

## CANADIAN INDIGENOUS COMMUNITIES AND SUSTAINABILITY

### 1. *Introduction*

This research examines the implementation of sustainability in Indigenous consultations in Canada. Using a two-sided methodological approach that aims to consider both corporate and community perspectives in consultation, this study identifies principles for improving their relationships. It is part of a broader doctoral research project on stakeholder protection conducted jointly at the University of Macerata, Italy, and the University of Ottawa, Canada. This research sheds light on one of the most important tools in Canadian law for safeguarding the interests of Indigenous communities in relation to industrial projects on their traditional lands. By examining the characteristics of the consultation process and critically analysing the expectations of Indigenous communities regarding its outcomes, this study seeks to reimagine the relationship between industry and local communities in a holistic and equitable manner.

In the next section, I provide a brief overview of the origins and content of Indigenous consultations in Canada. Subsequently, I explore the connection between the concept of sustainability and the research topic. I then turn to the literature review and identify the gap that my research aims to fill. Based on these gaps, I outline the research questions and provide information on the applied methodology and methods. The final section summarises the research findings and discussion, followed by some concluding remarks.

### 2. *Indigenous Consultation in Canada*

Consultation serves as an important platform for Indigenous communities and corporations to engage with each other. The Duty to Consult requires the Government of Canada to consult with Indigenous communities whose rights may be affected by economic development projects in their territories. The government is also responsible for appropriately addressing community needs and mitigating potential harm. While the duty officially

rests with the government, consultation is typically delegated to proponent companies. As a result, companies establish direct relationships with Indigenous communities and have a de facto responsibility to provide information about the project and seek their consent.<sup>1</sup>

The Duty to Consult is based on Section 35(1) of the Canadian Constitution Act, which recognises Aboriginal and Treaty rights,<sup>2</sup> and on the Principle of the Honour of the Crown. The latter is a constitutional principle that governs the fiduciary relationship between the Crown and Indigenous peoples and requires the government to respect and protect them from exploitation.<sup>3</sup>

Pivotal Supreme Court of Canada (SCC) rulings have further developed the Duty to Consult. In the *Sparrow* case, the SCC held that Aboriginal rights limit the sovereignty of the Crown and can only be infringed upon if the government has a valid purpose and acts honourably.<sup>4</sup> In the *Badger* and *Haida Nation* cases, this protection was extended to established Treaty rights as well as to Aboriginal and Treaty rights that have been asserted but not yet proven in court.<sup>5</sup> In the *Rio Tinto* case, the Court outlined a three-step test to determine when the Duty to Consult is triggered, involving the Crown's actual or potential knowledge of an Aboriginal claim or right, a Crown's planned conduct, and the likelihood of adverse effects on the identified claim or right.<sup>6</sup> Nonetheless, the test is general in nature and the level of consultation required has to be determined on a case-by-case basis.

It is worth noting that the Duty to Consult does not obligate the government to reach an agreement with the consulted community, nor does it give the community a veto over project implementation. However, the ratification of the United Nations Declaration on the Rights of Indigenous

<sup>1</sup> Peter Landmann, 'Crown Delegation of Consultation Responsibilities' (2012) OBA.org <[http://www.oba.org/en/pdf/sec\\_news\\_abo\\_dec12\\_con\\_lan.pdf](http://www.oba.org/en/pdf/sec_news_abo_dec12_con_lan.pdf)> accessed 17 September 2024.

<sup>2</sup> While Aboriginal rights originate with indigenous peoples, Treaty rights are the result of negotiated agreements between indigenous groups and the Canadian government.

<sup>3</sup> *Mitchell v MNR* [2001] SC (Canada) 1 SCR 911, para 9.

<sup>4</sup> *R v Sparrow* [1990] SC (Canada) 1 SCR 1075.

<sup>5</sup> *R v Badger* [1996] SC (Canada) 1 SCR 771; *Haida Nation v British Columbia (Minister of Forests)* [2004] SC (Canada) 3 SCR 511.

<sup>6</sup> *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* [2010] SC (Canada) 2 SCR 650.

Peoples (UNDRIP)<sup>7</sup> in British Columbia and at the federal level in Canada<sup>8</sup> may contribute to a more robust understanding of consent-seeking. UNDRIP mandates governments to obtain the free, prior, and informed consent (FPIC) of Indigenous peoples before proceeding with a project.

### 3. *How does Sustainability Fit in?*

Although the connection between Indigenous consultation and the concept of sustainability may not be immediately obvious, it is indeed a strong one. While “sustainability” tends to be equated with environmental stewardship, it encompasses much more than that. For example, the concept of sustainable development integrates environmental concerns with social and economic ones.<sup>9</sup> In order to achieve sustainable development goals, the engagement of Indigenous communities in industrial projects is fundamental. This is evident in Canada’s SDG implementation plan, which includes advancing partnership and reconciliation with Indigenous peoples as one of its targets.<sup>10</sup>

From an Indigenous perspective, the concept of sustainability also goes beyond nature conservation. It includes consultation with native groups, protection of cultural resources and traditional knowledge, and respect for cultural differences.<sup>11</sup> It is no coincidence that the Indigenous community of Alderville First Nation, in its consultation protocol, defines sustainability in terms of the survival and prosperity of the community, its members, and its cultural heritage, in addition to the well-being of the surrounding environ-

<sup>7</sup> United Nations General Assembly, ‘United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)’ (13 September 2007).

<sup>8</sup> British Columbia, ‘Declaration on the Rights of Indigenous Peoples Act’ (SBC 2019); Government of Canada, ‘United Nations Declaration on the Rights of Indigenous Peoples Act’ (SC 2021, c 14).

<sup>9</sup> Jamie Benidickson, *Environmental Law* (5th edn, Irwin Law 2019).

<sup>10</sup> Government of Canada ‘Canada’s Federal Implementation Plan for the 2030 Agenda’ <<https://www.canada.ca/en/employment-social-development/programs/agenda-2030/federal-implementation-plan.html>> accessed 17 September 2024.

<sup>11</sup> Grant Christensen, ‘What Does It Mean to Be Sustainable? Regulating the Relationship between Corporations and Indigenous Peoples’ in Beate Sjøfjell and Christopher M Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press 2019) 429.

ment.<sup>12</sup> This broader understanding of sustainability highlights the need to examine its social implications.

#### 4. *Literature Review and Research Gaps*

We have seen that reconciliation with Indigenous communities appears in both the Western agenda for sustainable development and the Indigenous understanding of “sustainability”. In practice, however, achieving this goal is not as straightforward as it may seem in theory. In the context of Indigenous consultation, substantial and procedural issues hinder the goal, as a review of both Western and Indigenous scholarship shows.

Substantial issues include power asymmetries and a lack of trust between the parties in consultation. Power asymmetries can manifest themselves in different ways, such as disparities in knowledge about the nature of the project and implications due to different approaches to science and resource limitations. These asymmetries affect the way consultations are conducted and give proponents greater control over the process. As a result, these disparities can lead to doubts about the actual influence of communities on the final decision.<sup>13</sup> Procedural issues include, among other things, proponents' uncertainty about the standards to follow. For example, a lack of timing provisions poses risks to the meaningfulness of consultation, since if consultation occurs too early or too late, it is unlikely to have any practical relevance to the final project.<sup>14</sup>

To address these problems, scholars from both sides have advanced various recommendations. However, these recommendations often lack comprehensiveness. On the one hand, Western scholars have focused primarily

<sup>12</sup> Alderville First Nation, ‘Alderville First Nation Consultation Protocol’ (2015) <<http://alderville.ca/wp-content/uploads/2017/02/AFNProtocol2.pdf>> accessed 17 September 2024.

<sup>13</sup> James Anaya, ‘Report of the Special Rapporteur on the rights of indigenous peoples; The situation of indigenous peoples in Canada’ (UN Human Rights Council A/HRC/27/52/Add.2 2014), cited by Françoise Montambeault and Martin Papillon, ‘Repoliticising Indigenous Participation: FPIC Protocols in Canada and Brazil’ (2022) *The International Journal of Human Rights* 1, 7.

<sup>14</sup> Riccarda Flemmer and Almut Schilling-Vacaflor, ‘Unfulfilled Promises of the Consultation Approach: The Limits to Effective Indigenous Participation in Bolivia’s and Peru’s Extractive Industries’ (2015) 37 *Third World Quarterly* 172.

on the role of corporations and legal institutions, emphasising their responsibility to improve the effectiveness of engagement practices with local communities and other external stakeholders.<sup>15</sup> However, these calls for action by Western actors can significantly limit the role of Indigenous communities in contributing to the success of consultation, potentially exacerbating inequalities rather than mitigating them. On the other hand, Indigenous scholars have primarily emphasised relationships between the government and Indigenous communities, in line with the idea of self-determination, which implies establishing a 1:1 relationship with the government.<sup>16</sup> This perspective is also biased because it overlooks the crucial role played by proponents in consultation.

### 5. *Research Questions and Methodological Insights*

I challenge both of the aforementioned approaches and argue that sound relationships can only be achieved by recognising an equal and active role for both parties in the consultation process. This raises the question of how relationships can be improved and whether there are any guidelines for better consultation. To address these questions, I examined 17 Indigenous Unilateral Consultation Protocols (UCP), documents unilaterally adopted by various Indigenous communities across Canada to govern consultations.

UCPs have legal status within Indigenous legal systems, though not within Canadian law. They express the Indigenous perspective on consultation and provide guidelines for its implementation in the community in which they were issued. I have chosen them because they are rooted in Indigenous values and worldviews, and thus align with the requirements of the applied Critical Indigenous Methodology (CIM). The CIM aims to incorporate the Indigenous

<sup>15</sup> See Alberto Chilosi, 'Stakeholder Protection, Varieties of Capitalism, and Long-Term Unemployment' (2010) 9 *European Journal of Comparative Economics* 197 (suggesting introducing forms of stakeholder representation in corporate boards or protective provisions in labour law); Kenneth E Goodpaster, 'Business Ethics and Stakeholder Analysis' (1991) 1 *Business Ethics Quarterly* 53 (suggesting recognising directors' ethical obligations towards stakeholders).

<sup>16</sup> See John Borrows, 'Wise Practices: Exploring Indigenous Economic Justice and Self-Determination' in Robert Hamilton and others (eds), *Wise practices: exploring Indigenous economic justice and self-determination* (University of Toronto Press 2021).

worldview into research, making it appropriate for this study.<sup>17</sup> Additionally, the CIM recognises the significance of relationships among all beings. These relationships form kinship and determine the extent of one's responsibility to all interconnected entities. Consequently, the CIM offers researchers the opportunity to rethink the relationship between industry and locals in a holistic way.<sup>18</sup> A second reason for selecting UCPs is that they specifically address proponent companies as delegated parties responsible for conducting consultations. This makes them particularly relevant for understanding the dynamics of their relationship. Lastly, the selected sample of UCPs covers a wide range of geographical areas within Canada, respecting the diversity of Indigenous communities and acknowledging the complexity of Indigenous cultures.

I conducted a textual analysis of the UCP sample, examining recurring concepts and terms, to identify Indigenous values underlying consultation. This qualitative method is consistent with the requirements of the CIM, as it prioritises interpretation over objectivity and seeks to identify shared solutions to social needs. Additionally, this method provides valuable insights into the consultation phenomenon by offering a contextual understanding of the perspectives and concerns of Indigenous communities within the broader Indigenous worldview.<sup>19</sup>

Building upon the values identified, I formulated five practical principles for fostering meaningful relationships between industry and local communities. This step was informed by the Two-Eyed Seeing (TES) principle, which originated in the field of scientific learning as an approach to reconcile Western and Indigenous worldviews through a process of "weaving" different educational techniques.<sup>20</sup> By adopting a dual perspective, the principles

<sup>17</sup> Cora Weber-Pillwax, 'Indigenous Research Methodology: Exploratory Discussion of an Elusive Subject' (1999) 33 *The Journal of Educational Thought (JET) / Revue de la Pensée Éducative* 31; Shawn Wilson, 'What Is Indigenous Research Methodology?' (2001) 25 *Canadian Journal of Native Education* 175.

<sup>18</sup> See James (Sakéj) Youngblood Henderson, 'Postcolonial Indigenous Legal Consciousness' (2002) 1 *Indigenous Law Journal* 16.

<sup>19</sup> Evelyn Steinhauer, 'Thoughts on an Indigenous Research Methodology' (2002) 26 *Canadian Journal of Native Education* 69, 72; Stanley Deetz, 'Interpretative Research in Communication: A Hermeneutic Foundation' (1977) 3 *Journal of Communication Inquiry* 53, 66.

<sup>20</sup> Cheryl Bartlett, Murdena Marshall and Albert Marshall, 'Two-Eyed Seeing and Other Lessons Learned within a Co-Learning Journey of Bringing Together Indigenous and Mainstream Knowledges and Ways of Knowing' (2012) 2 *Journal of Environmental Studies and Sciences* 331.

I have developed seek to consider and balance the interests of both communities and corporations. While there have been preceding legal studies on UCPs,<sup>21</sup> this study introduces the original application of the TES principle.

## 6. *Values and Principles for Meaningful Consultation*

The textual analysis of the UCP sample revealed four underlying Indigenous values that inform consultation. First, *interconnectedness* highlights the recognition of the interdependence of all elements of Creation. This value emphasises the understanding that all beings are part of a larger web of relationships and depend on each other to thrive.<sup>22</sup>

Second, *reciprocity* emphasises the importance of knowledge exchange and learning across different ways of knowing (i.e., people belonging to different cultural traditions). It acknowledges the value of diverse cultures and encourages the sharing of knowledge between Indigenous and non-Indigenous perspectives.<sup>23</sup>

Third, *relational accountability* refers to the accountability that individuals have to other people, animals, or natural elements with whom they have relationships. This value is rooted in the concept of relational knowledge and informs the Indigenous approach to academic research, which includes an obligation for researchers to “answer their relations”, which means to address the needs and concerns of their communities.<sup>24</sup>

Fourth, *materiality* reflects the Indigenous responsiveness to practical issues and a refusal of abstraction. In the legal context, materiality shapes the law to be a tool for addressing real conflicts that may arise within the community, rather than being purely theoretical.<sup>25</sup>

Interpreted through the TES approach, these values may inform five practical principles for improved consultation. These principles aim to meet the values and needs of both actors involved.

<sup>21</sup> See, eg Montambeault and Papillon (n 13).

<sup>22</sup> Leah Levac and others, ‘Learning Across Indigenous and Western Knowledge Systems and Intersectionality’ (2018) Canadian Research Institute for the Advancement of Women 10; Steinhauer (n 19) 73; Borrows (n 16) 271.

<sup>23</sup> Levac and others (n 22) 10.

<sup>24</sup> Wilson (n 17) 177.

<sup>25</sup> Steinhauer (n 19).

1. The value of interconnectedness highlights the importance of *involving all members of the community in the consultation process*. Consultation should take place within the community, and if necessary, may involve other affected communities and subcontractors. This could be done, for example, by using community consultation bodies to mediate between community members and corporate representatives. By ensuring that all community members have a voice in the project, their engagement would be more meaningful and enable the consultation to address specific individual needs. Simultaneously, extending the scope of consultation to include all those likely to be affected by the project would increase its effectiveness. By giving community bodies the responsibility for consulting their members, proponents would be relieved of the burden of reaching out to them and establishing a common ground for dialogue, resulting in cost and time saving.
2. *Mutual learning* stems from the value of reciprocity. This principle calls for companies and communities to engage in mutual disclosure of their interests and expectations early in the process. For example, in-person meetings between representatives and community visits could help both parties to better understand and accommodate each other's needs. This would also foster a more collaborative atmosphere in which communities are less sceptical of proponents' intentions and more open to providing consent.
3. The value of reciprocity also implies the *participation of all parties in negotiations, with equal power and say*. This principle aims to build a "created space" for participation among all parties, moving away from a hierarchical structure in which one party "owns" or "leads" the consultation while others are left "lagging" behind with limited influence in the process.<sup>26</sup> One way to fulfill this principle could be to incorporate illustrations in written agreements, whenever applicable. This is because imagery has a cultural significance in Indigenous traditions, and the inclusion of images in consultation documents would be perceived as a recognition of Indigenous participation and influence in the process.
4. According to the value of relational accountability, proponents' duties arise from their relationships with the communities affected by

<sup>26</sup> Andrea Cornwall, 'Unpacking "Participation": Models, Meanings and Practices' (2008) 43 *Community Development Journal* 269.

industrial operations. Therefore, *consultation should be understood as the 'right thing to do'* and should be undertaken regardless of legal requirements to do so. By engaging in consultation whenever Indigenous interests are likely to be affected by a project, communities can develop trust in this tool and in their counterparts, leading to peaceful coexistence and long-term project success.

5. Consistent with the value of materiality, *consultation should also address practical issues*. Consultation agreements, if applicable, should set timelines, regulate resource provision, and include sample templates. Providing appropriate resources for Indigenous communities to engage in consultations can help bridge information gaps between them and the proponent companies. This can make consultations more meaningful. Moreover, examples and templates would help proponents assess the feasibility of their proposal at an early stage, thereby avoiding unnecessary costs and delays and streamlining the project.

## 7. Conclusion

This study suggests the possibility of reimagining Indigenous-corporate relationships. By adopting a TES approach to interpreting a set of Unilateral Consultation Protocols adopted by Indigenous Communities across Canada, five principles have been formulated that aim to benefit both Indigenous communities and companies. These principles seek to address the substantial and procedural issues identified in Indigenous and Western literature, simultaneously empowering Indigenous communities while providing practical guidance to corporate directors on how to implement sustainable development goals. In addition, these principles are general in nature, which makes them potentially applicable beyond the scope of the Duty to Consult. Further research is needed to explore whether they can serve as new standards for improving stakeholder engagement in corporate operations.