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# **Exerting Sovereignty Through Relational Self-determination: A Case Study of Mineral Development In Stk'emplupsemc te Secwépemc Territory**

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## **Abstract**

With an increasingly political environment developing in western, industrialized resource sectors, the purpose of this paper is to explore Indigenous governments' ability to assert sovereignty over their territory as it pertains to resource development. Utilizing a relational self-determination framework, we present a case study of the Stk'emplupsemc te Secwépemc Nation and their role in governance over mineral development in their unceded traditional territory located in the interior of British Columbia, Canada. This article adds to the growing case examples that suggest that First Nations governments in Canada are exerting their self-determination strategically, transitioning the role of negotiated agreements from an Impact-Benefit transaction to gain greater participation in resource extraction decision-making. Utilizing tools such as cultural heritage studies, legal action, and developing community-based processes of consent, First Nations governments are gaining more negotiating leverage and influence over decision-making processes for resource development projects. These insights are particularly relevant for Indigenous communities that are considering their options regarding resource development as a path to autonomy and self-governance over their territory, resources, and economies.

**Keywords:** Indigenous sovereignty; resource development; relational self-determination; negotiated agreements; impact benefit agreements

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## **1.0 Introduction**

Resource development projects have major implications for rural and Indigenous livelihoods. For many generations, Indigenous people have resisted colonial efforts to exploit and extract their lands. More recently, we have seen Indigenous governments utilize an increased recognition of their rights and title to engage with state actors and resource development proponents to negotiate agreements that govern resource extraction. These agreements, commonly known as Impact Benefit Agreements (IBAs), have led to a degree of decision-making and fiscal benefits for

Indigenous communities most directly impacted by resource extraction activities in their territory. Indigenous people's participation in agreement-making has been considered by some as a way for Indigenous nations to exert their self-determination and gain economic benefits from resource development (Fidler, 2010; Slowey, 2008). Others caution participation in these agreements due to their inequitable distribution in power prior to, during, and post agreement negotiation (most notably Caine & Krogman, 2010). More critically, proponents of Indigenous resurgence suggest Indigenous communities refuse to participate in these engagement processes that prioritize a western-imperial economic model and further facilitate colonial dispossession of Indigenous lands and relationships (Coulthard, 2014; Alfred, 2005; Cornthassel, 2012; Simpson, 2014). Due to the pace and scale of environmental impacts from development, disengaging from state-based processes may have very real negative consequences for many who feel that development is inevitable (Garvie & Shaw, 2016). Murphy (2019) suggests a more strategic, relational strategy that focuses on gaining multiple access points to political power. This approach recommends working inside and outside state institutions, across geopolitical scales—in cooperation and confrontation with state institutions.

In this article, we employ a relational approach to self-determination to ask, 'how can Indigenous nations increase their decision-making authority over resource development projects that impact their territory?' Drawing upon a case study of the Stk'emlupsemc te Secwépemc Nation (SSN), whose unceded territory is located in the south-central interior of British Columbia, Canada, our research investigates the types of legal, socio-political and self-governance tools that may influence the level of Indigenous participation in decision-making on resource development through state-based processes.

We begin with a literature summary that considers the current environment of Indigenous participation in resource-extraction regimes and the concept of self-determination. We then present a description of the research methods employed for the project, along with a description of the case context, including a background of the current institutional arrangements that govern two mineral development projects within SSN territory. A content assessment is done using the Participation Spectrum for Resource Decision-making framework we developed to illustrate the levels of decision-making power SSN accesses while engaging in resource development negotiation and agreement-making. This framework illustrates a continuum of authority that results from the outcomes of actions taken in each case. This is followed by a discussion of strategic tools that the SSN employed to influence resource decision-making and exert their self-determination in these two project examples. From these case examples, we conclude that participation within state-centered engagement processes can have varying degrees of governance outcomes based on the strategy a First Nation employs.

### ***1.1 Positionality and Research Relationship***

This work began as a research project investigating the role Impact Benefit Agreements play in securing royalties that support community development. Our investigation stems from a shared research interest in rural community planning and development. For myself as first author, this work was not simply about conducting research, but has also been a spiritual and reflexive learning experience that has led me down a more purposeful path as a young Haudenosaunee scholar.

The project began through an introductory meeting with Skeetchestn band leadership, with whom the second author, a Settler, had a previous relationship. Although much initial time was spent on the literature review considering IBAs, it became very clear in this first meeting that there was no interest in that research path, as SSN had moved on to exploring alternative avenues of governance and expressions of sovereignty. This experience offers insight into the advantages and disadvantages of various governance options, as an Indigenous elder statesman advised that IBAs are insufficient tools for First Nations communities. This insight into IBAs is touched upon further in the results and discussion sections of this project. Rather than a focus on IBAs, this project has evolved based on the advice of community leaderships, who have been considering alternative options as they search for solutions that provide greater decision-making control and stewardship of their territories and economies. Access to the agreements analyzed in this work was provided either by band leadership, accessed through the BC government's website, or through secondary grey literature, and is within the public domain.

This project was created in consultation with Skeetchestn band and SSN leadership. As outsider researchers, we do not speak for the SSN or Secwépemc people, only that our work is intended to support Secwépemc self-determination and acknowledges the incredible work they have been doing to assert their sovereignty and maintain sustainable relationships with all beings within Secwepemcúl'ecw. As non-Secwépemc people, we are limited in our ability to ground this research in a Secwépemc perspective. Instead, we position this article to interrogate the State-based processes that impact the Secwépemc people's ability to be self-determining and self-governing. We have learned a great deal from our community relations, and we are grateful.

## **2.0 Literature**

### ***2.1 Neoliberalism and the Resource Economy***

Over the past few decades, Canada has experienced a policy shift towards a neoliberal economic strategy, employing tenets such as privatization, deregulation, fiscal decentralization, and economic adjustment on a national and state/provincial level (Heisler & Markey, 2014). This shift, employed by senior levels of government, has had a profound effect on the expansion of the mineral development industry through strategies that include: the elimination/reduction of mineral development and exploration taxes; ease of access to land and resources; and the encouragement of private-public partnerships between industry proponents and local communities (Prno & Slocombe, 2012). These changes are leading to diminished government oversight and streamlined state research, creating absent or inadequate processes and regulations (Garvie & Shaw, 2016). This reduction in regulatory commitments has also had major socio-economic implications for rural and Indigenous communities where resource dependency and lack of economic diversity have made communities highly susceptible to fluctuations in the global marketplace (Markey, Halseth, Ryser, Argent, & Boron, 2019; Heisler & Markey, 2014). The combined impact of off-loading state responsibility and the need to be globally competitive means that municipalities and Indigenous communities are developing local and regional scale economic development strategies in an effort to retain some of the wealth created by mineral development within their jurisdictional boundaries to offset the physical and social costs of these projects (Markey et al., 2019; Heisler & Markey, 2014).

The decline in state intervention has also affected the role of industry proponents, looking to secure project certainty, navigate elements of community participation in approval processes, and facilitate benefits negotiations. This is notably witnessed through delegating procedural aspects of the Crown's legal duty to consult Indigenous communities to the proponent that is proposing a particular development (Papillon & Rodon, 2017). The duty to consult is a legal obligation in Canada, set as legal precedence in the Supreme Court of Canada (SCC) ruling in *Haida* (2004) and subsequent cases, in which the Crown has a duty to consult with and, where appropriate, accommodate First Nations with regard to decisions that have the potential to infringe upon asserted Aboriginal rights and title. While the onus to consult and accommodate rests with the Crown, in most Canadian jurisdictions this consultation requirement is achieved through environmental assessment processes, delegating the procedural responsibility of consultation to proponents (Papillon & Rodon, 2017).

Further to this duty, colonial states such as Canada have seen an emergence of the right to free, prior and informed consent (FPIC) for the Indigenous peoples of the territories these states lay claim. The right to FPIC is a recognition that, as self-determining actors, Indigenous peoples have the power to make decisions over their collective futures and the future of their traditional lands (Papillon & Rodon, 2017). While at the heart of the United Nations Declaration of Rights for Indigenous Peoples (UNDRIP), FPIC remains a contested norm as its implementation is highly contentious among industry and state actors fearful that an acceptance of FPIC means an Indigenous veto over resource development projects in their territory (Papillon & Rodon, 2017). Consent-as-veto is a polarizing discourse that brings about significant differences in the meaning, scope and practice of the norm (Papillon & Rodon, 2020). This debate highlights power and equity issues around what constitutes consent, who defines community consent, and who within the community has the authority to give consent, and to whom (Mitchell, Arseneau, Thomas, & Smith, 2019; Papillon & Rodon, 2020). Papillon and Rodon (2020) indicate that while much of this debate has focused on Western-centric approaches, limited attention has been given to Indigenous views of consent and how they might translate to practice. Mitchell et al. (2019) propose an Indigenous-informed relational approach to FPIC that might address the ontological differences that are the core divide between FPIC definitions, centering the goal of reaching a mutually agreeable outcome.

## **2.2 Resource Management Regimes**

The increased need to obtain community consent and address regulatory gaps created by neoliberal policies has given rise to various types of multi-level governance regimes involving industry, the state, and Indigenous communities, resulting in increased collaboration and clarity on project expectations, benefits, impacts, and outcomes (Galbraith, Bradshaw, & Rutherford, 2007). Our study is particularly interested in the level of decision-making authority attributed to Indigenous community decision-makers through these supra-regulatory governance agreements that have emerged, specifically co-management arrangements and impact benefit agreements (IBAs).

Co-management arrangements occur at local, regional, and state governance levels and result in the sharing of power, responsibility, and management (Berkes, George, & Preston, 1991). The core themes of arrangements include the encouragement of

community-based development, decentralizing regulatory power, and reducing conflict through consensus building and participatory principles (Prno & Slocombe, 2012).

IBAs are typically used to establish relationships between Industry proponents and Indigenous communities with provisions that are meant to alleviate the impact felt by communities from development activities. IBAs are often voluntary, although some are required by legislation, and are encouraged by state governments because they provide greater certainty for development, clarify royalties, and outline mechanisms whereby communities and regions will receive socio-economic benefits and/or mitigate adverse environmental and social impacts (O’Faircheallaigh, 2020, 2013; Levitan & Cameron, 2015). Levitan and Cameron (2015) argue that IBAs are a tool used to privatize the state’s duty to consult, as this duty is off-loaded to Industry proponents through the consultation, negotiation and accommodation mechanisms of an IBA. Industry proponents use IBAs as a measure of social license and, consequently, increase project certainty (Papillon & Rodon, 2017).

Indigenous communities may participate in IBAs for a variety of reasons. It is suggested that IBAs are an opportunity for Indigenous communities to assert their status as self-determining Nations, as IBAs are a mechanism that recognizes the authority of the First Nation to their territory, can improve agency in terms of land use and management, and can improve capacity as a community through the benefits that flow from these agreements (O’Faircheallaigh, 2020; Siebenmorgen & Bradshaw, 2011; Fidler, 2010). While Slowey (2008) argues that these agreements may offer a pathway for transforming Indigenous socio-economic well-being and self-sufficiency, there is concern that these neoliberal, market-driven forms of self-governance create new configurations of dependency (Kuokkanen, 2011), specifically on volatile markets of staples-industries (Markey et al., 2019). What is clear is that IBAs operate within an extractive capitalist framework that naturalizes market-based solutions to social and environmental suffering (Levitan & Cameron, 2015) while facilitating the continued destruction of land and the reorganization of Indigenous relations to land as property (Hoogeveen, 2015; Curran, Kung, & Slett, 2020). Some communities, as highlighted in an example from Garvie and Shaw’s (2016) work with Treaty 8 First Nations, choose to participate because they feel they have no other option as development has and will continue to occur without their consent.

Additional concerns around social and environmental justice are raised by Caine and Krogman (2010), as the power dynamics that persist in IBA processes “do not appear to encourage widespread involvement of Aboriginal people in the Canadian North to think and act toward their own social and economic development” (p. 89). Atleo (2015) suggests a re-centering of Indigenous values and principles in analysis and planning processes, with the goal of identifying where Indigenous communities should be in terms of resisting or accommodating the dominant economic system.

### ***2.3 Relational Self-Determination***

The principle of self-determination, “the unconditional freedom to live one’s relational, place-based existence and practice healthy relationships” (Corntassel & Bryce, 2012, p 152), is a requirement “for the exercise of spiritual, territorial, social, cultural, economic and political rights, as well as the practice of survival” (Henderson, 2008, p 71). For self-determination to be sustainable on an individual and community level, it must be driven by processes that ensure the practice,

maintenance, and transmission of Indigenous ways of being to future generations<sup>1</sup> (Reed, Brunet, & Natcher, 2020; Corntassel, 2012). Further, self-determination is continuous and relational in nature, as Lightfoot and Macdonald (2017) conceptualize it as “part of an ongoing set of relations and obligations—political, cultural and spiritual” (p. 35).

There is a wide gap between the theory and practice of Indigenous self-determination, primarily due to the historically and ongoing oppressive, paternalistic and assimilative relationship between the Crown and Indigenous peoples (Anaya, 2009; Murphy, 2008). Over the past several decades, the Indigenous rights movement has worked to gain international recognition of Indigenous individual and collective rights, and in 2007, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was passed by the UN General Assembly. The Declaration, covering rights on self-government, self-determination and rights to land, calls on states to negotiate plural sovereignty and power-sharing processes that protect Indigenous self-determination (Lightfoot, 2010). Although this emerging Indigenous rights regime has made strides forward in the protection of Indigenous self-determination, the non-binding nature of the regime requires a high level of commitment from settler states in its implementation.

A common argument with respect to the rights discourse is that strategies premised on state recognition of Indigenous self-determination have shortcomings in their ability to wholly encompass the principles of self-determination. Rights-based and state-recognition discourses “divert attention away from deep decolonizing movements and push us towards a state agenda of co-optation and assimilation” (Corntassel, 2012) in what Hingagaroa Smith (2000) has termed the ‘politics of distraction.’

As a response, Indigenous scholars (Corntassel 2012; Alfred, 2005; Simpson, 2014) reject the performative politics of a rights discourse and instead suggest a program of Indigenous resurgence. Indigenous resurgence is centred on the premise that Indigenous self-determination cannot be negotiated through the state’s existing political and economic structures that maintain a goal of eliminating and assimilating Indigenous societies (Daigle, 2016; Elliott, 2018). Resurgence, then, looks beyond the state and encourages independent programs of social, cultural, spiritual, and physical rejuvenation (Elliott, 2018; Corntassel, 2012). Indigenous resurgence in practice utilizes and engages Indigenous ontologies, laws, and relational responsibilities every day at the community level, even when local knowledge and practices have been severely affected by colonization (Daigle, 2016).

While focusing on resurgent practices is *vital* to sustainable self-determination (Corntassel, 2008) on an individual, community, and nation level, we agree with Murphy’s assertion that a withdrawal from state processes “will not stop state judicial and legislative bodies from asserting their jurisdiction over Indigenous territories, governments and economies” (2019, p. 76). A shift in these environmental governance power structures is required for Indigenous Nations to function “on their own onto-epistemological terms” (Muller, Hemming, & Rigney, 2019, p. 6). We argue that the pathway for self-determination must be co-constructed: (1) through the empowerment of Indigenous, community-based

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<sup>1</sup> Including: food sovereignty, community governance, ceremony, legal traditions, and relationships to homelands and the natural world.

decision-making processes that are effective in articulating Indigenous knowledge and responsibility-based value systems (Muller et al., 2019; Napoleon & Overstall, 2007), and (2) by dismantling western policies, plans, and programs that entrench colonial relationships (Pasternak, 2014), in order to foster a setting that centres Indigenous decision-making processes in environmental management decisions.

A strategic-political conception of relational self-determination can be employed to this end, as it recognizes the reciprocal responsibilities and interdependencies of Indigenous and non-Indigenous peoples (Murphy, 2019). This strategy is grounded in the understanding that Indigenous peoples, as self-determining agents, are able to govern themselves through their own institutions, laws and governance practices and acknowledges that an ethical relationship exists where each party has a responsibility to address how their actions impact each other's interests and well-being.

Relational self-determination as a political strategy suggests that Indigenous peoples, striving for self-determining autonomy, work to gain multiple access points to power, through various mediums across geopolitical scales in varied engagements of cooperation and confrontation, accommodation and resistance with/to the state (Murphy, 2019). Types of cooperative strategies include constitutional recognition of Indigenous Nationhood and self-government (Cornell, 2015), co-management and other negotiated agreements, consultation, and electoral empowerment (Murphy, 2019). Types of engagement options that operate outside state institutions include modes of direct action and resistance to state operations (Alfred, 2005), community resurgence practices (Corntassel, 2012; Simpson, 2014; Alfred, 2005), resurgent education actions (Corntassel, 2012; Simpson, 2017; 2014), and external mobilization tactics through the utilization of networks and connections with public influence, petitions, and press releases (Garvie & Shaw, 2016; Pinkerton, 1993). Each method carries varied situation-based results in its ability to access and redefine power relationships at local, regional, and state levels.

We explore the merits of a diverse political strategy within this work. First, we engage with a collaborative environmental governance discourse (Reed et al., 2020; von der Porten & de Loë, 2014) to explore situation-based results from three negotiated agreements that illustrate the limitations of a rights-based approach. We then highlight an alternative, Indigenous governance approach taken by the SSN to revitalize their own self-determining institutions for resource management decision making. It is important to understand how different institutional engagement options can advance or limit the goal of Indigenous self-determination, particularly when these options are used in combination (Murphy, 2019). Further, we believe that a broad relational self-determination strategy can move beyond the rights discourse in accessing power that exists outside of state-centred processes, within Indigenous communities, and where Corntassel (2012) suggests real power resides— in “our inherent responsibilities” (p. 92). This is one point of power, responsibility-based governance, that requires more attention from Murphy's incomplete<sup>2</sup> relational model, as it neglects the complex interdependencies of Indigenous and non-Indigenous peoples with the natural world. A responsibility-based approach decentres the state to enact community-based powers that derive from relational

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<sup>2</sup> See Anaya 2009, on the content of self-determination and Corntassel, 2008, on sustainable self-determination

responsibilities to the land and enables Indigenous Nations to practice sustainable self-determination (Reed et al., 2020; Corntassel, 2012).

#### **2.4 Framework—Participation Spectrum for Resource Decision-making**

Drawing from collaborative environmental governance literature, we developed a framework to describe the spectrum of power that exists within negotiated resource development agreements to assist in our analysis (see Figure 1). Caine and Krogman (2010) call for “a greater investigation into the nuances of power in the range of agreements among industry, government and Aboriginal organizations to expose the relationship between conditions of the agreement and the agreement themselves” (p. 89). By exploring the content and context of these agreements, First Nations may better determine a strategy for gaining more decision-making power and thus self-determination over their Nation-specific territories when engaging in state-based processes. The results of this project are meant to offer a critique of the governance arrangements that have been used in the New Afton and Ajax mine projects, in an attempt to provide some thought to the usefulness of a relational self-determination strategy.

Our framework utilizes the concept of relational self-determination and applies it to resource rights regimes within co-management literature. Specifically, Pinkerton and Weinstein (1995) provide a framework for analysing and comparing co-management agreements in fisheries, focused on a spectrum of rights. Additionally, Berkes, George, and Preston (1991) created a descriptive framework for levels of co-management participation that assists the framework in describing the levels of power at various stages of the Crown-Indigenous engagement process.

While Aboriginal<sup>3</sup> rights and title in Canada have been affirmed by the Supreme Court to be *sui generis*, deriving from pre-existing occupation and social organization (Calder, 1973), Colonial institutions have worked to entrench a sub-ordination of these rights through the presumption of underlying Crown title<sup>4</sup> that shifts legislative authority and control over lands and resources ultimately back to the Colonial government (Pasternak, 2014). Despite the recognized status of these unique and inherent rights, state-based resource management processes within Canada continue to treat Indigenous peoples as stakeholders, albeit separate from other resource users, but with limited self-determination over land and resource management decisions or the processes that create these decisions (Reed et. al, 2020; Curran et al., 2020; Nadasdy, 1999). The level of Indigenous participation in decision-making within state-based environmental management processes is thus filtered through a property-rights scheme<sup>5</sup> that can be viewed on a spectrum that considers access, withdrawal, and management activities that range between lower order rights, higher order rights, broader rights that affect other resource users, and highest-level rights that include policy-making and co-governance (Schlager & Ostrom, 1992; Pinkerton & Weinstein,

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<sup>3</sup> The term Aboriginal is used here to specifically denote Aboriginal rights within the Canadian legal framework. This is to say, the western legal view of what these rights are, how they are derived, and how they are exercised in practice within state-based legal processes.

<sup>4</sup> Indigenous legal experts are critical of the assertion of underlying Crown title or overarching Crown sovereignty in Indigenous Territories (Borrows, 2002; Mills 2011).

<sup>5</sup> State-based processes treat land-based relationships as property, which is a fundamental ontological issue with these processes. As Muller et al. (2019) poignantly state, “[o]ne of the most significant acts of colonialism is to impose an understanding of Country as something separate from humans” (p. 1).

1995). The level of participation from the Crown’s perspective is informed by two factors that stem from the Crown’s duty to consult: the strength of claim to an exerted Aboriginal right, and the impact an activity may have on that right. This spectrum is prevalent in the differences of power designated to Indigenous groups through negotiated agreements that may allow for consultation, collaboration, co-governance, or autonomous self-governance.

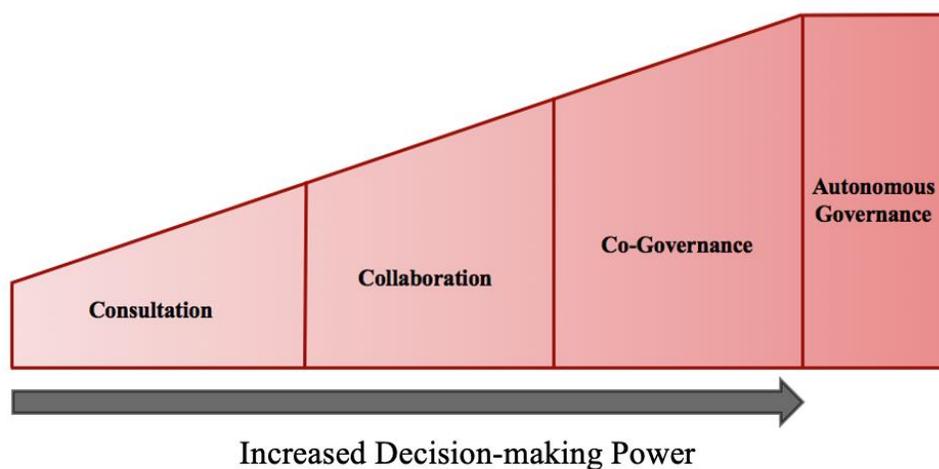
*2.4.1. Consultation:* Considers interactions that allow only for consultation activities and the exercise of operational rights from the Indigenous group that includes data collection, sharing, and analysis in an effort to provide notification or an opportunity to comment on the resource management activity. This level may inform policy or action, but it keeps the decision-making power in the hands of one party.

*2.4.2. Collaboration:* This level of involvement allows for the ability of First Nations to exercise collective-choice rights at a level that influences management plans, rules regarding harvest allocation, and location of harvest activities (Pinkerton & Weinstein, 1995). Localized resource management boards that include all resource users may exist at this level, but primarily operate only as a stakeholder in an advisory capacity to management decisions.

*2.4.3. Co-Governance:* Considers interactions that strive for equality in the decision-making process of resource management activities. These interactions set out the management vision of the resource and develops policy based on the incorporation of the values and interests of all parties (Pinkerton & Weinstein, 1995). These co-management structures are generally comprised of a management board with equal representation of all parties making decisions based on a consensus model that guides these decisions.

*2.4.4. Autonomous Governance:* Occurs when Indigenous influence over land-use interests are at their highest. Regardless of state jurisdiction or recognition, First Nations exert full control as rights-holders over land management decisions within their territories. Governance decisions are grounded in that particular Nation’s ontological worldview.

*Figure 1.* Participation Spectrum for Resource Decision-making.



### 3.0 Background and Methods

#### 3.1 Case Context

The Secwépemc and their ancestors are from and take care of Secwepemcúl'ecw, a vast, unceded territory spanning 180,000 square kilometres of the interior plateaus between and adjacent to the Thompson and Fraser rivers in what is now occupied British Columbia.<sup>6</sup> Seventeen bands make up the internal divisions of the Secwépemc Nation, who are a political alliance that protects and shares the responsibilities of managing resources held in the common interest of the Secwépemc. The Indian Act band governing system replaced the hereditary governing system in Secwépemc communities in 1951 (Ignace & Ignace, 2017). The Indian band system is a colonial imposed institution formed through the employment of Section 74 of the Indian Act that was meant to replace traditional forms of government and place-based legal orders (Lee, 2011), such as those that are founded on and are responsible for Secwepemcúl'ecw (Friedland, Leonard, Asch, & Mortimer, 2018).

The Secwépemc, as many other Nations across North America, have been resisting and fighting against colonial imposition and dispossession of land and resources through diverse strategic and political methods.<sup>7</sup> The SSN is comprised of two Indian bands, the Skeetchestn Band and the Tk'emlups Band. In 2007, the bands united to protect their collective interests and strengthen their socio-economic situations. This union is of historical significance, as these two communities have been intrinsically tied as the southern division of the Secwépemc Nation (Ignace, 2008). The SSN's mandate is to collectively manage and negotiate the conservation of resources on their shared territory, as they have done since time immemorial. In 2009, they successfully negotiated a Mining and Minerals Agreement (MMA) with the government of British Columbia, setting out a government-to-government process for decisions that affect mineral development on their territories (MMA, 2009). From this, a Participation Agreement was reached with New Gold with regard to the New Afton Mine project. In 2010, the SSN signed an Economic and Community Development Agreement with the Province of BC in regard to the New Afton Mine Project operated by New Gold Inc.

The New Afton mine is an underground copper and gold mine that is being developed on the site of the former Afton open-pit mine, located 10 kilometres west of the city of Kamloops, BC, and in the traditional territory of the SSN (Schmitt, Ames, & Stoopnikoff, 2008). New Gold Inc. is the proponent of this mine. The New Afton mineral deposit contains 65.7 million tonnes grading 1.02% copper, 0.77 gram/tonne gold, and 2.59 gram/tonne silver, which will yield approximately 680 million kilograms of copper and 45.4 million grams of gold (Schmitt et al., 2008).

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<sup>6</sup> For a greater understanding of Secwépemc people, history, laws, and relationship to land see Ignace & Ignace (2017). In addition, see the *Secwépemc Lands and Resource Law Research Project*, a collaborative research project between the University of Victoria's Indigenous Law Research Unit and the Shuswap Nation Tribal Council.

<sup>7</sup> There is a vast repository of Secwépemc oral histories and stories of the colonial entanglement. We direct you to Manuel & Posluns (2018) and Manuel & Derrickson (2017), and again to Ignace & Ignace (2017) as a start.

The mine has a 12-year lifespan, with commercial production commencing in 2012 (Schmitt et al., 2008).

Primary to this case as well was the resistance to the KGHM Ajax Mine (KAM) project resulting in the filing of a title claim before the BC Supreme Court by the SSN in September 2015. The KAM project was a proposed open-pit copper-gold mine located approximately 2 kilometres south-west of the City of Kamloops, also within the asserted traditional territory of the SSN (Environmental Assessment Office, 2017). The planned Ajax footprint was approximately 1,700 hectares and would operate for an estimated 23 years (Environmental Assessment Office, 2017). The expected output of the mine over its lifetime was approximately 140 million pounds of copper and 130,000 ounces of gold annually (KAM, 2015).

### **3.2 Methods**

The direction of this research project was guided by the advice and interest of SSN community leadership, who have been considering alternative solutions that provide greater control of their territories, economies, and livelihoods. Our research employed three core qualitative methods. First, we conducted an academic literature review related to existing resource development regimes with Indigenous communities in BC, across Canada, and internationally. Second, we conducted a content analysis of official documents of the agreements, supportive reports, and official press releases. Third, we conducted ongoing, in-depth interviews with two key informants (KI) involved with the resource agreements and specifically the SSN territory. These ongoing discussions were supplemented with two additional interviews with key informants identified via their work title or expertise related to Indigenous governance issues in order to verify certain details pertaining to the projects. Further, data was collected and recorded in field notes through observation and conversation over the course of multiple visits (five) that spanned 16 months, as we engaged with the community at specific events that we were invited to witness. Finally, we performed a qualitative content analysis of the collection of data to gain insight into the purpose, structure and provisions of the negotiated agreements, and to determine the type of relationships between parties (and to land) these agreements create.

## **4.0 Agreement Dynamics**

Our study considers the content of three agreements negotiated between SSN, the Province of BC, and New Gold, as well as actions taken by SSN with regard to the KAM project.

### **4.1 New Afton Mine Project**

In December 2006, the Skeetchestn community leadership were made aware of the potential New Afton Mine project proposed by New Gold. The SSN experienced difficulty regarding engagement and consultation on the project, as the Province initially granted a mining permit without adequate consultation (KI4); Union of British Columbia Indian Chiefs [UBCIC], 2007). The lack of consultation also extended to the mining proponent, as KI4 remembers, “we had real difficulty with the various representatives of the mine.” It wasn’t until an Assembly of First Nations (AFN) annual general meeting, where a major investor in the mine was told by SSN leadership that a title case would be launched unless SSN was consulted (KI4). This

threat of court action acted as a catalyst for the following negotiated agreements surrounding the New Afton project.

The New Afton Participation Agreement between New Gold and SSN outlined an engagement protocol between the two parties and included a number of benefits for SSN communities. The New Afton Participation Agreement (PA) is a negotiated agreement that operates within the realm of an IBA, but deviates in its extension of participation in the project afforded to the First Nations government through a political hierarchy engagement structure that deals with the ongoing operations of the mine (KI4; Shantz, 2015). These governance tables allowed SSN to be involved in every decision-making aspect of the mine (see Table 1).

Table 1: *New Gold Participation Agreement Provisions*

Category	Provision
	<i>Chiefs Table:</i> Involving the Chief of Skeetchestn, the Chief of Tk'emlups and the CEO of New Gold Mine would meet bi-annually to discuss the project.
Governance	<i>Management Committee:</i> Made up of council members and New Gold managers, would meet four times a year.  <i>Environmental Committee:</i> The technical level that reviews environmental impacts that would go on in the mine and find remedies and would meet regularly as needed.
Economy	[SSN] would have the right of first refusal on contracts for the mine (KI4; Roscoe Postle Associates Inc., 2015).
Land Tenure	[SSN] holds the right of first refusal to purchase the 2000 acres of land adjacent to the mine that was owned by New Gold (KI4).
Employment	23% of the mines labour force will be Secwépemc or Indigenous peoples (KI4; Roscoe Postle Associates Inc., 2015).
Training	[New Gold] and the Federal government would provide financing to train [community members] in mining (KI4; RPA, 2015).
Education	A scholarship fund was created of \$50,000 a year. \$25,000 for Skeetchestn and \$25,000 for Tk'emlups (KI4).
Revenue Sharing	Net Smelter Return (NSR) Royalty ranging between 0.5% - 2% dependent on the value of copper and stage of development and construction, paid into a trust.

The Mining and Minerals Agreement (MMA) is a government-to-government agreement entered into on April 7th, 2009, by the BC government, represented by the Minister of Energy, Mines and Petroleum Resources (MEMPR), and the SSN. This agreement was created with the objective of “begin[ning] to reconcile the interests of the Parties, consistent with the Constitution Act, 1982, Section 35(1) and with common law” (MMA, 2009). The specific interests of concern for reconciliation and scope of this agreement are the management of all mining activity and mineral exploration on or within SSN traditional territory.

The structure outlined in the MMA was developed through the creation of the Mines and Minerals Joint Resources Committee to address interests of the SSN, including: tenures issues; processes for the review of major projects; every aspect of mineral

development from exploration to mine closure; industry engagement; compliance and enforcement; protection of cultural and heritage resources of the SSN; development of a Cultural Heritage Management Process for industry direction; capacity development, training and education; and policy development and legislative review (MMA, 2009). The goal of this Committee is to provide recommendations to affect the planning and management of mining activities on SSN Traditional Territory. The creation of the Committee provides SSN a platform: “being embedded in the mine permitting, it gave us oversight on the mine itself” (KI4).

The Economic and Community Development Agreement (ECDA) was signed in 2010 between the Province of BC (represented by MEMPR, the Minister of Forest and Range (MFR) and the Minister responsible for the Integrated Land Management Bureau) and the SSN for two purposes (ECDA, 2010): To confirm understandings around how BC will meet its legal duty to consult with and accommodate SSN with respect to the New Afton Project; and, to share the resource revenue received by BC from the New Afton Project with SSN so that they pursue enhancement of social, economic and cultural well-being of their communities.

Provisions within the ECDA include: royalty payments, where SSN receives a 37.5% share of tax revenue collected by the Province for the New Afton project; an engagement protocol stating that all engagement regarding this project will occur through the previously established Joint Resources Committee; and an annual community priorities statement from SSN to the Province outlining the intended community priorities the tax share will be put towards (ECDA, 2010).

#### **4.2 KGHM Ajax Mine Project**

KGHM Ajax Mining Inc. (KAM) began preliminary negotiations with SSN regarding a mining project located near an important cultural and spiritual site known to them as *Pípsell* (Secwépemc Nation, 2015). SSN concerns surrounding the impact on *Pípsell* as well as a hunting blind complex located in the surrounding site area were voiced immediately, and through numerous consultations, KAM attempted to alter the project where appropriate (KAM, 2015). It became clear to SSN, however, that their concerns were not being appropriately addressed when KAM submitted a Notice of Work order to begin initial exploration around the site (Secwépemc Nation, 2015). Further, the BC Environmental Assessment Office (BCEAO) completed an initial strength of claim assessment of SSN’s Aboriginal and title rights within the project footprint and surmised that SSN had a medium to weak strength of title, and strong prima facie rights (Secwépemc Nation, 2015). KI4 describes the limitations of this initial approach by BCEAO:

The Province made a statement of claim using a stones and bones approach and archival research without interviewing our people. They conducted a strength of claim assessment on us, without even talking to us. (KI4)

SSN lobbied KAM to fund a cultural heritage study based on seasonal rounds. The seasonal round approach to cultural heritage studies considers Aboriginal Title and Rights much more holistically:

[O]pposed to the stones and bones approach and the check-box approach, it takes in our stories on the land, our medicinal uses, our fishing rights, our

hunting rights, our spiritual rights. Not just material aspects of our life but the cultural, social, spiritual aspects of the land and the stories that we have about the land (KI4).

This comprehensive approach to the cultural heritage study forced the BCEAO to change their strength of claim assessment (Environmental Assessment Office, 2017), as they had to declare “that they could see we had a strong prima facie case of title, and a strong prima facie case of rights on the land” (KI4). Using the updated strength of claim, SSN decided that court action was the best available option to exercise power and get an injunction to stop the project’s progress.

After submitting their title case to the BC Supreme Court, SSN developed and carried out a community-based project assessment process comprised of a 26-member panel to review the KAM project. SSN felt that their knowledge and worldview were not considered fairly within the Federal and Provincial environmental assessment processes and wanted to create a process that incorporated both western and traditional knowledge in a fair and just manner. The 26-member panel was created with the focus of providing a community-based consent mechanism that gave community members greater power to decide whether the project was something they believed would benefit the community. The panel was constructed with specific family representatives, reaching back to traditional kinship and governing systems (SSN, 2017):

Our kinships are founded on our Shuswap laws, they’re interconnected. So, we got 13 heads of families from Skeetchestn and we got 13 heads of families from Tk’emlups along with elders and youths from each community and our Council to make up a review panel for the project (KI4).

This panel held a week-long hearing where project proponents, government agencies, non-governmental agencies, and community knowledge holders were given opportunity to provide all of their individual expertise. “We came up with the idea of walking on two legs – by that I mean that we wanted to utilize both western and Indigenous knowledge through the review” (KI4).

Based on the assessment panel recommendations, the SSN Joint Council declared that the SSN does not give its free, prior, and informed consent to the KAM project (SSN, 2017). As part of this EA Panel decision, the SSN joint Council provided a list of land use objectives, recommending that *Pípsell* become a sacred cultural heritage site (SSN, 2017). On June 20<sup>th</sup>, 2017, a ceremony was performed, and the SSN government designated *Pípsell* as a Cultural Heritage site. Following these actions, the provincial ministers responsible for issuing an Environmental Assessment certificate rejected the project proposal, citing in their decision that “Ajax would have adverse impacts on SSN’s asserted Aboriginal rights and title, and in many cases cannot be avoided or minimized” (British Columbia, 2017). As a result of this finding, the Ministers deemed the impacts ‘unacceptable’ (British Columbia, 2017).

## 5.0 Participation Spectrum Assessment

Using the Participation Spectrum (see Figure 1) to assess the content of each agreement and the actions taken by SSN in each project case, we seek to understand the extent of decision-making power accessed by SSN.

The Mining and Minerals Agreement (MMA, 2009) looks to establish a foundation for shared decision-making, through the creation of a Mining and Minerals Joint Resource Committee (JRC) that works to address the concerns for SSN at operational and policy levels (MMA, 2009). The higher order rights that are discussed by the JRC involve the planning and management of mineral development from exploration, through mine development, operations and closure, to post-closure remediation activities. However, the abilities of this Committee only go as far as providing recommendations to the Ministry of Energy, Mines and Petroleum of BC, which drastically affects the power afforded to SSN in this agreement. From this, it is evident that the agreement falls into a collaborative governing structure when applying the participation assessment (see Figure 2a). The MMA allows for SSN contributions through information sharing mechanisms, and there is interest in incorporating Secwépemc knowledge and laws into consultation processes. SSN is able to exercise its interests through consideration of collective-choice rights (see Schlager & Ostrom, 1992) that require consultation or accommodation where necessary, as outlined by the Agreement's consultation and accommodation framework. The limitation of the MMA lies in the fact that the JRC operates in an advisory capacity, providing recommendations, which the BC government can reject.

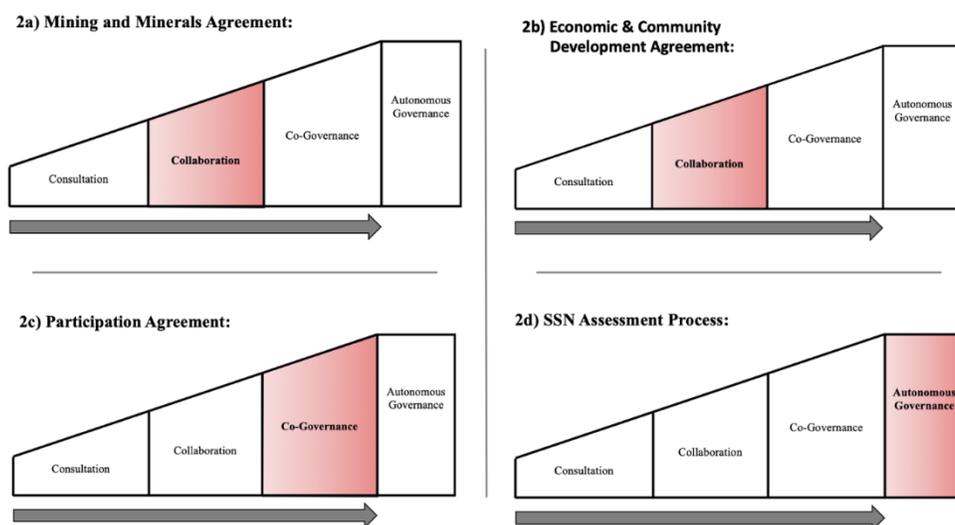
Looking at the ECDA, we can see a similar level of hierarchical control (see Figure 2b) limiting SSN self-determination in two specific ways. First, the ECDA dictates that the government engagement process will occur through the JRC previously established in the MMA, where SSN's role is at an advisory capacity. Second, the Province asserts a level of paternalism by monitoring expenditures from the share of the resource revenue received by SSN through the ECDA. SSN is required to prepare annual statements outlining community priorities, goals, and specific outcomes that SSN intends to fund to enhance the communities' social, cultural, and economic well-being (ECDA, 2010). While the definition of such activities is not given, the failure of these activities to meet the Province's definition or failure of SSN to provide such statements can give the Province cause to terminate the agreement.

The Participation Agreement between SSN and New Gold sets out rules regarding communication, conflict resolution, and benefit-sharing (KI4; ABIC, n.d.). A Joint Implementation Committee was set up with equal representation from SSN and New Gold as well as the Environmental Manager from the Project site, where issues are discussed and worked through (KI4). A Chief's Table was also created, seating both the Skeetchestn and Tk'emlups Chiefs as well as the New Gold CEO, that meets quarterly to discuss the project's progress and deal with any issues that persist from the Joint Implementation Committee (KI4). It would seem that the parties are trying to satisfy each other's interests and concerns on a consensus basis, with higher levels of accommodation (see Figure 2c). This is likely due to the need for continuous interaction through the lifecycle of the project. It is important to note that while the Agreement itself is set up to achieve co-governance, the Agreement is set within an underlying capitalist framework with the intention of facilitating development. SSN's ability to exert more control regarding whether or not development should

occur was limited by the State’s assessment process that classified the land as a brownfield site [KI4].

Moving to the second mine case example, KAM began preliminary negotiations with SSN regarding the Ajax mining project located near *Pípsell* (Jacko Lake). These negotiations followed the consultation protocol set out by the MMA and both parties signed an Exploration Agreement as the project assessment progressed (KAM, 2015). Despite resolution to SSN concerns, KAM submitted and BC approved a Notice of Work order to begin initial exploration, against SSN’s JRC recommendation (Secwépemc Nation, 2015). This example indicates the limitations to the decision-making ability afforded to SSN in the MMA. In May 2015, the BC Environmental Assessment office completed a ‘strength of claim’ assessment of SSN’s Aboriginal and title rights within the project footprint and surmised that a strong *prima facie* case could be made for both aboriginal rights and title (Secwépemc Nation, 2015). As noted by KI4, SSN asked the Province to declare the land in question as SSN title land. However, the Province refused. SSN then decided to exercise its own sovereignty in the absence of Provincial acknowledgement of their rights. SSN made their own title declaration over the territory and decided that court action was the best available option to exercise power and get an injunction to stop the project’s progress (Secwépemc Nation, 2015). Next, SSN developed their own Assessment institution that decided the project would have too great of an impact on their culture and livelihoods. SSN then made a declaration that the land known as *Pípsell* is now a cultural heritage site. SSN exercises autonomous governance in this case (see Figure 2d), making land use management decisions to protect their territory from development. The ability to withhold consent and exercise title on the ground is considered by KI1 as a key part of self-governance, “do the legal titleholders have the organization and means to actually put that into effect – to figure out how do we give consent” (KI1). The creation of the SSN Assessment process is an example of a community-based consent mechanism where decision-making authority is given to traditionally selected community representatives. Since title is held collectively, it is the collective of the SSN community that have the right to determine the future of the Ajax project.

Figures 2a, 2b, 2c and 2d. Participation Spectrum Assessment.



It is clear that First Nations governments like the SSN experience tremendous difficulty when asserting their rights and ensuring those rights are adhered to by state and industry actors. While the general trend related to the agreements, in this case, has been positive for SSN in securing more decision-making power in resource decisions, there is still a limitation within negotiated resource agreements regarding decision-making authority that forces SSN to take more extreme measures such as court action. The agreements do not contain government-to-government protocol that defines consensus-based decision making for land that both governments claim title over, severely limiting the ability of these governments to reconcile interests over resource development as the Province continues to make decisions regardless of SSN's opposition. Self-determination requires respect for Indigenous consent, specifically on decisions that will have major implications to lands that are culturally significant.

## 6.0 A Relational Self-determination Strategy

On its own, the content assessment shows the resulting relationships formed through negotiations. SSN's ability to access more power in these agreements relied on their ability to leverage that power, to not only instigate negotiations, but in the negotiations themselves. Drawing from the contextual aspects of the previous section, we can see how various relational tools, both inside and outside state-based processes, were utilized to leverage and assert greater SSN governance in each project.

In each case, SSN found ways to leverage their relationships with the State to improve their bargaining position based on the State's legal responsibility that stems from Section 35 of the Canadian Constitution. The duty to consult, accommodate, and gain consent provides explicit conditions required to be met by the government and are a source of power for Indigenous groups when negotiating resource management agreements with the government or industry proponents. These legal conditions can be viewed as a hierarchy of legal rights for First Nations when negotiating resource agreements and dictate the level of engagement minimally required of the Crown, dependent on the strength and nature of the claim. But again, this process illustrates how Indigenous self-determination is limited by state recognition, as the burden of proof for these claims relies on the First Nation to prove to the state that these rights exist and have never been extinguished. We see this recognition framework limit SSN's concerns regarding the New Afton project, as an environmental assessment was not triggered due to the Province's classification of the land as a brownfield site and their determination that the projected new land disturbance did not pass the required thresholds (Schmitt et al., 2008). It was determined, however, that the project would be considered a major mine and thus required the Province to consult with impacted First Nations. SSN was able to leverage this consultation requirement into a formalized agreement to be embedded in the permitting process of all future mine proposals within their territory through the MMA. Going a step further due to the determination of high *prima facie* aboriginal and title rights in the Ajax mine case, SSN submitted a title case to the BC Supreme Court when they felt their governing authority was not being respected.

SSN was also able to leverage its relationships with shareholders and proponents in both projects. SSN was having difficulty engaging with representatives of New Gold (KI4), but the situation changed when SSN leadership told a major shareholder that they would launch a title case against the project unless they negotiated an

arrangement. This threat of legal action was a catalyst for a respectful relationship codified by the Participation Agreement. Leveraging social licence for greater participation in resource development decisions worked again in the Ajax mine case, as SSN lobbied KAM for capacity funding to carry out a seasonal round cultural heritage study. This study strengthened their prima facie title case and allowed them to pursue greater control through the courts. Further, in recognizing the inherent rights of the SSN, KAM supported and were active participants in SSN's project review process.

Numerous external mobilizations were seen across these two cases, as SSN utilized issue networks across political scales. Notably, Assembly of First Nations Chief Phil Fontaine met with the provincial cabinet when negotiating the 37.5% share of the mine tax on the New Afton project, and SSN garnered support from the Union of British Columbia Indian Chiefs (UBCIC) for their efforts in both the New Afton and Ajax projects. Elizabeth May, the leader of the Federal Green Party, showed her party's support for both the SSN assessment process and declaration of *Pípsell* as a cultural heritage site. Locally, the city council of Kamloops voted in favour of supporting the SSN's findings from their project assessment and decision to reject the mine.

Finally, SSN employed several self-governing activities that were vital in their relational strategy for self-determination and exerting their sovereignty in these cases. By bringing the Skeetchestn band and T'kumlups band together to form the SSN, they renewed historical community relationships that had previously been severed through colonial assimilation policy. This allowed SSN to consolidate resources and share capacity in order to exert their shared jurisdiction. This was the start to a series of actions SSN made to lift up or re-develop self-governing processes based on Secwépemc legal orders. Through these processes, SSN renewed their relational responsibilities to the land, as concern for *Pípsell* was centered in the Project Review Process and supported by the decision to reject the mine and hold a ceremony to designate the area as a cultural heritage site. This responsibility-based governance does not derive its power from state-based policy unbound from place, but rather Indigenous legal orders are guided by responsibilities bound relationally to the land, and the beings that depend on the land. The oral histories that the Secwépemc associate with *Pípsell* are fundamental to Secwépemc laws that speak on the reciprocal and mutually accountable relationship humans have with the environment (SSN, 2017). The destruction of *Pípsell* will mean the destruction of these legal principles, to which every Secwépemc, present, past, and future, has a right to learn and practice. These decisions are Secwépemc practicing relational self-determination, as they commit to their reciprocal responsibilities and connection to *Pípsell*, a cultural keystone place critical to SSN's identity and well-being.

## 7.0 Conclusion

The Secwépemc case study offers several key findings that help contribute to our understanding of Indigenous governance issues in resource management. First, the nature of negotiated agreements for resource projects is transitioning from an Impact-Benefit transaction to forms that allow more Indigenous participation and collaboration as Indigenous nations work to gain more decision-making autonomy. While this is encouraging, mineral development agreements in BC are still unbalanced in terms of decision-making authority, as the limitations of a rights-based, collaborative governance approach are prevalent within this case study.

Second, employing a relational strategy to self-determination can assist Indigenous governments in gaining more negotiating leverage and influence decision-making for resource development projects. In this case, SSN leveraged relationships within state-based processes, with the state, proponent and project stakeholders, and political actors at various geopolitical scales, as well as relationships beyond state institutions to exert their self-determination. Lastly, the development and implementation of SSN's Assessment Process is a compelling example of how Indigenous communities can organize and develop relational, community-based consent mechanisms for decision-making on resource development issues. Community-based consent mechanisms are important institutions for self-determining Indigenous communities, and more community-based research into how communities organize consent may offer support and capacity for communities strengthening their own expressions of relational sovereignty.

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