11:1), online:<http://nnkn.ca/files/u28/nis-eng.pdf> (confirming that the Nisga'a Nation can exercise the right of self-government in accordance with the terms of the Agreement).

facilitates resource development because proponents can better predict when their projects may infringe a First Nation's land or other Aboriginal right:

> [T]he primary purpose of comprehensive land claims settlements is to conclude agreements with Aboriginal peoples that will resolve the legal ambiguities associated with the common law concept of Aboriginal rights. The objective is to negotiate modern treaties which provide certainty and clarity of rights to ownership and use of lands and resources for all parties. The process is intended to result in agreement on the rights Aboriginal peoples will have in the future with respect to lands and resources. Through the negotiations, the Aboriginal party secures a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements.
>
> Comprehensive land claim agreements define a wide range of rights, responsibilities and benefits, including ownership of lands, fisheries and wildlife harvesting rights, participation in land and resource management, financial compensation, resource revenue sharing and economic development projects. Settlements are intended to ensure that the interests of Aboriginal groups in resource management and environmental protection are recognized, and that claimants share in the benefits of development.[39]

Through the James Bay and Northern Quebec Agreement, the government of Quebec was able to launch its billion-dollar hydroelectric project because it established clear land boundaries between Indian and non-Indian lands. The Agreement acknowledges the James Bay Cree and Inuit peoples right to exercise self-governance and allows them to manage their ancestral lands with environmental oversight and receive financial compensation.[40]

A primary distinction between the historic treaties and many MLCAs is that the latter acknowledge a First Nation's right to "self-government."[41] Through MLCAs, First Nations have

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[39] "Resolving Aboriginal Claims – A Practical Guide to Canadian Experiences," online: Indigenous and Northern Affairs Canada <http://www.aadnc-aandc.gc.ca/eng/1100100014174/ 11001000 14179#clcp>.

[40] The James Bay and Northern Quebec Agreement is available online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/cin00_1100100030849_eng.pdf>.

[41] See Jennifer E. Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claim Agreements?" (2006) 22 Windsor Rev Legal Soc Issues 29 at 6 [Dalton] (explaining that the MLCA often include outright self-government provisions).

gained the autonomy to manage and control their ancestral homelands – a right not recognized by the historic treaties. The numbered treaties crystallized the nation-to-nation relationship originally envisioned in the *Royal Proclamation*, but left First Nations subservient to the Crown and the Dominion of Canada.[42]

While the right to self-government is an innovative aspect of MLCAs, the extinguishment of Aboriginal title remains a central feature. The critical component to the Indian treaties, both historic and ongoing, is the extinguishment of Aboriginal title in exchange for a bundle of rights, which has bestowed on Canada a fiduciary duty to preserve Aboriginal rights and/or lands.

II. Aboriginal Rights

Canada recognizes and preserves the rights held by First Nations through the *Constitution Act, 1982*.[43] Section 35 states:

1) The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed.

2) In this Act, "[A]boriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

4) Notwithstanding any other provision of this Act, the [A]boriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[44]

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[42] Canada, in the name of the Crown, holds legislative authority over all Indians and the land enclaves that were reserved for them through the historic treaties. Canada fulfills this particular fiduciary obligation primarily through the *Indian Act*, which supervises the affairs of Indians living on reserves.

[43] See *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 (CanLII) (stating that "[t]he 'promise' of s. 35 … recognized not only the ancient occupation of land by [A]boriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value" at para 82) [emphasis added].

[44] See *Constitution Act*, *1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35. Prior to this constitutional entrenchment, Aboriginal rights were vulnerable and were often unilaterally extinguished.

Section (1) preserves rights that were acknowledged through the historic treaties while section (3) preserves rights that exist, or receive similar acknowledgment, through ongoing MLCAs. The affirmation of Aboriginal rights in the Constitution furthers reconciliation between Canada and First Nations and strengthens the Crown-to-First Nation fiduciary relationship.

Despite the Crown's efforts to entrench Aboriginal rights in the Constitution, it is the courts that must interpret the Constitution and determine which rights are entrenched.[45] In *R v Van der Peet* ("*Van der Peet"*), the Supreme Court of Canada explains that Aboriginal rights originate from the fact that First Nations are *Aboriginal*.[46] Chief Justice Lamer, writing for the Court in *Van der Peet*, narrowly defined Aboriginal rights as "those activities which are an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group that existed in North America prior to contact with the Europeans."[47] Unless a right is

[45] See *R v Van der Peet*, [1996] 2 SCR 507, 9 WWR 1 (CanLII) [*Van der Peet* cited to SCR] (explaining that "[i]n order to define the scope of aboriginal rights, it will be necessary first to articulate the purposes which underpin s. 35(1), specifically the reasons underlying its recognition and affirmation of the unique constitutional status of aboriginal peoples in Canada. Until it is understood why aboriginal rights exist, and are constitutionally protected, no definition of those rights is possible. As Dickson J. (as he then was) said in *R. v Big M Drug Mart Ltd.*, [sic] a constitutional provision must be understood 'in the light of the interests it was meant to protect.' This principle, articulated in relation to the rights protected by the Canadian Charter of Rights and Freedoms, applies equally to the interpretation of s. 35(1)" at para 3).

[46] *Ibid* at para 19. Aboriginal rights are *sui generis* because they are inherent rights that existed before European contact. For more discussion on the sui generis nature of Aboriginal rights see *Guerin v The Queen*, [1984] 2 SCR 335 at 382-87, 6 WWR 481 (CanLII) (explaining that s*ui generis* means one of its kind; unique); Russell Binch, "Speaking for Themselves' Historical Determinism and Cultural Relativity in Sui Generis Aboriginal and Treaty Rights Litigation" (2002) 13 NJCL 245; J. Borrows & L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta. L. Rev. 9 (for further discussion regarding the sui generis nature of Aboriginal rights).

[47] *Van der Peet* cited to SCR, *supra* note 45 at paras 44-45.

explicitly reserved by treaty, First Nations must prove that they exercised their rights prior to European contact in order to receive the constitutional protection of s. 35(1).[48]

Some rights, such as hunting or fishing, were not extinguished or confined to a First Nation's reserve. All of the numbered treaties, with the exception of Treaty 1 and 2, permit First Nations to hunt on surrendered lands (i.e., lands not reserved and managed by the Crown). The Crown made similar assurances when transferring ownership of natural resources to Alberta, Saskatchewan, and Manitoba in the *1930 Natural Resource Transfer Agreement* (*NRTA*). The Crown explicitly reserved the right for First Nations to fish and hunt anywhere "they may have a right of access" within the Prairies.[49]

The Supreme Court of Canada held that Aboriginal rights can exist independently from Aboriginal title. In *R v Adams*, for example, a member of the Mohawk Band argued that he held a right to fish regardless whether the Mohawks held Aboriginal title to the area where the fishing occurred.[50] The Court agreed and held that Aboriginal rights are not inherently based in

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[48] In *Van der Peet* the court analyzed whether a member of the Sto:lo Nation (Dorothy Van der Peet) held an existing Aboriginal right to sell fish. See *Van der Peet* cited to SCR, *supra* note 45 at paras 84, 91 (where the court concluded that Ms. Van der Peet only held an Aboriginal right to fish for food because fishing for food, as opposed to selling fish, was an integral part of distinctive Sto:lo society existing prior to contact). Because Ms. Van der Peet failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society, she violated the *Fisheries Act* upon selling salmon without a license. This holding means that s.35 only safeguards rights proven to exist prior to European contact.

[49] The *Natural Resource Transfer Acts* for Saskatchewan (now titled the Constitution Act, 1930, 20-21 George V, c 26 (U.K.), *reprinted in* RSC 1985, App II, No 26 (Can.)) (clause 12), Alberta (clause 12) and Manitoba (clause 13) states "[i]n order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence. Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access" [emphasis added].

[50] *R v Adams*, [1996] 3 SCR 101at paras 2-3, 138 DLR (4th) 657 (CanLII).

Aboriginal title.[51] The Court held that Aboriginal title is "simply one manifestation of a broader-based conception of Aboriginal rights."[52]

Aboriginal title is a unique interest in land analogous to fee simple, including: "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[53] Despite the unique bundle of rights associated with Aboriginal title, the title holder is prohibited from leasing or using the land in a manner that would substantially deprive future generations of the benefit of the land.[54] Aboriginal title is accompanied by a unique limitation – "it is collective title held not only for the present generation but for all succeeding generations."[55]

The Supreme Court's holding in *Adams*, along with the language in the *NRTA* and most of the numbered treaties, confirm that First Nations may exercise rights, particularly the right to hunt and fish, beyond a reserve's boundaries. Many of the MLCAs, on the other hand, confine

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[51] See *Ibid* (holding that "while claims to [A]boriginal title fall within the conceptual framework of [A]boriginal rights, [A]boriginal rights do not exist solely where a claim to [A]boriginal title has been made out. Where an [A]boriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an [A]boriginal right to engage in that practice, custom or tradition…. To understand why [A]boriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that some [A]boriginal peoples were nomadic" at paras 26-27) [emphasis added].

[52] *Ibid* at para 25.

[53] *Tsilhqot'in Nation*, *supra* note 15 at para 73.

[54] See *Ibid* at para 74 (explaining that that the land cannot be 'developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises').

[55] *Ibid*.

the exercise of certain rights within a defined territory.[56] The Nisga'a Final Agreement, for example, acknowledges the Nisga'a Nation's right to self-government, but only within territories defined by the treaty. The geographical uncertainty of Aboriginal rights coupled with the fact that many First Nations continue to assert Aboriginal title in areas not governed by a treaty creates uncertainty for companies which attempt to extract resources. The Court has articulated a test, known as the "duty to consult," to help Canada and resource proponents navigate the maze of Aboriginal rights.

A. Respecting Aboriginal Rights through Consultation

The duty to consult strives to prevent Aboriginal people from being unjustly exploited by Canada's industrial progression. It is a procedural duty grounded in the honour of the Crown that requires governments to *proactively* consult their Aboriginal neighbors before infringing their rights.[57]

> At a fundamental, principled level, the aim in any consultation context is to achieve meaningful consultation. Meaningful consultation is that which achieves the purposes of the doctrine. The duty to consult doctrine seeks to maintain the honourable Crown conduct and to offer proactive protection to Aboriginal and treaty rights such that in situations of uncertainty about the scope of Aboriginal and treaty rights, there is a discussion of that uncertainty in advance of a government decision that may adversely impact them.[58]

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[56] See Dalton, *supra* note 41 at 7 (explaining that while MLCAs may incorporate robust self-government and land rights, the act of extinguishment is still nonetheless present in MLCAs, which inevitably confines and limits fundamental rights).

[57] See *Haida Nation*, *supra* note 10 (explaining how consultation and accommodation are a part of the process of fair dealing and reconciliation between the Crown and First Nations that "stems from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people" at para 32); see also Newman, *supra* note 4 (explaining that the Crown does not have to achieve perfection, but must act consistent with the honour of the Crown when employing its procedural duty to consult).

[58] Newman, *supra* note 4 at 86-87.

To assist the Crown in employing its fiduciary duty proactively and in advance of a decision that may adversely impact a First Nation, the Supreme Court of Canada established a low threshold for determining when the duty to consult is triggered.

The Crown's duty to consult is triggered "when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect it."[59] The first element of this doctrine is *knowledge* of a First Nation's claim or right, which can be a complex question given the uncertainty associated with Aboriginal rights.[60] The Crown will automatically be deemed to have knowledge of a First Nation's treaty right since the Crown is a signatory to the treaty.[61] The Crown will unlikely be held liable for commencing projects when they could not possibly have any notion of the claimed right, but will be held liable for failing to consult First Nations when they knew of an asserted claim, even if the claim was weak or uncertain.[62] The duty to consult furthers reconciliation because it requires governments to *proactively* consult First Nations regardless whether their right is proven or merely asserted. The test is triggered by knowledge of a right, not its validity.

The second element of the duty to consult assesses how much consultation should be employed. The degree of consultation employed is circumstantial and changes case by case.[63] The Supreme Court of Canada opined that the degree of consultation owed to a First Nation

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[59] *Haida Nation*, *supra* note 10 at para 35.

[60] Newman, *supra* note 4 at 95 (explaining that there is an element of shared responsibility between the Crown and First Nations to identify what rights might be infringed by a proposed project. This identification process helps pinpoint the appropriate level of consultation and accommodation).

[61] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 269 at para 34, 3 SCR 388 [*Mikisew*].

[62] *Haida Nation*, *supra* note 10 at paras 36-37.

[63] See *Ibid* at para 39 (explaining that the scope of the duty to consult and accommodate varies with the circumstances).

depends 1) on the *prima facie* strength of a First Nation's claim and 2) the seriousness of the impact on the Aboriginal right or treaty right.[64] The former is less relevant in the context of treaty rights. The treaty itself is evidence of a strong *prima facie* claim. Consultation within the context of definitive treaty rights primarily hinges on the second factor – the seriousness of the impact on the treaty right.

The strength of a First Nation's *prima facie* claim is essential where First Nations have not signed treaties and still seek recognition of their rights. Professor Dwight Newman explained this distinction in his recent "*Revisiting The Duty to Consult Aboriginal Peoples*:"

> [C]onsultation in Saskatchewan operates in a different context than it does in British Columbia. A Saskatchewan consultation will frequently pertain to treaty rights rather than any other Aboriginal right, and Aboriginal title claims have very limited application, if any, in the Saskatchewan context…The result is that the *prima facie* strength of an Aboriginal claim will typically not be a distinguishing factor in different circumstances…leaving the seriousness of impact on the relevant Aboriginal interests the key distinguishing factor set out in the case law in this treaty right context. By contrast, many of the issues in British Columbia will be Aboriginal rights or Aboriginal title questions, but with the *prima facie* strength of those claims very much at issue in different parts of the province. In that setting, both the impact on the community and the *prima facie* strength of its claims will operate as full factors in helping to identify meaningful consultation [footnotes omitted].[65]

Because the historic treaties acknowledged First Nations' rights throughout Saskatchewan, the Saskatchewan government implemented a consultation policy that primarily guides consultation in proportion to the level of infringement on the treaty right.[66] Saskatchewan's consultation policy holds that more consultation is required when major infringement (permanent disturbance

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[64] *Ibid*.

[65] Newman, *supra* note 4 at 100.

[66] See also *Government of Alberta Guidelines on Consultation with First Nations on Land and Natural Resources Management, 2014* (28 July 2014) at A2-A3 online: <http://indigenous. alberta.ca/documents /First_Nations_Consultation_Guidelines_LNRD.pdf.pdf> [*Alberta's Guideline on Consultation with First Nations*] (explaining that consultation will vary in proportion to the level of impact).

or permanent uptake of land) is likely to occur, whereas less consultation may be sufficient when minor infringement (short-term disturbance) is likely to occur.[67]

Once the Crown fulfils its procedural duties and informs a First Nation that its plan of action is adverse to its interests, there *might* be a duty to accommodate a First Nation.[68] Accommodation is only considered *after* meaningful consultation has occurred.[69] Accommodation must uphold the honour of the Crown and account for the severity of harm a project may impose on a First Nation.[70] The Crown is forbidden from sharp dealings and must negotiate in good faith.[71]

Accommodation strives to balance different concerns, interests, and perspectives. It is a process to compromise, not agree.[72] Proponents may proceed with their project adverse to the interests of a First Nation – if they can justify that their incursion will fulfill a compelling and substantive interest for the broader Canadian public.[73]

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[67] The Government of Saskatchewan First Nation and Métis Consultation Policy Framework, online: <https://www.saskatchewan.ca/live/first-nations-citizens/lands-and-consultation/ consultations>.

[68] See *Haida Nation*, *supra* note 10 at para 47 (explaining that good faith consultation may lead to accommodation).

[69] See *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, at para 82 (CanLII) (explaining that consultation is never to be "narrowly interpreted as the mitigation of adverse effects on Aboriginal rights and/or title" because accommodation evolves *after* meaningful consultation has been employed).

[70] See *Haida Nation*, *supra* note 10 at para 50 (explaining that the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests).

[71] *Ibid* at para 49.

[72] See *Ibid* (where the Court holds that accommodation is a process to compromise yet a commitment to the process does not require a duty to agree).

[73] See *Sparrow*, *supra* note 22 (where the Supreme Court of Canada articulated a test for determining when a proposed incursion is justified under s. 35 of the *Constitution Act, 1982*).

B. Infringing Aboriginal Rights for the Greater Good

In *R v Sparrow* ("*Sparrow*"), the Supreme Court of Canada held that the Crown may infringe Aboriginal rights as long as the infringement is "justified."[74] This test asks whether an infringement on an Aboriginal right is in pursuit of a valid legislative objective that is compelling and substantive; if so, the infringement may be justified:

> To justify overriding the Aboriginal title-holding [or right-holding] group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group.[75]

The onus of proving a *prima facie* infringement lies with the individual or group challenging the incursion.[76] This is an easy burden for First Nations that hold rights explicitly acknowledged in a treaty or the *NRTA*. First Nations that have not signed a treaty, on the other hand, do not possess existing rights pursuant to the court's interpretation of s. 35(1). Their rights have yet to be explicitly acknowledged. First Nations that assert Aboriginal title (or any other right) must present *prima facie* evidence that proves they legally possess Aboriginal title, before they can litigate whether an intrusion on their land is unjustified. First Nations faced with this legal conundrum are not left without any protection because the first element to the *Sparrow* test requires the Crown to discharge the duty to consult before an incursion on Aboriginal title or other Aboriginal right can be deemed justified.[77]

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[74] *Ibid*; see also *R v Côté*, [1996] 3 SCR 139 at para 74, 138 DLR (4th) 385 (CanLII) (extending *Sparrow's* holding to provincial governments).

[75] *Tsilhqot'in Nation*, *supra* note 15 at para 77, citing *Sparrow*, *supra* note 22.

[76] *Sparrow*, *supra* note 22 at 70.

[77] See *Tsilhqot'in Nation*, *supra* note 15 citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186, 10 WWR 34 (CanLII) [*Delgamuukw*] (stating that "…[t]he process of reconciling Aboriginal

Jurisprudence defines how the Crown fulfills its fiduciary obligations in both the context of definitive treaty rights and mere *prima facie* claims.

C. Consultation and Accommodation in the context of Definitive Treaty Rights

In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* ("*Mikisew Cree*"),[78] the Supreme Court of Canada decided what level of consultation was owed to the Mikisew Cree First Nation when the federal government proposed to build a winter road that would service isolated communities, but at the cost of crossing the traplines of 14 Mikisew families – a right explicitly protected by Treaty 8.[79]

The government held an open house and invited the general public, including the First Nation to express its comments regarding the road's construction. The First Nation refused to attend on the belief that an open house session was not the appropriate forum to conduct nation-to-nation consultation."[80]

The Crown argued that its course of action in planning and approving the road's construction was adequate for two main reasons. First, Treaty 8 gave it the right to "take up" surrendered lands from time to time and since the Mikisew Cree people were fully consulted in 1899 when Treaty 8 was negotiated, the Crown could unilaterally approve the road without further consultation.[81] Second, if consultation was required, then a public forum, such as an

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interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation. [*sic*] To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective" at para 82).

[78] *Mikisew*, *supra* note 61.

[79] *Ibid* at para 2.

[80] *Ibid*.

[81] *Ibid* at para 36.

"open house" was sufficient and because the First Nation failed to participate after being invited, it should not be heard to complain.[82]

The Court confirmed that the Crown could "take up" surrendered lands from time to time, but it could not take this course of action unilaterally and without directly consulting the First Nation.[83] The Court rejected the Crown's second argument and held that it "not only ignores the mutual promises of the treaty, both written and oral, but also is the antithesis of reconciliation and mutual respect."[84]

The Court's holding confirms that Canada is burdened with ongoing fiduciary obligations to First Nations. The Crown should have assessed the road's potential impacts and communicated those findings directly to the Mikisew Cree people prior to approving the road's construction.[85]

The Court estimated how much consultation should be employed by assessing the impact of the road on the Mikisew Cree's hunting rights under the treaty. The Court agreed that the road would provide critical transportation at the cost of infringing only 14 families' trapping rights.[86] In this particular circumstance, the Court believed that the Crown's duty to consult fell at the lower end of the spectrum.[87] Even at this lower end of the spectrum, however, the federal Minister was required:

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[82] *Ibid* at para 13.

[83] *Ibid* at para 55.

[84] *Ibid* at para 49.

[85] See generally *Ibid* at paras 53, 55 (explaining that the treaty negotiations that occurred in 1899 is only a stage of reconciliation and do not fulfill the Crown's obligations today).

[86] But see *Ibid* at para 3 (where the Court did express how important these traplines may be for these remote families who rely on hunting for food).

[87] *Ibid* at para 64.

> …to provide notice to the Mikisew and to engage directly with them...This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights.
>
> …The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.
>
> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that [A]boriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action [emphasis added].[88]

The Court felt that consultation never got off the ground despite the Crown's effort to include the Mikisew Cree people in the public forum. A simple invitation to a public forum did not fulfill the Crown's fiduciary obligations because it did not directly address the potential adverse impacts that affected the Mikisew Cree's interest.

It should be emphasized that the winter road proposed by the Minister was a permissible "taking up" of surrendered lands under Treaty 8.[89] Because the Crown held a treaty right to take up surrendered lands, there was no need to justify its incursion under a *Sparrow* analysis.[90] The Court suggested that if the Crown had fulfilled its fiduciary obligations and proactively consulted the Mikisew Cree people, it could have altered the road's route to accommodate the Mikisew

[88] *Ibid*.

[89] *Ibid* para 60.

[90] See *Ibid* at para 31 (where the Supreme Court distinguished the facts from *Sparrow* and held that Treaty 8 unambiguously anticipated that lands would be taken up from time to time).

Cree or proceeded as planned, despite its adverse impacts on the Mikisew Cree people.[91] The Supreme Court of Canada's holding in *Mikisew Cree* suggests that consent is not required in the context of infringing definitive treaty rights.

D. Consultation and Accommodation in the context of Prima Facie Claims

In the context of *prima facie* claims, consultation is contingent on the strength of the claim supporting the asserted right, as well as the extent of the potential adverse impact from the proposed government action. Although consultation is owed regardless whether the right is proven or not, the degree of consultation employed in the context of a *prima facie* claim hinges on the strength of the evidence submitted to support the asserted claim:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation in its least technical definition is talking together for mutual understanding."
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> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
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> [Regardless whether the right is proven or asserted,] [t]he controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake [citations omitted].[92]

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[91] See *Ibid* (explaining that accommodation may or may not result in an agreement. "Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road" at para 66) [emphasis added].

[92] *Haida Nation*, *supra* note 10 at paras 43, 45.

First Nations must submit evidence demonstrating that they exercised their rights prior to European contact as defined by *Van der Peet* or, in the case of Aboriginal title, as defined by *Tsilhqot'in Nation v British Columbia* ("*Tsilhqot'in*").

In *Haida Nation v British Columbia (Minister of Forests)* ("*Haida*"), for example, a high degree of consultation was owed to the Haida people because the evidence strongly supported Haida's assertion to Aboriginal title. In that case, the government of British Columbia issued permits to a forestry firm authorizing them to cut down trees in the Queen Charlotte Islands.[93] Title to the Islands was held by British Columbia, but the Haida Nation had a claim for Aboriginal title.[94] The Haida Nation was concerned that forestry from the Islands would be depleted before they could validate their claim to Aboriginal title.[95] This would deprive the Haida people of viable economic opportunities, and also impact their culture since the Haida people use the cedar forest for their "ocean-going canoes, their clothing, their utensils and the totem poles that guard their lodges.[96] "The cedar forest remains central to their life and their conception of themselves."[97]

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[93] *Ibid* at para 4.

[94] *Ibid* at para 5.

[95] See *Ibid* (explaining that "[t]he stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled" at para 7).

[96] *Ibid* at para 2.

[97] *Ibid.*

The government argued that it had the right to manage forestry for the good of all British Columbians, "and that until the Haida people proved their claim, they had no legal right to be consulted..."[98] The Supreme Court of Canada rejected this argument:

> To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title… It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.
>
> I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s.35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation…[99]

The Court held that the Crown's duty to consult was triggered before it authorized the forestry project within Haida's claimed territory. The Supreme Court of Canada seems less concerned with the validity of rights and more focused on fostering a dialogue between First Nations and the Crown. Consultation is the root to achieving reconciliation and ensuring rights (both proven and merely asserted) do not go unjustifiably infringed.

After confirming that the Crown's duty to consult was triggered in this *prima facie* context, the Court evaluated the evidence to determine what degree of consultation was owed to the Haida First Nation. The evidence proved that the Haida people never surrendered their ancestral homeland to the Crown and have continuously inhabited the Haida Gwaii since 1774;

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[98] *Ibid* at para 8.

[99] *Ibid* at paras 33, 38.

the evidence supported Haida's *prima facie* claim beyond a mere assertion.[100] In light of this evidence, the Court concluded that consultation was owed at the higher end of the spectrum.

Because the Crown never fulfilled its procedural duties prior to issuing the forestry permit, the Court could not decide whether consultation would have led to accommodation. The Court did suggest that

> the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.[101]

Accommodation in the context of *prima facie* claims, particularly those that relate to Aboriginal title, may include financial compensation. A claim pertaining to Aboriginal title triggers what the Supreme Court of Canada has deemed an inescapable economic component because Aboriginal title holders possess an interest in land, which has economic value.[102] British Columbia, for example, has entered into resource revenue sharing agreements with First Nations that hold a *prima facie* claim to Aboriginal title.[103] First Nations, like the Haida Nation, can encounter incursions on their ancestral homelands before they legally validate their claims. Resource revenue sharing agreements can provide an interim solution to accommodate First Nations that have not finalized their MLCA.[104]

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[100] See *Ibid* at paras 69, 71 (explaining the strength of Haida's *prima facie* claim).

[101] *Ibid* at para 77.

[102] See *Delgamuukw*, *supra* note 77 at para 169 (explaining the economic component of Aboriginal title).

[103] See "Ministry of Forests, Lands, and Natural Resource Operations," online: <https://www.for.gov.bc.ca/haa/fn_agreements.htm> (for a list of resource revenue sharing agreements in the forestry sector).

[104] See generally *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at para 97, 6 WWR 429 (CanLII) (explaining that the core of

In *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* ("*Taku River*"),[105] for example, the Taku River Tlingit First Nation (TRTFN) was negotiating its MLCA when a company applied to reopen an old mine in its ancestral territory.[106] TRTFN participated in an environmental assessment process over a course of three-and-a-half-years.[107] The province approved funding for wildlife monitoring programs as desired by the TRTFN,[108] reviewed reports that addressed TRTFN's traditional land use and other interests,[109] and conducted several meetings directly with the TRTFN to ensure it was fully included throughout the environmental assessment process.[110]

The environmental assessment confirmed that the TRTFN held a strong *prima facie* claim to its traditional homelands and was owed a high degree of consultation.

> The potentially adverse effect of the Ministers' decision on the TRTFN's claims appears to be relatively serious. The chambers judge found that all of the experts who prepared reports for the review recognized the TRTFN's reliance on its system of land use to support its domestic economy and its social and cultural life. The proposed access road was only 160 km long, a geographically small intrusion on the 32,000-km^2 area claimed by the TRTFN. However, experts reported that the proposed road would pass through an area critical to the TRTFN's domestic economy. The TRTFN was also concerned that the road could act as a magnet for future development. The proposed road could therefore have an impact on the TRTFN's continued ability to exercise its Aboriginal rights and alter the landscape to which it laid claim.

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accommodation is the balancing of interests, which may spark innovative forms of reconciliation, such as the sharing of resources or employment agreements).

[105] 2004 SCC 74, 3 SCR 550 [*Taku River*].

[106] *Ibid* at para 28.

[107] *Ibid* at para 1.

[108] *Ibid* at para 12.

[109] *Ibid* at para 13.

[110] *Ibid* at para 37.

> In summary, the TRTFN's claim is relatively strong, supported by a *prima facie* case, as attested to by its acceptance into the treaty negotiation process. The proposed road is to occupy only a small portion of the territory over which the TRTFN asserts title; however, the potential for negative derivative impacts on the TRTFN's claims is high. On the spectrum of consultation required by the honour of the Crown, the TRTFN was entitled to more than the minimum receipt of notice, disclosure of information, and ensuing discussion. While it is impossible to provide a prospective checklist of the level of consultation required, it is apparent that the TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation" [emphasis added and footnotes omitted].[111]

Despite this high burden, the Supreme Court of Canada concluded that the environmental assessment process, specifically the degree in which TRTFN participated, met the Crown's consultation obligation.[112] The Court made clear that TRTFN was not entitled to a decision that furthered its interests.[113] Consultation and accommodation do not have to meet the expectations of a First Nation. It must only satisfy the honour of the Crown and in this case, TRTFN's participation in the environmental assessment was "sufficient to uphold the province's honour and meet the requirements of its duty."[114]

The Supreme Court of Canada's analysis in *Taku River* supports the notion that consultation and accommodation furthers reconciliation not by satisfying the demands of Aboriginal people, but by balancing the concerns and interests held by Aboriginal people and

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[111] *Ibid* at paras 31-32.

[112] See *Ibid* at paras 132-40 (where the Supreme Court agreed with the Trial judge's determination that the TRTFN was fully included throughout the environmental assessment process. "The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples").

[113] *Ibid* at paras 43-44.

[114] *Ibid* at para 2.

then seeking a compromise.[115] Reconciliation is a continuing process aimed towards compromise, not a final stage of agreement. In limited cases where a First Nation has legally proven it possesses Aboriginal title, however, the Crown may face a heavy burden to justify its incursion.

In *Tsilhqot'in*, for example, the Supreme Court of Canada concluded that the Tsilhqot'in people did legally possess Aboriginal title over their ancestral homelands. Since the Tsilhqot'in people held Aboriginal title to their ancestral land, the government could only proceed with its project if it obtained the Tsilhqot'in peoples' consent or if it justified its incursion pursuant to *Sparrow*.[116] Courts have similarly held that industries must obtain the consent of a First Nation where a MLCA explicitly requires it.[117] The Nunavut Land Claims Agreement and the Gwich'in Final Agreement, for example, requires proponents to reach an agreement before commencing any resource development on their lands.[118]

Courts typically view resource development as a compelling and substantial government action that serves the broader public interest.[119] Projects that infringe Aboriginal title, however,

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[115] *Ibid*.

[116] *Tsilhqot'in Nation*, *supra* note 15 at para 76.

[117] See *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, 3 SCR 103 (holding that "[w]hen a modern treaty has been concluded, the first step is to look at its provisions and try to determine the parties' respective obligations, and whether there is some form of consultation provided for in the treaty itself. If a process of consultation has been established in the treaty, the scope of the duty to consult will be shaped by its provisions" at para 67).

[118] See Nunavut Land Claims Agreement, online: <http://www.gov.nu.ca/sites/default/files/files /013%20-%20 Nunavut-Land-Claims-Agreement-English.pdf> (stating that "no Major Development Project may commence until an IIBA is finalized in accordance with this Article" at 26.2.1); Gwich'in Comprehensive Land Claim Agreement, at 20.4.6 (a) online: <http://gwichin.nt.ca/wp-content/uploads/2014/11/GTC-Comprehensive-Land-Claim.pdf> (stating that a developer will gain a right of access to Gwich'in lands only with the agreement of the Gwich'in Tribal Council).

[119] See *Delgamuukw*, *supra* note 77 (holding that "[t]he development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of

may not be *justified* because it is unlikely that the government's incursion is consistent with the Crown's fiduciary duty – the last component to the *Sparrow* analysis:

> First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.
>
> Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" [emphasis added].[120]

While a gate-keeping power to control the land is correlated with consent, the justified-infringement test set forth in *Sparrow* enables the Crown to proceed with its course of action – even if a First Nation does not render its consent in favour of the project. First Nations cannot prohibit *justified* resource development. However, the Supreme Court's analysis in *Tsilhqot'in* suggests that incursions onto lands held in Aboriginal title would unlikely uphold the honour of the Crown or align with Canada's fiduciary obligations owed to Aboriginal peoples.

Consultation and accommodation, albeit stemming from the honour of the Crown, are jurisprudential creations designed to establish certainty and mandate a dialogue between the

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the environment or endangered species, and the building of infrastructure, [such as roads] and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title" at para 165).

[120] *Tsilhqot'in Nation*, *supra* note 15 at paras 86-87 [footnotes omitted].

Crown and First Nations. Because Canada owes First Nations a trust-like relationship and must uphold the honour of the Crown, the duty to consult is a fiduciary obligation held solely by Canada, on behalf of the Crown.[121] First Nations cannot refuse to consult with the Crown. A nation-to-nation approach to reconciliation posits a reciprocal obligation on First Nations to participate in the consultation process and negotiate in good faith to reach a compromise.[122] A failure to consult First Nations appropriately often results in litigation, as *Mikisew Cree*, *Haida*, and *Tsilhqot'in* illustrate.

Although the duty to consult is a nation-to-nation approach to reconciliation, other stakeholders, such as companies which extract natural resources, bear a cost when First Nations are not adequately or efficiently consulted. The following two sections explain how resource proponents can directly participate in the legal process of consultation and use IBAs to accommodate and reconcile First Nations with resource development.

III. Companies' Role in the Duty to Consult and Accommodate

Despite the absence of any legal obligations, industries have not been sidelined in the consultation process. In *Haida*, the Supreme Court of Canada held that the Crown may delegate procedural aspects of consultation "to industry proponents who seek a particular development."[123] After the Court's decision in *Haida*, many provinces modified their consultation policies to include project proponents in the consultation process. British Columbia, for example, acknowledges the need for a joint approach in its "Updated Procedures for Meeting

[121] See *Haida Nation*, *supra* note 10 at para 53 (holding that third parties have no obligation to consult and accommodate First Nations. The Crown alone bears this responsibility).

[122] See *Mikisew*, *supra* note 61 (holding that "there is some reciprocal onus on the Mikisew to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution" at para 65).

[123] *Haida Nation*, *supra* note 10 at para 53.

Legal Obligations when Consulting First Nations."[124] The government of British Columbia concedes that it alone bears the legal responsibility to ensure consultation is appropriately administered, but recognizes *Haida's* holding that certain procedural aspects could be delegated to project proponents. The government of Alberta similarly delegates procedural aspects of consultation to project proponents when considering proposals regarding land and natural resource management.[125]

Procedures that may be delegated to industries planning projects in Alberta and British Columbia may include, but not limited to:

- Participating in meetings with provincial representatives and First Nations or directly with the First Nation to discuss the concerns of the First Nations;
- Providing First Nations with plain language information on project scope and location;
- Identifying potential short and long-term adverse project impacts, which may include providing information to First Nations about the proposed activity, how it could happen, where it could occur (i.e., maps) and what the potential impacts may be to lands and resources;
- Developing potential mitigation strategies to minimize or avoid adverse impacts;
- Implementing mitigation measures; and
- Summarizing consultation efforts and providing an explanation, when required, of how a specific First Nations' concerns regarding adverse impacts have been addressed.[126]

First Nations can refuse to consult directly with proponents. Where this happens, the Crown is obligated to step back in and directly consult with the First Nation.[127] The Crown's duty to

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[124] Province of British Columbia, *Updated Procedures for Meeting Legal Obligations When Consulting First Nations* (7 May 2010), online: <file:///C:/Users/tlovett/Downloads/legal _obligations_when_ consulting_with_first_nations%20(1).pdf>.

[125] *Alberta's Guideline on Consultation with First Nations*, *supra* note 66 at 6.

[126] This list summarizes the procedural duties that may be delegated to industries that plan to implement projects in British Columbia and Alberta that could potentially infringe a First Nation's rights, land, or community.

consult does not wither away where a proponent proactively seeks to consult a potentially impacted First Nation, because the Crown must ensure that consultations are carried out in good faith.[128]

The common theme in both Alberta and British Columbia's policies is *proactive consultation*.[129] Industries which proactively consult First Nations before commencing their projects will gain certainty. Certainty, in the context of resource development, is vital in Canada, despite the clear land boundaries established by the historic treaty process. As discussed above, there is a geographical component associated with Aboriginal rights – some First Nations can exercise their rights outside the border of their reserves while others cannot. The need for proactive consultation is perhaps most needed in British Columbia where land ownership remains ambiguous. As *Haida* and *Tsilhqot'in* illustrate, the Crown often approves projects without consulting nearby First Nations. If the Crown and proponent had jointly approached the

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[127] See e.g., Province of British Columbia, *Guide to Involving Proponents When Consulting First Nations* (2014), online:<file:///C:/Users/tlovett/Downloads/involving_proponents_guide_when _consulting _with_first_nations%20(3).pdf > [*British Columbia's Guide to Consultation*] (stating "[w]here a First Nation refuses to engage with a proponent, the Province will continue to consult that First Nation directly. While proponent engagement can promote timely decisions, the refusal of a First Nation to engage with a proponent may not necessarily impact the consultation process or the timelines for decisions on applications. First Nations have a reciprocal responsibility to participate in the consultation process in good faith, to make their concerns regarding impacts on their Aboriginal Interests known and to respond to government's effort to consult" at 9).

[128] The Crown's duty to consult can never be replaced. If it did, it would breach the honour of the Crown and its fiduciary obligations owed to First Nations. Under both Alberta's and British Columbia's consultation policies, proponents are encouraged to keep records so the province can review and determine whether consultation was adequately employed.

[129] See e.g., *British Columbia's Guide to Consultation*, *supra* note 127 (stating that "[p]roponents are encouraged to engage with First Nations as early as possible in the planning stage to build relationships and for information sharing purposes. Engagement early in the planning stage provides opportunities to identify any concerns by First Nations about the proposed development/activity and may increase the likelihood of successful consultation outcomes. As well, proponents are often in a better position to provide information about their proposed activity directly to the First Nation" at 4) [emphasis added]; see also *Alberta's Consultation Policy*, *supra* note 63 (stating that "[p]roponents are encouraged to notify and consult with First Nations as early as possible in the pre-application stage" at 6).

First Nation and expressed their interest in commencing forestry projects, they would have learned the First Nation had a potential interest in the land. Because neither the Crown nor industry conducted their due diligence prior to commencing the project, litigation ensued and development was delayed.

Consultation in the private sector between companies and First Nations may be more efficient and effective than government consultation required by legal doctrine. The more proponents can learn from First Nations, the better they can quantify and predict a project's proposed impacts. This also enables First Nations to "acutely articulate their concerns and requests for particular forms of accommodation in response."[130]

The Crown has little incentive to go above and beyond its legal obligations, which only requires that consultation be in proportion to the strength of a First Nation's *prima facie* claim and in proportion to a project's potential impact on a First Nation's right. Consultation pursuant to this legal doctrine requires the Crown to exercise a level of discretion along a spectrum, which results in different degrees of consultation on a case-by-case basis. A spectrum allowing low and high ends of consultation only incentivizes the Crown to downplay its duties and argue minimal impacts. This inherently contradicts the "honour of the Crown," but nonetheless is an economic reality because consultation costs money.

Unlike the Crown using tax revenue to uphold its fiduciary obligations, companies can foot their own bill. Companies bear a direct cost when consultation fails to remedy or reconcile a First Nation's concerns associated with a project. There is no need for a spectrum. Regardless how minimal a project's proposed impact or weak a First Nation's *prima facie* claim may be,

[130] Kaitline Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation," 46 UBC L REV 397-438 at 8.

proponents have an economic incentive to employ full consultation so they can comprehensively understand how their project will impact the First Nation and ensure it proceeds efficiently without litigation.[131] The need for compromise preserves comprehensive consultation as Canada progresses towards renewable forms of energy. Despite the minimal impact a wind or solar project may have, industries are still economically incentivized to reconcile the concerns of First Nations.

Most resource based industries, as opposed to the government, possess the capital needed to overcome any funding impediments a First Nation may encounter.[132] Companies can cover legal costs and provide travel accommodations to ensure that a First Nation can fully participate in consultation. This is not because of industries' good graces, but because anything less than full consultation creates a risk industries cannot *afford* to take. Asian investors, for example, established a $200 million fund to facilitate consultation and develop partnerships with Aboriginal peoples.[133] This upfront cost borne by industry ensures that negotiations occur efficiently and without delay. Relying on a bureaucratic government as an intermediary between a proponent and First Nation is anything but efficient.

Unlike the Crown consulting within the legal realm, companies anticipate an *agreement* from the outset. Consultation is initially employed to learn and gain knowledge, but afterwards

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[131] Although economics will guide consultation between proponents and First Nations, the Crown will ensure First Nations are not exploited or unfairly consulted. The legal doctrine and the Crown's fiduciary obligations provide a minimum level of consultation in proportion to the strength of a First Nation's *prima facie* claim and a project's potential impact on a First Nation's rights.

[132] But see Newman, *supra* note 4 at 135 (explaining that consultation policies are inevitably modified by the size and finances bracing a particular industry. Smaller companies may not be able to invest in consultation on equal par with larger companies); see also Chapter Three, at 118-19 below, discussing how NovaGold allocated funding to the Tahltan Nation so it could adequately participate in the consultation process.

[133] Joe Friesen, "Asian investors back native bands," online: The Globe and Mail <http://www.theglobeandmail.com/news/national/asian-investors-back-native-bands/article20441597/>.

those negotiations are tailored towards mitigation of adverse effects on Aboriginal rights and/or title. This does not diminish the legal process of consultation, but rather focuses negotiations on reaching an agreement. Under the legal doctrine, the Crown often focuses too much on the intricacies which underlie consultation, whereas in the private sector, proponents will strive for reconciliation regardless of the level of impact in effort to expedite their project and avoid litigation. This leads to innovative forms of accommodation, such as IBAs, to reconcile First Nations with resource development. IBAs aim to reach an agreement while the law only balances competing interests, which may not reconcile a First Nation with a proposed project.

IV. Accommodating First Nations through Impact and Benefit Agreements

IBAs are negotiated contracts that aim to reconcile a First Nation's interests with a company's projected plan for development.[134] IBAs seek to address a project's potential impacts and to establish a business relationship between a company and impacted First Nation. They serve as a mechanism to achieve a First Nation's consent for a proposed project in exchange for allocating benefits to an impacted First Nation. Although the Crown has a fiduciary obligation to ensure First Nations receive adequate consultation, the Crown does not have a similar obligation to act as a fiduciary and oversee the negotiation of an IBA. A developer and affected Aboriginal group can negotiate an IBA with little or no direct participation by federal, provincial, or territorial governments.[135]

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[134] See Introduction, at 3 above, informing that IBAs are enforceable under the principles of contract law.

[135] See Steven A. Kennett, "Issues and Options for a Policy on Impact and Benefits Agreements" (Prepared for the Mineral Resources Directorate, Department of Indian Affairs and Northern Development 27 May 1999) at 98-101, online: <http://cbern.sharpschool.com/kr/One.aspx?objectId=10486954&contextId =677979&lastCat=10486919> at 18 [Kennett].

Where companies engage in consultation beyond the legal spectrum, IBAs can accommodate First Nations beyond the legal requirements as well. The legal doctrine only requires accommodation if it is necessary to uphold the honour of the Crown. In most instances, the law only requires proponents to mitigate their project's impacts. Financial compensation is only required in the context of infringing Aboriginal title. This fosters a "take it or leave it" approach to accommodation. As the Supreme Court of Canada suggested in *Mikisew Cree*, had the Crown fulfilled its fiduciary obligations, it could have either rerouted the road or proceeded to construct the road as planned, despite its adverse effects on the Mikisew's hunting rights.[136]

To modify the facts from *Mikisew Cree*, a company proposing an oil refinery nearby, but outside a First Nation's reserve, would likely disturb wildlife migration patterns and impact the community's hunting subsistence. Here, a company could utilize an IBA to financially compensate the First Nation to avoid the time and costs associated with rerouting pipelines or litigating its incursion pursuant to *Sparrow*. If proponents can construct roads or refineries without infringing Aboriginal rights, then they will do so. Companies planning projects in the Prairie Provinces, however, risk infringing a First Nation's right regardless where their projects are located given the large number of First Nations and the broad language in the *NRTA*.

IBAs help to avoid litigation, and offer First Nations a chance to receive financial compensation, even in the context of definitive treaty rights. IBAs create an opportunity for First Nations to define the parameters of accommodation. First Nation leaders, not the courts or government, know what their communities need. Through the process of negotiating an IBA, First Nation leaders can voice how much they want to participate and benefit from a proposed project.

[136] More on this case can be found at 29-32, above.

IBAs are also advantageous for First Nations which hold nothing more than a *prima facie* claim to a right. As argued earlier, it may be cheaper for companies to accommodate First Nations than to risk litigation.[137] The Voisey's Bay Nickel Project exemplifies how a company can utilize an IBA to accommodate an Aboriginal group who holds nothing more than a *prima facie* claim to rights. When Vale Inco (the project developer) discovered nickel within Nunatsiavut Nation's claimed traditional territory, the Labrador Inuit Association (LIA)[138] was currently negotiating its MLCA. Even though the LIA had not finalized its land claim, the Inuit peoples feared the proposed Nickel Mine would adversely impact their traditional homelands.

The Labrador Inuit Association (LIA) launched a court challenge arguing that the access roads to the mine were not being appropriately included in the environmental review process.[139] The LIA was concerned that the construction of access roads and airstrips would increase traveling and cause significant damage to the ice, which is an integral component of the Inuit's culture. The Inuit feared that damage to the ice would impede their travel and alter migration patterns for polar bears, seals, and other sea mammals that they rely on for food.[140] The Inuit

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[137] See also Hitch, *supra* note 7 at 152 (explaining that some Indigenous peoples have used unresolved disputes over minerals/land as a strategy to halt the development of a project).

[138] Prior to the recognition of the Nunatsiavut Government, this Inuit community was called the Labrador Inuit Association (LIA).

[139] See *Labrador Inuit Assn. v Newfoundland (Minister of Environment & Labour)*, [1997] 155 Nfld & PEIR 93, at paras 15, 22, 152 DLR (4th) 50 [*Labrador Inuit Assn.*] (explaining that the LIA, the government of Newfoundland, and the Crown entered into a Memorandum of Understanding (MOU), which dictated how they would complete the Mine's environmental review process. An issue arose whether the roads and airstrips that were constructed to facilitate access to the Mine were to be included in the ambit of the MOU. The developer, along with the government, argued that the construction of roads and airstrips were a separate undertaking outside the ambit of the MOU. The LIA and nearby Innu Nation argued that the construction of roads and airstrips was "supporting infrastructure" that was "inextricably intertwined" with the Project and therefore within the ambit of the MOU).

[140] See Interview of Ms. Isabella Pain, Senior Negotiator, and Ms. Theresa Hollet, IBA Coordinator, Nunatsiavut Government (28 March 2011) at 5, online: <http://accessfacility.org/sites/default/files

peoples located throughout this region wanted to prioritize and protect the ice – it was a unique cultural value that would delay the mine's opening – if not accommodated.[141]

The proponent worked hand-in-hand with members from the community to address the Inuit's unique concerns regarding ice.[142] Vale Inco and the LIA entered into an agreement to construct a winter road that would mitigate damage to the ice.

> A consensus developed to create "ice bridges" by compacting the ice in the ships track. This is done by the ship putting its props in reverse. The ice and slush freeze together faster than open water. After the first season, a plan to deploy a floating pontoon bridge system which could be pulled across the open water of the track after the ship had passed by was used in addition to the "ice bridges", as this seemed to be the most effective way to address both Vale's desire to be able to ship nickel ore during the winter, and the Inuit's demands with regards to environmental and personal safety. From the Inuit perspective, the pontoon bridge was an attractive option insofar as it limited travel delays to four hours (the time taken to deploy the bridge) as compared to as many as 11 days which is the length of time it sometimes took for the ice to refreeze during particularly warm winter periods.
>
> Over time, the collaborative problem solving approach also led Vale to utilize input from Inuits in the design and construction of the pontoon bridge (as well as the design of the ships that would be used to transport the ore through the ice – the ship design was a part of the shipping agreement discussions).[143]

/Interview_Nunatsiavut Govt.pdf> [Interview of Pain & Hollet] (explaining the cultural significance that Inuit people have with ice).

[141] See *Labrador Inuit Assn.*, *supra* note 139 at para 142 (where the Newfoundland Supreme Court agreed with the claimants and held that the Mine would not open unless the proponent could reconcile its differences with the surrounding Aboriginal communities).

[142] See Interview of Pain & Hollet, *supra* note 140 at paras 7-8 (explaining that the proponent worked with traditional teachers from the community to develop strategies, such as constructing pontoon bridges to minimize impacts to the ice).

[143] *Ibid*.

The joint effort exemplified by Vale Inco and LIA proves that consultation and good faith negotiation can lead to successful IBAs and productive projects.[144] In this example, an IBA not only brought certainty to a community that was waiting for its rights to be recognized from the Crown, but also preserved the Inuit's cultural concerns.

If a First Nation holds a strong *prima facie* claim to Aboriginal title, as in the case of the LIA, then it might hold leverage over an industry because *Tsilhqot'in* suggests that it would be difficult to justify infringing land held in Aboriginal title without the title holder's consent. This may incentivize First Nations to hold out for more benefits if the project cannot move forward without their consent. First Nations should hesitate before employing this strategy, because of the difficulty and time needed to establish Aboriginal title.[145] Only one First Nation in Canada has so far validated its claim to Aboriginal title.[146] First Nations that employ this strategy risk costly and lengthy litigation, which jeopardizes reconciliation and delays resource development. In order for IBAs to minimize the divisiveness that is currently hindering Canada's progress in the resource sector, First Nations have to be willing to participate and compromise. First Nations have to play their role in Canada's path to reconciliation. A proponent that proactively consults and negotiates in good faith establishes a strong record of consultation on behalf of the Crown and demonstrates its commitment, despite the absence of a legal duty, towards reconciliation. When First Nations decline to negotiate with resource companies, the Crown will step back in and proceed to consult with the First Nation, which triggers a reciprocal onus on First Nations to

[144] Today the Voisey's Bay Nickel Project produces 6,000 tonnes of nickel per-day yet the Mine may have never opened had the developer not constructed a winter road to preserve the Inuit's cultural attachment to ice.

[145] The trial in *Tsilhqot'in Nation* took 339 days, stretching over almost four and half years.

[146] The Tsilhqot'in Nation retains Aboriginal title; further discussion is at 38, above.

negotiate in good faith. IBAs may be a strategic alternative for industries to save costs, but for First Nations, in both the context of definitive treaty rights and *prima facie* claims, it may be the only chance they have to actively participate in Canada's resource sector.

IV. Conclusion

This Chapter explained how companies can reconcile the interests of First Nations with resource development in Canada. Aboriginal rights, although inherent, lie at the mercy of judicial interpretation. Aboriginal rights are only accorded constitutional protection if a court determines the right existed as an integral part of the First Nation's society prior to European contact. Historic treaties explicitly acknowledge and preserve such rights, but many First Nations continue to fight for equivalent recognition through MLCAs. Rights exist on a spectrum for First Nations in Canada – rights which have received acknowledgement or judicial verification and rights which have not.

This spectrum causes uncertainty for proponents commencing projects near First Nation communities. As *Haida* and *Tsilhqot'in* illustrate, this uncertainty may spark lengthy litigation. Regardless whether a right is recognized or merely asserted, the Crown is still burdened with a duty of consultation. The duty to consult fosters awareness of Aboriginal rights before commencing resource development. It requires good faith negotiation and may require accommodation to address the adverse impacts on a First Nation's right.

As this Chapter explained, the government is not the sole intruder on a First Nation's rights. Companies often propose projects that impact communities yet have no legal obligation to consult First Nations. Despite the absence of legal obligations, companies can consult First Nations under the procedural duties delegated by the Crown, which creates potential for partnerships between industries and First Nations, such as IBAs.

Direct consultation between companies and First Nations help both parties gain knowledge. Proponents learn directly from First Nations how their projects will impact their communities, and First Nations can better assess a project's impacts because industries hold ground level expertise. Companies are incentivized to consult directly with First Nations because they suffer a direct cost when consultation is inadequate. IBAs, unlike the accommodation and mitigation measures under the law, can offer First Nations an opportunity to define the parameters of accommodation, which fosters a long-term working relationship between industries and First Nations. IBAs offer a win-win solution that can expedite projects and offer First Nations a participatory role in Canada's resource sector.

CHAPTER TWO

The Need for Strong Governance and Institutional Stability while Administering Resource Revenue in First Nation Communities

A common feature of an IBA is a money payment. Industries often utilize financial payments to reconcile First Nations with impacts predicted to infringe their communities and/or rights. Industries that use monetary benefits to accommodate First Nations should not be characterized as "paying First Nations off," nor should First Nations which accept these payments be perceived as "selling out" their lands or other rights in exchange for money.[147] Companies are not using IBAs to pay First Nations off, but rather to form partnerships and offer First Nations a commercial opportunity to participate in Canada's resource sector, even though the law does not require it.[148]

An abundance of resource revenue, however, does not automatically lead to wealth. Nigeria, for example, is Africa's largest oil and gas producer yet forty-five percent of Nigerians live in poverty and on less than US $1 a day.[149] This paradox is commonly referred to as the "resource curse." It arises because States fail to manage their resource rents with political stability and fiscal policies that diversify their economies. [150] This Chapter discusses how First

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[147] See generally Gogal, *supra* note 9 at para 82 (informing that financial provisions capture more than just monetary targets. They aim to capture the intended and expected relationship between industries and First Nations entering into an IBA).

[148] See Chapter 1, Section III "Companies' Role in the Duty to Consult and Accommodate," at 40 above, for more on this topic.

[149] See U.S. Energy Information Administration, online: <http://www.eia.gov/beta/international /analysis.cfm?iso= NGA> (overviewing Nigeria's petroleum production).

[150] See Halvor Mehlum, Karl Moene, & Ragnar Torvik, "Institutions and the Resource Curse" (2006) 116:508 Economic Journal 1, online: <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0297.2006.01045.x/full> (arguing that countries with weak political institutions often endure the resource curse whereas countries that have strong political institutions often view resources as a blessing); Atsushi Iimi, "Did Botswana Escape from the Resource Curse?" (Working Paper NO 06/138) (International Monetary Fund, 2006), online: <https://www.imf.org/external/pubs/ft/wp/2006/wp0613 8.pdf> (arguing

Nations can manage their resource revenue to avoid socio-economic hardships associated with the resource curse. I argue that First Nations must seek reform of paternalistic legislation, such as the *Indian Act*,[151] so they can create political stability within their Band government and strengthen their economies.

Section One briefly introduces the resource curse and explains the socio-economic hardships that arise when a State administers its resource revenue in conditions of economic and political instability.

Section Two discusses how paternalistic legislation, especially the *Indian Act*, precludes First Nations from governing with political and economic stability. First Nation communities mimic a totalitarian nation: the *Indian Act* fosters government-owned businesses, short-sighted political agendas, and political factionalism. For these reasons, I argue First Nations which govern under the *Indian Act* are more susceptible to the resource curse.

Section Three discusses how First Nations can break the shackles of paternalism by opting out of the *Indian Act*. With political and economic autonomy, First Nations can create a private sector, diversify their economies, implement long-term projects, and invest resource revenue to sustain future generations, which are critical components that combat the resource curse.

Section Four illustrates how First Nations can strengthen and diversify their economies by using a trust fund to administer their resource revenue and/or using resource revenue to finance a wholly-owned corporation to create a private sector. First, I compare Norway's and

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that Botswana avoided the resource curse because they administered resource revenue with strong political institutions); Malebogo Bakwena, et al, "Avoiding the Resource Curse: The Role of Institutions," online: <http://www.uq.edu.au/economics/mrg/3209.pdf> (examining whether institutions can alleviate the resource curse).

[151] RSC 1985, c 1-5 [*Indian Act*].

Alberta's Sovereign Wealth Funds as models for First Nations when governing and institutionally managing their trust funds. Second, I provide two examples of wholly-owned corporations (Ho-Chunk, Inc. and the Meadow Lake Tribal Council) which have successfully created a private sector that First Nations can mimic in structuring their wholly-owned corporation.

Section Five concludes this Chapter.

I. The Resource Curse

The "resource curse" is a socio-economic theory positing that resource-rich States administering a substantial inflow of resource revenue in conditions of political and fiscal instability often endure community turmoil and an overall low level of Gross Domestic Production (GDP).[152] Although there are diverse explanations for the resource curse, this Chapter briefly explains the resource curse through economic and political theory.

A. Economic Theory of the Resource Curse

The "Dutch Disease," which describes the economic crisis endured by the Netherlands in the 1960s following the discovery of natural gas in the North Sea, is a commonly cited economic example for the resource curse.[153] It hypothesizes that booming resource production can trigger a state of dependence whereby the government narrowly focuses on resource production and

[152] See Jeffery Sachs & Andrew Warner, "Natural Resource Abundance and Economic Growth" (Working Paper NO 5398) (National Bureau of Economic Research, 1995), online: <http://www.nber.org/papers/w5398.pdf> (discussing the inverse correlation between petroleum production and economic growth when countries administer resource revenue with political and fiscal instability).

[153] For further explanation see "The Dutch Disease", *The Economist* (26 November 1977), pp. 82-3; see also C.W. "What Dutch disease is, and why it's bad", online: The Economist <http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-2>.

ignores other sectors of the economy, such as manufacturing and agriculture.[154] A gradual depreciation occurs in all sectors of the economy not affiliated with resource production because production inputs (capital and labour) from the declining sectors are transferred to the resource sector to keep pace with booming exploitation.[155] Many of the country's resources are utilized to enlarge one sector of the economy while ignoring all others.

Countries which fail to diversify their economy govern at the mercy of market volatility. When the resource sector plummets, transactional costs occur because the government cannot efficiently shift production inputs back into other sectors of the economy.[156] Oil and gas are no strangers to the boom-bust price cycles of the market for natural resources, which is influenced by external and unpredictable factors.[157] Uncontrollable market volatility can negatively impact a country's GDP. "For many countries, starting from a baseline of $100, the difference between an oil export price of $50 and $150 is on the order of 50 percent of GDP."[158] This is especially true for developing countries that lack an industrialized sector. A heavy dependence on resource

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[154] W.M. Corden, "Boom Sector and Dutch Disease Economics: Survey and Consolidation" (1984) 36:3 Oxford Economic Papers 359.

[155] *Ibid*.

[156] See Jeffrey A. Frankel, "The Natural Resource Curse: A Survey" (Working Paper NO 15836) (National Bureau of Economic Research, 2010), online: <http://www.nber.org/papers/w15836. pdf> at 11 [Frankel] (explaining that transaction costs incur when resources are shifted back and forth from different sectors of the economy).

[157] See e.g. *Ibid* at 10 (explaining that the Arab oil embargo in 1973 and the Iranian revolution in 1979 drove oil prices up throughout the 1970s. The collapse of global stock markets in 2009 drove oil prices down to $42 per barrel yet two years later, Libya curtailed production surging prices to more than a $100 per barrel); see also Tracy Johnson, "Oil prices jump as Fort McMurray wildfire slows down oilsands production," online: cbcnews <http://www.cbc.ca/news/canada/calgary/fort-mac-fires-oil-impact-1.3566457> (explaining that a recent wildfire in northern Alberta has slowed oil production in Fort McMurray by approximately 600,000 – 800,000 barrels, which has caused a three percent increase in oil prices).

[158] Alan Gelb, "Should Canada Worry About A Resource Curse?" (2014) 7 SPP Research Papers 2 at 14, online: <http://www.policyschool.ucalgary.ca/sites/default/files/research/resource-curse-gelb.pdf>.

development (i.e., the Dutch Disease) coupled with negative effects of market volatility results in slow economic growth. While the Dutch Disease is a distinct economic theory that explains the resource curse, it cannot be separated from the issue of institutional governance.[159]

B. Political Theory of the Resource Curse

Weak and ill-structured political institutions amplify the economic paradox. This theory partly explains why industrialization first took place in North America and not Latin America (and in the Northeastern United States rather than the South):

> Lands endowed with extractive industries and plantation crops (mining, sugar, cotton) developed institutions of slavery, dictatorship, and state control, whereas those climates suited to fishing and small farms (fruits and vegetables, grain and livestock) developed institutions based on individualism, democracy, egalitarianism, and capitalism. When the industrial revolution came along, the latter areas were well-suited to make the most of it. Those that had specialized in extractive industries were not, because society had come to depend on class structure and authoritarianism, rather than on individual incentive and decentralized decision-making…[160]

A lack of economic diversification also jeopardizes social programs because funding will fluctuate with the market volatility of the resource. Heavily dependent resource rich nations often experience low levels of school enrollment and public expenditures on education.[161]

Countries which experience high resource rents frequently structure policies solely to facilitate resource development. Political leaders are unmotivated to create other sources of

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[159] See *Ibid* at 15 (explaining that institutional governance is a key factor to sustaining economic policies).

[160] Hussein Mahdavy, "The Patterns and Problems of Economic Development in Rentier States: The Case of Iran (1970)," in M.A. Cook, editor, *Studies in the Economic History of the Middle East* (Oxford University Press: London, 2007), cited in Frankel, *supra* note 156 at 17.

[161] See Erika Weinthal & Pauline Jones Luong, "Combating the Resource Curse: An Alternative Solution to Managing Mineral Wealth" (2006) 4:1 Perspectives on Politics 35 at 38, online: <http://www.policy.hu/karimli/ Paulin Luone_CombatingResourceCurse.pdf> [Weinthal & Luong] (explaining the inverse relationship between school enrollment and public expenditures on education relative to national income in resource rich countries).

revenue because of the substantial inflow of resource revenue.[162] This all-or-nothing approach is inherently linked with rent-seeking behavior and fuels political corruption.[163] Industries may bribe or persuade elected leaders, commonly known as the "divide and conquer" strategy, in order to persuade leaders to coalesce in a faction that supports the project for rent-seeking rewards (divide) and to overcome any opposition that may arise from those opposed to the project (conquer).[164]

Political patronage eventually supplants democracy. Citizens demand less accountability and transparency from resource rich States, which fail to establish a viable tax regime to generate revenue.[165] Decision making becomes self-serving and public spending is limited to only those supporting the state.[166] This causes a division of wealth – those who invest or hold a participatory role in the resource project acquire wealth, while others grow poor because of the lack of alternative economic opportunities.[167]

A substantial inflow of resource revenue does not automatically trigger the resource curse. Countries which manage their resource revenue with strong political and fiscal regulatory institutions often perceive their resources as a "blessing" rather than a "curse." Studies show that the most common solutions to combating the resource curse include:

(1) Sound fiscal and monetary policies;

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[162] *Ibid*.

[163] Robert T. Deacon & Ashwin Rode, "Rent Seeking and the Resource Curse" (2012), online: <http://www.econ. ucsb.edu/~deacon/RentSeekingResourceCurse%20Sept%2026.pdf>.

[164] See Gibson & O'Faircheallaigh, *supra* note 9 at 51-54 (explaining the "divide and conquer" strategy and the importance of unity while negotiating an impact and benefit agreement).

[165] Weinthal & Luong, *supra* note 161.

[166] *Ibid*.

[167] *Ibid*.

(2) Economic diversification;
(3) Natural resource funds;
(4) Transparency, accountability and public involvement; and
(5) Direct distribution of revenues to the population.[168]

Countries that fail to implement strong political and fiscal regulatory regimes often endure the resource curse because they focus narrowly on resource production rather than structuring policies that will diversify their economy.

First Nations in particular are susceptible to the resource curse because they are often trapped under paternalistic legislation that impedes strong governance.

II. Governance pursuant to Paternalistic Legislation

The *Indian Act* was enacted so that Europeans could replace pre-existing Aboriginal legal structures and assimilate First Nations into mainstream society.[169] The *Indian Act* was "developed without any reference to previous [T]ribal systems of government and was implemented with little sensitivity to traditional values."[170] It is often criticized for regulating First Nations under paternalistic policies and leaves First Nations little autonomy to administer their own affairs.[171] The Minister of Indigenous and Northern Affairs Canada (Minister)

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[168] *Ibid* at 38-42.

[169] Wendy Moss and Elaine Gardner O'Toole, Aboriginal People: History of Discriminatory Laws, Library of Parliament, 1991 cited in Senate, Standing Senate Committee on Aboriginal Peoples, *First Nations Elections: The Choice is Inherently Theirs* (May 2010) 3 (Chair: Gerry St. Germain), online: <http://www.parl.gc.ca/Content/SEN/ Committee/403/abor/rep/rep03may10-e.pdf> [*First Nations Elections: The Choice is Inherently Theirs*].

[170] Leroy Little Bear, Menno Boldt, J. Anthony Long ed., Pathways to self-determination: Canadian Indians and the Canadian State. Toronto: University of Toronto Press, 1984, p. xii cited in *First Nations Elections: The Choice is Inherently Theirs*, *supra* note 169.

[171] John Provart, "Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada" (2003) 2 Indigenous L.J. 117 – 169 (QL); see also *First Nations Elections: The Choice is Inherently Theirs*, *supra* note 169 at 4 (explaining that the *Indian Act* provides little power to local Band governments).

determines what system of government is best for First Nations.[172] Regardless how efficient or effective a First Nation's government may be, the Minister can unilaterally replace that system of government with the *Indian Act*.[173] First Nations are sovereign in theory, but in reality they govern under colonial control and operate in a manner similar to municipalities.

A. Government Structure and Politics

First Nations forced to govern under the *Indian Act* must abide by all regulations established to supplement the Act, such as the *Indian Band Election Regulations*[174] and the *Indian Band Council Procedure Regulations*.[175] The *Indian Act* mandates a Chief and Council system of government.[176] The Chief and Councillors must be elected in accordance with ss.74-80 of the *Indian Act* and the *Indian Band Election Regulations*. The Band government must appoint an electoral officer, subject to the approval of the Minister, to ensure compliance.[177]

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[172] First Nations which lack a self-government agreement may be forced to govern under the *Indian Act*. See *Indian Act*, *supra* note 151, s 74(1) (stating that "[w]henever he deems it advisable for the good governance of a [B]and, the Minister may declare by order that after a day to be named therein the [C]ouncil of the [B]and, consisting of a [C]hief and [C]ouncillors, shall be selected by elections to be held in accordance with this Act).

[173] See *First Nations Elections: The Choice is Inherently Theirs*, *supra* note 169 at 18 (explaining that the Crown replaced many First Nations' traditional form of government with the electoral provisions of the *Indian Act*. The government's intrusion results in low voter turnout because many Band members feel the *Indian Act* is oppressive).

[174] CRC, c 952.

[175] CRC, c 950.

[176] *Indian Act*, *supra* note 151 at s 74(2).

[177] Candidates for Chief or Council must be nominated by a member of the community who is eligible to vote. While the *Indian Act* stipulates that only ordinary residents on the reserve are eligible to vote, ss.5-6 of the *Indian Band Election Regulations* clarify that Band members living off the reserve can mail-in their ballots. All candidates must be nominated during a "nomination meeting," held 42 days prior to the election date. Candidates for Council must be a Band member and at least 18 years of age on the day of the nomination meeting. Candidates for Chief must be nominated, but do not have to be a Band member and do not have to be at least 18 years of age on the day of the nomination meeting. Anyone is eligible to be Chief, including non-Indians, as long as they are nominated pursuant to s.75 (2) of the *Indian Act* and s.4.2 of the *Indian Band Election Regulations*.

Once a Chief and Council are elected, they are only permitted to serve two years before they must stand for re-election. If the Chief and Councillors governing under the *Indian Act* wish to implement longer terms of office, they must submit a Band Council Resolution (BCR) to the Minister requesting that they be scheduled under the *First Nation Elections Act* (*FNEA*).[178] The *FNEA* allows Chief and Councillors to govern for four-year terms.[179] According to Parliament, it "will support the political stability necessary for First Nations governments to make solid business investments, carry out long term planning and build relationships, all of which will lead to increased economic development and job creation for First Nations communities."[180] Although the *FNEA* gives Band leaders more time to plan for long-term projects and to create sustainable economic development, neither it nor the *Indian Act* allow for *staggered terms*. Staggered terms build institutional knowledge and prevent constant turnover in government.[181]

The *Indian Act* provides the Chief and Councillors with regulatory and law-making powers. A First Nation's by-laws only apply on lands reserved and managed in trust for First Nations and cannot contradict the *Indian Act* or other federal laws, such as the *Criminal Code of Canada*.[182] Everyone present on a First Nation's reserve is subject to its by-laws, including non-

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[178] *First Nations Elections Act*, SC 2014 c 5, s 3.

[179] *Ibid* at s 28(1).

[180] "Frequently Asked Questions – First Nations Elections Act", online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1323195944486/1323196005595>.

[181] Kenneth Grant & Jonathan Taylor, "Managing the Boundary between Business and Politics: Strategies for Improving the Chances for Success in Tribally Owned Enterprises" in Miriam Jorgensen, ed, *Rebuilding Native Nations* (The University of Arizona Press 2007) 175 at 181-82 [Grant & Taylor] (explaining the benefits to staggered terms in Tribal governments).

[182] *Indian Act*, *supra* note 151 at s 81(1) (stating that "[t]he [C]ouncil of a [B]and may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister…).

Band members who may not live on the reserve. Band leaders can pass by-laws to regulate, *inter alia*, traffic, law and order, the construction and maintenance of local works, residency, zoning, and trespassing.[183] Bands can also prohibit intoxicants under s.85.1 of the *Indian Act*. Band leaders must enact by-laws pursuant to s. 2(3)(b) of the *Indian Act* and the *Indian Band Council Procedure Regulations*,[184] but do not need the Minister's approval.[185]

The *Indian Act* also dictates how First Nations manage and administer their finances.

B. Financial Management and Administration

Indian moneys are defined as capital or revenue. Money derived from a sale of surrendered lands or the sale of capital assets is considered capital money.[186] Revenue consists of all moneys not considered as capital.[187] Both capital and revenue are deposited into the Consolidated Revenue Fund (CRF) and held in separate accounts. [188] The Crown manages these two accounts, but has no fiduciary obligation to invest Indian moneys on behalf of First Nations.[189] Indian moneys only accrue interest.[190]

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[183] For a complete list of by-laws that a Band government can implement see s.81(1) of the *Indian Act*.

[184] The Band Council must convene to introduce and vote on by-laws. If a majority of the Councillors vote in favour of the by-law, then it is enacted and published for the community pursuant to s.86(1) of the *Indian Act*. Before by-laws can be enforced under s.85.1, a special meeting must be called by the Council for purposes of considering the by-law and a majority of the Band's electorate must assent to the by-law.

[185] By-laws enacted pursuant to s.81(1) required ministerial approval until the federal government passed the *Indian Act Amendment and Replacement Act* in 2014. Now, First Nations can pass by-laws pursuant to s.81(1) without ministerial oversight and approval.

[186] *Indian Act*, *supra* note 151 at s 62.

[187] *Ibid*.

[188] Manual for the Administration of Band Moneys, online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-BR/STAGING/texte-text/bm_pubs_mon_ pol_man_pdf_1358868879487_eng.pdf> [Manual for the Administration of Band Moneys].

[189] See *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, 1 SCR 222 (holding that the Crown lacks legal authority to invest Indian moneys on behalf of the Band. The *Indian Act*, the *Financial*

For example, if an oil and gas project is located on a reserve and generates royalty payments to a First Nation, the Crown collects and deposits those royalties into the First Nation's capital account. Any interest earned on those royalties is deposited into the First Nation's revenue account.[191] While resource revenue is generally considered capital, revenue derived from a project that is not located on the reserve is not considered capital since it is not derived from a sale of *surrendered land*. First Nations which generate income through an IBA and from an off-reserve resource project, for example, is considered "own-source revenue."[192] First Nations do not have to deposit this income into the CFR. They can deposit their own-source revenue in an external trust fund and administer it with complete autonomy and without ministerial oversight.[193]

In contrast to own-source revenue, Indian moneys are subject to ministerial oversight. Moneys held in the CRF can only be spent and administered in accordance with the provisions set out in the *Indian Act*. Pursuant to s. 64(1), capital moneys can only be used:

Administration Act, and the *Indian Oil and Gas Act* do not permit the Crown to invest oil and gas royalties generated by a Band).

[190] *Indian Act*, *supra* note 151 at s 61(2).

[191] See Manual for the Administration of Band Moneys, *supra* note 188 at 17-18 (explaining that interest earned from moneys held in a Band's capital or revenue account is deposited into a Band's revenue account. Interest rates are calculated quarterly and based off government of Canada bonds having a maturity of ten years or over).

[192] See Canada, Indian and Northern Affairs Canada, *Understanding the Regulatory Environment for On-Reserve Lending*, (Ottawa: Minister of Indian Affairs and Northern Development, 2005) at 40-41, online: <http://www.cba.ca/contents/files/misc/msc_onreservelending_en.pdf> [*Understanding the Regulatory Environment for On-Reserve Lending*] (explaining that resource revenue derived from sharing agreements is not classified as Indian money under the *Indian Act* and do not have to be administered pursuant to the *Indian Act*).

[193] See Manual for the Administration of Band Moneys, *supra* note 188 at 15 (explaining that while a Band's own-source revenue can be administered with autonomy, the Band must adopt a referendum with the Band's consent and demonstrate that the money will be administered for the benefit of the Band).

(a) to distribute per capita to the members of the [B]and an amount not exceeding fifty percent of the capital moneys of the [B]and derived from the sale of surrendered lands;

(b) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

(c) to construct and maintain outer boundary fences on reserves;

(d) to purchase land for use by the [B]and as a reserve or as an addition to a reserve;

(e) to purchase for the [B]and the interest of a member of the [B]and in lands on a reserve;

(f) to purchase livestock and farm implements, farm equipment or machinery for the [B]and;

(g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the [B]and or will constitute a capital investment;

(h) to make to members of the [B]and, for the purpose of promoting the welfare of the [B]and, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(i) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any [B]and property;

(j) to construct houses for members of the [B]and, to make loans to members of the [B]and for building purposes with or without security and to provide for the guarantee of loans made to members of the [B]and for building purposes; and

(k) for any other purpose that in the opinion of the Minister is for the benefit of the [B]and.

Revenue, on the other hand, can be used for any purpose that, in the opinion of the Minister and with the consent of the Band Council, "will promote the general progress and welfare of the

Band or any member of the Band."[194] The Minister may also release revenue funds pursuant to s. 66(2) "to assist sick, disabled, aged or destitute Indians" and "for the burial of deceased indigent members of the [B]and."

Before First Nations can make a permitted expenditure, the Band Council must submit a BCR to the Minister requesting permission to exercise a planned expenditure with moneys held in the CRF.[195] The Minister then decides whether the expenditure is in the best interest of the Band by assessing, *inter alia*, the availability of funds, previous expenditures, socio-economic considerations, environmental considerations, and potential legal issues.[196] If a BCR is approved, then the Minister releases moneys from the CRF, with strict terms governing the expenditure. Band governments can implement monetary by-laws, subject to the approval of the Minister, to administer, *inter alia*, their expenditures, taxation, and business licensing.[197]

At the end of each fiscal year, a First Nation must submit Consolidated Audited Financial Statements to the Crown and demonstrate that all expenditures were made in accordance with the Minister's terms.[198] The Band Council must reimburse the Crown for all non-permitted expenditures.[199] If the Band provides capital or revenue moneys to a corporation owned by the

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[194] *Indian Act*, *supra* note 151 at s 66(1).

[195] See *Understanding the Regulatory Environment for On-Reserve Lending*, *supra* note 192 at 41 (explaining the process First Nations must undergo before making an expenditure with Indian moneys).

[196] Manual for the Administration of Band Moneys, *supra* note 188 at 43-46.

[197] *Indian Act*, *supra* note 151 at s 83.

[198] *Understanding the Regulatory Environment for On-Reserve Lending*, *supra* note 192 at 37.

[199] See "First Nations and Tribal Councils National Funding Agreement Model for 2016-2017", online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1449514740673/1449514901418>.

Band, as either a loan or equity, then the corporation's financial statements must also be submitted to the Minister.[200]

The Band must also maintain a degree of transparency to its members. The Band Council must provide, *inter alia*, Consolidated Audited Financial Statements, annual reports, and budgetary and remuneration information, to any member within sixty days of a request.[201] Moneys generated from an IBA, however, are not included in a First Nation's Consolidated Audited Financial Statements.[202] Many IBAs have confidentiality clauses that prohibit Band leaders from disclosing how much revenue is generated from the project.[203] Band leaders must also maintain a conflict of interest policy. This policy, at a minimum, must prohibit elected leaders from abusing their position of power for monetary personal gain and require elected leaders to disclose to the Council when a conflict of interest arises so the Council can determine whether that particular leader should be temporarily recused.[204]

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[200] *Ibid*.

[201] *Ibid*.

[202] As of July 27, 2015, Canada modified "Canada's Fiscal Approach for Self-Government Arrangements" ("Fiscal Approach") to exclude revenue generated from resource development that occurs *outside* the Band's land or reserve. This exemption does not apply, however, if the Band participates as an equity partner in the project. The Fiscal Approach's policy recognizes the difference between a Band receiving payments because of unwarranted infringement to its rights versus a Band participating as a commercial actor in an IBA to generate economic development. For more information regarding own-source revenue see "Canada's Fiscal Approach for Self-Government Arrangements", online: Indigenous and Northern Affairs Canada <https://www.aadncaandc.gc.ca/eng/ 1428002512964/14280025382 39>.

[203] Irene Sosa & Karyn Keenan, "Impact Benefit Agreements between Aboriginal Communities and Mining Companies: Their Use in Canada" at 19 (October 2001), online: Canadian Environmental Law Association <s.cela.ca/files/uploads/IBAeng.pdf> [Sosa & Keenan]; see also Ken J Caine & Naomi Kragman, "Powerful or Just Plain Power-Full? A Power Analysis of Impact and Benefit Agreements in Canada's North" (2010) 23:1 Organization & Environment 76 at 86 (discussing the use of confidentiality clauses in IBAs).

[204] *Ibid*.

The *First Nations Financial Transparency Act* (*FNFTA*), passed by the Conservative government in 2013, also required First Nations subject to the *Indian Act* to upload on the internet a complete audit of all "Band expenditures," including a First Nation's own-source revenue.[205] First Nations which failed to meet this obligation risked having federal transfer payments withheld by the Crown.[206] The Liberal government under Prime Minister Trudeau, however, has announced that they will not enforce the *FNFTA*.[207] They have returned all funds originally withheld by the previous government and suspended all court actions taken against First Nations which failed to disclose their audits pursuant to the *FNFTA*.[208] The Liberal government, along with many opponents of the *FNFTA*, argues that it goes too far by requiring First Nations to disclose their expenditures over the internet.[209] First Nations fear that the Crown

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[205] See *First Nations Financial Transparency Act*, SC 2013, c 7, s 5(1) (explaining that a First Nation must disclose an annual consolidated financial statement); See Frequently Asked Questions – First Nations Financial Transparency Act, online: <http://www.aadnc-aandc.gc.ca/eng/1322055921752 /1322056591514> (stating that "[t]he information found in these audited consolidated financial statements relates to the assets, the liabilities, the results, as well as the other various elements of economic activities undertaken by the First Nation for a particular year"). For a list of consolidated financial reports prepared and disclosed by First Nations, see Aboriginal Affairs and Northern Development Canada, online: <http://pse5-esd5.aadnc-aandc.gc.ca/fnp/Main/Search/Search FF.aspx? lang=eng>.

[206] See *First Nations Financial Transparency Act*, SC 2013, c 7, s 13(1)(b) (explaining that the Minister holds the authority to withhold moneys from First Nations that fail to disclose a consolidated financial statement in accordance with the *FNFTA*).

[207] See Government of Canada, News Release, "*Statement by the Honourable Carolyn Bennett on the First Nations Financial Transparency Act*" (18 December 2005) online: <http://news.gc.ca/web/article-en.do?nid=1024739> (explaining that the recently elected Liberal Party has decided not to enforce the *FNFTA*).

[208] *Ibid.*

[209] Many First Nations perceive the *FNFTA* as an intrusion on their sovereignty. They are not opposed to the Act because it mandates accountability, but rather because it was passed without consultation and their consent. See also Shari Narine, "Three Alberta First Nations Continue to defy the *FNFTA*" (2015), online: Aboriginal Multi-Media Society <http://www.ammsa.com/ publications/alberta-sweetgrass/three-alberta-first-nations-continue-defy-fnfta>; Douglas Sanderson, "Overlapping Consensus, Legislative Reform and the Indian Act" 39 Queen's LJ 511 at 5-6 [Sanderson] (explaining that the *FNFTA's* requirement that consolidated financial statements be published on the internet is not supported by First Nation because it poses commercial and negotiating disadvantages).

will reduce federal dollars annually transferred to them and force them to utilize their own-source revenue, such as moneys generated from a project located off-reserve.

First Nations can opt to "control, manage, and expend" their *revenue* moneys under s. 69(1) of the *Indian Act*. Section 69(1) of the *Indian Act* does not permit similar autonomy in the control and management of its *capital* moneys. First Nations cannot administer on-reserve resource revenue under the *Indian Act*. Before First Nations can manage revenue pursuant to s. 69(1), the Band Council must adopt a BCR which demonstrates to the Minister that the Band Council has received the consent of its membership and is prepared to exercise financial responsibility.[210] Once a Band receives s. 69(1) authority, revenue moneys are still collected and deposited into the CRF, but can be transferred into an external trust fund afterwards.[211] While s. 69(1) delegates autonomy to First Nations, Band leaders are still required to administer revenue moneys in a manner consistent with s. 66 (i.e., to promote the general progress and welfare of the Band) and uphold a fiduciary role:

> There can be no question that a duly elected Chief as well as the members of a Band Council are fiduciaries as far as all other members of the Band are concerned. The Chief, upon being elected, undertakes to act in the best interests of the members of the Band. The members of the Band are vulnerable to abuse by the fiduciary of his or her position, and a fiduciary undertakes not to allow his or her interest to conflict with the duty he or she has undertaken.[212]

[210] Manual for the Administration of Band Moneys, *supra* note 188 at 28-30 (explaining the process of opting under s.69(1) of the *Indian Act*).

[211] *Ibid* at 22 (explaining that s.69(1) of the *Indian Act* does not give the Band the authority to collect revenue).

[212] *Gilbert v Abbey*, [1992] 4 CNLR 21 at 24 (BCSC).

The *Indian Act* forces Band leaders to administer Indian moneys for the greater good of the Band – "Indian moneys shall be expended only for the benefit of the Indians or [B]ands for whose use and benefit in common the moneys are received or held."[213]

Land, in addition to money, is also held collectively for the use and benefit of First Nations.[214] Individual Band members are generally prohibited from owning land, but may be given an allotment, which grants an individual the legal right to *occupy* a parcel of land.[215] The legal title, however, remains with the Crown; allotments, similar to reserve land, are held in trust for the use and benefit of an individual.

While the administration of land is outside the scope of this Chapter, the communal feature of reserve property creates financial and economic restrictions for First Nations. Reserve land, including allotments, cannot be sold. Unlike their provincial neighbors who can acquire equity through mortgage financing, s. 89(1) of the *Indian Act* prohibits the seizure or mortgaging of property on reserves. This hinders First Nations from using property as collateral to obtain

[213] *Indian Act*, *supra* note 151 at s 61(1).

[214] See *Ibid* at s 18(1) (stating that … "reserves are held by Her Majesty for the use and benefit of the respective [B]ands for which they were set apart, and… the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the [B]and"). While the *Indian Act* forces First Nations to manage their money and land in a manner that serves the greater good, it should be noted that many First Nations perceive land from a communal perspective. They hold a spiritual relationship with land that obligates them to protect and use the land for the betterment of the community as a whole. For more on this topic, see John W. Ragsdale, "Individual Aboriginal Rights" (2004) 9 Mich J Race & L 323 at 324 (explaining how First Nations perceive land communally and not as an economic commodity).

[215] See *Indian Act*, *supra* note 151 at s 20(1) (stating that "[n]o Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the [C]ouncil of the [B]and"); see also *Indian Act*, *supra* note 151 at s 20(2) (stating that [t]he Minister may issue a "Certificate of Possession, as evidence of an individual's legal right to occupy the allotment").

loans from creditors or to secure seed-money to start a business.[216] Neither s.64 nor s.66 of the *Indian Act* permits First Nations to use Indian moneys for investment purposes or to secure loans. First Nations cannot use Indian moneys to obtain loans since the expenditure would not occur until the First Nation defaulted on their loan.[217] Individual Band members cannot receive loans from the Band government unless the loan promotes the welfare of the Band pursuant to s. 64(1)(h) or the loan is for housing purposes pursuant to s. 64(1)(j).[218]

The combination of paternalistic and strict ministerial oversight under *Indian Act* leaves First Nations with little autonomy to administer and manage their finances. This lack of autonomy leaves First Nations particularly vulnerable to the resource curse.

C. Managing and Administering Resource Revenue pursuant to the Indian Act

The *Indian Act* impedes political stability for First Nations governing and administering resource revenue. Short two-year terms under the *Indian Act* do not motivate Band leaders to manage revenue with long-term objectives to create sustainable benefits. Before Band leaders can learn how a resource project operates, come up with ideas for managing and administering its profitability, it will be time for re-election.[219] Neither the *Indian Act* nor the *FNEA* allow for

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[216] See Flanagan, *supra* note 26 (stating that "[a]s long as the *Indian Act* protects real and personal property on reserves from attachment, banks and trust companies will not give conventional mortgages to would-be [home] owners" at 108).

[217] *Understanding the Regulatory Environment for On-Reserve Lending*, *supra* note 192 at 41.

[218] See Manual for the Administration of Band Moneys, *supra* note 188 at 68-69 (explaining that Band members may obtain loans in limited circumstances under s.64 (1)(h) and s.64 (1)(j) of the *Indian Act*).

[219] See Standing Senate Committee on Aboriginal Peoples, Proceedings, 27 October 2009, Lawrence Paul, Co-Chair, Atlantic Policy Congress of First Nations Chiefs Secretariat cited in *First Nations Elections: The Choice is Inherently Theirs*, *supra* note 169 (quoting that "[i]t is common that the two-year term of office for First Nation [C]ouncils that hold their elections under the *Indian Act* system limits their ability to govern and act in the best interests of all of our citizens over the long term. The short time frame hinders the establishment of solid business investments and relationships, long-term planning and implementation, ongoing strong accountability and an acceptable governance regime that works for the long term interests of all First Nation citizens" at 19-20); see also Joseph P. Kalt, "The Role of Constitutions in Native Nation Building, Laying a Firm Foundation" in Miriam Jorgensen, ed, *Rebuilding*

staggered terms, which impedes stability because newly elected leaders will likely attack the previous candidate and replace the previous administration's personnel and business plans.[220]

The *Indian Act* also hinders economic stability. While First Nations can opt to govern for four-year terms under the *FNEA*, they cannot invest on-reserve royalties into external funds.[221] This inability impedes Bands from investing to sustain future generations – moneys held in the CRF cannot reach their optimal value since the money cannot be invested in the open market. First Nations have little means to combat market volatility.

Also, the restrictions attached to reserve property under the *Indian Act* prevent Band members from becoming homeowners, establishing equity, and accumulating family wealth. First Nations cannot participate in the Canadian economy on par with non-Aboriginals because reserve land must be administered and managed for the general welfare of the Band (i.e., the common good). This cultivates social welfare and averts entrepreneurial initiative. Band members are heavily dependent on the Band Council for jobs, housing, and everything in between:

> The result of such public ownership of housing is no better than it was in the Soviet Union under communism or in the vast public housing projects of American inner cities. Lacking pride of ownership, tenants neglect maintenance. Without the incentive of ownership, there is chronic under-investment in housing.

Native Nations (The University of Arizona Press 2007) 78 at 103-104 (explaining that short-terms for office impedes a Band leader's ability to stabilize policies and programs).

[220] See Standing Senate Committee on Aboriginal Peoples, Proceedings, 25 May 2009, Paul Chief, Councillor, Brokenhead Ojibway Nation cited in *First Nations Elections: The Choice is Inherently Theirs*, *supra* note 169 (quoting that "[b]ecause the [C]ouncil keeps changing year after year, the continuity of working with each other in partnerships is almost impossible because we are spending a majority of our time updating, educating new and outgoing [C]ouncil members" at 21).

[221] But see "Draft Policy on the Transfer of Capital Moneys Through Section 64(1)(k) of the *Indian Act*", online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1398858830949/1398858969100> (discussing a policy to transfer capital monies to a First Nation so it can administer capital monies through a trust fund).

> Private funds are not mobilized, the [B]and [government] never seems to have enough to meet its needs.[222]

Indeed, most businesses in First Nation communities are either controlled or owned by the Band Council. The *Indian Act* does not mandate a separation between politics and business. It incentivizes the exact opposite since Indian-owned businesses are often tax exempt.[223]

Political patronage thrives when government is entrenched with business. A lack of separation between politics and business inherently poses a conflict of interest. While Band leaders are prohibited from rent-seeking under the Crown's mandated conflict of interest policy, it may not thwart rent-seeking when a First Nation receives royalties through an IBA since this income is not reported to the Crown and is protected by confidentiality clauses.[224] While the *FNFTA* inhibits rent-seeking, the Liberal government has announced that they will not enforce it.[225] This lack of accountability and transparency establishes a perfect climate for industries to employ the divide and conquer strategy characteristic of the resource curse.

A lack of economic opportunities in First Nation communities incites political rent-seeking. The combination of constituent pressure and short terms of office incentivizes the Chief and Councillors to depend on the resource project and to distribute revenue for quick benefits to

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[222] Flanagan, *supra* note 26 at 108.

[223] Section 87 of the *Indian Act* generally exempts Indian-owned businesses. Whether an Indian-owned business is tax exempt under s.87 depends on the business's location, income stream, and corporate structure. Taxation and whether Indian-owned businesses qualify for s.87 tax exemption would warrant a separate Chapter; for more information, see First Nations and the Canadian Tax Environment, online: <http://www.bdo.ca/en/Library/Industries/ public-sector/Documents/first-nations-and-the-canadian-tax-environment.pdf>.

[224] See e.g."Kwikwetlem Chief Ron Giesbrecht should resign, band councillor says", CBC News (2 August 2014), online: <http://www.cbc.ca/news/aboriginal/chief-ron-giesbrecht-won-t-resign-after-1m-payday-controversy-1.2730320> (where a Chief directly received 10% from all profits generated by the Band's resource development and earned $800,000 while serving simultaneously as an economic development officer).

[225] For more on this topic, see the discussion at 66-67, above.

satisfy voters. A common example is Band leaders distributing revenue through per capita payments in exchange for political gain rather than adopting a long-term investment strategy.

A valuable lesson of the dangers of this approach dates back to the 1980s when the Samson Cree First Nation began to experience dramatic socio-economic issues after substantial oil and gas royalties were distributed through per capita payments. By 2005, there were 13 active gangs within the community, and the community began to experience a high increase in crime and a dramatic decrease in school attendance.[226] During the 1980s no community member graduated from high school and the community held the highest suicide rate in North America.[227]

> Hobbema has the highest automobile-accident rate in Alberta, an almost unbelievable forty times higher than Edmonton's. Band members, especially young people, use their share of royalties to buy high-powered trucks. Too many drive too fast, too often under the influence of alcohol and other drugs…[228]

Excessive per capita payments were proven to be the main culprit in destroying the Samson Cree's culture and community. This is a classic example of how the resource curse can infect a First Nation's community and create a culture in which Band members vote for who they think can allocate the most "kick-backs" rather than who is most suited to serve the long-term interest of the community.

Political favours and behind the scene kick-backs foster factionalism, which already exists to some degree in many First Nation communities.

> [T]he potential rewards for holding office in an [A]boriginal government are larger than those for being, say, city councillor, mayor of a small town, or reeve of a municipal township. Chiefs and [C]ouncillors have far greater opportunity to appoint their relatives and supporters to jobs, to sign contracts with well-

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[226] Vern Saddleback & Koren Lightning-Earle, "NipisihKopahk & HUB Program" (lecture given at the 26th Annual Indigenous Bar Association Conference Calgary, Canada, 2-4 October 2014) [unpublished].

[227] *Ibid*.

[228] Flanagan, *supra* note 26 at 93.

> connected businesses, and to manipulate the assignment of property rights. It is a fertile field for factionalism.[229]

Familial factionalism triggered community opposition over how oil and gas royalties were managed on the Samson Cree reserve:

> "The [C]hief's daughter runs social services. The [C]hief's daughter determines who gets the cheque," said one protester, who also claimed to have been fired from his job on the reserve after he started the public protests. Six hundred of the [B]and's forty-three hundred members signed a petition calling for a [federal] investigation.[230]

This political environment resembles the experiences of governments under the resource curse. It creates a culture of "what is in it for me?" and transforms the Band government into a "spigot" that dispenses the "bag-of-goodies."[231]

First Nations which govern under the *Indian Act* are susceptible to the resource curse because their management of resource revenue would likely feature:

1) Chiefs and Councillors administering revenue from a short-term perspective and without a plan for long-term sustainability;
2) Self-serving leadership influenced by industry and constituent pressure;
3) The distribution of royalties for political favoritism rather than for the greater good of the community; and
4) A narrow dependence on resource development and a tendency to ignore alternative economic opportunities.[232]

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[229] *Ibid* at 102.

[230] *Ibid* at 93.

[231] See Ben Carson & Candy Carson, *America the Beautiful: Rediscovering What Made this Nation Great* (Grand Rapids, MI: Zondervan, 2012) (where Dr. Carson uses the phrase "the spigot that dispenses the goodies" as an analogy to describe government social welfare).

[232] This form of governance mimics what Stephen Cornell and Joseph P. Kalt (two scholars that founded the Harvard Project on American Indian Economic Development) call the "standard approach." The standard approach has five common characteristics: (1) it is short-term and non-strategic; (2) it lets persons or organizations other than the Indian nation set the development agenda; (3) it views development as primarily an economic problem; (4) it views indigenous culture an obstacle to development; and (5) it encourages narrowly defined and often self-serving leadership. For more discussion regarding the standard approach see Stephen Cornell & Joseph P. Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't" in Miriam Jorgensen, ed, *Rebuilding Native Nations* (The University of Arizona Press 2007) 3 at 7-17 [Cornell & Kalt] (where Cornell and

The *Indian Act* fosters a weak political environment that is not equipped to effectively stabilize and diversify a First Nation's economy in order to combat the resource curse. The perpetual cycle of starting over must stop; it is critical that Band leaders have time to govern from a long-term perspective and to implement long-term projects that aim to sustain future generations. Band governments must be structured to withstand industry influence and familial factionalism. Fiscal policies must administer finances with checks and balances, transparency, accountability, and seek to diversify the economy.[233]

Sociologist Stephen Cornell and economist Joseph Kalt have thoroughly studied the economic and socio-economic factors associated with governance and economic development in American Indian communities. They conclude that successful governance and economic development within Indigenous communities typically emerges from a "nation-building approach" consisting of five traits:

> (1) the native nation asserts decision-making power [rather than the government];
> (2) the native nations back up that power with effective governing institutions;
> (3) governing institutions match Indigenous political culture;
> (4) decision making is strategic; and
> (5) leaders [are not self-serving], but rather serve as nation builders and mobilizers.[234]

These five traits have collectively proven to stimulate long-term planning and reduce self-serving leadership, which can help First Nations combat the resource curse.[235] Before First Nations can

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Kalt explain that the standard approach reveals a lack of continuity, strength, and frequently ends in failure).

[233] See Kanayo Ogujiuba & Harrison Okafor, "Public Financial Management and Fiscal Outcomes in Nigeria: Empirical Evidence", (Working Paper 002) (African Heritage Institution, 2013) at 6, online: <http://dspace.africaportal.org/jspui/bitstream/123456789/34696/1/Afri Heritage%20Working %20Paper%20002%20June%202013doc1.pdf?1> (describing stable financial management).

[234] Cornell & Kalt, *supra* note 232 at 18-30 (explaining how the nation-building approach leads to sustainable development).

govern pursuant to the nation-building approach and administer resource revenue with institutional stability, they first must gain their political and financial autonomy free from paternalistic legislation.

III. Opting Out of the Indian Act

First Nations which govern and administer their finances outside the provisions of the *Indian Act* are more likely to secure political stability and institutional knowledge. The most prevalent advantage is autonomy and less ministerial oversight, which enables First Nations to structure stable political regimes and sound fiscal policies.

A. Political stability

Section 74(1) of the *Indian Act* allows First Nations to elect their leaders pursuant to "custom" until the Minister determines that the electoral provisions of the *Indian Act* should apply.[236] Custom does not imply traditional forms of governance, but rather is a term used to distinguish First Nations which do not select their leadership in accordance with electoral provisions of the *Indian Act*, which may or may not conform to traditional customs.

First Nations which were forced by the Minister to govern pursuant to the *Indian Act* can revert to selecting its leadership pursuant to the custom method. Before a First Nation can conduct elections pursuant its own custom, it must structure an election code, which must demonstrate to the Minister that:

- the First Nation's electorate supports the proposed election code and protects the rights of individual Band members;
- the code is consistent with the Charter;

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[235] *Ibid*.

[236] See *First Nations Elections: The Choice is Inherently Theirs*, *supra* note 169 at 6-7 (explaining that the default approach for First Nations to select their leadership has always been the custom method until the Minister directs otherwise).

- the code allows off-reserve members to participate in the electoral process, such as voting by way of mail-in ballots and/or holding positions on the Band Council; and
- the code follows the principles of natural justice – fairness, impartiality, objective review of all facts and circumstances, and the opportunity of each party to adequately state their case, and includes the right to receive notice, the right to know the case against them and the right to be represented. [237]

Once the community ratifies the election code pursuant to a BCR, the code and all supporting documents are sent to Indigenous Northern Affairs Canada (INAC) for the Minister's approval.[238]

Band governments that have successfully completed this process can create longer and staggered terms for their leaders.[239] Seventy-two percent of First Nations that have implemented their own election codes have chosen to extend the terms for Chiefs and Councillors.[240] Longer-terms give Band leaders more time to plan for long-term projects and to create sustainable economic development. Band leaders can become familiar with resource projects that are undertaken and create strategies to administer revenues for economic diversification before reelection.

Staggered terms will prevent constant turnover and force newly elected leaders to "get on board" with the current administration rather than creating an entirely new political agenda after each election. Newly elected members can be efficiently brought up to speed regarding any

[237] See "Conversion to Community Election System Policy", online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1433166668652/1433166766343> (explaining how the Department determines whether a First Nation can conduct elections pursuant to its own custom).

[238] *Ibid*.

[239] Standing Senate Committee on Aboriginal Peoples, Proceedings, 16 September 2009, Jerome Slavik, Barrister and Solicitor, Ackroyd LLP cited in *First Nations Elections: The Choice is Inherently Theirs*, *supra* note 169 at 30-31 (explaining that a First Nation's custom method can address many of the gaps under the *Indian Act*, such as terms of office).

[240] See Coutts & King Inc., "Custom Leadership Selection Codes for First Nations", online: <http://fngovernance.org/resources_docs/CustomElectionCod_BackgroundTemplate.pdf> (explaining that forty-one percent have opted for three-year terms, twenty-six percent opted for four-year terms, and five percent opted for five-year terms).

resource projects. Staggered terms can reduce constituent criticism because the pressure to "get something done" no longer rests entirely on newly elected leaders, which will help to combat the familial factionalism that is often prevalent in First Nation communities.

Some First Nations hold self-government agreements with the Crown, which acknowledges a First Nation's inherent right to govern pursuant to its own laws and traditions.[241] Like First Nations electing their leaders pursuant to custom, these First Nations can create both longer and/or staggered terms of office for their leaders as well. Sioux Valley Dakota Nation, for example, achieved its right to self-government in 2014; one year later the Sioux Valley Dakota Nation's government passed an election law that allows Chief and Councillors to serve three-year terms, as opposed to the two-year terms mandated under the *Indian Act*.[242] Ironically, only when a First Nation is free from the *Indian Act* and *FNEA* can a Band government fully achieve the intended goal of the *FNEA* – political stability and long-term economic development.

B. Financial Autonomy

Similar to First Nations opting under s.69 (1) of the *Indian Act* to "control, manage, and expend" their *revenue* moneys, First Nations can opt under the *First Nations Oil and Gas and Moneys Management Act* (*FNOGMMA*)[243] and the *First Nations Fiscal Management Act* (*FNFMA*)[244] to control and manage their *capital* moneys. Parliament enacted both the *FNOGMMA* and the *FNFMA* to alleviate ministerial paternalism. Self-government agreements

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[241] See e.g., "Sioux Valley Dakota Nation Governance Agreement and Tripartite Governance Agreement", online: Indigenous and Northern Affairs <https://www.aadnc-aandc.gc.ca/eng/1385741084467/1385741171067> [SVDN Governance Agreement] (explaining that the Sioux Valley Dakota Nation is no longer subject to the *Indian Act* because the Nation has the right to self-government and the authority to make laws, as set out in the Agreement).

[242] Sioux Valley Dakota Oyate Election Law, 2015, s 7.1.

[243] SC 2005, c 48 [*First Nations Oil and Gas and Moneys Management Act*].

[244] SC 2005, c 9 [*First Nations Fiscal Management Act*].

similarly exempt First Nations from the money management provisions of the *Indian Act* and allow First Nations to manage their resource revenue with autonomy.

1) <u>First Nations Oil and Gas and Moneys Management Act</u>

The *FNOGMMA* is "optional legislation that allows a First Nation to opt out of the moneys management provisions of the *Indian Act* and assume control of their capital and revenue held in trust by Canada."[245] The *FNOGMMA* regulates First Nations management of on-reserve oil and gas activities, but First Nations do not need on-reserve oil and gas activities in order to opt in under the legislation.[246] They only need to have money held for them in trust by Canada. First Nations receiving revenue from other resource projects, such as mining or forestry projects are not precluded from taking advantage of the *FNOGMMA*.

Before First Nations can manage their revenue pursuant to the *FNOGMMA*, they must satisfy a series of pre-requisites by proving to INAC that they are capable of undertaking the responsibility. First, the Band government must develop its own financial codes. Pursuant to s.11 of the *FNOGMMA*, financial codes must detail:

> (a) the mode of holding moneys paid by Her Majesty to the [F]irst [N]ation under sections 30 and 31 by their deposit in an account with a financial institution or payment to a trust of which the [F]irst [N]ation is settlor and sole beneficiary, and prescribing the conditions governing future changes from one mode to the other;
>
> (b) the manner of expending moneys held by the [F]irst [N]ation in the account or received by it from the trust;
>
> (c) the accountability of the [C]ouncil of the [F]irst [N]ation to [F]irst [N]ation members for the expenditure of those moneys;

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[245] See *First Nations Oil and Gas and Moneys Management Act*, *supra* note 243 at s 60 (stating that First Nations scheduled pursuant to the Act are no longer bound to ss. 61-69 of the *Indian Act*).

[246] See "Fact Sheet - First Nations Oil and Gas and Moneys Management Act (FNOGMMA): Moneys Provisions", online: Indigenous and Northern Affairs Canada <https://www.aadnc-aandc.gc.ca/eng/1100100032344 /1100100032345> (explaining that First Nations do not have to produce oil in order to opt under the money provisions of the Legislation).

> (d) procedures for disclosing and addressing conflicts of interest of members of the [C]ouncil and employees of the [F]irst [N]ation in the expenditure of those moneys; and
>
> (e) for the amendment of the code by the [F]irst [N]ation.

Next, the Band government must enter into an agreement with the Minister specifying how moneys held in the CFR are to be transferred to the First Nation.[247] Afterwards, the community members must ratify the financial code and approve the transfer agreement.[248] If all three steps are completed, then the Band government will receive decision-making autonomy over their resource revenue. Once a First Nation is scheduled pursuant to the *FNOGMMA*, it is no longer constrained by the *Indian Act* and the Crown no longer has the responsibility to administer the First Nation's capital or revenue moneys.[249]

2) <u>First Nations Fiscal Management Act</u>

The *FNFMA* was primarily enacted to combat s. 89(1) of the *Indian Act*, which prohibits the seizure or mortgaging of property on reserves.[250] The *FNFMA* enables First Nations to opt out of s. 89(1) of the *Indian Act* and manage their finances free from the *Indian Act*. The *FNFMA* offers First Nations access to the First Nations Finance Authority (FNFA), the First Nations Tax Commission (FNTC), and the First Nations Financial Management Board (FMB), which collectively provide First Nations access to financial markets and helps First Nations institutionally manage their finances. The FNTC offers First Nations an alternative means to

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[247] *First Nations Oil and Gas and Moneys Management Act*, *supra* note 243 at s 16.

[248] *Ibid* at s 18. Votes are counted pursuant s.24 of the *First Nations Oil and Gas and Moneys Management Voting Regulations*.

[249] *First Nations Oil and Gas and Moneys Management Act*, *supra* note 243 at s 32(2).

[250] See Section II-B at 68-69, above, for a discussion on how s.89 of the *Indian Act* hinders First Nations from obtaining loans since property cannot be offered as collateral; secured transactions cannot be offered on First Nation reserves.

collect property taxes, which can be used to obtain loans from the FNFA.[251] A First Nation's tax regime alone warrants a separate Chapter; [252] but for the purposes of this Chapter, the *FNFMA* was amended to include other forms of revenue, such as resource revenue, that can be used to obtain loans from the FNFA.[253]

The FNFA does not require First Nations to use their tax or resource revenues as collateral in order to obtain loans. Instead, the FNFA only leverages a First Nation's tax or resource revenue by creating bonds, which are then sold on the open market to investors and the proceeds are returned as loans to participating First Nations.[254] First Nations which elect to leverage their resource revenue, as opposed to tax revenue,[255] can use their loan for any purpose that promotes economic or social development, including financing for:

> (a) Capital infrastructure that is to be wholly or partly owned by the First Nation, including infrastructure for the provision of local services on reserve lands, housing, plants and machinery, buildings and other capital assets;
>
> (b) Rolling stock that is to be wholly or partly owned by the First Nation;
>
> (c) Land that is to be wholly or partly owned by the First Nation;

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[251] See Sanderson, *supra* note 209 at 10 (proposing that First Nations opt into the *FNFMA* so they can collect property taxes that can be used to borrow money for infrastructure and other projects, something that is currently precluded under the provisions of the *Indian Act*).

[252] This Chapter narrowly analyzes how First Nations can structure their governments to manage their finances with political stability to combat the resource curse. Therefore, this section only analyzes the FNFA and FMB aspects of the *FNFMA* because these institutions guide First Nations in establishing sound fiscal policies to better manage their finances.

[253] *Financing Secured by Other Revenues Regulations*, SOR/2011-201.

[254] See "Finance FAQ", online: <http://fnfa.ca/en/faqs/finance-faqs/> (explaining that revenue is not collected for collateral, but leveraged on the bond market, sold to investors, and then loaned to First Nations).

[255] See "Eligible Revenue", online: <http://fnfa.ca/oldfiles/en/pdf/Eligible%20Revenues.pdf> (explaining that loans secured through tax revenue can only be used for (i) long-term financing of capital infrastructure for the provision of local services on reserve lands, (ii) short-term financing to meet cash flow requirements for operating or capital purposes under a law made under paragraph 5(1)(b), or to refinance a short-term debt incurred for capital purposes).

> (d) Shares or any other ownership interest in a corporation whose purpose includes the ownership, operation, management or sale of products of power generating facilities, waste or wastewater treatment facilities or other public service utilities or facilities;
>
> (e) Lease financing of capital assets for the provision of local services; and
>
> (f) Short-term financing to meet cash flow requirements for capital purposes or to refinance a short-term debt incurred for capital purposes.[256]

Individual Band members cannot obtain loans from the FNFA; FNFA loans can only finance projects wholly or partially owned by the Band and cannot finance business ventures or program operations.[257]

First Nations can also invest their resource revenue into a pooled investment fund, which was established by the Municipal Finance Authority of British Columbia, and currently holds over $1.2 billion.[258] The FNFA's pooled investment fund operates similar to a bank account or traditional mutual fund. First Nations create an account, deposit money, and face no penalty for withdrawing money prior to maturity.[259] First Nations can either invest into the Money Market Fund for short-term investments (up to a year), the Intermediate Fund for short to medium-term investments (up to 2 years), and the Bond Fund for long-term investments (up to 5 years).[260] Monies deposited into the pooled investment fund are managed pursuant to s.16 of the British Columbia *Municipal Finance Authority Act*.[261] A pooled investment scheme offers First Nations

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[256] *Ibid*.

[257] *First Nations Fiscal Management Act*, *supra* note 244 at s 79.

[258] "Investing FAQ", online: <http://fnfa.ca/en/faqs/investing-faqs/> [Investing FAQ].

[259] *Ibid*.

[260] *Ibid*.

[261] RSBC 1996, c 325.

security; investments are not guaranteed, but have never undergone a write-down and traditionally perform much better than regular investment products.[262]

Before First Nations can receive a loan from the FNFA, they must obtain certification from the FMB.[263] The FMB acts a gate-keeper to determine which First Nations qualify to become a borrowing member of the FNFA. Pursuant to s.49 of the *FNFMA*, the FMB's mandate is to:

> (a) assist [F]irst [N]ations in developing the capacity to meet their financial management requirements;
>
> (b) assist [F]irst [N]ations in their dealings with other governments respecting financial management, including matters of accountability and shared fiscal responsibility;
>
> (c) assist [F]irst [N]ations in the development, implementation and improvement of financial relationships with financial institutions, business partners and other governments, to enable the economic and social development of [F]irst [N]ations;
>
> (d) develop and support the application of general credit rating criteria to [F]irst [N]ations;
>
> (e) provide review and audit services respecting [F]irst [N]ations financial management;
>
> (f) provide assessment and certification services respecting [F]irst [N]ations financial management and financial performance;
>
> (g) provide financial monitoring services respecting [F]irst [N]ations financial management and financial performance;
>
> (h) provide co-management and third-party management services [in an intervention]; and
>
> (i) provide advice, policy research and review and evaluative services on the development of fiscal arrangements between [F]irst [N]ations' governments and other governments.

[262] Investing FAQ, *supra* 258.

[263] First Nations must obtain both of the FMB Certifications (the Financial Performance Certification and the Financial Management Systems Certification) in order to borrow from the FNFA.

Once First Nations are approved to borrow from the FNFA, they can participate in public financing on a par with other governments across Canada. Without this approval, they are precluded from doing so by the *Indian Act*.

The FMB can help First Nations qualify to borrow from the FNFA in a number of ways, including assisting First Nations to implement a stable financial administrative regime, such as structuring Financial Administration Laws (FAL).[264] Unlike financial codes pursuant to the *FNOGMMA*, FALs pursuant to the *FNFMA* are recognized as law and do not require ministerial approval.[265] Rather than the Minister approving an FAL, the FMB reviews and approves a First Nation's FAL. For example, the FMB ensures that a FAL complies with the "Financial Administration Law Standards" (FAL Standards), which are used to certify that a Band's FAL reflects sound financial practices and offers predictability for outside investors in accordance with the *FNFMA*.[266] To help First Nations meet the FAL Standards, the FMB has already drafted a Sample Financial Administration Law (Sample FAL).[267] Rather than "reinventing the wheel," First Nations can consult the FMB's Financial Administration Law Review Procedures (FAL Review Procedures) and utilize the Sample FAL to ensure they comply with the FAL Standards. The FMB establishes the necessary framework for First Nations to institutionally manage their resource revenue as sovereign nations and with sound fiscal policies, such as FALs.

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[264] *First Nations Fiscal Management Act*, *supra* note 244 at s 9.

[265] British Columbia Assembly of First Nations Governance Toolkit – A Guide to Nation Building, "Part 1/// Section 3.11 Financial Administration," loose-leaf (8 April 2015), online: <http://bcafn.ca/about/governance-toolkit/> [British Columbia Assembly of First Nations Governance Toolkit].

[266] See "Financial Management Standards", online: <http://www.fnfmb.com/wp-content/uploads/2011/09/A2_Financial_Administration_Law_Standards_April_2016_EN.pdf> (detailing the standards that a FAL must meet before it receives FMB approval).

[267] Sample FALs can be found online: <http://www.fnfmb.com/core-documents/>.

3) Self-Governance

First Nations which govern under a self-government agreement have the autonomy to administer their own finances. The Band government, not the Minister, controls all expenditures. Sioux Valley Dakota Nation's Governance Agreement and Tripartite Governance Agreement, for example, explicitly exempts Sioux Valley Dakota Nation from the money management provisions of the *Indian Act*.[268] Canada and the province of Manitoba recognize Sioux Valley Dakota Nation's legal sovereignty to manage its finances pursuant to its own laws, which may include borrowing, lending, spending, or investing money, and the giving of guarantees.[269] This level of responsibility only confirms the need for political stability.[270]

Self-governed First Nations are not precluded from taking advantage of the benefits offered under the *FNFMA*.[271] Many self-governed First Nations opt into the *FNFMA* so that they may borrow from the FNFA.[272] Accessible guidance from expert institutions, such as the FMB, is advantageous for First Nations administering their own finances for the first time.

IV. Utilizing Autonomy to Diversify Economies and to Sustain Future Generations

While securing autonomy outside of the *Indian Act* is a critical step to avoiding or combatting the resource curse, it is only a step. First Nations must utilize their political and

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[268] For a list of provisions in the *Indian Act* that no longer apply to Sioux Valley Dakota Nation, see SVDN Governance Agreement, *supra* note 241 Schedule D.

[269] *Ibid* at s 11.01 (3) (iii).

[270] See *Ibid* at s 9.01 (2) (explaining that the Sioux Valley Dakota Nation's government is structured pursuant to its own constitution).

[271] See e.g., *Ibid* at s 66.04 (stating that "[t]he Federal Implementing Legislation will contain provisions to enable the Governor in Council to make regulations so that Sioux Valley Dakota Nation may benefit from the provisions of the *First Nations Fiscal Management Act* or obtain services of anybody established under that Act").

[272] British Columbia Assembly of First Nations Governance Toolkit, *supra* note 265.

financial autonomy to diversify their economies and sustain future generations. Sustainability is critical: community members must continue to profit long after the resource has been depleted.[273] Long-term sustainability and economic diversity can be accomplished through the utilization of a trust fund, or by structuring a wholly-owned corporation to fund start-up businesses and create a private sector within the community, which will offset the state of dependence that often exists in First Nation communities.

A. Utilizing a Trust Fund

Utilizing a trust fund to administer resource revenue opens up two key advantages for the First Nation – it allows for (1) economic stability and (2) economic diversity. The economy will be stabilized because Band leaders will no longer depend entirely on resource revenues. Uncontrollable market factors, such as fluctuating prices and high production costs, will no longer detrimentally affect the Band government's ability to fund social programs. When prices are low, First Nations can withdraw revenue from the trust fund and when prices are high, First Nations can create a diversified investment portfolio.[274]

Allowing moneys to accrue interest in the trust fund or investing them in a diversified portfolio will also create an alternative source of revenue for the First Nation. First Nations which opt out of the *Indian Act* can achieve a greater return by investing their resource revenues into various accounts, as opposed to accruing minimal interest in the Crown's CRF. This

[273] Investing non-renewable resource rents in order to sustain future generations is known as the "Hartwick Rule"; see John Hartwick "Intergenerational Equity and the Investing of Rents from Exhaustible Resources," (1977) 67 American Economic Review, 5 at 972-974, online: <http://fiesta.bren.ucsb.edu/~costello/research/BajaGroup/Urciaga/Hartwick1.pdf>.

[274] See Weinthal & Luong, *supra* note 161 (explaining that trust funds "reduce overspending when prices are high and borrowing when prices fall because when commodity prices are high, excess revenue is placed in the stabilization fund, but when prices are low, revenue is transferred out to make up for budgetary shortfalls" at 40).

additional source of revenue will lower the risk for Band governments to invest in long-term projects and to fund social programs unaffected by market volatility.

The success of using a trust fund to administer resource revenue is best demonstrated by Norway. Norway implemented its Government Pension Fund Global (GPFG) in 1990 to sustain future generations with revenue earned through oil and gas projects.[275] The GPFG was originally modeled after Alberta's Heritage Savings Trust Fund (AHSTF), which was established to save revenue generated from its petroleum sector to sustain future generations.[276] Because Norway and Alberta share this common objective, both utilize long-term, diversified investment strategies.[277] Despite their similar objectives, there remains a tremendous gap in success. The performance of Norway's Fund has far exceeded that of Alberta's.[278] The relative performance of both funds offers lessons to First Nations which wish to manage revenues over the long term.

1) <u>Norway</u>

Norway's Fund is managed pursuant to legislation (*Government Pension Fund Act, 1990* (*GPFA*)) and restrictive spending policies. These spending policies lack statutory status, but

[275] See *Government Pension Fund Act*, (No. 123 of 21 December 2005), s 1, online: <https://www.nbim.no/en/the-fund/governance-model/ government-pension-fund-act/> [*Government Pension Fund Act*] (stating that the Government Pension Fund's objective is to "support government expenditure on pensions and support long-term considerations in the use of petroleum revenues").

[276] See *Alberta Heritage Savings Trust Fund Act*, RS 2000, c A-23 [*Alberta Heritage Savings Trust Fund Act*] (stating in the Act's preamble that the Fund strives to save and invest revenue for current and future generations).

[277] See Investment Strategy, online: Norges Bank Investment Management <https://www.nbim. no/en/responsibility/responsible-investment/> (explaining that the Norges Bank enhances investments through long-term management); see *Alberta Heritage Savings Trust Fund Act*, *supra* note 276 at s 3(1) (stating that "[t]he investments of Heritage Fund assets must be made with the objective of maximizing long-term financial returns").

[278] Norway has accumulated nearly US $1 trillion while Alberta has accumulated US $17.5 billion.

have been strictly adhered to.[279] For example, the government is only allowed access to a portion of the Fund's return on investments – currently estimated at 3%.[280]

The *GPFA* creates a tripartite separation of power between the Ministry of Finance,[281] the Norwegian central bank (Norges Bank),[282] and the Supervisory Council. The Ministry of Finance is responsible for managing the Fund in accordance with the *GPFA*:

> It establishes the investment strategy. It defines the asset allocation and risk limits. It ensures risk diversification and adequate financial returns over the long term. It also monitors and evaluates the management of the Fund and defines responsible investment practices.[283]

The Ministry of Finance establishes a basis for the investment practices to be carried out by the Norges Bank.

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[279] Murphy, Robert P., and Jason Clemens (2013). Reforming Alberta's Heritage Fund: Lessons from Alaska and Norway. Alberta Prosperity Initiative. Fraser Institute at 31 (explaining that government does not spend what the fund does not earn and while there is no sanction if the government deviates from the rule, the press is aware of the rule and public discussions of fund management invoke it).

[280] According to the website (https://www.nbim.no/en/the-fund/about-the-fund/) of the Norges Bank Investment Management,

> The fund is an integrated part of the government's annual budget. Its capital inflow consists of all government petroleum revenue, net financial transactions related to petroleum activities, net of what is spent to balance the state's non-oil budget deficit.
>
> This means the fund is fully integrated with the state budget and that net allocations to the fund reflect the total budget surplus, including petroleum revenue. Fiscal policy is based on the guideline that over time the structural, non-oil budget deficit shall correspond to the expected real return on the fund, estimated at 3 percent.

[281] See *Government Pension Fund Act*, *supra* note 275 at s 2.

[282] See *Ibid*; see also Bruce Campbell, "The Petro-Path Not Taken, Comparing Norway with Canada and Alberta's Management of Petroleum Wealth", online: <https://www.policy alternatives.ca/sites/default/files/uploads/publications/National%20Office/2013/01/Petro%20Path%20Not%20Taken_0.pdf > [Campbell] (stating that "[t]he operational responsibility of the Fund is delegated to the central bank, the Norges Bank. A unit within the Bank — separate from monetary policy deliberations and other activities of the Bank — is devoted to the Fund's management. The Bank reports regularly to the Ministry of Finance. A complete list of Fund investments is published once a year. The Auditor-General, in turn, monitors the activities of the Ministry of Finance" at 30).

[283] Campbell, *supra* note 282 at 30.

The Norges Bank is the operational unit that invests the Fund's revenue.[284] It manages the investment portfolio,[285] creates a plan for the execution of its management objectives,[286] and holds the right to issue investment strategies and submit alternative proposals to the Ministry of Finance.[287] Not only is the Norges Bank restrained by the *GPFA*, but it is also supervised by the Supervisory Council. The Supervisory Council acts as a liaison between the Minister and the Bank, through which the Council updates the Norwegian Government with annual reports.[288] The Bank also publishes annual and quarterly reports that update the public regarding the Fund's performance.[289] To ensure accurate reporting, Norway abides by the Extractive Industries Transparency Initiative (EITI), which utilizes a global standard that promotes accurate reporting and fosters public awareness.[290] The EITI Standard requires full government disclosure of extractive industry revenues and all material payments to government by oil, gas, and mining companies.[291]

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[284] See generally "Management Mandate", online: Norges Bank Investment Management <https://www.nbim .no/en/the-fund/governance-model/management-mandate/> (explaining how the Norges Bank manages the Fund).

[285] *Ibid*.

[286] *Ibid*.

[287] *Ibid*.

[288] See generally "Supervisor Council", online: Norges Bank Investment Management <https://www.nbim. no/en/the-fund/ governance-model/supervision/supervisory-council/> (explaining the Supervisory Council's role in overseeing the Fund's management and administration).

[289] For a list of reports published by the Norges Bank see "Reports", online: Norges Bank Investment Management <http://www.nbim.no/en/transparency/reports/>.

[290] "The EITI Standard", online: Extractive Industries Transparency Initiative <https://eiti.org/files/English_EITI_ STANDARD.pdf>.

[291] *Ibid*.

Restrictive spending policies and a clear separation between business and politics have fostered Norway's success. Alberta manages its trust fund with similar policies, but achieves different results.

2) <u>Alberta</u>

Alberta's Fund is governed pursuant to the *Alberta Heritage Savings Trust Fund Act, 2000* (*AHSTA*). The *AHSTFA* initially mandated that 30% of all Alberta's non-renewable resource revenue be deposited into the Fund.[292] When oil prices dropped in the 1980s[293] the government quickly reduced the percentage to 15%.[294] At the same time as oil prices dropped during the 1980s, Alberta's population grew, which created a need for more public spending to meet the needs of a growing population.[295] Because of low energy prices, deposits into the Fund were halted in 1987 and did not resume until 2005.[296] From 2005 through 2008 the government deposited approximately $3.9 billion from budget surpluses into the Fund, which now holds assets amounting to $17.9 billion.[297]

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[292] Alberta Treasury Board and Finance, *Alberta Heritage Savings Trust Fund 2014-15 Annual Report*, at 4, online: <http://www.finance.alberta.ca/business/ahstf/annual-reports/2015/Heritage-Fund-2014-15-Annual-Report.pdf> [AHSTF 2014-15 Annual Report].

[293] See JC Herbert Emery, Ana Ferrer & David Green, "Long-term Consequences of Natural Resource Booms for Human Capital Accumulation" (2012) 65 Indus & Lab Rel Rev 3 (explaining how oil prices dropped throughout the 1980s).

[294] AHSTF 2014-15 Annual Report, *supra* note 292 at 4.

[295] See Alberta Treasury Board and Finance, online: Heritage Fund – Historical Timeline <http://www.finance. alberta.ca/business/ahstf/history.html> (explaining that revenue from the Heritage Fund was used for capital projects, which helped improve Albertans' quality of life by developing parks, enhancing libraries, and maintaining our forests. These projects were also used to diversify the economy and meet the needs of a growing population).

[296] AHSTF 2014-15 Annual Report, *supra* note 292 at 4.

[297] *Ibid*.

Both the public and private sector govern Alberta's Fund. The Department of Treasury Board and Finance ("Department") is responsible for developing the Statement of Investment Policies and Guidelines for the Fund, accounting for the Fund, reporting on investments, and for conducting ongoing research of asset allocation and risk management for the Fund.[298] The government established the Endowment Fund Policy Committee (EFPC) in 2003 to gain advice from the private sector regarding the Fund's investment policies and guidelines. These policies strive to maximize long-term gains through a diversified portfolio. The EFPC meets at least quarterly to review the Fund's performance and makes recommendations to the Minister of Finance regarding the Fund's business plans, annual reports, and investment policy statements.[299]

In 2007, the government concluded that a stand-alone organization, separate from the Department, would achieve a better return on investments and passed legislation to shift the Investment Management Division from the Department of Finance to Alberta Investment Management Corporation (AIMC).[300] AIMC manages the Fund's investments in accordance with the policies and guidelines established by the Department, which are overseen through a government-appointed Board of Directors.

A Standing Committee also provides oversight. The Department submits quarterly and annual reports to the Standing Committee, which reviews and approves the reports. The Standing Committee hosts annual meetings that inform the public on the Fund's investment activities and results. Seats on the Standing Committee are filled with members from the

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[298] *Ibid*.

[299] Alberta Treasury Board and Finance, *Alberta Heritage Savings Trust Fund 2005 Annual Report*, at 4, online: <http://www.finance.alberta.ca/business/ahstf/annual-reports/2005/report. pdf>.

[300] The *Alberta Investment Management Corporation Act* separated the Investment Management Division from the Department of Finance into a provincial corporation. See *Alberta Investment Management Corporation Act*, c A-26.5, online: <http://www.qp.alberta.ca/1266.cfm?page= A26P5.cfm&leg_type =Acts&display=html>.

provincial Legislative Assembly. Six of the nine seats are reserved for members of the Legislative Assembly who are members of the governing party.[301] Only three seats may be filled with members who are not members of the governing party, but if there is an insufficient number of non-government members to fill these seats, then members of the Legislative Assembly who are members of the governing party may fill any remaining vacancies.[302] Although Alberta issues reports on a quarterly and annual basis, they are prepared according to the government's own standards rather than the EITI Standard adopted by Norway.[303]

3) What First Nations can learn from Norway and Alberta

Although Norway has prospered more than Alberta, their respective circumstances are not the same. Alberta is a sub-national government that arguably lacks the economies of scale of Norway; Norway taxes its citizens more heavily than Alberta; and Norway's offshore access to oil is arguably cheaper than the techniques used for oil production in Alberta, which involve in-situ and mining operations in the oil sands and increasingly hydraulic fracturing to recover conventional oil reserves.[304] First Nations, share in part the sub-national characteristic of Alberta, and also face different circumstances – many Nations will have to opt of the *Indian Act* before they can manage their resource revenue, but those that achieve their political autonomy can learn a lot from the Norway-Alberta comparison. Putting their circumstances aside, the

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[301] *Alberta Heritage Savings Trust Fund Act*, *supra* note 276 at s 6(2).

[302] *Ibid*.

[303] See Report of the Alberta Royalty Review Panel (2007), Our Fair Share, (Edmonton: Ministry of Finance), online: <https://open.alberta.ca/dataset/923f6129-544f-4ba9-91b0-68cfb58f4920/resource/d0ab5af8-cdca-454a-bf4d-99a6af0b16b7/download/3981408-2007-Our-Fair-Share-Report-Alberta-Royalty-Review-Panel-Final-report.pdf> (explaining that Alberta "failed to accurately measure production data, failed to collect royalties efficiently, failed to conduct open reviews, and had one of the lowest public revenue shares among the petroleum states" at 94).

[304] See Max Fawcett, *Why We're Not Like Norway* (26 March 2015), online: Alberta Oil – The Business of Energy < https://www.albertaoilmagazine.com/2015/03/alberta-is-not-norway/>.

institutional governance of Norway's Fund and that of Alberta's contributes to their relative success. Both teach that a First Nation should govern its trust fund with: 1) long-term investments strategies and sound fiscal policies; 2) checks and balances; and 3) accountability and transparency.

i. *Long-term investment strategies coupled with sound fiscal policies*

How a First Nation manages its revenue will depend on the particular needs of each community. One First Nation may choose to fund cultural revitalization programs while others may use profits to fund education or health services. Regardless of a First Nation's objectives, it should manage trust funds pursuant to long-term investment strategies. Investing for purposes of long-term gains reinforces the need for longer terms for elected Band leaders. Sustainability is unlikely to evolve through constant government turnover because short-terms incentivize Band leaders to do the exact opposite – distribute the "bag of goodies" in order to please their constituent factions.

While both Norway and Alberta managed their trust funds pursuant to long-term investment strategies, only Norway adhered to restrictive spending policies and tightened its statutory regime with clear-cut rules that limited government interference. These rules limit Norway's spending and ensure that the bulk of its petroleum revenue accumulates in the Fund. Alberta, on the other hand, allocated unfettered discretion to the Minister of Finance in a statute filled with ambiguity. Nowhere in the *AHSTFA* is there a legal obligation for the government to contribute to the Fund; instead contributions are made on a discretionary basis each year. The lack of any price threshold enables the Alberta government to abandon the Fund even if prices slightly drop; from 1987 to 2005 not one deposit was made.

First Nations should take into account the experience of Norway and Alberta by enacting fiscal regulations, such as FALs or, if applicable, their own sovereign laws to regulate their trust fund. First Nations opting under the *FNFMA* have the advantage of consulting the FMB to ensure their FALs are structured adequately. First Nations should also consider pairing these financial regulations with restrictive spending policies to avoid the temptation to make excessive withdrawals similar to Alberta's experience from 1987 onwards. While elected leaders should utilize revenue to fund public expenditures when prices drop, establishing a price threshold prevents Band leaders from excessive spending, which can easily occur given the high state of dependence in First Nation communities.

ii. Checks and balances

First Nations should govern their trust fund separately from the Band government; politics must be kept separate from business. Alberta delegated responsibility to the private sector to invest its Fund's revenue while retaining oversight through a Board of Directors. First Nations could similarly hire a group of qualified and experienced financial investors to manage their fund's revenue or structure a Board of Directors separate from the Band government to manage their trust fund.[305]

If a First Nation chooses to utilize a Board of Directors to manage its trust fund, then the fund must be structured to combat the political patronage and factionalism that exists in First Nation communities. Dividing the Board between members and non-members, for example, prevents any one family from gaining too much control over the Band's revenue, while also

[305] See Grant & Taylor, *supra* note 181 at 189 (discussing how a Board of Directors can help separate business from politics).

ensuring a degree of financial expertise is employed.[306] To combat factionalism, seats held by Band members should be filled through an electoral vote rather than appointment by Chief and Council. Seats held by non-Band members could be appointed by the Band government, but no Chief or Councillor should sit on the Board.

iii. *Accountability and transparency*

The utilization of a Board of Directors will help foster both accountability and transparency. In a manner similar to the role which holds the Supervisory Council accountable to the Norwegian government, the Board of Directors would submit updated reports and audited financial statements to the Band government. Discrepancies should be resolved by the Board to ensure that projected plans are based on economic prudence rather than political interests. The issuing of reports will stimulate transparency between the Board and Band Council.

Transparency should also extend to the community. At present, there is no law that forces First Nations governing outside of the *Indian Act* to be transparent to their members. Transparency is needed within these First Nation communities to hold elected leaders accountable to their constituents, combat fraud, and keep the public informed. Publishing reports openly would inform the community, provide transparency, and help combat the rent-seeking behavior that easily arises under the resource curse. Because of the opposition associated with the *FNFTA*, Canada should pass a law that balances transparency while also protecting commercial bargaining. The solution is to acknowledge a First Nation's own method of transparency while not hindering competition in Canada's resource sector. In other words, do not require First Nations to upload sensitive financial information onto the internet.

[306] See *Ibid* (explaining that Tribal members can provide inside knowledge while non-Tribal members can provide expertise and experience).

The *Extractive Sector Transparency Measures Act*[307] (*ESTMA*), which came into force on June 1, 2015, requires entities engaged in oil, gas, or mineral projects[308] to publically disclose financial payments of more than $100,000 (either cumulative over the year or one-time payments) made to governments in Canada and abroad.[309] A First Nation is considered a "government" of Canada for purposes of this Act, yet there is currently a two year deferral period (until June 1, 2017) before extractive companies will be required to disclose financial payments made to First Nations.[310] A two year deferral period arose as an interim solution to address the concerns held by First Nations, which primarily hinged on whether the *ESTMA* would mandate the disclosure of an IBA.[311] The federal government has clarified that only payments totaling more than $100,000 in oil, gas, or mineral projects, which may or may not be issued through an IBA, are to be disclosed.[312] The overall contents of an IBA do not have to be

[307] SC 2014, c 39, s 376 [*Extractive Sector Transparency Measures Act*].

[308] See *Ibid* at s 2 (defining what "commercial development of oil, gas or minerals" and "entity" means for purposes of the *ESTMA*).

[309] See *Ibid* at s 9 (explaining ESTMA's reporting obligations).

[310] See *Ibid* at s 29.

[311] See Senate, Standing Senate Committee on Energy, the Environment and Natural Resources, *Report on the subject matter of those elements contained in Divisions 3, 28 and 29 of Part 4 of Bill C-43, A second Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures* (November 2014) (Chair: The Honourable Richard Neufeld & The Honourable Paul Massicotte) (explaining that a "deferral period arose as a result of concerns expressed by Aboriginal governments, industry and some provinces about how the Act will affect IBAs. In many cases, these agreements are confidential and therefore stakeholders need to work out how information will be reported" at 7).

[312] Natural Resource Canada issued an information sheet regarding the ESTMA, online: <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mining-materials/PDF/ESTMA%20Info%20Sheet%20-%20General.pdf> (which clarifies that "[e]xtractive companies are not required to disclose IBAs. The Act requires extractive companies to report certain types of payments of $100,000 or more made in relation to the commercial development of oil, gas or minerals. Some of these reportable payments might be included in IBAs").

disclosed, as well as payments totaling less than $100,000 or not associated with an oil, gas, or mineral project.[313]

However, the *ESTMA*, unlike the *FNFTA*, was not enacted to provide or improve transparency in First Nation communities. Canada enacted the *ESTMA* solely to support accountable reporting and transparency in the domestic and international resource sector.[314] The Act is aimed at extraction companies, not First Nations. First Nations are not required to report anything pursuant to the *ESTMA*.

Under the *ESTMA*, The Canadian Minister of Natural Resources has the authority to allow Reporting Entities (i.e., industries) to *substitute* reports prepared in another jurisdiction to meet Canada's requirements.[315] The Minister could allow First Nations, although currently considered as a domestic government within the Act, to substitute the reporting requirements mandated by the *ESTMA* with their own transparency provisions. The federal government could then require industries to comply with a First Nation's own standard of reporting and transparency.

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[313] The *ESTMA* only requires the disclosure of monetarily benefits, but fails to acknowledge other philanthropic efforts on behalf of industries, such as non-monetary benefits that promote education in First Nation communities or hiring preferences that create jobs. See generally Emily Stanhope "*Extractive Sector Transparency Measures Act*: Reporting Without Context Will Subvert Reconciliation Efforts" (16 April 2016) (blog), online: ABlawg.ca <http://ablawg.ca/ 2016/04/22/extractive-sector-transparency-measures-act-reporting-without-context-will-subvert-reconciliation-efforts/?utm_source =feedburner&utm_medium=email&utm_campaign=Feed %3A+Ablawg+%28ABlawg%29> (arguing against the disclosure of only select portions of an IBA).

[314] See *Extractive Sector Transparency Measures Act*, *supra* note 307 at s 6 (stating that "[t]he purpose of this Act is to implement Canada's international commitments to participate in the fight against corruption through the implementation of measures applicable to the extractive sector, including measures that enhance transparency and measures that impose reporting obligations with respect to payments made by entities. Those measures are designed to deter and detect corruption including any forms of corruption under any of sections 119 to 121 and 341 of the *Criminal Code* and sections 3 and 4 of the *Corruption of Foreign Public Officials Act*").

[315] *Ibid* at s 10.

This approach would not force Band leaders to upload financial information onto the internet, but would hold Band leaders accountable and keep members updated with the project's profitability – which is exactly what the Conservative government wanted to accomplish upon passing the *FNFTA*. It would also hold industries accountable and combat corruption because it would disclose financial payments made by an extractive industry to a government in Canada, which is a variation of the intended purpose underlying the *ESTMA*.

In some instances, this approach is more effective than either the *FNFTA* or *ESTMA*. Unlike the *FNFTA*, which applies narrowly to First Nations that govern pursuant the *Indian Act*, this approach would require transparency in all First Nation communities, because industries would be required to disclose their financial payments, including payments under an IBA and regardless whether a First Nation governed pursuant to the *Indian Act*. Because First Nations would be required to provide this transparency, industries would be required to disclose all financial payments – even if they were less than a $100,000 or not affiliated with an oil, gas, or mineral project, something not required by the *ESTMA*. This balancing approach provides transparency in First Nation communities and holds industries accountable without triggering commercial disadvantages for either industries or First Nations.

Full transparency in an impoverished community, however, may trigger unintended pressure from constituents. Community members who endure socio-economic hardships and see large sums of money generated from resource development may prefer distribution of the project's profits through per capita payments. Although direct distribution is a possible solution to the resource curse, it may not work well in First Nation communities. Band leaders distributing per capita payments would foster the existing culture of political kick-backs and familial factionalism in First Nation communities. This defeats the purpose of creating a trust

fund to sustain future generations through long-term investments. Per capita payments were a primary contributor to the community turmoil that emerged in Samson Cree First Nation.[316]

Rather than appealing to the "give me" attitude and distributing per capita payments, First Nations should consider utilizing resource revenue to generate entrepreneurial activity within their community. A wholly-owned corporation could be structured to achieve this objective. There are successful models of this type of corporation in some Aboriginal communities.

B. Wholly-Owned Corporation

First Nations can use resource revenue to finance a wholly-owned corporation for purposes of helping members create businesses and gain employment within the community. Community members who lack the capital and expertise to start a business could consult the wholly-owned corporation for guidance and acquire the up-front capital needed to start a business. Stimulating entrepreneurism within First Nation communities will diversify the economy because jobs will emerge and a private sector may ultimately evolve to convert a potential resource curse into a lasting benefit.

The creation of a wholly-owned corporation for purposes of diversifying the economy is best demonstrated by Ho-Chunk, Inc., a corporation wholly-owned by the Ho-Chunk Nation of Winnebago, Nebraska, and the Meadow Lake Tribal Council (MLTC), located in Northwest Saskatchewan. Both provide an interesting case study.

1) Ho-Chunk Inc.

Like most First Nation communities, Ho-Chunk has few, if any, economic opportunities in the vicinity of its rural reservation. The Ho-Chunk Nation took its chances in the gaming

[316] See Section II-C, at 72-74 above, for more on this topic.

industry in the early 1990s.[317] The casino was successful and quickly became the primary source for funding social development throughout the community. Tribal governance and self-sufficiency were contingent on the casino's success. Because the Tribe relied solely on the casino, it became worried when neighboring Iowa legalized riverboat gambling. Recognizing the need to diversify the economy and to create long-term stability, the Tribe created Ho-Chunk, Inc. (HCI) to diversify the Tribe's investments and to develop various economic opportunities other than gaming.[318]

The Tribe loaned approximately US $9M from casino revenue to finance HCI's investment portfolio.[319] This loan came with a five-year grace period that allowed HCI to reinvest all profits before any dividends were payable to the Tribe.[320] HCI reinvested their profits not only in the financial market, but also in the community. HCI bought land, convenience stores, gas stations, and now owns over 30 subsidiaries. These subsidiaries are located on and off the reservation and primarily fit under five broad categories: support services; housing and construction; government contracting; commercial marketing; and local businesses.[321]

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[317] The Harvard Project on American Indian Economic Development, "Economic Development Corporation: Ho-Chunk, Inc." (2000), online: John F. Kennedy School of Government, Harvard University <http://hpaied.org/sites/default/files/publications/Economic%20Development%20Corporation.pdf> [Ho-Chunk Inc. Case Study].

[318] See "Ho-Chunk, Inc. 2014-2015 Annual Report", online: <http://www.hochunkinc.com/downloadable_forms/annual-report-2015.pdf> [Ho-Chunk, Inc. 2014-2015 Annual Report] (explaining HCI's mission).

[319] See Ho-Chunk Inc. Case Study, *supra* note 317 at 2 (explaining that casino revenue was initially used to finance HCI).

[320] *Ibid*.

[321] See Ho-Chunk, Inc. 2014-2015 Annual Report, *supra* note 318 at 10-14 (for an overview on HCI's subsidiaries and economic progress).

The "All Native Group" is HCI's most successful subsidiary. The All Native Group consist of seven companies that compete for federal government contracts in a variety of disciplines including: information technology, corporate staff augmentation, editorial services, logistics, integrated health services and OCONUS (contracts for work conducted outside the continental United States).[322] These companies primarily rely on contracts issued by the Small Business Administration's Section 8(a) program (SBA s. 8(a)), which is a federal program that helps disadvantaged businesses compete in the open marketplace. Between 2006 and 2014, HCI earned US $486 million through the SBA s. 8(a) program, averaging US $54 million each year.[323] Revenue generated through SBA s. 8(a) government contracts accounted for 31% of Winnebago's economy, which was used to construct infrastructure and build a new community on the Reservation.[324]

HCI's economic success has improved the social welfare for citizens living in the Winnebago community. HCI and its subsidiaries have created a labour sector and provided its Tribal members with jobs.

> Winnebago Reservation employment growth was approximately 18 times that of nearby Iowa, 5 times that of Nebraska, and 15 times that of the United States. From 2010 to 2014 HCI generated more than $8.1 million in wages and salaries on the Reservation. From 2000 to 2013, the percentage of Winnebago Reservation living in poverty declined by 5.1%. Elsewhere poverty grew by 3.5% in Iowa; 3.2% in Nebraska and 3.1% for the United States.[325]

[322] *Ibid* at 10.

[323] See *Ibid* at 15 (explaining HCI's economic opportunity with the SBA 8(a) Contracting Program).

[324] *Ibid*.

[325] *Ibid* at 16-17.

Starting with only one employee in 1994, HCI now has approximately 1,200 employees, earns a quarter of a billion dollars annually, and holds US $99.1 million in assets.[326] With the emergence of a labour sector, the overall quality of life on the Winnebago Reservation has also improved: poverty sank while it expanded in surrounding states; enrollment at the Winnebago Public School District increased; high school graduation rates are now almost equal with the state of Nebraska; and life expectancy for Winnebago adults increased at a faster rate than the state average.[327] HCI has fostered a sense of pride and involvement within the community that was non-existent prior to its creation.

HCI is managed with institutional principles that are similar to those that underlie Norway and Alberta's Trust Fund. HCI's Articles of Incorporation provides clear separation between the Tribal government and HCI.[328] HCI is managed by a five member Board of Directors (Board). The Tribal Council selects members of the Board. Two seats are filled by current members of the Tribal Council, one seat is filled by a Tribal member, but not an acting Councillor, and two seats are filled by persons with business acumen, who need not be members of the Tribe.[329] The Board of Directors acts independently of the Tribal Council to select HCI's

[326] *Ibid* at 7-8. According to the Ho-Chunk, Inc. 2014-2015 Annual Report, Ho-Chunk, Inc. expanded sales by 992.6%, net income by 670%, and Native employment by 80.9% between 1994 and 2014. Ho-Chunk revenues have expanded at a spectacular compound annual growth rate of 46.1%. HCI has never endured volatility; for the past twenty years they have consistently broke record profits. In 2014 they generated $10.8 Million in Net Profit, a 17.5% increase from 2013.

[327] *Ibid* at 16.

[328] See Ho-Chunk Inc. Case Study, *supra* note 317 (stating that "Ho-Chunk, Inc. was established so that [T]ribal business operations would be free from political influence and outside the bureaucratic process of the government" at 2).

[329] *Ibid* at 2-3.

Chief Executive Officer, who oversees day-to-day management and makes all major strategic decisions for the Corporation.[330]

Accountability between the Tribal Council and HCI emerges through meetings and reports. The Board is responsible for providing the Tribal Council with annual fiscal and business reports that account for all financial expenditures and project future developments.[331] The Tribal Council approves these reports and works alongside HCI to ensure its long-term plans are implemented. Even though the Tribal Council holds ultimate authority and ownership over the Corporation, it defers to the CEO and Board in the event of a disagreement.[332] Annual reports are also published over the internet to inform and update Tribal citizens on HCI's progress, including its economic and social impact on the Winnebago community.

2) <u>Meadow Lake Tribal Council</u>

The MLTC created the Business Development Services (BDS) to help Band members apply for grants and educate Band members on how to develop and sustain a business.[333] The BDS does not directly service loans or engage in financing, but offers individual Band members "guidance, business expertise and access to an extensive network of contracts and professional service providers."[334] BDS's guidance led to the creation of sixty citizen-owned businesses throughout the Meadow Lake area within the first five years of MLTC's existence.[335]

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[330] *Ibid*.

[331] See *Ibid* 2-3 (describing how the Board submits reports to the Ho-Chunk Tribal Council).

[332] *Ibid*.

[333] Stephen Cornell et al, "Citizen Entrepreneurship: An Underutilized Development Resource" in Miriam Jorgensen, ed, Rebuilding Native Nations (The University of Arizona Press 2007) 197 at 211-213.

[334] *Ibid*.

[335] *Ibid*.

Because of forestry development throughout the Meadow Lake territory, BDS helped Band members create "anchor-and-ancillary" businesses. An "anchor-and-ancillary" business seeks to provide goods and services to an already established business.[336] Businesses were created to service log hauling, catering, and silviculture for existing forestry enterprises.[337] Prior to the creation of the BDS, only 37 percent of Band citizens were employed throughout the Meadow Lake area.[338] The employment and income within these communities grew much faster than those of the surrounding population after the establishment of the BDS.[339] There was no economic activity independent of the Band government prior to the creation of the BDS. Commercial goods, such as groceries, hotel lodging, and fuel from gas stations had to be purchased off the reservation.[340] Now, there is a constant inflow of revenue being spent on the reserve, as opposed to dollars being spent off the reserve.[341]

3) What First Nations can learn from Ho-Chunk Inc. and Meadow Lake Tribal Council

First Nations can use resource revenue to finance a wholly-owned corporation for purposes of diversifying their economy in a manner similar to the decision of Ho-Chunk Nation of Winnebago using casino profits to finance HCI. This corporation could then fulfill a two-fold mission: 1) assist and guide members searching for economic opportunity and 2) provide seed money for those who qualify to start a business.

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[336] *Ibid*.

[337] *Ibid*.

[338] *Ibid*.

[339] *Ibid*.

[340] *Ibid*.

[341] *Ibid*.

This wholly-owned corporation, similar to the FNFA, will service loans. Unlike loans serviced under the FNFA, individuals, as opposed to the Band government, would be permitted to obtain these loans. Rather than leveraging resource revenue on the open bond market, First Nations can provide loans directly to their membership – something that is hindered by s.89(1) of the *Indian Act*. This not only creates an alternative source of revenue for the Band, since loans will be repaid with interest, it creates a private sector within the First Nation's community. First Nations hosting a resource project could mimic the anchor-and-ancillary strategy employed by First Nations within the Meadow Lake area. First Nations can help their members start businesses that will service existing resource projects.

As the HCI and MLTC case studies exemplify, a labour sector improves the community's quality of life. Revenue will begin to circulate and stay on the reserve, as opposed to being spent off the reserve. Jobs emerge and education can improve. The socio-economic conditions on the Winnebago Reservation are the exact opposite from the socio-economic conditions that prevailed on the Samson Cree Reserve, where revenues were distributed through per capita payments. A sense of pride will arise where members participate directly in the project, as opposed to receiving per capita cheques. The attitude shifts from "what can the Band government do for me" to "what can I do for myself." It replaces socialism with capitalism and factionalism with democratic governance.

Similar to governing a trust fund with institutional stability, First Nations should also govern their wholly-owned corporation with clear checks and balances. Following the decision of Ho-Chunk, Inc. to structure a Board of Directors to manage HCI, First Nations can delegate the day-to-day management of their corporation to a Board of Directors. This precludes Chief and Council from interfering with the day-to-day business of the corporation. The wholly-owned

corporation can operate at the speed of business without becoming enmeshed with bureaucratic red tape. Council members can primarily focus on governance rather than on the wholly-owned corporation. A Band government with too much control over the Board of Directors is likely to foster political patronage.

The Band government can oversee the Board's management through reports and meetings. Similar to Ho-Chunk Tribal Council's oversight of HCI's Board of Directors, the corporation's Board would be responsible for submitting business reports that project future developments and annual audited reports that account for all financial expenditures. These reports would also hold the Board accountable to the Band government and ensure that moneys are disbursed only to those qualified, rather than to family relatives or friends that fail to qualify, which is characteristic of political factionalism under the resource curse.

V. Conclusion

The shackles of the *Indian Act* must be broken in order for First Nations to successfully combat the resource curse. First Nations which govern under the *Indian Act*, as opposed to those governing outside of the *Indian Act*, are more susceptible to the resource curse. As this Chapter argued, First Nations often govern under short-terms and without institutional stability, which cultivates political patronage and factionalism. The resource curse thrives in this environment because there is a lack of economic diversification; the Band Council relies solely on resource development and typically gains office by distributing the project's financial benefits rather than setting out a plan to achieve long-term sustainable revenues.

First Nations which govern outside of the *Indian Act* are not immune to the resource curse, but they hold the autonomy to structure their governments with the institutional stability needed to combat the resource curse. By opting out of the money management provisions of the

Indian Act, First Nations can invest their revenues in the market and use their revenues to create a private sector. A private sector reduces the danger of dependence on resource development and combats market volatility of the resource. If First Nations manage their resource revenue with political stability and sound fiscal policies aimed towards sustaining future generations, then they will begin to perceive their resources as a blessing rather than a curse.

CHAPTER THREE

The Content of an IBA – Enforcement, Environment, and Non-Monetary Benefits

This Chapter discusses the content of an IBA. It narrowly focuses on:

- how the parties can achieve their initial expectations and hold one another accountable throughout the life of a project;
- how an IBA, unlike top-down environmental legislation, can take into account the traditional knowledge of a First Nation and accommodate a First Nation's spiritual attachment with land; and
- why benefits beyond a monetary payment are needed in an IBA to reconcile the socio-economic conditions of a First Nation.

Section One introduces provisions that can help the parties enforce the terms of their IBA while also securing enough flexibility to foster a working and long-term relationship between the parties. A non-objection clause expresses a First Nation's consent and declares that a community as a whole supports a project. This will help companies acquire external investments because it reduces the risk of objections and delays. During negotiations, the parties should carefully determine any provisions that may need to change as a project proceeds. The ability to amend certain provisions, such as start-up times or the geographic scope of the project can enable the parties to respond to minor or unanticipated circumstances without jeopardizing the entire agreement. Through an ongoing communication clause, the parties can monitor the project and hold each other accountable. These provisions will help strengthen the relationship between a company and First Nation because they balance certainty with adaptability and help the parties achieve the expectations of their IBA.

Section Two explains how companies can use an IBA to take into account the traditional knowledge of a First Nation when assessing their project's environmental impacts. It explains that an IBA can supplement and/or exceed the obligations set out under a statutory environmental assessment. It includes a comparison of how companies completed their

respective environmental assessments for the Galore Creek Mining Project in British Columbia versus that of the Dakota Access Pipeline in South Dakota and considers the possibility that proponents may receive support for their projects by completing their environmental assessments through an IBA. Unlike companies which complete their environmental assessments pursuant to top-down legislation, IBAs encourage companies to work hand-in-hand with traditional teachers and account for the traditional knowledge of a First Nation when assessing environmental impacts.

Section Three discusses how companies can provide benefits beyond a monetary payment. Non-monetary benefits often include preferential hiring policies and business quotas that aim to include local businesses, on-site training and apprentice programs, and other philanthropic initiatives, such as the sponsorship and construction of wellness centres. These types of benefits offer Band members a participatory role in the project and aim to improve the overall quality of life during a resource project. They can offset unemployment, further education, create a steady flow of revenue within a community, and prevent the community's social well-being from being entirely contingent on project profitability.

Section Four concludes this Chapter.

I. How the Parties can better Enforce the Terms of their IBA, Achieve Flexibility, and Create an Ongoing Dialogue throughout the Life of a Resource Project

The life of a resource project, and hence of an IBA, is normally long. Projects typically encounter unanticipated impacts or circumstances which can threaten the parties' relationship or defeat their initial expectations. The parties will be in a better position to manage unanticipated circumstances and to enforce the terms of their IBA through a non-objection clause, by recognizing that some provisions may need amending as the project proceeds, and by adhering to

an ongoing communication clause. These clauses provide a sense of certainty, flexibility, and foster an ongoing dialogue between the parties throughout the life of a project.

A. Non-Objection Clause – a sense of certainty

Despite the Declaration on the Rights of Indigenous Peoples' hope for *free, prior, and informed consent*,[342] proponents do not have to *obtain* a First Nation's consent where a project fulfills a compelling and substantive interest for the broader Canadian public.[343] While a proponent can proceed without a First Nation's consent and/or adverse to the interest of a First Nation, this course of action does not foster the type of reconciliation that an IBA aims to achieve. The purpose of an IBA is to reach an agreement, to enable First Nations to benefit from a project, and allow projects to proceed efficiently without opposition. Through a non-objection clause, companies achieve what is not required under Canadian law – a First Nation's consent to a project. Proponents which obtain a First Nation's consent through a non-objection clause protect their investment and gain some assurance that their project will procced without opposition.[344]

The United Nations Development Group opines that the process of obtaining consent from an Indigenous community should, *inter alia,* be free of coercion and intimidation, show respect for the time requirements surrounding the Indigenous consultation/consensus processes, and occur proactively. It is vital that companies ensure that the negotiators on behalf of the First

[342] Article 32(2) of the Declaration on the Rights of Indigenous Peoples states that States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources [emphasis added].

[343] See Chapter 1, Section II C-D, at 29-40 above, for a discussion on when a company must obtain a First Nation's consent before it can proceed and/or implement its project.

[344] See Brad Gilmour & Bruce Mellett, "The Role of Impact and Benefits Agreements in the Resolution of Project Issues with First Nations" (2013) 51:2 Alta L Rev 385 – 400 at paras 25-29 [Gilmour & Mellett]; Gogal, *supra* note 9 at paras 97,102 (explaining how a non-objection clause provides investors with assurance that the project will precede without protest).

Nation have the requisite authority to negotiate and enter into the agreement on behalf of the Band.[345] Companies should also host meetings so Band members can learn how a project can impact and benefit a community. Those who are not in favour of the project should be allowed to voice their opinion and foster healthy debate. A confidentiality clause which prohibits Band leaders from disclosing information to the community is characteristic of the "divide and conquer" strategy and misconstrues the purpose of utilizing a confidentiality clause.[346] Confidentiality clauses should serve to protect financial information from parties that hold competing interests, not to "divide and conquer" a First Nation community.[347] An IBA requires developers to work with the community, not against them. Proceeding without communal consent or a simple majority saturates the process with corporate influence and political patronage.[348] Gaining consent is the first step to establishing a healthy relationship and demonstrates that the community, as a whole, is in favour of the project.

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[345] See e.g. *Indian Act*, *supra* note 151 at s 2(3)(b) (stating that "a power conferred on the [C]ouncil of a [B]and shall be deemed not to be exercised unless it is exercised pursuant to the consent of a *majority* of the [C]ouncillors of the [B]and present at a meeting of the [C]ouncil duly convened); see *Heron Seismic Services Ltd v Muscowpetung Indian Band* (1991), 86 DLR (4th) 767 (CanLII) (SKCA) (holding a contract void because the Indian Band did not receive approval from the Band Council in accordance with s.2 (3)(b) of the *Indian Act*).

[346] See Chapter 2, Section I-B, at 57 above, for further discussion on how companies employ the "divide and conquer" strategy; for further discussion on the consequences of not allowing a community to review an agreement, see Gibson & O'Faircheallaigh, *supra* note 9 at 132-33.

[347] Confidentiality clauses are a contentious issue. Commentators argue that they strengthen industries' bargaining position because they prohibit First Nations from disclosing the content of an IBA and therefore, preclude First Nations from working together. Despite criticism, confidentiality clauses can shield revenues from federal regulation and there are numerous ways a First Nation could assist another First Nation in negotiating and/or managing an IBA without disclosing the content of its IBA, such has sharing strategies and/or teaching the skills of negotiating an IBA. For further discussion on confidentiality clauses see generally Gilmour & Mellett, *supra* note 344 at paras 53-58; Gibson & O'Faircheallaigh, *supra* note 9 at 126-27.

[348] See Chapter 2, Section I-B, at 57 above, for further discussion on how a substantial amount of resource revenue can lead to rent-seeking and political corruption.

The duty to consult offers proponents the opportunity to gain a First Nation's consent.[349] A company which seeks the consent of a First Nation before commencing its project demonstrates respect for a First Nation's rights and/or land. Companies which employ this proactive approach produce a record of consultation, which helps the Crown meet its duties and can reduce opposition to the project.[350] Companies, through a non-objection clause, can prevent a newly elected Chief and Council from unwinding any progress established by their predecessors, which is critical especially where Chief and Council are elected on a two-year cycle.[351]

A non-objection clause has the obvious drawback of reducing a First Nation's freedom of action once a project begins.[352] This is problematic since unforeseen impacts are likely to occur throughout the life of a project. Although there is no way to completely alleviate this uncertainty, First Nations should wait until all environmental assessments are completed before consenting to a project.[353] First Nations can respond to unanticipated circumstances by returning to the negotiating table to modify the agreement so that it keeps pace with current conditions.

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[349] But see Newman, *supra* note 4 at 147-53 (explaining that the United Nations Declaration on the Rights of Indigenous Peoples is aspirational and that the Crown's duty to consult Indigenous falls short of obtaining a First Nation's free, prior, and informed consent – First Nations do not have a veto power in Canada).

[350] See Chapter 1, Section III, at 40-45 above, for further discussion on how proactive consultation can expedite resource development.

[351] See Chapter 2, Section II-A, at 59-60 above, for further discussion on how the Chief and Councils are up for re-election every two years under the *Indian Act*.

[352] See Sosa & Keenan, *supra* note 203 at 10 (explaining that a non-objection clause can prevent First Nations from opposing a project during the government licensing or environmental assessment process).

[353] *Ibid* (explaining that non-objection clauses should be avoided during the early stages of a project because information about its potential impacts may be insufficient or uncertain).

B. ***The Ability to Amend Portions of the Agreement – balancing certainty with adaptability***

Minor changes or unanticipated circumstances should not jeopardize an IBA, if the agreement allows the parties to amend the agreement to respond to minor changes and/or unanticipated circumstances.[354] A company may need more time to complete environmental assessments and need to amend start-up dates. A developer might discover new ores or deposits and request an amendment of the geographic scope of the project. A lack of qualified personnel from the First Nation community might require the parties to amend hiring quotas in the agreement. Other provisions, such as a lump-sum payment clause[355] or provisions which prohibit a company from trespassing into sacred sites are unlikely to change throughout the life of a project. Establishing those provisions which may require amendment during the preliminary stages of negotiating an IBA balances certainty with adaptability.

The ability to amend portions of the agreement, while offering both parties a sense of assurance that future circumstances will not jeopardize their agreement, does not give either party a free pass to evade their contractual obligations. An IBA should establish enforcement mechanisms to ensure that the parties adhere to their commitments.[356] A company that fails to issue payments in accordance with an agreement or infringes a designated environmental area

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[354] See generally Carmen Diges, "Sticks and Bones: Is Your IBA Working? Amending and Enforcing Impact Benefit Agreements" at 5-8 (Paper delivered at Canadian Institute, 13 February 2008, online: < http://www.millerthomson.com/assets/files/article_attachments2/C-Diges_Sticks-and-Stones-Is-Your-IBA-Working_February2008.pdf> (explaining that there is a growing trend to revisit, reconsider, and amend portions of an IBA, as opposed to resolving a problem through other formal dispute resolution methods).

[355] A lump-sum payment clause guarantees a fixed amount of payment which does not adjust to unforeseen changes, positive or negative. If a First Nation wishes to receive payments which reflect the market volatility of the resource, then they should negotiate a royalty structure which takes into account profits and production costs.

[356] See Kennett, *supra* note 135 at 48, 99 (for a discussion on how sanctions can help enforce the terms of an IBA).

should face a sanction or suffer a penalty, which might increase in proportion to the severity or frequency of non-compliance. While most IBAs provide a formal dispute resolution process to address severe or repeated non-compliance,[357] returning to the negotiating table before resorting to enforcement mechanisms offers both parties an opportunity to implement their IBA in a non-adversarial manner.

The parties will be in a better position to monitor and respond to changing circumstances if they set out a schedule for ongoing communication.

C. An Ongoing Communication Clause – creating a dialogue throughout the life of a resource project

An ongoing communication clause establishes a schedule of meetings throughout the life of a project.[358] A continuing dialogue will notify the parties when circumstances change or when unanticipated impacts occur. It will also enable First Nations to monitor whether a company adheres to its contractual obligations. A set schedule of communication helps the parties maintain a healthy relationship because it enables the parties to voice their concerns and preemptively resolve problems.[359]

Companies can also maintain community support through ongoing communication. The membership of a First Nation, in addition to Chief and Council, should receive updates as the

[357] Many IBAs have a "governing law" clause and/or an arbitration clause, and as stated in the Introduction, at 3 above, IBAs are a legally binding contact and are enforceable under the principles of contract law.

[358] See Gilmour & Mellett, *supra* note 344 at paras 32-34 (explaining how consultation continues throughout the life of a resource project); see also Gibson & O'Faircheallaigh, *supra* note 9 at 185 (explaining that IBAs often include provisions which require the parties to periodically meet and review their IBA).

[359] See Gibson & O'Faircheallaigh, *supra* note 9 at 188 (discussing how periodic communication can help the parties resolve problems early on and before they escalate).

project proceeds.[360] Periodic meetings with the community will keep Band members informed and help prevent inaccurate information from circulating throughout the community, which can easily occur in a small community, such as a reserve. Ongoing communication preserves a company's relationship with a First Nation.

To ensure that meetings occur as set out in the agreement, the parties can create a monitoring committee:

> This committee usually consists of representatives of the company and First Nation, and may also include independent members that are jointly appointed. Its main role is to keep regular, open communication between the parties, to promote compliance with the objectives of the agreement, to serve as a forum to discuss and resolve implementation problems and to appoint special committees or staff to conduct specific tasks. [Citations omitted].[361]

First Nations should structure this committee in a manner to counteract the high rate of turnover that occurs in Indian politics.[362] Similar to structuring a government with staggered terms to

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[360] The parties can agree when the community should receive updates regarding the project. It may be impractical to notify the community about minor regulatory hurdles and/or impacts throughout the life of a resource project. For example, the community would likely receive notice of a major oil spill that could potentially contaminate the community's water supply, but may not receive notice when regulatory hurdles postpone operating stages of production. See e.g. Rescan. 2012. KSM Project: Impacts of Mining Operations on Aboriginal Communities in the Northwest Territories and Labrador: Case Studies and Literature Review. Prepared for Seabridge Gold Inc. by Rescan Environmental Services Ltd.: Vancouver, British Columbia, online: <https://www.ceaa-acee.gc.ca/050/documents_staticpost/49262 /89282/Chapter_29_ Appendices/Appendix_29-D_Impacts_of_Mining_Operations_on_Aboriginal _Communities. pdf> [Rescan] (stating that "community update meetings are held annually with all of the communities that signed IBAs with Diavik [Diamond Mine]). Mine tours are conducted for Aboriginal elders, leaders, and IBA committee members. More recently, input was obtained from communities on the existing wildlife programs at the site, and how best to incorporate traditional knowledge into the various monitoring programs at the mine site").

[361] Sosa & Keenan, *supra* note 203 at 18.

[362] See Chapter 2, Section II-A, at 59 above, for further discussion on governance under the *Indian Act.*

promote stability, structuring a monitoring committee with staggered terms will help new members acclimate to the culture of the committee and strengthen institutional stability.[363]

A communication committee should also provide checks and balances. Similar to structuring a Board of Directors apart from the Band Council to manage a trust fund, the communication committee should also be independent of the Band Council. The communication committee can inform and update Chief and Council through reports and briefings. This allows Chief and Council to govern without interfering with the business aspects of the resource project. Separation between business and politics reduces political corruption and the negative perceptions that emerge when Band leaders intrusively participate in the business realm of the project.[364]

As the following Section will explain, a set schedule of communication will also enable First Nations to monitor environmental impacts and ensure companies take mitigation measures in accordance with an IBA.

II. Protecting and Monitoring Environmental Impacts through an IBA

Federal and provincial legislation determine whether a project requires an environmental assessment.[365] Under the *Canadian Environmental Assessment, 2012*, the *Regulations*

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[363] See generally Gibson & O'Faircheallaigh, *supra* note 9 at 190 (for further discussion on the importance of implementing mechanisms to deal with staff turnover).

[364] See Chapter Two, Section II-C, at 69-75 above, for more on this topic.

[365] Resource developers which undertake federal and provincial environmental assessments do so in a concerted and integrated manner. The federal government under the Harper Administration amended the *Canadian Environmental Assessment Act, 2012* to prevent proponents undertaking duplicate assessments at both the federal and provincial level. The *Canadian Environmental Assessment Act, 2012* aims to minimize adverse environmental effects, achieve sustainable development, and encourage collaborative planning and decision making between federal and provincial governments. Sections 32-37 of the *Canadian Environmental Assessment Act, 2012* sets out a process for the Minister of Environment to exercise its discretion and substitute an assessment at the provincial level for an environmental assessment at the federal level.

Designating Physical Activities sets out a list of projects which require an environment assessment.[366] At the provincial level, projects usually require an environmental assessment where a project proposes significant environmental effects.[367] Projects which do not qualify as a "designated project" as described in the *Regulations Designating Physical Activities* or do not propose significant environmental effects may not require an environmental assessment. However, if a project is proposed on Indian land or requires funding or statutory authorization from Indigenous and Northern Affairs Canada, then the project is subject to an environmental review.[368] An environmental review, like an environmental assessment, aims to identify and mitigate environmental impacts and to account for public concern.[369]

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[366] *Regulations Designating Physical Activities*, SOR/2012-147.

[367] In Saskatchewan, under s. 2(d) of *The Environmental Assessment Act*, a project requires an environmental assessment if it is likely to:

(i) have an effect on any unique, rare or endangered feature of the environment;
(ii) substantially utilize any provincial resource and in so doing preempt the use, or potential use, of that resource for any other purpose;
(iii) cause the emission of any pollutants or create by-products, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
(iv) cause widespread public concern because of potential environmental changes;
(v) involve a new technology that is concerned with resource utilization and that may induce significant environmental change; or
(vi) have a significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment.

In Alberta, the *Environmental Assessment (Mandatory and Exempted Activities) Regulation* is the schedule under *Environmental Protection and Enhancement Act* which sets out a list of projects that require an environmental assessment. Projects which do not qualify as a "mandatory activity" under the *Environmental Protection and Enhancement Act* may still warrant an environmental assessment, if a Director pursuant to s. 44(1)(b) of the *Act* opines that the potential environmental impacts of the proposed activity warrant further consideration.

[368] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 67.

[369] See Indigenous and Northern Affairs Canada, "Proponents' Guide to Aboriginal Affairs and Northern Development Canada's Environmental Review Process" (1 April 2014), online:< http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-ENR/STAGING/texte-text/derp_1403213813290_eng.pdf > (explaining that the environmental review process shares the same objectives as any environmental assessment).

Most environmental assessments do not require a proponent to take into account the traditional knowledge of a First Nation when assessing environmental impacts. Nor do proponents have to assess environmental impacts in accordance with a First Nation's process for reviewing environmental impacts, unless a First Nation has set out a protocol through a MLCA or self-government agreement.[370] Environmental assessments pursuant to federal and/or provincial legislation usually do not account for Aboriginal perspectives and often fail to accommodate the spiritual attachment First Nations hold with land.[371]

Through an IBA, First Nations can remedy or supplement the deficiencies of a statutory environmental assessment.[372] First Nations can define and establish the process for assessing environmental impacts and obligate proponents to account for their distinct cultural perspectives and spiritual attachment with land. First Nations can designate environmentally sensitive areas, such as burial or hunting sites, and require companies to take extra mitigation measures beyond those required in environmental assessment processes.[373] Where a project requires an environment assessment, First Nations, through an IBA, can gain an additional layer of

[370] Under section 19(3) of the *Canadian Environmental Assessment Act, 2012*, "[t]he environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge" [emphasis added]. The word "may" indicates that proponents have discretion to take into account Aboriginal traditional knowledge, but it is not required.

[371] See Courtney Fidler & Michael Hitch, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice" (2007) 35:2 Environments at 56-57 (discussing whether conventional environmental assessments under legal frameworks adequately account for Aboriginal traditional knowledge).

[372] See *Ibid* at 62-64 (discussing how an IBA can supplement the deficiencies of an environmental assessment); see generally Sosa & Keenan, *supra* note 203 at 14-16 (discussing how First Nations can use an IBA to assess and monitor environmental impacts).

[373] See Sosa & Keenan, *supra* note 203 at 15 (explaining that some First Nations require companies to take extra mitigating measures to minimize impacts on wildlife and sites of cultural importance).

environmental protection. Where a project does not warrant an environmental assessment, an IBA may serve as the only means for a First Nation to voice and preserve its cultural values.

IBAs further a First Nation's sovereignty and right to self-determination by enabling the First Nation to negotiate the parameters of consultation, accommodation, and environmental review. Companies learn to respect and adhere to the process set forth by a First Nation, which can strengthen the partnership of a company and First Nation. Courtney Fidler explains the benefit of a company working hand-in-hand with a First Nation to assess a project's environmental impacts.[374] She explains how a proponent (NovaGold Canada Inc.) used an IBA to fund traditional knowledge studies and consulted with traditional teachers to learn how the Galore Creek Mining Project might infringe the cultural values of the Tahltan Nation. Through this hand-in-hand approach, NovaGold Canada Inc. was able to mitigate impacts and preserve the Nation's cultural values, which helped the proponent gain regulatory approval.[375]

As stated in Chapter One, most resource based industries, as opposed to the government, possess the capital needed to overcome any funding impediments a First Nation may encounter.[376] Although First Nations receive funding from the Crown under the duty to consult, it is often minimal or not enough for a First Nation to adequately participate in the consultation

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[374] Courtney Riley Fidler, *Aboriginal Participation in Mineral Development: Environmental Assessment and Impact and Benefit Agreements* (Master of Applied of Science, University of British Columbia 2008), online: <http://www.impactandbenefit.com/kr/One.aspx?objectId=10486924&contextId=677979&lastCat=10486919>.

[375] See *Ibid* at 40,53 (explaining that the Tahltan Heritage Resource Environmental Assessment Team ("THREAT") was created to better guide and educate industry on how to better protect the heritage, culture and resources of the Tahltan Nation. "THREAT's involvement increased the Tahltan leadership role in the process, which led to the Tahltan putting forth the expertise and skill to recommend an alternative access road, in lieu of that proposed by the proponent").

[376] See Chapter One, Section III, at 44 above.

process or adequately assess environmental impacts.[377] The Tahltan Nation, through working hand-in-hand with the proponent, received more funding than what was provided by the Crown, which according to many members of the Tahltan Nation, was an "unsaid necessity" to adequately participate in the environmental assessment.[378]

An example where resource proponents and Aboriginal peoples did not work together is the Dakota Access Pipeline. The Dakota Access Pipeline, while not underneath Indian land, was met with opposition from Native Americans, namely the Standing Rock Sioux who believe that the pipeline will destroy sites of cultural and historical significance, such as burial grounds and sites of spiritual worship, and potentially affect the quality of their water supply.[379]

The Tribe, in its effort to obtain a preliminary injunction against the permitting of the pipeline, argued, *inter alia*, that it was not given an adequate opportunity to participate in assessing the pipeline's socio-cultural impact. Despite this assertion, the court held that the federal government, specifically the United States Army Corps of Engineers fulfilled its duties under the *National Historic Preservation Act* by 1) repeatedly inviting and meeting with the Tribe to exchange information regarding the pipeline's environmental impacts, 2) instituting a "Tribal Monitoring Plan" that allowed Tribal monitors to oversee construction, and 3) forcing proponents to reroute the pipeline to avoid infringing the Tribe's burial site and other sites of cultural significance.[380] The court concluded that there was ample opportunity for the Tribe to

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[377] See *Ibid* at 51-52 (explaining that First Nations often do not receive enough funding to adequately participate in the process of assessing environmental impacts).

[378] See *Ibid* (explaining that the Tahltan Nation needed somewhere between $150,000 to $180,000 to adequately participate in the environmental assessment, but the British Columbia Environmental Assessment Office only provided $50,000).

[379] See generally *Standing Rock Sioux Tribe*, *supra* note 5 (for further information regarding the Tribe's complaint).

[380] *Ibid* at 48.

engage in consultations and submit cultural surveys to support its concern with respect to socio-cultural impacts.[381]

The environmental assessment for the Galore Creek Mining Project versus the environmental assessment for the Dakota Access Pipeline produced opposite results. The former was held pursuant to an IBA that helped the proponent to gain support from the impacted community and to proceed without delay. The latter was pursuant to the *National Historic Preservation Act*, which led to massive protest and resulted in costly litigation. This distinction suggests that proponents can potentially expedite their projects and receive communal support by taking into account the traditional knowledge and cultural values of a First Nation when completing their environmental assessment. Companies are more likely to achieve this integrated approach through an IBA, not top-down legislation.

First Nations can also create an environmental management committee, either independent from or as a component to the communication committee, to monitor and to identify environmental impacts.[382] An environmental management committee will help First Nations ensure companies comply with mitigating measures set out in an IBA, and also ensure that financial payments keep pace with unanticipated impacts.[383] Ongoing communication and environmental monitoring is likely expensive for a First Nation that struggles to provide basic social services, but because companies want their projects to proceed efficiently, First Nations

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[381] See *Ibid* (stating that "…the Tribe largely refused to engage in consultations. It chose instead to hold out for more – namely, the chance to conduct its own cultural surveys over the entire length of the pipeline").

[382] See generally Gilmour & Mellett, *supra* note 344 at paras 47-52 (discussing environmental monitoring schemes in an IBA).

[383] See Sosa & Keenan, *supra* note 203 at 15 (explaining that environmental monitoring can help First Nations assess whether a company adheres to its commitments and verify company reports regarding environmental performance).

could negotiate for funding to cover their monitoring schemes.[384] Although this upfront cost may be in a company's best economic interest, funding for purposes of monitoring environmental impacts is unlikely to continue once a project ends. First Nations need to recognize this and negotiate for a reclamation plan before the project begins. A reclamation plan will strive to remedy the environmental degradation that may occur during the life of a project. First Nations can secure funds to implement a reclamation plan by asking a company to pay a security deposit.[385] The Crown, as the fiduciary of First Nations, can secure this deposit and ensure it is used to fund the reclamation plan in accordance with the IBA. This strategy aligns with the long-term perspective that all First Nations should employ in negotiating an IBA.

Despite a First Nation's best efforts to curtail environmental impacts, cultural devastation or socio-economic issues associated with a resource project can linger on. To account for these types of impacts, First Nations should negotiate for non-monetary benefits to overcome the high rate of unemployment, the lack of education, and sparse economic opportunity in First Nation communities.[386]

III. Non-Monetary Benefits

As Chapter Two explained, a substantial inflow of resource revenue can cause and/or further socio-economic impacts in a First Nation community. The rate of unemployment, the low level of education, and the overall quality of life in First Nation communities often mimic

[384] See Gilmour & Mellett, *supra* note 344 at para 48 (stating that environmental monitoring schemes are generally funded by the project proponent).

[385] See Sosa & Keenan, *supra* note 203 at 16 (discussing the how a trust fund or a security deposit can secure revenue to fund reclamation costs); see also Gibson & O'Faircheallaigh, *supra* note 9 at 23 (discussing closure and reclamation).

[386] See *Brenda L. Gunn*, "More than Money: Using International Law of Reparations to Determine Fair Compensation for Infringements of Aboriginal Title" (2013) 46 UBC L Rev 299 (arguing that mere financial compensation does not adequately account for the special connection Indigenous people hold with their land).

the socio-economic conditions of a developing country.[387] To improve socio-economic conditions, either those which exist before a project or those which occur because of a project, IBAs can provide non-monetary benefits. Non-monetary benefits can create jobs and opportunities for local businesses, which unlike a mere financial payment, can offer Band members a participatory role in the project. Non-monetary benefits often include employment quotas, scholarships to further education, and other philanthropic initiatives that aim to improve the overall quality of life in a First Nation community.

A. Employment

First Nations can negotiate for hiring policies that obligate a company to fill its workforce with a percentage of First Nation members.[388] Jason Prno explains how hiring preferences and/or quotas can curtail the high rate of unemployment and improve the socio-economic conditions of a First Nation.[389] Prno's research reveals that the average income for Aboriginal communities that participated in mining projects throughout the Northwest Territories grew at a rate of 1.48% from 1995 to 2003.[390] The rate of unemployment declined from 45.0% in 1989 to 28.8% in 2004, which equates to an annual average change of -1.01%.[391] By 2001, the

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[387] See generally Canada, Royal Commission on Aboriginal Peoples, *Gathering Strength*, vol 3 (Ottawa: Communication Group, 1996) (reporting the socio-economic conditions of First Nations in Canada).

[388] See e.g. Rescan, *supra* note 360 (informing that the EKATI Diamond Mine, located in the Northwest Territories, set a target to hire 31% Aboriginal employees, and within less than a decade, the mine's total workforce was comprised of 33% Aboriginals from nearby communities. Voisey's Bay Nickel Mine similarly set a target to fill 50% of the mine's workforce with Aboriginal employees. In 2008, the mine's workforce was 54% Aboriginal employees from the Innu and Nunatsiavut Nations).

[389] Jason Prno, *Assessing the Effectiveness of Impact and Benefit Agreements from the Perspective of their Aboriginal Signatories* (Master of Arts, University of Guelph 2007) at 76, online: <http://www.impact andbenefit.com/kr/One.aspx?objectId=10486930&contextId=677979&lastCat=10486919> [Prno].

[390] *Ibid* at 76.

[391] *Ibid*.

percentage of tax filers in Aboriginal communities with an income $50,000 or more surpassed the Canadian average.[392]

Creating jobs through preferential hiring policies also helps combat the economic aspect of the resource curse. Jobs can diversify the economy of a First Nation and relieve the Band from the role of acting as the sole provider of jobs. Jobs can bestow Band members with responsibility and strengthen the culture of a First Nation,[393] but working in the resource sector can also further negative socio-economic conditions. Upon describing the fly-in, fly-out lifestyle of working in the Lupin Gold Mine in the Nunavut Territory, one community member explained that:

> …the Wellness Centre can track increases in family violence, alcohol and drug abuse, and spousal abuse that completely mirrors the shift rotation schedule. What you tend to see is that the people come back into the community with large sums of money sitting in their pocket with really nothing to spend it on. In addition when these people return with all this money, all family members and everybody they know in the community, want the money spent on them to buy them gifts and alcohol. This type of salary with lots of time off tends to result in increases in those types of incidents. Because of the tightness of the family unit, here, there tends to be increased allegations of infidelity. Because one spouse is left alone to care for the extended family, tensions mount and there is a marked increase in elder abuse.[394]

How companies can help combat the socio-economic impacts of a resource project will be discussed in detail below, but for present purposes it should be noted that companies often engage in philanthropic initiatives, such as the sponsorship and construction of wellness centres to provide counseling services and strengthen the cultural values of a First Nation. A lack of

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[392] *Ibid* at 75.

[393] See generally Theresa Hollet, "Indigenous Consent/Canadian Mining: Learning from Voisey's Bay" (Presentation by Ryerson University's Institute for the Study of Corporate Social Responsibility delivered at Ryerson University's Ted Rogers School of Management, 11 December 2015) [unpublished] (explaining how community members who work in the Voisey Bay Nickel Mine are prohibited from alcohol and drugs and eventually see life from a different angle – a life filled with sobriety and responsibility).

[394] Hitch, *supra* note 7 at 190.

capacity building by a company and/or a lack of participation from the community can increase, rather than alleviate, the socio-economic problems associated with resource development. Stimulating the workforce of a First Nation improved the social-economic conditions of the Ho-Chunk Nation of Winnebago, while sidelining members with nothing more than a per capita cheque proved detrimental to the interests of the Samson Cree First Nation.

A company and First Nation are more likely to achieve and maintain their employment quotas with the assistance of an employment coordinator. An employment coordinator can assist in the recruitment process by spreading awareness throughout the community and notifying members when jobs become available. They can explain the skills that are needed for various positions, help Band members submit resumes and prepare for interviews, and serve as a liaison between the company and community.[395] Because an employment coordinator will serve as a liaison, it is advantageous for companies to hire a member from the local community. Unlike an outsider, a local coordinator is already known by members of the community and understands what skills and training is needed. A local coordinator can help connect a company with a community.

An IBA can also increase the production of goods and services within a community.

[395] See Gibson & O'Faircheallaigh, *supra* note 9 at 149 (explaining how an employment coordinator can help recruit community members). At Voisey's Bay, the company's implementation coordinator, working with Innu and Inuit implementation staff, communicates the company's employment plans and advertises open positions; recruits community members into jobs; develops employment orientation programs; sits in on interviews, upon request, and conducts exit surveys; designs work schedules that recognize cultural needs; develops training programs that advance the Aboriginal labour force into higher skilled positions; creates cross-cultural training for non-Aboriginal employees and contractors; and provides periodic summaries of progress. During construction, there were two coordinators (one for training and one for employment), but during operation this was reduced to an employment coordinator.

B. Business Opportunities

IBAs often give priority to First Nation businesses and/or set quotas which obligate a company to purchase a certain percentage of its goods and services from Aboriginal businesses.[396] Chapter Two explained that there is often a lack of privately owned business within First Nation communities, but with financial payments from an IBA, First Nations could provide seed money to their members to fund start-up businesses for purposes of creating a private sector within the community. First Nations would be wise to mimic the "anchor-and-ancillary" strategy used by the Meadow Lake Tribal Council – where businesses were created to service log hauling, catering, and silviculture for existing forestry enterprises. This strategy *coupled* with a provision that mandates a certain percentage of the project's goods and services come from the ancillary businesses can stimulate opportunity and entrepreneurialism within a First Nation community.[397]

A competitive tender process normally determines who can supply the resource project and/or its affiliated contractors with goods and services. First Nation businesses often lack the financial and institutional capacity needed to submit competitive bids,[398] but through IBAs, companies can provide funding to local businesses and host workshops or other training programs that teach First Nations how to prepare competitive bids.[399] First Nation businesses

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[396] See Gilmour & Mellett, *supra* note 344 at paras 43-47 (discussing business opportunities in IBAs).

[397] See Sosa & Keenan, *supra* note 203 at 12-13 (discussing how IBAs often include a clause which obligates the proponent to obtain its good and services from Aboriginal business).

[398] See generally Sosa & Keenan, *supra* note 203 at 13; Gogal, *supra* note 9 at para 65 (stating that Aboriginal business often do not have the financial and technical capacity to present successful tenders).

[399] According to the 2007 Socio-Economic Monitoring Report for the Diavik Diamond Mine, the companies worked with Aboriginal-owned businesses to prepare business plans and to adopt contracting principles that resemble Diavik's business model and performance accountabilities. The Report is available online: <http://miningnorth.com/docs/Socio-EconomicReport2007.pdf>.

often merge with other local businesses or non-Aboriginal businesses in order to acquire additional capital and pursue larger contracts.[400] Companies can also split up contracts into smaller and simpler components so that First Nation businesses can compete.[401]

A committee and/or coordinator can help monitor target quotas and ensure First Nations benefit from preferential contracting.[402] A business coordinator can assist business owners in submitting bids, ensure that business owners receive notice of tenders, and act as a liaison between the community and company.[403] Business coordinators can establish and manage databases and/or registries that help companies identify Aboriginal businesses to fulfill contracts.[404]

In order for members and/or local businesses to benefit from preferential hiring policies and preferential contracting, the community must have the skills and capacity to work in the resource sector.[405]

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[400] See Sosa & Keenan, *supra* note 203 at 13 (discussing how Aboriginal businesses often enter into joint ventures to compete for larger contracts); *C.f.* Gogal, *supra* note 9 at para 73 (explaining that Aboriginal businesses are often formed so that it meets the definition of an Aboriginal business and qualify for preferential contracting, but not produce any benefit to the Aboriginal people – the parties should be cautious when defining the criteria for an Aboriginal business and strive to ensure there is significant Aboriginal benefit, ownership, control, and/or employment).

[401] See Sosa & Keenan, *supra* note 203 at 13 (explaining how companies can unbundle contracts).

[402] See *Ibid* (explaining how a joint company-First Nation committee can help facilitate communication and monitor/report the involvement of Aboriginal businesses in the project); see e.g. Rescan, *supra* note 360 (informing that Vale Inco and Aboriginal communities utilize a business development committee to expand and grow Aboriginal business in and beyond Voisey's Bay).

[403] See generally Sosa & Keenan, *supra* note 203 at 12; Gilmour & Mellett, *supra* note 344 note para 45 (stating that clauses often provide Aboriginal businesses preferential notice of tenders and that Aboriginal businesses often have the right of first refusal).

[404] See generally Sosa & Keenan, *supra* note 203 at 12 (explaining the use of a registry to identify available Aboriginal businesses that can supply the needed goods and services).

[405] See generally Hitch, *supra* note 7 (discussing and reviewing literature on how a community can increase its capacity to reap the objective and benefit of an IBA).

C. Training and Education

Companies often provide on-site training and apprentice programs to teach Band members the skills needed to work in the resource sector.[406] The initial cost to train local members can help companies save money over the long-run. Companies often have to recruit and transport labour when their projects shift into technical or skilled aspects of production,[407] but by investing in apprentice programs to train and employ local Band members, companies can reduce or eliminate the costs to transport labour.[408] The benefit of training has enabled many Aboriginals to receive journeyman certification and long-term mentorship, which can help members gain employment in resource development long after an individual project ends.[409]

Through an IBA, companies can also fund initiatives/programs that aim to improve the quality of education in a First Nation community. This type of benefit can increase the rate of members obtaining their high school diploma and enable members to pursue education at the post-secondary level.[410] Vale Inco, through an IBA for the Voisey's Bay Nickel Mine,

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[406] See generally Rescan, *supra* note 360; Gilmour & Mellett, *supra* note 344 at para 41; Gogal, *supra* note 9 at paras 66-68; Sosa & Keenan, *supra* note 203 at 11 (explaining how companies invest in training and apprentice programs to enlarge the local workforce and employ Aboriginals).

[407] See e.g. Rescan, *supra* note 360 (explaining that the proponent failed to reach its 66% hiring quota when the Diavik Diamond Mine shifted to the underground stages of production. The company had to recruit and transport labour because members from the nearby Aboriginal communities lacked the requisite skills needed to work underground).

[408] See Gogal, *supra* note 9 at para 68 (explaining that the costs to transport labour to remote areas can be high).

[409] See e.g. Rescan, *supra* note 360 (explaining that proponents associated with the Diavik Mine refined their recruitment and training program in 2008 to address the shortage of underground mining and within less than two and half years, 30 individuals had obtained journeymen certification at the Diavik Diamond Mine.

[410] See Prno, *supra* note 389 at 77-78 (construing a correlation between apprentice programs and an increase in the number of Aboriginals which obtained their high school education or greater).

> …re-invested $234,000 in the scholarship program at the College of the North Atlantic, making Vale the largest scholarship donor in the history of the college…The combined scholarship investments from 2004 to 2014 will total more than $344,000.
>
> Vale is also sponsoring a high school scholarship program in the Placentia/Long Harbour Region, offering scholarships of $600 (24 in total) to high school students who enrol[l] in the post-secondary industrial trades and technologies or science and engineering programs. Vale's "stay in school" and lifelong learning initiatives also include career fairs, school visits, student tours of the mine site, and various community-based training initiatives.[411]

Vale Inco also opened an on-site Skills Development Centre, which has become an accredited school that provides on-site supervisory training so members can qualify for positions at the management level.[412]

The cultural differences between Aboriginals and non-Aboriginals often cause a high turnover rate among First Nation employees.[413] First Nations often face a language barrier and fall victim to discrimination by non-Aboriginals. One method to curtail discrimination is to require workers to undergo cross-cultural training.[414] Cross-cultural training can include non-Aboriginals visiting and camping in Aboriginal villages so they can learn from the community

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[411] See Rescan, *supra* note 360.

[412] See *Ibid* (stating that "the Skills Development Centre was given exam invigilator status, meaning exams can be administered on site for post-secondary institutions located elsewhere. Students can study online or by correspondence, and do not have to leave the work site to take exams"); see also *Ibid* (explaining that the proponent started an Aboriginal Development Program in association with Southern Alberta Institute of Technology to help Aboriginals take on supervisory roles in the Diavik Diamond Mine).

[413] See Gibson & O'Faircheallaigh, *supra* note 9 at 151 (explaining that social and cultural differences can cause a high rate of turnover among Aboriginal employees).

[414] See *Ibid*; see generally Hitch, *supra* note 7; Rescan, *supra* note 360 (for a discussion on the importance and effect of cross-cultural training to overcome cultural differences and reduce the high rate of turnover among Aboriginal employees).

and its elders.[415] Other ways to integrate Aboriginals into the workforce include providing cultural leave so Aboriginals can participate in seasonal hunting and gatherings, enabling Aboriginals to prepare traditional foods while at the work camp, and promoting Indigenous languages at work sites.[416]

The non-monetary benefits discussed thus far (employment preferences, business opportunities, and training and educational support) empower a First Nation to combat the resource curse. With the emergence of a labour sector and an educated populace, the overall quality of life in a First Nation community can improve. IBAs also enable companies to play a substantial role in addressing and improving the socio-economic conditions of a First Nation.

D. Investing Financial Profits to Improve the Socio-economic Conditions of a First Nation Community

Companies often sponsor and participate in initiatives to build up the capacity of a First Nation. For example, companies have sponsored and developed housing projects to combat the lack of adequate housing in Aboriginal communities.[417] Other philanthropic initiatives include donations to provide medical equipment to local hospitals and furnish new health care

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[415] See e.g. Hitch, *supra* note 7 at 136 (explaining that under the Raglan Agreement (which governs an underground nickel mine in Northern Quebec), non-Inuit members complete their cross-cultural training in remote Inuit villages so they can learn from elders and participate in the Inuit community).

[416] See e.g. *Ibid* at 131 (informing that under the Dona Lake Agreement (which governs a mining project in western Ontario) Aboriginal employees were entitled to up to three months per calendar year for leave of absence to participate in traditional activities, such as hunting, trapping, and wild rice harvesting); see also Sosa & Keenan, *supra* note 203 at 11(discussing mechanisms to integrate Aboriginals into the workforce).

[417] According to Diavik's Community Legacy Project Report – *Highlighting our first decade of investing in the North*, the proponent worked with the Yellowknife Homelessness Coalition and other entities to provide construction management, funding, and in-kind services estimated at over $350,000 to help build the first men's transitional centre in the Northwest Territories. Diavik also helped fund a housing project that provides houses for elders in northern Dene communities. The Report is available online:<http://www.assembly.gov.nt.ca/sites/default/ files/11-02-17td141-165.pdf>.

facilities.[418] Companies which reinvest profits into the community foster reconciliation and will likely strengthen the relationship between a company and First Nation.

Companies can also help Aboriginals overcome the challenges of working in a resource project. Vale Inco. has an employee and family assistance program that helps employees and their families cope with issues related to substance abuse, depression, and work stress.[419] Similarly, BHP Diamond Inc., a company which entered into an IBA for the Ekati Diamond Mine, provides Aboriginals and their families access to counseling services, and sponsors a family day event by flying employee's families to the mine for a day of activities.[420]

Philanthropy is a non-monetary benefit beyond the employer-employee context. It aims to promote the culture of a community and foster a healthier lifestyle in an impacted community. Companies have achieved this type of reconciliation through sponsoring and developing wellness centres in an impacted community. Vale Inco. contributed $1.2 million towards the construction of two new recreational centres and another $1.8 million towards constructing facilities for a high school within the impacted community.[421] Vale Inco. also contributed $3 million for a project called Ulapitsaijet, meaning "talking together" in Inuktitut, which enabled the construction a community centre for purposes of promoting Aboriginal culture and developing new suicide prevention programs in the community.[422]

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[418] See Rescan, *supra* note 360 (discussing Diavik's contribution to provide medical equipment to local hospitals).

[419] *Ibid*.

[420] See *Ibid* (discussing the employee assistance program for the Ekati Diamond Mine).

[421] See also *Ibid* (explaining that Diavik contributed $830,000 for recreational activities throughout the Yellowknife).

[422] *Ibid*.

The construction of wellness centres can stimulate activities for the youth in a community, which can also help revitalize the culture of a First Nation. As part of a construction trades program associated with the Diavik Diamond Mine in the Northwest Territories, the company worked with the youth to renovate and to transform a vacant mine rescue service building into the SideDOOR youth centre, which serves to enrich the lives of both Aboriginal and non-Aboriginal youth in Yellowknife.[423]

The philanthropic aspect of an IBA enables companies to improve the socio-economic conditions of a First Nation.

IV. Conclusion

Companies and First Nations can overcome the challenges of market volatility and respond to unanticipated impacts by using a non-objection clause, negotiating for the ability to amend portions of the agreement, and adhering to an ongoing communication clause. These provisions help balance certainty with adaptability and help the parties maintain a healthy relationship throughout the life of a resource project.

Through an IBA, First Nations can set out a process for assessing a project's environmental impacts, which could encourage a company to work hand-in-hand with its traditional teachers and take extra mitigation measures to preserve its cultural values. First Nations can also establish a committee to monitor environmental impacts and ensure companies adhere to their contractual obligations.

Money alone cannot fully reconcile First Nations with resource development. Non-monetary benefits, such as preferential hiring policies, business opportunities, and training programs offer Band members a participatory role in a project and can empower a First Nation to

[423] *Ibid*.

combat its poor socio-economic conditions. Companies can also help combat the resource curse by sponsoring philanthropic initiatives, such as the development of wellness centres to stimulate youth activities, and fostering a healthier lifestyle within an impacted community by funding housing projects and providing counseling services to their employees.

CONCLUSION

The law is clear; First Nations are not the gate-keepers to Canada's resources and despite the underlying intent and language of the United Nation's Declaration on the Rights of Indigenous Peoples, proponents rarely need a First Nation's consent in order to proceed with a project. Aboriginal rights are neither supreme nor absolute, rather they are balanced against the broader interests of all Canadians, which may not always reconcile the interests of First Nations.

While proponents can carry out their projects through the loopholes of the law, proponents recognize the benefits of partnering with First Nations and are increasingly including First Nations in projects through IBAs. IBAs can fill the loopholes of the law with consent, consultation above and beyond an ambiguous spectrum, and innovative methods of accommodation that aim to improve the socio-economic conditions of a First Nation. The essential aspect to an IBA is not its impacts nor its benefits, but the fact that IBAs tailor consultation towards resolving differences and reaching an agreement. As the old saying goes, "it takes two to tango," and both parties will have to move from their original positions, listen, and negotiate in order to achieve an IBA.

IBAs also offer a promising future to achieving reconciliation outside the context of resource development. IBAs primarily occur in areas where land ownership remains ambiguous, such as in British Columbia. However, this Thesis also analyzes consultation in the context of definitive treaty rights and explains the importance of opting out of the *Indian Act* – a problem primarily for First Nations in the Prairie Provinces. This is because the advantages of an IBA (certainty, expediency, and a harmonious relationship) can also assist provincial governments when expanding municipalities, designating conservation parks, or when regulating wildlife and habit. These types of government action, albeit statutorily permitted, risk infringing the rights of

Aboriginal peoples, but could be carried out with input from First Nations and where there is a significant impact, an IBA could potentially help provincial governments proceed without litigation. The sovereignty of First Nations may have been diminished through colonization, but it can be revitalized through IBAs. In this sense, IBAs become the mortar that paves Canada's path to reconciliation – in the context of resource development or by helping government officials execute their day-to-day functions without infringing Aboriginal rights.

Although IBAs can foster reconciliation between government officials and First Nations, only those Bands which are fortunate enough to be located near a major resource project or suffer significant impact will receive substantial monetary benefits. But in order for First Nations to fully reap the rewards of an IBA, First Nations must have the autonomy to govern pursuant to their own traditions and to manage their resource revenue free from the *Indian Act*. The *Indian Act* does not foster the secure and stable government needed to sustain future generations nor does it offer entrepreneurial opportunities for a First Nation's community. Money is helpful, but it alone cannot cure all the socio-economic problems of a First Nation. Companies can use an IBA to provide non-monetary benefits, such as the benefit of employment, education, and other capacity building initiatives to improve the overall quality of life in a First Nation community. Where a First Nation receives substantial benefits, monetary or non-monetary, it can begin to cure many of the problems that plague First Nation communities and empower them to propel themselves out of poverty.

IBAs offer the win-win solution needed to reconcile First Nations with resource development and enable Canada to maximize its potential in the domestic and global resource economy. While no proposed solution is free from criticism and opposition, IBAs at least offer a realistic approach to resolve the divisiveness between industries and First Nations.

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