

Unfinished conversations: Honouring Indigenous relationships and knowledges in IA

Elder Florence Paynter, Joëlle Pastora Sala, Patricia Fitzpatrick, and Sage Broomfield

Introduction

Boozhoo dinawemaagananik (hello our dear relatives). We are four women - an Anishinaabe Elder, a professor, a lawyer, and a Neyihaw/settler master's student, living in Treaty #1 territory. We have worked together in various capacities relating to Impact Assessments (IA) and have seen great value in listening and learning from each other.

Inspired by the growing respect for Indigenous¹ laws and knowledges in IA legislation, we aim to build on unfinished conversations and to work towards respectful relationships in IA. We believe that to truly honour relationships and reconciliation² within IA, we must respect the inherent knowledge of Indigenous people and emphasize a shared equitable environmental decision-making process.

Living in good relations with Mother Earth: A teaching by Elder Florence Paynter

Boozhoo aniin. Our languages are the foundation of who we are as Anishinaabe people. To begin, I greet you all in Anishinaabemowin. Oshoshko Bineshikwe nidishinikas. Gawiikowendakong nidonjii. Makwa nidinawemakan. [*My spirit name is Blue Thunder Bird Woman. I am from Sandy Bay First Nation. My clan is the Bear.*]

As Anishinaabe people, we have a strong relationship with Mother Earth³. Our understanding of this relationship is deeply connected to the four elements of life — fire, water, air, and earth. All humans need water to sustain our mind, body, and spirit. The sun is our source of energy. Our people speak of a little blue light within each of us that we call spirit.

Our ancestors have told us how everything was first created in our Anishinaabe Creation stories. Even the ones society recognizes as 'non-humans' were placed here before us. As Indigenous people, we consider them our relatives too. If you have a pet that you care for, you can relate and will know that they too carry a spirit and are good companions to have.

Our people have survived for millions of years because of the teachings and beliefs that we were placed here to live in harmony with nature. We also have a deep gratitude and recognition that we have everything we could ever need to survive and a firm belief in a Higher Power.

The ancestors and succeeding Knowledge Keepers have taught us how to live in good relationships with Mother Earth and all creation - by being respectful. It means taking only what we need. Mother Nature follows a natural cycle which must be respected. In the order

¹ Consistent with the Constitution of Canada, we include First Nations, Inuit, and Metis Nation in our definition of Indigenous.

² Reconciliation is defined as "establishing and maintaining respectful relationships between [Indigenous] and [non-Indigenous] peoples" (Truth and Reconciliation Commission of Canada, 2015, Pg 3.).

³ We use land, Mother Nature, Mother Earth, and the environment interchangeably.

that all life was created, humans were the last ones to be placed on earth. Everything else will go on but we will disappear if we are not mindful of caring for all the elements.

As contemporary Anishinaabe peoples living in contemporary times, we continue to practise and teach our ancestral responsibilities and our ways of life. We are still here. We continue to fulfil our roles and responsibilities to teach our children, grand-children and others to be grateful for life by doing what our ancestors taught us - to make offerings and to offer prayers.

Creator's laws and Nature's laws keep us moving and grounded. Nature is always giving us signs. As humans, we have witnessed many catastrophic events in the last couple of years - all related to the four elements of life. These events have been prophesized by our Elders and Knowledge Keepers. Many Indigenous people believe we are living in the time of prophecy where we would experience and witness floods; forest fires; polluted air; and the impacts of water on land, humans and non-humans alike.

A deep understanding of Creator's laws and Nature's laws is critical for us as Knowledge Keepers to share now. Our lives and the lives of future generations depend on it. The disparity that exists between the Indigenous people and general society is so wide - there has to be a way for different entities to develop partnerships in order to gain access and control over our own ancestral lands and resources that exist within Canada.

The voices of our people are getting stronger. When there are IAs for projects that relate to the extraction of natural resources for profits, it would be wise to keep the four elements in mind and to consider the power they hold to impact our lives.

IAs and relationships

IA originally focused on mitigating negative ecological impacts and has since expanded to include broader socio-economic, health and cultural considerations (Doelle & Sinclair, 2021). When done well, IA should bring transparency to decision-making regarding how, if at all, a proposed development may proceed.

IA is situated within a broader social and legal framework of Canadian colonialism which has failed to acknowledge the "golden thread" of Indigenous laws (Caleb Behn as cited in Expert Panel Review of Environmental Assessment Processes, 2017, pg. 29).

These realities shape IA processes and result in varied and complex outcomes for Indigenous peoples. Often economic interests, government, and proponent convenience are favoured over nation-to-nation decision-making and Indigenous rights and title (Eckert et al, 2020). In other cases, Indigenous nations are considered partners or are the proponent in development projects (Buckland & O'Gorman, 2016).

Increasingly, the literature calls for the meaningful recognition of the laws, knowledges, and rights of Indigenous people. While these developments are encouraging, we caution that efforts to "Indigenize" IA processes do not go far enough. Indigenous laws and Western laws must be respected as equal and distinct. Each have fundamentally different roots and sources (Craft, 2013; 2019; Mills 2016, 2019). By attempting to "integrate" Indigenous Knowledge, it

is instead *subsumed* by Western knowledge and thinking. As stated in *R v Ippak* NUCA 2018 at para 85, “[t]here is a danger...[in] inadvertently giv[ing] weight only to those elements of a [Indigenous] legal system which are recognized in Canadian law. At the very least, we must question our assumptions; at most we must unlearn them.”

As demonstrated in Elder Paynter’s remarks, the source of Indigenous laws can be stories, prophecies, dreams, and ceremonies. Because these sources of knowledge are ‘foreign’ to decision makers, they are often misunderstood and can be easily ignored within IAs.

In contrast to Western law, Indigenous law is rooted in deep and reciprocal relationships and responsibilities with all life (Mills 2018; Simpson 2017). To move towards reconciliation in IA, we must recognize that the relationships between Indigenous people, governments, proponents, and Mother Earth are badly out of balance and must be renewed.

New IA Act: from good intentions to meaningful change

The new federal IA legislation, the *Impact Assessment Act* (IAA) (S.C. 2019, c. 28, s. 31), includes positive changes affecting Indigenous peoples, particularly when compared to previous acts (Mainville & Pelletier, 2021; Wright, 2020). While we are encouraged by some of the provisions in the IAA, we note some inherent contradictions and identify further work that is needed to move IA toward reconciliation.

We highlight the following provisions of the IAA relating to Indigenous peoples:

- Stronger language in the preamble and purpose which requires consideration of Indigenous Knowledge; the recognition of inherent Indigenous rights; and a commitment to reconciliation and the implementation of the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP);
- Additional factors to be considered in IA, including impacts on any Indigenous Groups (s. 22(c)), Indigenous Knowledge (s. 22(g)), Indigenous culture (s. 22(l)), the outcome of an assessment undertaken by an Indigenous governing body (s. 22(q)), and research undertaken by an Indigenous governing body (s. 22(r)); and,
- Consideration in the Minister decision of the impacts of the project on Indigenous people.

These changes emphasize the inclusion of Indigenous Knowledge and legally require increased consideration of how projects may impact Indigenous people. They send a strong message that the IAA should be interpreted consistently with principles of reconciliation and *UNDRIP*.

The IAA also expands on a process called “substitution” which was permitted under CEAA 2012. Under substitution, another jurisdiction can apply to the Minister to conduct a separate IA if certain conditions are met (s. 22). The Minister would use the substituted process to make the assessment decision. As compared to CEAA 2012, IAA expands the definition of ‘jurisdiction’ thereby widening the types of Indigenous ‘bodies’ considered (Fitzpatrick, Kwasniak, & Sinclair, 2021; Mainville & Pelletier, 2021). In a substituted process, an Indigenous nation could exercise some control over the process, information gathered, and recommendations proposed. However, the ultimate decision remains with the Minister and

the process is still within the confines of the IAA. As noted by Mainville and Pelletier, while this element of IAA expands on CEAA 2012, an “Indigenous governing body is arguably doing little more than administering federal legislation on behalf of the government” (p. 129).

While promising, substitution under IAA, does not truly implement the spirit and intent of UNDRIP. It does not promote shared decision-making or respect Indigenous laws as equal and distinct from IAA. In this way, IAA still has considerable work to do to truly honour relationships with Indigenous people (King et al, 2020; Mainville & Pelletier, 2021).

Another addition in the IAA is the Indigenous Advisory Committee which is comprised of First Nations, Inuit, and Métis representatives appointed by the Agency. The Committee’s mandate is to offer non-political advice reflecting the interests and concerns of Indigenous peoples. It has published principles for collaborative agreements with Indigenous nations, including:

- Recognizing Indigenous self-determination, governance, and inherent rights;
- Implementing reconciliation;
- Decolonizing law and policy;
- Implementing a consent-based process which is more transparent and accountable; and,
- Promoting good decision-making outcomes.

This ambitious list of requirements goes beyond the IAA. Unfortunately, the IAA does not set out any requirement to meaningfully consider the recommendations of this Committee. Like substitution, the final decisions still rest with the Minister.

Conclusion Moving from a checklist approach to good relationships

Much is needed to centre mutually respectful Indigenous-settler relationships within IA. The current process lacks true respect of Indigenous legal systems and equal decision-making. It neglects to engage with repairing or understanding our collective relationship with Mother Earth, which is essential for reconciliation (McGregor, 2018; Mills, 2018).

Adding legal requirements within IA is an important and a powerful tool for change. However, we must guard against a checklist approach to IA (McCreary & Milligan, 2014). To truly honour Indigenous laws, relationships, and knowledges in IA, there must be an emphasis on listening, un-learning and learning from one another. Importantly, we must advocate for and support parallel Indigenous legal and decision-making processes.

As stated by Elder Paynter,

We must recognize that as Indigenous peoples we have inherent right to lands and resources as we were placed here by a Higher Power. Our ancestors passed on our knowledge and teachings. We were provided everything needed to survive in our homeland. This assurance is embedded in our responsibility as stewards of the land to protect and be the voice of Mother Earth. In return, she will continue to regenerate herself to fulfil her given role and responsibility to all of us.

IA also needs to respect the inter-relationships and interdependence of one another. As humans, we must only take what we need in order to survive.

Working together as four women gave us the opportunity to become the voice of Mother Earth and provided each of us a greater understanding of the significant role that the four elements play in our lives.

The forming of business partnerships with Indigenous peoples of this land is inevitable and is needed now. Through these teachings and understandings, it is our hope that a more equitable process will emerge. One that will truly benefit us all and that will build-in an allowance for Mother Earth to regenerate herself as she has done since time immemorial.

Work Cited

- Arsenault, R., Bourassa, C., Diver, S., McGregor, D., & Witham, A. (2019). Including Indigenous knowledge systems in environmental assessments: Restructuring the process. *Global Environmental Politics*, 19(3), 120-132. doi:10.1162/glep_a_00519
- Craft, A. (2013). *Breathing life into the Stone Fort Treaty: An Anishinaabe understanding of Treaty One*. Purich Publishing Limited.
- Craft, A. (2019). Neither infringement nor justification: The Supreme Court of Canada's mistaken approach to reconciliation. In Drake, K, & Gunn, L. B. (Eds). *Renewing relationships: Indigenous peoples and Canada*.
- Doelle, M., & Sinclair, A. J. (2021). The Evolution of Canadian Environmental Assessment Practice and Literature. In M. Doelle & A. J. Sinclair (Eds.), *The Next Generation of Impact Assessment: A Critical Review of the Impact Assessment Act* (pp. 11-31). Toronto: Irwin Law Inc.
- Eckert, L. E., Claxton, N. X., Owens, C., Johnston, A. Ban, N. C., Moola, F., & Darimonta, C. T. (2020). Indigenous knowledge and federal environmental assessments in Canada: Applying past lessons to the 2019 Impact Assessment Act. *FACETS* 5(1); 67-90. doi:10.1139/facets-2019-0039
- Expert Panel Review of Environmental Assessment Processes. (2017). *Building common ground: A new vision for impact assessment in Canada*. Retrieved from Ottawa, ON:
<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>
- Fitzpatrick, P., Kwasniak, A., & Sinclair, A. J. (2021). Putting multi-jurisdictional impact assessment into action under the Impact Assessment Act. In M. Doelle & A. J. Sinclair (Eds.), *The Next Generation of Impact Assessment: A Critical Review of the Impact Assessment Act*. 165-193. Toronto: Irwin Law.
- Lindberg, D. (2020). *Nêhiyaw âskiy wiyasiwêwina: Plains Cree earth law and constitutional/ecological reconciliation*. [Doctoral Dissertation, University of Victoria]
- Mainville, S., & Pelletier, R. (2021). UNDRIP, decision making, and the role of Indigenous peoples. In M. Doelle & A. J. Sinclair (Eds.), *The Next Generation of Impact Assessment: A Critical Review of the Impact Assessment Act*. 119-139. Toronto: Irwin Law.
- McCreary, T. A., & Milligan, R. A. (2014). Pipelines, permits, and protests: Carrier Sekani encounters with the Enbridge Northern Gateway project. *Cultural Geographies*, 21(1), 115-129.
- McGregor, D. (2018). Mino-Mnaamodzawin. *Environment and Society*, 9(1), 7-24. doi:10.3167/ares.2018.090102

- Mills, A (2016). The lifeworlds of law: On revitalizing Indigenous legal orders today. *McGill Law Journal* 61(4) 847.
- Mills, A. (2018). Rooted constitutionalism: Growing political community. In M. Asch, J. Burrows, & J. Tully (Eds.) *Resurgence and reconciliation: indigenous-settler relations and earth teachings*. University of Toronto Press. 135-6.
- Mills, A. (Waabishki Ma'iingan) (2019). Miinigowiziwin: All that has been given for living well together: One vision of Anishinaabe constitutionalism (PhD Dissertation, Faculty of Law, University of Victoria, 22 July 2019)
- Simpson, B. L. (2017). *As we have always done: Indigenous freedom through radical resistance*. University of Minnesota Press. 367.
- The Right Honourable Justin Trudeau, P.C., M.P. (2015, November 30). Canada's National Statement at COP21. Government of Canada.
<https://pm.gc.ca/en/news/speeches/2015/11/30/canadas-national-statement-cop21>
- Truth and Reconciliation Commission of Canada (2015). The Final Report of the Truth and Reconciliation Commission of Canada. *Montreal & Kingston McGill-Queens University Press* (6). 3
- Wright, D. V. (2020). Public Interest Versus Indigenous Confidence: Indigenous Engagement, Consultation and "Consideration" in the Impact Assessment Act. *Journal of Environmental Law and Practice*, 33(3), 185-210