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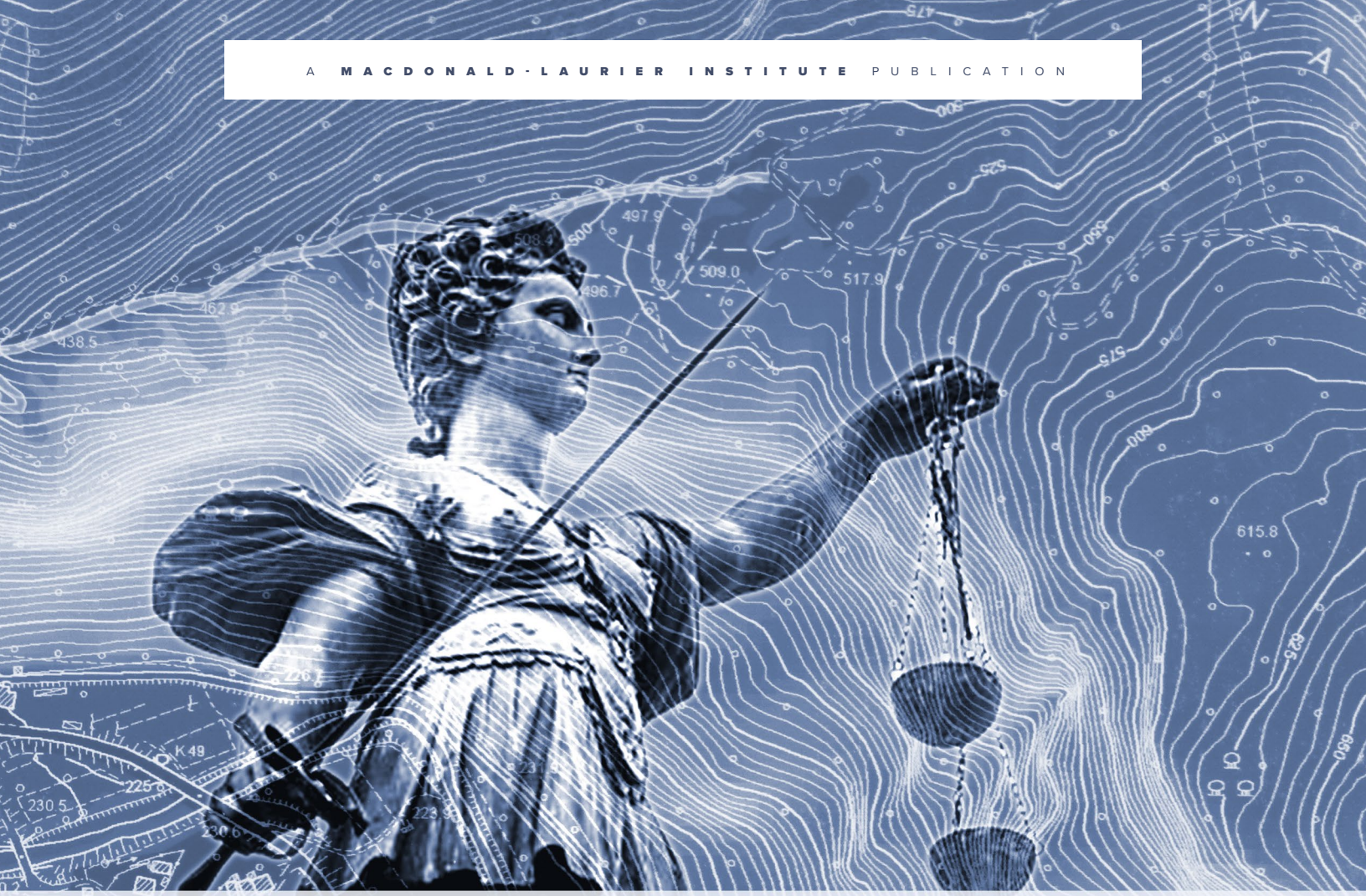

From SHIELD to SWORD

The evolution of Indigenous economic rights in Canada

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For over a century, Indigenous rights were routinely ignored or dismissed in favour of moving resource projects forward, often with damaging environmental and social consequences. However, a significant shift has occurred because of the affirmation of the duty to consult: the obligation of the Crown to consult and accommodate Indigenous groups when it considers conduct that might adversely impact potential or established Aboriginal or treaty rights.

The trilogy of Supreme Court decisions in 2004 and 2005 affirming this duty to consult provided clarity to, and significantly bolstered, Indigenous rights. Government agencies and departments seeking to approve projects that had a potential impact on Indigenous rights now had to ensure that their approval was consistent with this newly elevated legal standard. Those seeking to delay or cancel resource projects often relied on Indigenous rights to oppose proposed projects through legal action.

The strengthened legal standing of Indigenous communities, however, is not restricted to rejecting plans for resource development in their territories; it means they can support them as well. Many Indigenous communities have determined that it is in their interests to pursue economic benefits through resource development in the form of royalties, payments, employment, business contracts, and even equity positions. They are now turning to the Courts to protect those interests, and are starting to find success. Three recent cases exemplify the trend:

- *Ermineskin Cree Nation v. Canada (Environment and Climate Change)* (2021 FC 758)
- *AltaLink Management Ltd v Alberta (Utilities Commission)* (2021 ABCA 342)
- *Reference re: Impact Assessment Act* (2022 ABCA 165)

Through an examination of these cases, this paper argues that Indigenous rights are evolving from being a *shield* for proponents (in the sense that their consent and support simply reduced the risk of a legal challenge based on Indigenous rights) towards Indigenous rights as a *sword* for proponents, including Indigenous proponents (in the sense that Indigenous consent and support for projects within their traditional territory

can limit the ability of provincial and federal governments to reject those projects in favour of other policy considerations).

It concludes by suggesting that while the concerns of Indigenous communities opposing a development have been the focus of legal and political attention, it must now be recognized that Indigenous support for a project, based on the economic benefits and advancement the project provides, should be subject to the same constitutional deference as the traditional rights to hunt and trap. MLI

Pendant plus d'un siècle, les droits des Autochtones *ont été régulièrement ignorés ou simplement écartés au profit de projets d'exploitation des ressources aux conséquences environnementales et sociales souvent dommageables. Toutefois, l'obligation de consulter a changé la donne : elle contraint la Couronne à consulter et à accommoder les groupes autochtones lorsqu'elle est amenée à examiner une conduite propre à nuire aux droits ancestraux ou issus de traités, potentiels ou établis.*

La trilogie de décisions rendues par la Cour suprême en 2004 et 2005 sur cette obligation de consulter a clarifié et considérablement renforcé les droits des Autochtones. Depuis, les agences gouvernementales et les ministères doivent veiller, avant de donner leur approbation, à ce que les projets susceptibles de toucher ces droits soient conformes à cette nouvelle norme juridique élevée. Ceux qui souhaitaient retarder ou annuler des projets d'exploitation de ressources naturelles se sont souvent appuyés sur les droits des Autochtones pour s'opposer aux projets par le biais d'actions en justice.

Le renforcement du statut juridique des collectivités autochtones ne se limite toutefois pas au seul rejet des programmes d'exploitation des ressources sur leurs territoires; il signifie qu'elles peuvent également les soutenir. De nombreuses collectivités autochtones estiment qu'elles ont intérêt à exploiter les ressources pour créer des retombées économiques sous la forme de redevances, de paiements, d'emplois, de contrats commerciaux et même de participations au capital. Elles se tournent maintenant vers les tribunaux pour protéger ces intérêts, et commencent à obtenir gain de cause. Trois décisions récentes illustrent cette tendance :

- Nation Crie Ermineskin c. Canada (Environnement et Changement climatique) *(2021 CF 758)*
- AltaLink Management Ltd c. Alberta (Utilities Commission*) (2021 ABCA 342)*
- Renvoi relatif à la Loi sur l'évaluation d'impact *(2022 ABCA 165)*

En nous basant sur l'examen de ces décisions, nous soutenons dans ce document que pour les promoteurs, les droits autochtones sont en train de passer du statut de bouclier (dans le sens où l'obtention d'un consentement et d'un soutien ne fait que simplement réduire le risque d'une contestation juridique fondée sur les droits autochtones) à celui

d'épée, y compris pour les promoteurs autochtones (dans le sens où le consentement et le soutien des Autochtones à des projets sur leurs territoires traditionnels peuvent limiter la capacité des gouvernements provincial et fédéral à rejeter ces projets en faveur d'autres considérations politiques).

En guise de conclusion, nous avançons que même si les questions soulevées par les collectivités autochtones opposées à un développement ont autrefois mobilisé l'attention juridique et politique, il faut maintenant reconnaître que le soutien de ces collectivités à tout projet motivé par ses bienfaits et les progrès économiques prévus devrait être accueilli avec la même déférence constitutionnelle que les droits traditionnels de chasse et de piégeage. **MLI**

Introduction

Throughout the 20th century, Indigenous peoples in Canada were routinely ignored when decisions around land use and resource development in their territories were made. Canada's economic development has been largely supported and even founded on the development of its resources. But historically, Indigenous peoples received very limited benefit from such development; instead, they were dispossessed of their lands and alienated from their Aboriginal and treaty rights.

However, in 2004 and 2005, the Supreme Court of Canada empowered First Nations, Métis, and Inuit communities when it affirmed the Crown's duty to consult and accommodate Indigenous rights holders in a trilogy of decisions: *Haida v. British Columbia (Minister of Forests)*, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. Indigenous engagement had been a nice thing to do before 2004; it was subsequently a necessary thing to do. These decisions provided important clarification and significantly bolstered Indigenous rights.

The Supreme Court's trilogy of decisions clearly set out that the views of Indigenous communities require special attention when governments are deciding whether proposed projects should proceed. Government agencies or regulators seeking to approve projects opposed by Indigenous communities must ensure that there has been meaningful consultation and must provide a very thorough explanation of how an approval can be issued given the potential impacts on Indigenous rights. Failure to do so often meant that any project approvals issued by a government agency or regulator were subsequently quashed by the courts.

Environmental organizations seeking to delay or cancel resource projects, especially those involving oil and gas production or transportation, have

recognized the unique importance that Indigenous rights hold in Canada's legal framework. This is why they have actively engaged in campaigns to encourage Indigenous people to oppose proposed projects. Organizations such as Raven Trust, Greenpeace, Ecojustice, West Coast Environmental Law, and others have developed campaigns focused on fundraising to support Indigenous legal interventions.

In response to these developments, responsible project proponents began to work much more closely with affected Indigenous groups to make sure that communities benefited economically from the projects in their territories. This has led to greater economic engagement with Indigenous communities, workers, and businesses, as well as greater consideration of Indigenous views on how projects should proceed and what measures should be taken to mitigate potential environmental and cultural impacts. As a result, and not surprisingly, there has been a significant increase in the number of projects that have enjoyed support from the very Indigenous communities most affected by those projects.

For the last 15 years, project proponents that successfully obtain Indigenous support for the advancement of their projects have been able to take comfort knowing that they have significantly reduced the regulatory and legal risk associated with obtaining the necessary project approvals. Whether the project violates the constitutional rights of Indigenous communities is not an issue, as evidenced by the support of the Indigenous communities. In effect, the support of Indigenous communities serves as a *shield* against allegations that a project is inconsistent with the rights of affected Indigenous communities. While the project still has to meet all the applicable technical and environmental standards required in law, in the vast majority of cases project proponents have had the requisite expertise to address these issues and design projects so that they can be carried out in an environmentally responsible manner.

Predictably, however, many of the same groups that championed Indigenous rights when they perceived Indigenous interests as being opposed to project development have been much less supportive of Indigenous economic rights when Indigenous communities seek to advance their economic rights through the support of resource projects. This includes environmental organizations and even Environment and Climate Change Canada. This is despite recognition by Canadian courts that Indigenous and treaty rights include the right to an economic livelihood.

In addition, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which has been affirmed through legislation in British Columbia and the federal Parliament, has provisions in it that protect the Indigenous right to own, use, develop and control lands, territories, and resources that they possess, and engage freely in all their traditional and other economic activities.

All of these measures have strengthened the legal ability of Indigenous communities to accept, reject, or alter plans for resource development in their territories. Many Indigenous communities have determined that it is in their interests to pursue economic benefits through resource development in the form of royalties, payments, employment, business contracts, and even equity positions.

> *Reconciliation is a constitutionally mandated objective that should be pursued by governments with vigour.*

Given the importance of reconciliation, and the recognition that the economic advancement of Indigenous peoples is crucial if reconciliation is to be achieved, to what extent should our regulatory and legal processes recognize the rights of Indigenous communities to pursue economic advancement? If Indigenous communities have decided that they are better off by supporting resource development and have made arrangements to participate in resource development and benefit from it, should not our regulatory and legal processes recognize this and prioritize the views of the Indigenous communities over other policy considerations that do not have the same constitutional protections?

The courts appear to agree that yes, reconciliation is a constitutionally mandated objective that should be pursued by governments with vigour. To the extent this means facilitating the ability of Indigenous communities to participate in and benefit from resource development, this should be prioritized over other policy objectives. We are witnessing an evolution of Indigenous rights from a *shield* for proponents (in the sense that their consent and support carried weight in achieving a favourable decision in the approval of resource proj-

ects in the past 15 years) towards Indigenous rights as a *sword* for proponents, including Indigenous proponents (in the sense that Indigenous consent and support for projects within their traditional territory can limit the ability of provincial and federal governments to reject them in favour of other policy considerations, such as opposing development of certain resources).

Several legal decisions in the past two years have affirmed Indigenous economic rights in Canada and are building legal precedent for the right of Indigenous peoples to develop resources and participate economically in resource development, even when this conflicts with other government objectives. They include:

- The Vista coal mine expansion near Hinton, Alberta, where the Federal Court found the minister of environment and climate change breached his duty by not consulting the Ermineskin Cree Nation before designating the project for federal assessment. This consultation was required because the Ermineskin had negotiated an impact and benefit agreement supporting development of the mine and ensuring that Ermineskin benefited from the mine. The Court affirmed that economic benefits are closely related to and derivative of Aboriginal rights.
- The Altalink transmission line, crossing through Blood Tribe and Piikani Nation reserve land, where the Alberta Court of Appeal affirmed that positive economic impacts for First Nations are not only relevant factors but critical factors to consider when evaluating the public interest.
- The Reference regarding the *Impact Assessment Act*, where the Alberta Court of Appeal took issue with the fact that the federal government gave itself the authority to veto projects that had an impact on Aboriginal and treaty rights, even when Indigenous communities themselves supported them. This, in the Court's view, constituted federal overreach.

These decisions all relate to projects in Alberta, perhaps owing to that province's advanced resource sector and sophisticated industry-Indigenous relations, but they have significance across the country with respect to interpreting and upholding Aboriginal rights.

Cases affirming Indigenous economic rights: Vista Coal, Altalink, and the IAA Reference

Vista coal mine expansion

In *Ermineskin Cree Nation v. Canada (Environment and Climate Change)* (2021 FC 758), the Ermineskin sought judicial review of the Designation Order of the Vista coal mine by the minister of environment and climate change.

Coalspur's Vista Project, located near Hinton, Alberta, consists of two phases. The Alberta Energy Regulator granted approval for Phase One of the project in February 2014. The first shipment of coal left the mine in May 2019. Phase Two would expand the project towards the west and would add up to 4.2Mt in annual production.

In 2019, Coalspur Mines Ltd. (Coalspur) proposed the Phase Two expansion. Several environmental groups requested that the federal minister of environment and climate change designate this expansion, Phase Two, as a reviewable project under the *Canadian Environmental Assessment Act, 2012*.

Some projects are automatically designated for a federal assessment, in addition to provincial processes, based on particular criteria outlined in legislation. Others, like the Vista Project, are not. However, they can still be designated by the federal minister if the minister thinks the project may cause adverse environmental effects, or believes that public concerns related to those effects warrant the designation.

After the new federal *Impact Assessment Act* (IAA) came into force in August 2019, the newly-renamed Impact Assessment Agency of Canada recommended that Phase Two not be designated for federal assessment, and the minister agreed.

However, in 2020, after Coalspur proposed the Vista Test Underground Mine (the VTUM) at the Vista mine site, environmental groups and several Indigenous groups requested that the minister designate both Phase II and the VTUM as a reviewable project under the IAA. The Impact Assessment Agency reanalysed the projects and again recommended that they not be designated for federal assessment. Despite the agency's recommendations, the minister designated both projects for federal assessment in 2020. Such designation imposes an additional regulatory standard on the project, and

ultimately gives the federal minister the authority to reject the project unilaterally, which Environment and Climate Change Canada signalled it would do.

During the process leading to the decision, the minister decided to consult and hear only from Indigenous communities seeking the designation order. It did not consult with the Ermineskin Cree Nation, who had negotiated an Impact Benefit Agreement (IBA) with Coalspur and wanted to see the project move forward. On that basis, Ermineskin sought a judicial review of the designation order on the grounds that such an order would "delay, lessen, or eliminate Ermineskin's economic interest." As Ermineskin's Director of Industrial Relations, Carol Wildcat, asserted in her affidavit to the Court:

> Ermineskin has engaged in a pattern of robust consultation and negotiation with proponents in its territory, and revenues generated from economic development on Treaty 6 lands have been used to support community business, retain outside expertise, and to further develop the nation's infrastructure.
>
> These revenues have been generated from, among other things, impact benefit and other agreements with proponents. Such agreements provide financial compensation and other benefits to Ermineskin to compensate for potential impacts caused by natural resource development on the ability of Ermineskin members to exercise Aboriginal rights within their Traditional Territory, including the right to hunt, fish, trap, and harvest.
>
> In entering into such agreements, Ermineskin has balanced its concern for the taking up of lands under Treaty 6 and the adverse impacts of natural resource development on Ermineskin Aboriginal rights, with a desire to promote the economic and social well-being of Ermineskin members within the Traditional Territory. These decisions are an exercise of Ermineskin's right of self-determination (2021 FC 758).

Despite this, the minister argued that a loss of economic, social, and community benefits, as negotiated in the IBA, was not an adverse impact related to

Ermineskin's Aboriginal or treaty right, and did not trigger consultation. The Court disagreed:

> The jurisprudence now extends the duty to consult to include economic rights and benefits closely related to and derivative from Aboriginal rights as discussed below. Thus, rights that are closely related to and derivative from Aboriginal rights are protected by the duty to consult which of course flows from the constitutionalized doctrine of the honour of the Crown. (2021 FC 758)

The Court also wrote that the Ermineskin were "inexplicably frozen" out of the process, which was "one-sided." As such, the Court set aside the designation order, and remanded the matter for reconsideration to the minister.

Any satisfaction on the part of Coaslpur or the Ermineskin was short-lived. Just over two months later, on September 29, 2021, the minister again determined that the projects did indeed merit federal designation and reinstated the order (Canadian Impact Assessment Registry 2021a). That subsequent decision of the minister has again been challenged by both Ermineskin and Coalspur, and it will be subject of another proceeding in the Federal Court in 2023.

AltaLink Management Ltd v Alberta (Utilities Commission)

In *AltaLink Management Ltd v Alberta (Utilities Commission)* (2021 ABCA 342), the Alberta Court of Appeal considered whether positive economic impacts for First Nations must be considered when evaluating the public interest.

In August of 2007, AltaLink applied to the Alberta Energy and Utilities Board for permission to construct and operate a new 240 kilovolt transmission line from Pincher Creek to North Lethbridge. It had considered three possible routes: one crossed the lands of the Piikani Indian Reserve No. 147 and the Blood Indian Reserve No. 148; the other two options either bypassed these reserves or crossed only one. It identified the option that crossed both reserves as its preferred route, due to it being the shortest and lowest cost with no significant environmental impacts and affecting the fewest number of landowners. It obtained consent from both the Piikani Nation and the Blood Tribe through band council resolutions, and a permit issued by the minister of Indian affairs and northern development.

The Piikani Nation and the Blood Tribe agreed to the construction of the transmission lines on their reserve lands in exchange for an option to obtain ownership interests in those lines. In 2012 and 2014, respectively, the Blood Tribe and Piikani Nation exercised their options to purchase a 51 percent interest in the transmission lines located on their reserves.

The controversy arose with the need to secure the Alberta Utilities Commission's approval for the sale. While it did approve the transfer of the transmission assets from AltaLink to PiikaniLink Limited Partnership and KainaiLink Limited Partnership, it was under the condition that they could not, as transmission facility operators, recover from ratepayers as part of their tariffs $60,000 in external auditor and hearing costs incurred for regulatory proceedings. These were incremental annual audit fees paid to external auditors estimated to be $35,000 and $25,000, respectively for each of PiikaniLink Limited Partnership and KainaiLink Limited Partnership, and would recur each year and be recovered from ratepayers as part of the partnerships' tariffs as transmission facility operators.

"Piikani Nation and the Blood Tribe agreed to the construction of the transmission lines on their reserve lands.

Altalink said it had weighed the negative effect of this $60,000 fee for ratepayers against the potential benefits: the savings from routing the transmission line through reserve lands which they estimated at $32 million, as well as intangible benefits arising from the partnership with the First Nations. These benefits included access to the First Nations workforce, a strengthening of AltaLink's relationship with other First Nations in Canada and the United States, and an alignment of interests between AltaLink and the First Nations to enhance the long-term safe and reliable operation of those utility assets.

The commission found that the offsetting benefits claimed did not mitigate the financial harm to ratepayers from the incremental costs, but the harm could be mitigated by imposing the condition that PiikaniLink Limited Partnership and KainaiLink Limited Partnership not recover audit and hearing

costs from ratepayers. It approved the transfer with this condition. AltaLink appealed.

In the Alberta Court of Appeal's decision, the Court held that positive economic impacts for First Nations *are* relevant factors for the commission to consider when evaluating the public interest:

> Projects that increase the likelihood of economic activity on a reserve ought to be encouraged. They are in the public interest. This particular project explicitly contemplated such activity…
>
> The high rate of unemployment on reserves is not conducive to a healthy and happy community. Nor is it beneficial to Canada to have geographic regions in which the benefits of education and jobs are largely absent and the unemployment rate far exceeds that in most areas of Canada. We should support Indigenous communities that want to participate in mainstream commercial activities.
>
> Indigenous communities benefit when meaningful employment opportunities are available. People who live on reserves need jobs. Meaningful employment keeps families together and thriving. It is a central component of a community that is a safe place in which to reside…
>
> Indigenous communities represent an untapped labour source for Indigenous and non-Indigenous enterprises. The potential benefits that may be derived from the increased utilization of this pool of talent are considerable… A diverse workforce benefits society. (2021 ABCA 342)

Justice Feehan, in his concurring reasons, stated:

> An administrative tribunal with a broad public interest mandate, such as the Commission, must address reconciliation as a social concept of rebuilding the relationship between Indigenous peoples and the Crown by considering the concerns and interests of

> Indigenous collectives. This includes consideration of the interests of Indigenous peoples in participating freely in the economy and having sufficient resources to self-govern effectively.

The decision reinforced the requirement to consider not only the negative impacts but also positive economic outcomes for Indigenous peoples in regulatory decisions and when considering the public interest.

Reference re: Impact Assessment Act

On May 10, 2022, the Alberta Court of Appeal issued an advisory opinion (2022 ABCA 165) regarding the constitutional validity of the government of Canada's *Impact Assessment Act* and *Physical Activities Regulations*. In a 4-1 decision, the majority opined that the IAA and the *Physical Activities Regulations* are unconstitutional. The opinion is non-binding and has now been referred to the Supreme Court of Canada, where eight provinces have standing.

While much analysis of the opinion has focused on how the IAA defines federal and provincial responsibilities, it also addressed the impact of the IAA on Indigenous communities, with multiple references to the intervention of the Indian Resource Council, an organization representing over 130 First Nations who produce or have a direct interest in the oil and gas industry. The majority found that the IAA infringed on the ability of Indigenous nations to advance their own best interests as they see them, using their Aboriginal and treaty rights as a means to "imprison" them by giving the federal government the ability to veto projects that they consented to based on environmental impacts on, for example, hunting and fishing:

> The intervenor Indian Resource Council... submits that the right to produce minerals, including hydrocarbons, on their lands, is as much an Aboriginal right as hunting, fishing and gathering rights and is protected by s 35 of the *Constitution Act, 1982*. In its view, the production of hydrocarbons is not inherently an adverse change to the health, social and economic conditions of Indigenous peoples and can provide positive changes to their lives. The Indian Resource Council also asserts that Indigenous peoples have an Aboriginal right "to

> improve their economic and social conditions through the creation of economic activity and the realization of economic rents from the production of hydrocarbons"... In its view, the *IAA* "grants both *de jure* and *de facto* veto power over any particular project to the Governor in Council"... We agree. It does.
>
> This legislative scheme permits the federal executive to stop intra-provincial designated projects authorized by a province or provincial authority even where agreements have been made by an Indigenous entity with either or both the provincial government and project proponent and with provincial approval again constitutes federal overreach. It also underscores that the true purpose of this legislative scheme is to empower the federal executive to veto intra-provincial designated projects based on its view of the public interest, not what is in the interests of the Indigenous entity involved...
>
> Restricting what Indigenous peoples are permitted – and not permitted – to do of their own accord... smacks of paternalism. Indigenous peoples have suffered the sting of paternalism since the 19th Century... The autonomy of Indigenous peoples includes their ability, via their leadership, to make lawful arrangements with provincial authorities and proponents of intra-provincial designated projects for what they consider to be in their best interests. Section 91(24) provides no constitutional basis for Parliament's imprisoning Indigenous peoples in their own Aboriginal and treaty rights. (2022 ABCA 165, paras 314-316)

This opinion provides a strong defensc of the right of Indigenous nations to conduct resource development, even of hydrocarbons, on their territories. Without a compelling reason, the federal government should not override the Aboriginal right to do so.

Indigenous economic rights not preeminent: Grassy Mountain Steelmaking Coal Project

While the above cases show a trend towards considering positive economic outcomes for Indigenous peoples in decision-making, it has not been ubiquitous, as the Grassy Mountain Steelmaking Coal Project shows.

In 2016, Benga Mining Limited submitted a proposal to regulators for the Grassy Mountain Steelmaking Coal project, a surface coal mine near the Crowsnest Pass that Benga estimates could produce 4.5 million tonnes of steel-making coal annually over the mine's 25-year lifespan. The Alberta Energy Regulator and the federal minister of environment and climate change established a Joint Review Panel (JRP) in August 2018 to assess the project. In June 2021, a review panel for the Alberta Energy Regulator (AER) denied the application for the project (Joint Review Panel 2021), stating it was not in the public interest, and in August 2021 the federal minister rejected the project on the basis that its significant adverse environmental effects outweighed its positive economic effects (Canadian Impact Assessment Registry 2021b).

The most affected Indigenous nations – the Kainai, Piikani, Siksika, Stoney Nakoda, and Tsuu T'iina Nations of Treaty 7 and Métis Nation of Alberta – all indicated their support for the project. The JRP accepted that because "Indigenous groups affected by the project have a positive view of their agreement and have withdrawn their objections, it is reasonable to assume that these agreements include measures that address aspects of the social, environmental, and economic interests of the different Indigenous groups" (Joint Review Panel 2021). But those benefits were not meaningful enough to sway their decision.

Both the Piikani Nation and the Stoney Nakoda Nations (comprised of Bearspaw, Chiniki, and Wesley First Nations) have filed legal challenges of the JRP's decision in various courts, as did Benga. While the Alberta Court of Appeal, and later the Supreme Court of Canada, refused to hear these appeals, other legal challenges remain ongoing in the Alberta Court of King's Bench and the Federal Court.

Although these legal challenges remain outstanding, the arguments of the Stoney Nakoda are consistent with those adopted by the Courts in the decisions discussed previously. The Stoney Nakoda indicated that they oppose

coal exploration and development in sensitive areas of the Rockies, but that the Grassy Mountain project is proposed on an abandoned, highly disturbed, legacy mine that has never been reclaimed. The project would in fact lead to reclamation efforts which would allow the Stoney Nakoda to practise their Aboriginal rights in the area again; something they are prevented from doing today due to its poor state.

In addition, the Stoney Nakoda articulated that the decision ignored their right to self-determination, and that only they could determine whether the project was in their best interests:

> The report concludes that the project is not in Stoney Nakoda Nations best interest, yet the AER/JRP did not have access to our agreements (cultural, environmental, or economic) with the Grassy Mountain Project, nor did the AER/JRP consult with Stoney Nakoda Nations on how this decision would impact our interests.
>
> The AER/JRP, or any other organization for that matter, does not dictate to Stoney Nakoda Nations what is, or is not, in our best interest; only the Stoney Nakoda Nations decide what is in our Nations' interests. (Stoney Tribal Administration 2021)

Finally, government filings in the Grassy Mountain legal proceedings reveal that Environment and Climate Change Canada takes a narrow view of Indigenous rights. In internal briefings that supported the federal decision to reject the project, the Impact Assessment Agency took the view that if Canada approved the Grassy Mountain project, it would have to continue to consult with the affected Indigenous communities because of potential impacts on their rights to hunt and trap. However, the agency also took the view that if Canada were to reject the project, no further consultation with Indigenous groups would be required, despite the fact that the agency was told that denial would result in the loss of economic benefits and opportunities for Indigenous communities. The agency's views in this regard are at odds with the principles of UNDRIP, the recent decisions of the Federal Court and Alberta Court of Appeal, and the stated goal of reconciliation.

Conclusion

The Truth and Reconciliation Commission stated that reconciliation in part requires "constructive action on addressing the ongoing legacies of colonialism that have had destructive impacts on Aboriginal peoples' ... economic opportunities and prosperity" (Truth and Reconciliation Commission of Canada 2015) Consistent with this, the Alberta Court of Appeal has stated that "We should support Indigenous communities that want to participate in mainstream commercial activities" (2021 ABCA 342). We agree and in our view, this constructive action requires that governments immediately begin to recognize that where resource projects are supported by Indigenous groups, our regulatory processes should, whenever possible, facilitate the advancement of those projects. The advancement of these projects is critical if we are going to alleviate the current difficult economic conditions that many Indigenous communities face.

Of course, we recognize that not all Indigenous communities share the same views on any given project. In addition, it is not uncommon to see Indigenous communities divided on the particular merits of a given project. Nothing in this paper should be taken as suggesting that it is always a simple exercise to determine the level of Indigenous support for a project. What is clear, however, is that for many Indigenous communities resource development is often one of the only significant economic opportunities available. A decision to deny a project despite it being supported by that community means that the historical injustices and economic inequalities inflicted on that community will be perpetuated. Therefore, to the extent a government agency or regulator intends to deny a project that is supported by the most affected Indigenous communities, it should at a minimum be required to explain how this denial is consistent with reconciliation and to what extent other economic opportunities of similar scale may exist for those communities.

Traditionally, the focus has been on the concerns of Indigenous communities opposing a development. However, governments and politicians must now recognize that Indigenous support for a project when based on the economic benefits and advancement the project provides is subject to the same constitutional deference as the traditional rights to hunt and trap. This is a good thing if we are going to seriously advance reconciliation in Canada. MLI

About the authors

Heather Exner-Pirot has over fifteen years of experience in Indigenous and Arctic economic development and governance. She is currently Senior Fellow and Director of the Natural Resources, Energy and Environment Program at MLI. She has published on Indigenous economic and resource development, energy security, Indigenous workforce development, First Nations taxation and own source revenues, regional Arctic governance, and Arctic innovation. Exner-Pirot obtained a PhD in Political Science from the University of Calgary in 2011.

In addition to her role at MLI, she is currently a Fellow in residence at the Woodrow Wilson International Centre for Scholars in Washington DC. Furthermore, Exner-Pirot is a Principal Consultant at Morris Interactive and a Research Advisor for the Indigenous Resource Network. She has published over 45 peer-reviewed journal articles, book chapters, and edited volumes, and presented at over 75 conferences and events nationally and internationally. She has chaired or moderated dozens of provincial, national and international panels, workshops and conferences. MLI

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Recognized as a "stand-out lawyer," Martin regularly advises clients on the implications of regulatory regimes on their businesses. He advocates for government regulations and policies that provide project proponents and operators with a regime that is timely and predictable. Martin is keenly interested in assisting clients with the challenges and opportunities presented by the energy transformation, including in the areas of CCUS, hydrogen, critical metals and energy storage. MLI

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