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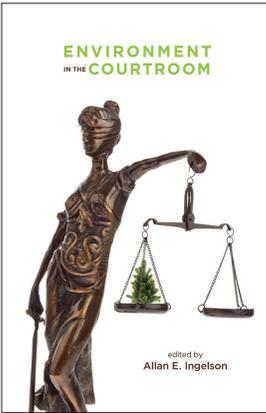
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ENVIRONMENT IN THE COURTROOM

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The Challenges in Using Aboriginal Traditional Knowledge in the Courts

DAVID LAIDLAW

Aboriginal traditional knowledge has governed Aboriginal Peoples'¹ relationships with themselves and their world since time immemorial. But recognition of that knowledge within Canadian society, and in particular the legal system, is problematic. Canada's Assembly of First Nations (AFN) describes three definitions of *Aboriginal Traditional Knowledge* (ATK):

Aboriginal Traditional Knowledge is not a concept that is easily defined or categorized. However, it can be generally described as the customary ways in which aboriginal peoples have done or continue to do certain things or activities, as well as the new ideas or ways of doing things that have been developed by Aboriginal peoples which respect their traditions, cultures and practices. Many of these customary ways have been passed on from generation to generation and are considered sacred. This unique body of knowledge is culturally based, context specific, holistic and differs from nation to nation.

The Royal Commission on Aboriginal People (1996) has also described indigenous knowledge as "oral culture in the form of stories and myths, coded and organized by knowledge systems for interpreting information and guiding action ... a dual purpose to manage lands and resources and to affirm and reinforce one's relationship to the earth and its inhabitants."

ATK can also be seen as the summation of all knowledge, information, and traditional perspectives relating to the skills, understandings, expertises, facts, familiarities, justified beliefs, revelations,

and observations that are owned, controlled, created, preserved, and disseminated by a particular Indigenous nation. ATK is comprised of a holistic body of knowledge and it remains the sole right of the community to determine what knowledge establishes their ATK.

It is important to note that these are general definitions and do not necessarily reflect or conform to the definitions held by ATK holders.²

The entry points for ATK in Canadian courts can be grouped into three categories:

- (1) Court review of government or board rulings under legislation referencing ATK;
- (2) Court review under the doctrine of the Crown's duty to consult and accommodate Aboriginal Peoples; and
- (3) Aboriginal rights claims, Aboriginal title, and criminal defence of wildlife charges.

Packaging ATK

Despite admonitions from the highest authority in *Delgamuukw v. British Columbia*,³ lower courts have been and continue to be reluctant to accept and consider ATK. There may be many reasons for this, including the oral transmission nature of ATK, which runs afoul of the hearsay rule, reluctance to accept ATK particularly if it conflicts with Western scientific evidence, and the observational nature of ATK evidence, which Aboriginal Peoples traditionally are reluctant to generalize. Further, while courts and tribunals may follow the standard or revised evidentiary rules (e.g. *Delgamuukw*), the definitional issues, oral transmission, and observational nature risks that information being given little weight.

In response to this attitude, Aboriginal litigants have resorted to studies of ATK such as traditional land use studies, historical studies, etc., and have engaged experts in related fields to collect and opine on them.⁴ With few actual experts in ATK, this second-hand collection of ATK by way of expert reports risks the attendant misunderstandings and issues.⁵ While a tradition has arisen in Aboriginal litigation since *Delgamuukw* to present an Aboriginal Peoples elder's evidence first,⁶ ATK, if it is included, has been generally packaged by experts. This is an expensive and cumbersome process leading to some

situations where relevant ATK is not advanced, including those involving financial constraints or confidentiality concerns.

Court Review of Government or Board Rulings under Statutes that Reference ATK

There are two categories of legislation referencing ATK: general legislation and Implementing Legislation that approves Comprehensive Land Claim Agreements⁷ and establishes a number of institutions [Boards] to provide for the Aboriginal joint management of land planning, environmental protection, development approval, land and water rights, wildlife conservation, and other matters. These Boards may be directed in that legislation to consider ATK and will implicitly consider ATK due to their Aboriginal membership. Boards can make recommendations to government, have decision-making powers, and make rules of procedure for the consideration and protection of ATK. Board rules of procedure and First Nation government processes will not be separately considered in this chapter.

Only two of the 28+ Canadian statutes that reference ATK in the environmental context⁸ define what that term means: the Nunavut *Wildlife Act*, which incorporates Inuit traditional knowledge,⁹ and the *Yukon Environmental and Socio-economic Assessment Act*, which defines traditional knowledge as:

the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and the environment, that is rooted in the traditional way of life of first nations.¹⁰

Statutes referencing ATK fall into several categories: environmental protection,¹¹ environmental assessment,¹² oceans,¹³ land and marine conservation areas,¹⁴ wildlife,¹⁵ forest conservation,¹⁶ species protection¹⁷ including migratory birds,¹⁸ surface and water rights in the North,¹⁹ land planning in Northern Ontario, Nunavut, and Eastern Manitoba,²⁰ nuclear waste disposal,²¹ and game conservation plans under Modern Land Claim Agreements that include the British Columbia governments as well as Canada.²²

BEARERS OF TRADITIONAL KNOWLEDGE

The common formulation in statutes is Aboriginal traditional knowledge or First Nations and Métis communities traditional ecological knowledge;²³

however, some use community knowledge²⁴ in addition, or in one case local knowledge,²⁵ as a replacement. The local or community knowledge formulations are undefined but will allow consideration of non-Aboriginal knowledge under those statutes. Only the Ontario *Endangered Species Act*²⁶ defines “aboriginal” by reference to section 35(2) of the *Constitution Act, 1982*.²⁷

It is noteworthy that the *Oceans Act* speaks only of traditional ecological knowledge,²⁸ while the *Canada National Marine Conservation Areas Act* includes Aboriginal traditional ecological knowledge as a subcategory of traditional ecological knowledge.²⁹

In terms of combining scientific knowledge and ATK, Alberta’s *Environmental Protection and Enhancement Act* has an “Indigenous Wisdom Advisory Panel” to advise Alberta’s Chief Scientist, responsible for monitoring and reporting on Alberta’s environment, as to the incorporation of ATK into the governing science.³⁰ The balance of ATK legislation is silent in this regard.

In terms of rights to or authority to advance ATK, the relevant Aboriginal group would generally hold such knowledge, as an Aboriginal right on a communal basis as outlined by the Supreme Court of Canada (SCC) in *Behn v. Moulton Contracting Ltd.*³¹ One aspect of ATK is its diffuse nature, with some knowledge being restricted to certain families and held in confidence within that Aboriginal subgroup.³² This may accord with the SCC’s statement in *Behn* that:

It will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.³³

Thus, identifying relevant ATK may require additional enquiries, beyond the general knowledge of the Aboriginal group, as to who may hold additional knowledge.

Holders of ATK may be reluctant to disclose that information in a public fashion. There are provisions in ATK legislation that could protect the confidentiality of ATK, such as section 42(6)(b) in the *First Nations Oil and Gas Environmental Assessment Regulations*, section 10.2(c) of the *Species at Risk*

Act, which allows only permitted information to be shared, the Northwest Territory's *Wildlife Act*, section 168(1)(b), and *Yukon Environmental and Socio-economic Assessment Act*, section 121(a). Agreements or court orders could also be structured to protect ATK, but without them holders of confidential ATK may be reluctant to advance it.

STATUTORY PREAMBLES AND PURPOSE SECTIONS

In *Quebec (Attorney General) v. Moses*,³⁴ the Supreme Court of Canada, in interpreting statutory preambles, noted that section 13 of the federal *Interpretation Act* provides “[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.”³⁵ Thus, although “a legislative preamble will never be determinative of the issue of legislative intent since the statute must always be interpreted holistically, it can nevertheless assist in the interpretation of the legislature’s intention.”³⁶

References to ATK in the preamble of federal legislation include: *Canadian Environmental Protection Act, 1999*; *Canada National Marine Conservation Areas Act*; *Species at Risk Act*; and, provincially, *Ontario’s Climate Change Mitigation and Low-carbon Economy Act*; and territorially in Yukon’s *Parks and Land Certainty Act* and *Species at Risk (NWT) Act*. The ATK provisions in the preambles for the ATK legislation have yet to receive judicial consideration, although other components, such as the precautionary and polluter pay principles,³⁷ have informed the interpretation of legislation.

In *Moses*, legislative purpose statements were described as “[t]he most direct and authoritative evidence of legislative purpose.”³⁸ Purpose statements referencing ATK are found in Ontario’s *Great Lakes Protection Act, 2015*, the *Wildlife Act*,³⁹ and Yukon’s *Forest Resources Act*, but those purpose statements have yet to be judicially considered.

The *Canadian Environmental Assessment Act (CEAA)* contains an ATK purpose statement in section 4 that has yet to receive judicial consideration.⁴⁰ The predecessor legislation⁴¹ contained a similar purpose statement in section 4 that did not refer to ATK and was the subject of varying interpretations. In *Environmental Resource Centre v. Canada (Minister of Environment)*, a 2001 decision, the Federal Court said:

Section 4 imposes no duties on the MOE [Minister of the Environment] nor does it state how she is to discharge her duties under the Act. It is a statement of general principle. The MOE does not breach

this section and the submissions alleging an error of law in relation to section 4 are without foundation.⁴²

However, in *Union of Nova Scotia Indians v. Canada (Attorney General)*, a 1996 decision in the Aboriginal context, the Federal Court said:

The applicants also urge that the Ministers were required to conduct a careful and reasonable assessment of the project in light of para. 4(a) of the CEAA which specifies, among other purposes of the Act, “to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them”. I accept that standard as consistent with the purposes and the processes established by the Act.⁴³

It is arguable that in the Aboriginal context CEAA would, given the purpose statement, invite greater court scrutiny of government decisions with contrary ATK. This contention is supported by *Moses*, which involved a decision as to applicability of CEAA under the James Bay Land Claim Settlement, and where the Supreme Court of Canada said:

[45] Accordingly, unlike the Quebec Court of Appeal, I do not believe the correct outcome here is to substitute the Section 22 Treaty procedure in place of the statutory procedure required by the CEAA. The CEAA procedure governs but, of course, it must be applied by the federal government in a way that fully respects the Crown’s duty to consult the Cree on matters affecting their James Bay Treaty rights in accordance with the principles established in *Haida Nation v. British Columbia (Minister of Forests)*, ... *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, ... and in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. [citations omitted]⁴⁴

It should be noted that the current federal policy, the Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (2011) states that:

The environmental review process is generally viewed by Aboriginal groups and third parties ... as the most effective method managed

by the Crown to identify environmental effects of proposed activities and related changes.⁴⁵

Ontario's *Endangered Species Act*⁴⁶ purpose statement in section 1, aside from the ATK aspect, was considered by the Ontario Court of Appeal in 2016 in *Wildlands League v. Ontario (Natural Resources and Forestry)*,⁴⁷ when it upheld a regulation permitting interference with listed species. Likewise, the *Yukon Environmental and Socio-economic Assessment Act* purpose statement in section 5, aside from the ATK aspect, was interpreted to uphold the Yukon Final Agreement in that a project approval did not carry over to the regulatory process and overrule the Water Board's licensing decision.⁴⁸ The purpose statement in section 4 of the *Migratory Birds Convention Act, 1994*⁴⁹ was interpreted straightforwardly in *Animal Alliance of Canada v. Canada (Attorney General)*.⁵⁰

The federal *Species at Risk Act (SARA)* contains a purpose section 6, which does not explicitly reference ATK but provides:

6. The purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened.⁵¹

This purpose statement has been interpreted in *Adam v. Canada (Environment)*.⁵² *Adam* was a judicial review application on a decision statement by the Minister of the Environment to not include Alberta woodland caribou on a list of species at risk. The Federal Court said:

Given all of the information that was specifically addressed in the Decision, it was not a reviewable error for the Minister to have failed to have specifically addressed the objectives of the SARA in his Decision. In my view, the manner in which the Decision addressed the relevant scientific and other information in the Certified Record was not inconsistent with the purposes of the SARA, [in section 6].⁵³

The implication was that if the minister had not addressed that information in his decision that would be a reviewable error, and indeed by failing to address an emergency request without justification the minister committed a reviewable error.⁵⁴ It is noteworthy in *Adam* that pursuant to ATK the "First Nations

Applicants have voluntarily stopped hunting boreal caribou, in an attempt to address the current threat to the caribou's survival and recovery."⁵⁵

Purpose statements in ATK legislation that do *not* refer to ATK include Alberta's *Environmental Protection and Enhancement Act*⁵⁶ section 2, which was interpreted as involving "balancing sensitive environmental concerns with general economic well being and social needs of the Province of Alberta."⁵⁷ It also affected the contentious issue of standing in interpreting Alberta's environmental legislation requiring a person be "directly and adversely affected."⁵⁸ Other ATK Acts that contain purpose statements that do *not* refer to ATK include the *Canada National Marine Conservation Areas Act*,⁵⁹ Nova Scotia's *Endangered Species Act*,⁶⁰ New Brunswick's *Species at Risk Act*,⁶¹ Ontario's *Far North Act, 2010*,⁶² the *Species at Risk (NWT) Act*,⁶³ Nunavut's *Wildlife Act*,⁶⁴ and Yukon's *Forest Resources Act*⁶⁵ and have not received court review.

DUTY STATEMENTS

The *Canadian Environmental Protection Act, 1999* has a duty statement in section 2(1) that says:

- 2 (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),
- (a) exercise its powers in a manner that protects the environment and human health, applies the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches;
 - ...
 - (i) apply knowledge, including traditional aboriginal knowledge, science and technology, to identify and resolve environmental problems;
 - ...

In *Great Lakes United v. Canada (Minister of the Environment)*, this duty section was interpreted to require the minister to include the mining industry information on waste rock and tailings disposals on site in the *National Pollutant Release Inventory (NPRI)* established by the minister to provide an inventory

of pollutants released into the environment.⁶⁶ The ATK duty in section 2(1)(i) was not an issue in that case, but the possibility remains that this may require ATK consideration in a proper case.

PERMISSIVE LEGISLATION

The importance of preambles and purpose and duty statements come from the nature of ATK legislation. Most of the ATK legislation is phrased *permissively*, either by giving discretion to government to consider ATK or confining ATK to an advisory role.

In the maritime context, ATK is limited to educational purposes. The *Oceans Act*, section 42(j), says the minister *may* “conduct studies to obtain traditional ecological knowledge for the purpose of understanding oceans and their living resources and ecosystems.” In the *Canada National Marine Conservation Areas Act*, section 8(3) says Canada “*may* conduct scientific research and monitoring and carry out studies based on traditional ecological knowledge, including traditional aboriginal ecological knowledge, in relation to marine conservation areas.” (Emphasis added.)

In *CEAA*, the only reference to ATK is in section 19(3), where:

19(3) The environmental assessment of a designated project *may* take into account community knowledge and Aboriginal traditional knowledge. [Emphasis added.]

This is contrast to section 19(1), where:

19(1) The environmental assessment of a designated project *must* take into account the following factors:

- (a) the environmental effects of the designated project ...
 - ...
 - (j) any other matter relevant to the environmental assessment ...
- [Emphasis added.]

The *First Nations Oil and Gas Environmental Assessment Regulations*, section 11(1), lists factors that must be considered, and section 11(2) says, “The environmental assessment *may* also consider community knowledge and aboriginal traditional knowledge.” The *Nuclear Fuel Waste Act* Advisory Council, members of whom should have expertise in ATK, merely advise the minister.

Manitoba's *The East Side Traditional Lands Planning and Special Protected Areas Act* indicates in section 10(4) that the planning council *may* apply traditional knowledge. Alberta's *Environmental Protection and Enhancement Act*, section s 15.3(1), involves at best a second-hand incorporation of ATK into the governing scientific standards. The Ontario *Far North Act, 2010*, section 6 reads, "First Nations *may* contribute their traditional knowledge and perspectives on protection and conservation for the purposes of land use planning under this Act," but there is no direction on the usage of that information. The *Great Lakes Protection Act, 2015* and the *Climate Change Mitigation and Low-carbon Economy Act* in Ontario are similar.

That being said, particularly when developments are undertaken within the traditional areas of Aboriginal peoples,⁶⁷ in practice some consideration is given to ATK under the doctrine of the Crown's duty to consult and accommodate First Peoples discussed below.

SPECIES AT RISK ACTS

The federal *Species at Risk Act (SARA)*, and provincial equivalents, represent a special case. The general scheme under *SARA* is the listing of at-risk species in various categories by way of committees established for that purpose. The listing of a species can change, and if it meets a standard of endangerment that status will engage mandatory plans to curtail exploitation or habitat destruction or enhance recovery.

In *SARA*, the preamble takes notice of ATK when it says, "the traditional knowledge of the aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures." *SARA* establishes a *Canadian Endangered Species Conservation Council (CESPCC)* in section 7 composed entirely of government ministers or their delegates.⁶⁸ The role of the CESPCC is to "provide general direction on the activities of COSEWIC [Committee on the Status of Endangered Wildlife in Canada], the preparation of recovery strategies and the preparation and implementation of action plans" and to coordinate government activities.⁶⁹ *SARA* directs the creation of a "National Aboriginal Council on Species at Risk [NACSR], consisting of six representatives of the aboriginal peoples"⁷⁰ who would presumptively consider ATK, but the role of NACSR is *limited to advising* the government's CESPCC.

The minister, after consulting with the CESPCC, may create a public "stewardship action plan that creates incentives and other measures to support voluntary stewardship actions taken by any government in Canada, organization

or person.”⁷¹ That stewardship action plan is educational and must include commitments to, among other things, “methods for sharing information about species at risk, including community and aboriginal traditional knowledge, that respect, preserve and maintain knowledge and promote their wider application with the approval of the holders of such knowledge, with other governments and persons.”⁷²

Section 14 establishes a “Committee on the Status of Endangered Wildlife in Canada” (COSEWIC). The functions of COSEWIC include periodically assessing the status of species⁷³ at risk, identifying the existing or potential threats, and classifying each species as extinct, extirpated, endangered, threatened, of special concern, or not at risk.⁷⁴ COSEWIC “must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and *aboriginal traditional knowledge*,”⁷⁵ including a finding of insufficient knowledge.⁷⁶ Members of COSEWIC “must have expertise drawn from a discipline such as conservation biology, population dynamics, taxonomy, systematics or genetics or from community knowledge or *aboriginal traditional knowledge* of the conservation of wildlife species.”⁷⁷ COSEWIC must establish a “subcommittee specializing in *aboriginal traditional knowledge*”⁷⁸ whose chairperson and members will be appointed by the minister after consultation with Aboriginal groups that she considers appropriate.⁷⁹ COSEWIC has approved *Aboriginal Traditional Knowledge: Process and Protocols Guidelines* (2010) that include four Guiding Principles, the last of which directs “equal recognition and value with western Science and Community Knowledge”; however, they are only guidelines.⁸⁰

Thus, under SARA, aside from membership requirements, ATK consideration is confined to an advisory role to COSEWIC, albeit a prominent one. Provincial legislation generally follows the same model as SARA.⁸¹

MANDATORY LEGISLATION

Implementing legislation can mandate consideration of ATK, and implicitly acknowledges its relevance in the Aboriginal composition of the resulting Boards:

- Nunavut Agreement: Nunavut’s Territorial *Wildlife Act*, with its explicit description of Inuit ATK and its application; the *Nunavut Waters and Nunavut Surface Rights Tribunal Act* in section 119, where “due regard and weight shall be given to Inuit culture, customs and knowledge”

and the *Nunavut Planning and Project Assessment Act*, section 103(3) (“must take into account any traditional knowledge”).

- Yukon Umbrella Agreement: In the *Forest Resources Act*’s section 1(1), “forest resource management” is the *practical* application of scientific, biological, social, cultural, and economic information and traditional knowledge of First Nations; *Parks and Land Certainty Act* preamble: to “establish protected areas based on available traditional knowledge”; *Environment Act*, section 53: “partnership with Yukon First Nations using knowledge”; and the *Yukon Environmental and Socio-economic Assessment Act*’s explicit definition in 2(1), YESAA Board’s rules on integration, treatment, and confidentiality of ATK in section 33, and section 39 equal treatment.
- Gwich’in, Sahtu Dene and Metis, Inuvialuit, Déline and Tâïchô Agreements: Northwest Territories’ *Wildlife Act*’s Principles; *Surface Rights Board Act* section 32(b) (hearings *must* take into account any relevant Aboriginal traditional knowledge); and the *Mackenzie Valley Resource Management Act* (established Land and Water boards who shall consider ATK in section 60.1(b) with Environmental Impact Board considering cumulative impacts using ATK in addition to other informant in section 115.1).

Implementing legislation for modern land claims settlements can mandate consideration of ATK, especially with respect to wildlife management plans with the provincial parties.⁸²

CONSIDERATION OF ATK

Whether framed in a mandatory or permissive fashion, there is little statutory guidance for courts as to the relevance, weight, or evidentiary standards regarding ATK. The *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, section 119 (“due regard and weight”) and the *Nunavut Planning and Project Assessment Act*, section 103(3) (“must take” ATK into account) have not received judicial consideration to date.

The *Yukon Environmental and Socio-economic Assessment Act* [YESAA] contains ATK consideration directions that have received judicial consideration. In *White River First Nation v. Yukon Government*,⁸³ sections 39 and 74(1) of YESAA were considered. Section 39, entitled General Requirement, provides:

39 A designated office, the executive committee or a panel of the Board shall give full and fair consideration to scientific information, traditional knowledge and other information provided to it or obtained by it under this Act.

and section 74(1) provides:

74 (1) A decision body considering a recommendation in respect of a project shall give full and fair consideration to scientific information, traditional knowledge and other information that is provided with the recommendation.

At issue in *White River* was the March 19, 2012, Tarsis Resources Ltd. (“Project Proponent”) approval for a Mining Land Use Approval permit under *YESAA* for a Quartz Exploration Project (the “White River Project”) on lands claimed by the White River First Nation (“First Nation”). That application, under *YESAA* regulations, was directed to a Designated Office for evaluation. That Designated Office, after appropriate consultation with the Project Proponent and First Nation under section 39 of *YESAA*, issued an Evaluation Report, dated July 30, 2012, recommending that the White River Project not be allowed to proceed because it would have significant adverse effects both on wildlife and wildlife habitat (specifically the Chisana Caribou Herd) and on traditional land use and culture of the First Nation—effects that could not be mitigated. The Evaluation Report was forwarded to a Decision Body, in this case the Director of Mineral Resources (the “Director”), who met once with the First Nation to review the Evaluation Report on August 21, 2012.⁸⁴ The Director issued a Decision Document on September 5, 2012 on the basis that the impacts of the White River Project could be mitigated.⁸⁵

Justice Veale found that the First Nation members, in the meeting with the Director, were asked in effect if they agreed with the negative Evaluation Report—to which they naturally agreed.⁸⁶ The Director knew on August 16, 2012, *prior to the meeting*, that it had contrary scientific information from telemetry as to the stability of the Chisana Caribou herd and *they did not disclose that information* to the First Nation. That scientific information ultimately formed the basis for rejection of the Evaluation Report in the Decision Document.⁸⁷

Justice Veale contrasted the conduct of the Decision Body in *Liard First Nation v. Yukon Government and Selwyn Chihong Mining Ltd.*,⁸⁸ wherein that

Decision Body closely monitored the submissions to the Designated Office and exchanged drafts of the Decision Document with the affected First Nation. In *White River* it was argued that the Decision Body had behaved similarly, but Justice Veale rejected this argument, saying:

However, here the consideration was not full and fair. The First Nation should have had the opportunity to put forward a technical expert, challenge the telemetry data, and present their traditional knowledge. Fairness and the honour of the Crown require that the First Nation be given an opportunity and time to put forward their view when the Decision Body, as here, is contemplating a decision completely at odds with the one that was rendered after an in-depth consultation process.⁸⁹

Noting the significance of Decision Document in the *YESAA* process, Justice Veale quashed the Director's Decision Document. Justice Veale was careful to not direct any specific result or comment on the appropriate weight to be given to ATK—just the lack of consideration.⁹⁰ However, as a consultation and accommodation case it may be significant in that *lack of consideration of ATK may be dishonourable on its own*.

While Board Rules can provide guidance as to ATK reception, in their absence recourse to the court's administrative law concepts such as natural justice, proper reasons, etc., may be the only mechanisms to advance ATK consideration in the courts under ATK legislation.

ATK AND THE CROWN'S DUTY TO CONSULT AND ACCOMMODATE

The Crown's duty to consult and accommodate with Aboriginal Peoples is well established as part of Canadian law that governs decisions regarding matters that affect Aboriginal rights, lands, and interests.⁹¹ The leading authorities include *Haida Nation v. British Columbia (Minister of Forests)*,⁹² *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,⁹³ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*,⁹⁴ and *Beckman v. Little Salmon/Carmacks First Nation*.⁹⁵ Together these cases make it clear that governments owe a duty to consult and accommodate Aboriginal Peoples' interests prior to making any government decisions that would impact them. There are Aboriginal consultation policy instruments in every Canadian jurisdiction that provide direction to governments as to the existence of that duty, the acceptable delegation of procedural aspects to project proponents, and

standards of consultation and accommodation with Aboriginal Peoples in order to satisfy this duty.⁹⁶

In the process of consultation with governments under this doctrine, Aboriginal Peoples will deploy ATK to persuade governments about the seriousness of a claim and the impact of the proposed decision. If Aboriginal Peoples are dissatisfied by the actions of government, recourse may be had to the courts. In those proceedings, analogies from administrative law are applicable and the standard of review would focus on the process:

Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable.⁹⁷

As noted in the *Alberta First Nations Consultation & Accommodation Handbook* (2014) (*Handbook*), litigation of this type is expensive and potentially futile, such that Aboriginal Peoples may be unwilling to engage in court proceedings.⁹⁸ A good example of ATK playing a role in consultation litigation is *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*.⁹⁹ In that case a permit for coal mining exploration was quashed when it interfered with critical habitat of caribou that the West Moberly First Nation had, in accordance with its ATK, suspended hunting.¹⁰⁰

A further barrier to court consideration of ATK arises through the operation of the environmental assessment process under *CEAA*, which is considered by the federal government to be the “best process” to satisfy the Crown's duty.¹⁰¹ *CEAA* defines environmental impact in section 5(1)(a) and (b) as including the usual impacts on the environment but goes on in section 5(1)(c) to say:

- (c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes, or

- (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.¹⁰²

This definition of environmental impact allows for the permissive consideration of ATK in section 19(3) of *CEAA*.¹⁰³ Projects such as oil sands mines, mines, hydropower dams, interprovincial pipelines, etc., that engage federal jurisdiction¹⁰⁴ will be subject to *CEAA*. On major projects, *CEAA* provides for Joint Review Panels (JRPs) negotiated with provinces to reduce potential regulatory overlap. These JRPs will hold hearings and make decisions as to the environmental impact of a designated project and project conditions and submit their recommendation to the government, with cabinet making the final decision.

The mandates of JRPs are open for public comment, but the template for Aboriginal issues appears to be fixed.¹⁰⁵ This mandate is described in *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*¹⁰⁶ as the JRP providing Aboriginal Peoples with the opportunity to present their perspective on the following matters:

- Their traditional ecological knowledge about environmental effects of the Project;
- The effect that environmental change caused by the Project may have on the current use of lands and resources for traditional purposes;
- The nature and scope of their ... asserted Aboriginal rights or treaty rights, the potential impacts of the Crown's activities in relation to the Project on those rights and the appropriate measures to avoid or mitigate those impacts.¹⁰⁷

However, the JRP's mandate excluded any determinations or interpretations as to:

- the validity or strength of any Aboriginal group's claims to Aboriginal rights or title;
- the scope or nature of the Crown's duty to consult Aboriginal persons or groups;
- whether the provincial or federal government had satisfied that duty; and
- any interpretation of the [relevant] Land Claims Agreement¹⁰⁸

The court characterized this, saying, “In other words, the Joint Review Panel could not determine the strength of the Innu of Ekuanitshit’s claim to Aboriginal rights or the scope of the duty to consult but was to consider the Project’s impacts on their claimed rights.”¹⁰⁹ An argument can be made that despite limited mandate, JRPs are *effectively* ruling on the existence and strength of Aboriginal rights or title in balancing the “benefits vs the costs.”

In any case, JRPs are ruling on ATK, and the court in *Ekuanitshit* deferred to the JRP’s determinations.¹¹⁰ The use of JRP panels to conduct Crown consultation and accommodation further distances court consideration of ATK, as courts are restricted by administrative doctrines of jurisdictional legality and reasonability of outcomes.

ABORIGINAL RIGHTS, ABORIGINAL TITLE, AND CRIMINAL DEFENCE OF “WILDLIFE CHARGES”

In civil litigation to determine constitutional Aboriginal rights or Aboriginal title, ATK plays a significant role in courts’ findings—by their very definition.

In the leading case of *R v. Van der Peet*,¹¹¹ Justice Lamer for the SCC said that Aboriginal rights are activities that “must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,”¹¹² being practised in a current form that relates to the original practice prior to European contact.¹¹³ The pre-contact way of life is ATK in the broadest sense.

In *Delgamuukw*, Aboriginal title was described by Justice Lamer, for the majority, as a unique (*sui generis*) fusion of common law and Aboriginal legal systems.¹¹⁴ ATK plays a role in any finding of Aboriginal title by evidencing the necessary exclusive occupation¹¹⁵ and the qualification as to use representing Aboriginal Peoples’ attachment to land.¹¹⁶

As noted in its trial decision,¹¹⁷ ATK was deployed in the first declaration of Aboriginal title in the recent SCC case *Tsilhqot’in Nation v. British Columbia*.¹¹⁸

Much of the modern Aboriginal constitutional jurisprudence has come from the defending Aboriginal Peoples from “wildlife charges.”¹¹⁹ The first decision of the SCC interpreting Aboriginal rights, *R v. Sparrow*,¹²⁰ had its origins in criminal charges under the *Fisheries Act*, as did the *Van Der Peet* decision and *R v. Adams*.¹²¹ ATK played a role in those cases—by establishing Aboriginal rights to hunt and fish. As Aboriginal law doctrines have developed, most wildlife statutes have acknowledged exemptions for Aboriginal Peoples’ rights,¹²² but ATK still plays a role in defining Aboriginal rights.

Table 45.1

<i>Legislation</i>	<i>ATK Preamble/ Purpose</i>	<i>Formulation</i>	<i>Use</i>	<i>Mandatory</i>
<i>Canadian Environmental Protection Act, 1999, SC 1999, c 33</i>	Preamble Duty 2(1)(i)	traditional aboriginal knowledge	s 2(1)(i) apply knowledge, including traditional aboriginal knowledge, science and technology, to identify and resolve environmental problems; 247 alternative qualification for Review Officers	may
<i>Canadian Environmental Assessment Act, 2012, SC 2012, c 19</i>	Purpose 4(1)(d)	community knowledge and Aboriginal traditional knowledge	19(3) EA may take into consideration	may
<i>First Nations Oil and Gas Environmental Assessment Regulations, SOR/2007-272</i>		community knowledge and aboriginal traditional knowledge	11(2) environmental assessment may also consider	may
<i>Oceans Act, SC 1996, c 31</i>		traditional ecological knowledge	s 42(j) Minister may conduct studies to obtain	
<i>Canada National Marine Conservation Areas Act, SC 2002, c 18</i>	Preamble	traditional ecological knowledge	8(1)(3) may conduct studies	may
<i>Nuclear Fuel Waste Act, SC 2002, c 23</i>		traditional aboriginal knowledge	s 8(2)(b.1) members of advisory council shall have expertise in	shall
<i>Species at Risk Act, SC 2002, c 29</i>	Preamble	scientific, community and aboriginal traditional knowledge	10(c) Stewardship Plan 15(2) COSEWIC must classify best information 16(2) COSEWIC qualification 18(3) Aboriginal Traditional Knowledge Subcommittee	shall
<i>Endangered Species Act, 2007, SO 2007, c 6</i>	Purpose 1.1	scientific information, including information obtained from community knowledge and aboriginal traditional knowledge	3(4)(b) COSSARO qualification 5(3) COSSARO shall classify species best 48(e) COSSARO subcommittee	shall
<i>Species at Risk Act, SNB 2012, c 6</i>		scientific knowledge, community knowledge and aboriginal traditional knowledge	10(1)(b) COSSAR qualification 15(2) COSSAR shall classify species best	shall

Table 45.1 | continued

<i>Legislation</i>	<i>ATK Preamble/ Purpose</i>	<i>Formulation</i>	<i>Use</i>	<i>Mandatory</i>
<i>Endangered Species Act, SNS 1998, c 11</i>		scientific information and traditional knowledge as documented in peer reviewed status reports	10(2) Group to make decision on best information	shall
<i>Species at Risk (NWT) Act, SNWT 2009, c 16</i>	Preamble	Aboriginal traditional knowledge, community knowledge and scientific knowledge	17(2) SARC make decision best information 18(2) SARC qualification 30(4) Species status reports	shall
<i>Endangered Species Act, SNL 2001, c E-10.1, s 6(2)</i>		scientific knowledge, traditional ecological and local ecological knowledge	6(2) SSAC make decision best information 12(1) SSAC shall consult with info holders	shall
<i>Environmental Protection and Enhancement Act, RSA 2000, c E-12</i>		traditional ecological knowledge	s 15.3(1) Indigenous Wisdom Panel to provide advice to Chief Scientist on integration	may
<i>The East Side Traditional Lands Planning and Special Protected Areas Act, CCSM c E3</i>		traditional knowledge	10(4) planning council may apply traditional knowledge	may
<i>Far North Act, 2010, SO 2010, c 18</i>		First Nations traditional knowledge	6 First Nations may contribute [for] land use planning	may
<i>Great Lakes Protection Act, 2015, SO 2015, c 24</i>	Purpose 1(2)5	traditional ecological knowledge	28(1) First Nations and Métis communities ... may offer 28(2) Minister shall take into account for strategy	shall
<i>Climate Change Mitigation and Low-carbon Economy Act, SO 2016, c 7,</i>	Preamble	traditional ecological knowledge	7(2) if First Nations and Métis communities offer traditional ecological knowledge the Minister shall take into consideration with respect to the [Climate change] action plan	shall

Table 45.1 | continued

<i>Legislation</i>	<i>ATK Preamble/ Purpose</i>	<i>Formulation</i>	<i>Use</i>	<i>Mandatory</i>
IMPLEMENTING LEGISLATION: NUNAVUT AGREEMENT				
<i>Wildlife Act, SNU 2003, c 26</i>		s 8 has extensive Inuit ATK definitions		shall
<i>Nunavut Waters and Nunavut Surface Rights Tribunal Act, SC 2002, c 10</i>		Inuit culture, customs and knowledge	119 due regard and weight shall be given to Inuit culture, customs and knowledge	shall
<i>Nunavut Planning and Project Assessment Act, SC 2013, c 14,</i>		traditional knowledge or community knowledge	103(3) must take into account any traditional knowledge or community knowledge provided to it.	shall
IMPLEMENTING LEGISLATION: GWICH'IN, SAHTU DENE AND METIS, INUVIALUIT, DÉLINE AND TÁÍCHÔ AGREEMENTS				
<i>Wildlife Act, SNWT 2014, c 31</i>	Principles 2(1)(d) & (e)	traditional, scientific and local knowledge 2 (2) "local knowledge" includes a person's knowledge about wildlife or habitat acquired through experience or observation;	2(1)(e) 168 (1)(b) provides ATK confidentiality	shall
<i>Mackenzie Valley Resource Management Act, SC 1998, c 25</i>		traditional knowledge and scientific information	60.1(b) Land and Water boards shall consider 115.1 Environmental Impact Board shall consider 146 Cumulative impact monitor	shall
<i>Surface Rights Board Act, SNWT 2014, c 17</i>		Aboriginal traditional knowledge	11(2) alternate Board qualification, s 32 (b) hearing shall take into account any material that it considers relevant, including Aboriginal traditional knowledge s 90 (c) rules on confidentiality decisions on	shall

Table 45.1 | continued

<i>Legislation</i>	<i>ATK Preamble/ Purpose</i>	<i>Formulation</i>	<i>Use</i>	<i>Mandatory</i>
IMPLEMENTING LEGISLATION: YUKON UMBRELLA AGREEMENT				
<i>Forest Resources Act, SY 2008, c 15</i>	Purpose 6(2) Forest plan comply with	traditional knowledge of First Nations	1(1) "forest resources management" is the practical application of scientific, biological, social, cultural and economic information and traditional knowledge of First Nations	shall
<i>Parks and Land Certainty Act, RSY 2002, c 165</i>	Preamble	traditional knowledge, local knowledge and scientific information	Preamble "(e) to establish protected areas based on available traditional knowledge, local knowledge and scientific information"	shall
<i>Environment Act, RSY 2002, c 76</i>		traditional knowledge of Yukon First Nations	48(1) (b) shall incorporate into Status report 51(2) Educational materials 53 partnership with Yukon First Nations using knowledge	shall
<i>Yukon Environmental and Socio-economic Assessment Act, SC 2003, c 7</i>	Purpose 5(2)(g)	Defined 2(1) traditional knowledge means the accumulated body of knowledge, observations and understandings about the environment, and about the relationship of living beings with one another and the environment, that is rooted in the traditional way of life of First Nations.	Yukon Environmental and Socio-economic Assessment Board (Board) 33 Board shall make rules (a) integration of scientific information, traditional knowledge (b) determination of traditional knowledge confidentiality (c) the handling of information to prevent its disclosure 39 Board shall give full and fair consideration to scientific information, traditional knowledge and other information	shall

Table 45.1 | continued

Legislation	ATK Preamble/ Purpose	Formulation	Use	Mandatory
<i>Tsawwassen First Nation Final Agreement Act</i> , SBC 2007, c 39			Schedule - Chapter 10 Wildlife Management Plans para 43 Provincial Minister will take into account Tsawwassen First Nation ATK	shall
<i>Maa-nulth First Nations Final Agreement Act</i> , SBC 2007, c 43			Schedule - Chapter 23, para 23.10.1 "consult with applicable Maa-nulth [FN] ATK."	shall
<i>Migratory Birds Convention Act</i> , 1994, SC 1994	Article 11 amended to say "long-term conservation of migratory birds ... shall be managed in accord with the following conservation principles: ... Means to pursue these principles may include, but are not limited to: ... Use of aboriginal and indigenous knowledge, institutions and practices"			

NOTES

- In this chapter this term refers to First Nations, Inuit, and Métis Peoples.
- Aboriginal Traditional Knowledge and Intellectual Property Rights (2011: AFCN, Ottawa) at 3, online: <http://www.afn.ca/uploads/files/env/atk_and_ip_considerations.pdf> (accessed 14 November 2017). This has been implemented in a Resolution ATK & Intellectual Property Rights (2011), online: <<http://www.afn.ca/2011/06/15/atk-intellectual-property-rights/>> (accessed 14 November 2017).
- Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*] at para 84 ("adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts"); see also para 87.
- Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, Executive Summary: "Evidence was tendered in the fields of archeology, anthropology, history, cartography, hydrology, wildlife ecology, ethnocology, ethnobotany, biology, linguistics, forestry and forest ecology."
- For an elaboration on the difficulties these experts face, see Arthur Ray, *Telling It to the Judge: Taking Native History to Court* (Montreal: McGill-Queen's University Press: 2011) ch 8 at 145 to 159.
- Ibid* at 28.
- Reference Map (2016), online: <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-AI/STAGING/texte-text/mprm_pdf_modrn-treaty_1383144351646_eng.pdf>.
- Search terms *indigenous traditional knowledge, Aboriginal traditional knowledge, traditional knowledge, community knowledge, and local knowledge* conducted on 19 November 2017. We have limited this discussion to the environment, but note that this search flagged legislation relating to *human* health, social work, and customary election codes under the *Indian Act*, RSC 1985, c I-5.
- Wildlife Act*, SNU 2003, c 26, s 8, has extensive Inuit ATK definitions. Per s 5(2) and (3), this implementing legislation

is subject to the *Agreement between The Inuit of The Nunavut Settlement Area and Her Majesty The Queen in Right of Canada* (1993) signed 25 May 1993, online: <<http://publications.gc.ca/site/eng/9.644783/publication.html>> with a list of amendments at <<https://www.aadnc-aandc.gc.ca/eng/1100100030970/110010003097>> [Nunavut Agreement]. The Nunavut Agreement created the Territory of Nunavut, prevails over all legislation in Nunavut, and continued the Nunavut Wildlife Management Board and Nunavut Species at Risk Committee.

- 10 *Yukon Environmental and Socio-economic Assessment Act*, SC 2003, c 7, s 2(1). This implementing legislation, and all other Yukon legislation in this chapter, is subject to and interpreted in accordance with the *Umbrella Final Agreement Between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (1993), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100030607/1100100030608>> [Yukon Umbrella Agreement] under s 4. The Yukon Umbrella Agreement forms the basis for standardized Land Claims Settlement Agreements. See *Traditional Territories of Yukon First Nation*, online: <http://www.env.gov.yk.ca/maps/media/uploads/pdf-maps/Traditional_Territories_ENV.020.02.pdf>.
- 11 *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, Preamble, and Duty of the Government of Canada in s 2(i)(i) to “apply knowledge, including traditional aboriginal knowledge, science and technology, to identify and resolve environmental problems”; and s. 247 (alternative qualification for Review Officers that consider appeals from persons under an environmental order); *Environment Act*, RSY 2002, c 76, s 47 (tri-annual State of the Environment Report intended to establish early warning, baseline determinations, and ongoing accountability of the ministry), and under s 48(1)(b) shall “incorporate the traditional knowledge of Yukon First Nation members as it relates

to the environment”; under s 51(2) educational materials should include the same; and s 53 speaks of partnership with First Nations, including using their knowledge and experience; *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 15.3(1) (Indigenous Wisdom Panel to provide advice to Alberta’s Chief Scientist on incorporating “traditional ecological knowledge” into the science program); *Great Lakes Protection Act, 2015*, SO 2015, c 24, s 1(2)¶5 (“promoting the consideration of traditional ecological knowledge”) and ss 28(1) (First Nations and Métis communities that have a historic relationship with the Great Lakes–St. Lawrence River Basin may offer their traditional ecological knowledge), 28(2) (minister shall take that into account for strategy); *Climate Change Mitigation and Low-carbon Economy Act*, SO 2016, c 7, Preamble and s 7(2) (if First Nations and Métis communities “offers its traditional ecological knowledge to the Minister, the Minister shall take into consideration the role of traditional ecological knowledge with respect to the [Climate change] action plan”).

- 12 *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 [CEAA]; s 19(3) (may take into account “community knowledge and Aboriginal traditional knowledge” in conducting environmental assessments), as well as *First Nations Oil and Gas Environmental Assessment Regulations*, SOR/2007-272, s 11(2); notably, s 42(6)(b) protects “information whose disclosure would result in the public becoming aware of aboriginal traditional knowledge that a first nation has always treated in a confidential manner”; *Yukon Environmental and Socio-economic Assessment Act*, *supra* note 10, s 2(1) (definition), s 33 (integration and handling), and s 39 (“shall give full and fair consideration to scientific information, traditional knowledge and other information”).
- 13 *Oceans Act*, SC 1996, c 31, s 42(j) (Minister may “conduct studies to obtain traditional ecological knowledge for the purpose

- of understanding oceans and their living resources and ecosystems”)
- 14 *Parks and Land Certainty Act*, RSY 2002, c 165, Preamble: “(e) to establish protected areas based on available traditional knowledge, local knowledge and scientific information”; and *Canada National Marine Conservation Areas Act*, SC 2002, c 18, Preamble and s 8(3) (the government may establish facilities to “conduct scientific research ... and carry out studies based on traditional ecological knowledge, including traditional aboriginal ecological knowledge, in relation to marine conservation areas”).
 - 15 *Wildlife Act*, SNU 2003, *supra* note 9; *Wildlife Act*, SNWT 2014, c 31; s 2(1)(d) (traditional Aboriginal values and practices in relation to harvesting and conservation of wildlife are to be recognized and valued); (e) (best available information, including traditional, scientific and local knowledge to be used is to be used in the conservation and management of wildlife and habitat); s 2(2) (in para (1) (e), “local knowledge” includes a person’s knowledge about wildlife or habitat acquired through experience or observation); s 168(1)(b) (if the information is traditional knowledge and an Aboriginal organization requests that it not be disclosed). The Northwest Territories have entered into the Gwich’in, Sahtu Dene and Metis, Inuvialuit, Déline, and Tăichô Agreements (online: <<https://www.aadnc-aandc.gc.ca/eng/1100100030598/1100100030599>>) that govern in the case of conflicts.
 - 16 *Forest Resources Act*, SY 2008, c 15, s 1(1): “forest resources management” means the practical application of scientific, biological, social, cultural, and economic information and traditional knowledge of First Nations to the management of forests; this is subject to the Yukon Umbrella Agreement.
 - 17 *Species at Risk Act*, SC 2002, c 29, Preamble; s. 10.2(c) (Stewardship Action Plan must include “methods for sharing information about species at risk, including community and aboriginal traditional knowledge, that respect, preserve and maintain knowledge and promote their wider application with the approval of the holders of such knowledge, with other governments and persons”); A Committee on the Status of Endangered Wildlife in Canada (COSEWIC) is established in s 14, and members can include holders of “aboriginal traditional knowledge of the conservation of wildlife species.” Under s 15(2), COSEWIC must operate on the “best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge.” COSEWIC must establish an Aboriginal Traditional Knowledge subcommittee in s 18.
 - Provinces have similarly structured Acts: *Endangered Species Act*, 2007, SO 2007, c 6; *Species at Risk Act*, SNB 2012, c 6, s 10(1)(b) (alternate qualification for Committee); ss 15(2), 18(2)(b) (Aboriginal traditional knowledge of the conservation of wildlife species); *Endangered Species Act*, SNS 1998, c 11 (where species list changes based on “scientific information and traditional knowledge as documented in peer reviewed status reports”); *Species at Risk (NWT) Act*, SNWT 2009, c 16, s 17(2) (“[Committee] shall carry out its functions on the basis of the best available information, including Aboriginal traditional knowledge, community knowledge and scientific knowledge”); *Endangered Species Act*, SNL 2001, c E-10.1, s 6(2) (“[Committee] shall base its decisions on the best scientific knowledge available to it and on traditional ecological and local ecological knowledge about a species”).
 - 18 *Migratory Birds Convention Act, 1994*, SC 1994, c 22, amending the Migratory Bird Treaty (1918) to provide in art II that conservation principals include “aboriginal and indigenous knowledge, institutions and practices.”
 - 19 *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, SC 2002, c 10, s 119 (“due regard and weight shall be given to

- Inuit culture, customs and knowledge”); *Mackenzie Valley Resource Management Act*, SC 1998, c 25, ss 60.1, 115.1, and 146 (cumulative impact, joint-management Land and Water Boards shall consider Aboriginal traditional knowledge); *Surface Rights Board Act*, SNWT 2014, c 17, s 11(2) (alternate Board Membership qualification), s 32(b) (hearing shall take into account any relevant Aboriginal traditional knowledge), s 90(c) (rules on confidentiality decisions on Aboriginal traditional knowledge).
- 20 *Far North Act, 2010*, SO 2010, c 18, s 6 (First Nations “may contribute their traditional knowledge and perspectives on protection and conservation for the purposes of land use planning under this Act”); *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 103(3) (“must take into account any traditional knowledge or community knowledge provided to it”); and *The East Side Traditional Lands Planning and Special Protected Areas Act*, CCSM c E3, s 10(4) (“a planning council may apply traditional knowledge in relation to” plans in areas where First Nations traditionally used lands).
- 21 *Nuclear Fuel Waste Act*, SC 2002, c 23, s 8(2)(b.1) (members of advisory council “reflects expertise in traditional aboriginal knowledge”).
- 22 *Tsawwassen First Nation Final Agreement Act*, SBC 2007, c 39, Sched, c 10, cl 43, where the provincial minister in approving Wildlife Harvest Plans will take into account scientific and Aboriginal traditional knowledge of “Wildlife populations, numbers, health, distribution and methods for managing Wildlife.” See also CQLR, c M-35.1.2, r 1 for Quebec’s *New Relationship with the Crees of Québec* (2014).
- 23 See *supra* note 11, *Great Lakes Protection Act, 2015*, and *Climate Change Mitigation and Low-carbon Economy Act* (2016).
- 24 *Supra* note 12: *CEEA*, s 19(3); *First Nations Oil and Gas Environmental Assessment Regulations*, s 11(2); *supra* note 17: *Species at Risk Act*, SNB 2012, ss 15(2), 18(2); *Endangered Species Act*, 2007, SO 2007, ss 1, 5(3), and 48(f); *Species at Risk Act*, SC 2002, Preamble, ss 2(1) status report, 15(2), and 16(2); *Species at Risk (NWT) Act*, s 17(2); *supra* note 20: *Nunavut Planning and Project Assessment Act*, s 103(3).
- 25 *Wildlife Act NWT*, *supra* note 15.
- 26 Ontario *Endangered Species Act*, *supra* note 17 at s 2 (1).
- 27 *Constitution Act, 1982*, Sched B to the Canada Act 1982 (UK), 1982, c 11 [Constitution].
- 28 *Oceans Act* *supra* note 13. This may be a reference to the long history of non-Aboriginal fisheries.
- 29 *Canada National Marine Conservation Areas Act*, *supra* note 14. It is interesting that the maritime regimes speak of ecological knowledge as opposed to environmental knowledge. The recent Ontario strategy legislation, *Great Lakes Protection Act, 2015*, and *Climate Change Mitigation and Low-carbon Economy Act* (2016), does as well.
- 30 See *Environmental Protection and Enhancement Act*, *supra* note 11, s 15.3(1). See also *Yukon Environmental and Socio-economic Assessment Act*, *supra* note 10, s 33(a), where the Yukon Environmental and Socio-economic Assessment Board has the power to make rules respecting the integration of science and traditional information. Other board rules may call for this.
- 31 *Behn v Moulton Contracting Ltd*, [2013] 2 SCR 227, 2013 SCC 26 at para 33 [Behn].
- 32 This was part of the problem in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras 35–38. For an inadequate analogy consider the idea of a “favourite fishing hole” where the location is kept secret and only disclosed in confidence to other “proper” persons.
- 33 *Behn*, *supra* note 31 at para 37.
- 34 *Quebec (Attorney General) v Moses*, [2010] 1 SCR 557, 2010 SCC 17 [Moses].
- 35 *Interpretation Act*, RSC 1985, c. I-21. The *Interpretation Act*, RSNWT 1988, c I-8, s

- 11, and *Interpretation Act*, RSY 2002, c 125, s 8 are identical. Ontario's *Legislation Act, 2006*, SO 2006, c 21, Sched F, s 69 is similar.
- 36 *Moses supra* note 34 at para 101.
- 37 *Syncrude Canada Ltd v Canada (Attorney General)*, 2014 FC 776 at para 48, aff'd *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160; see also reference in 114957 *Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40 at paras 30–32 [*Spraytech*]. As to the polluter pays principle see *Imperial Oil Ltd v Quebec (Minister of the Environment)*, [2003] 2 SCR 624, 2003 SCC 58 at para 23.
- 38 *Moses supra* note 34 at para 101.
- 39 SNWT 2014, c 31.
- 40 *Supra* note 12, s 4. But see *Canada (Minister of the Environment) v Bennett Environmental Inc*, 2005 FCA 261 at para 63. See also Considering Aboriginal traditional knowledge in environmental assessments conducted under the *Canadian Environmental Assessment Act – Interim Principles*, online: <<https://ceaa-acee.gc.ca/default.asp?lang=En&n=4A795E76-1>> [*CEAA Interim Principles*].
- 41 *CEAA*, SC 1992, c 37, s 4. That purpose statement omitted ATK.
- 42 *Environmental Resource Centre v Canada (Minister of Environment)*, 2001 FCT 1423 at para 141.
- 43 *Union of Nova Scotia Indians v Canada (Attorney General)*, 1996 CanLII 11847, 122 FTR 81 at para 67 (cited to FTR) [*Union of Nova Scotia Indians*]. That standard was met in the case.
- 44 *Moses supra* note 34 at para 45.
- 45 *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (March 2011)* (Minister of the Department of Aboriginal Affairs and Northern Development Canada, Ottawa: 2011) at 25, online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf>.
- 46 *Supra* note 17, s 1.
- 47 *Wildlands League v Ontario (Natural Resources and Forestry)*, 2016 ONCA 741 at paras 16–17 and 91–99.
- 48 *Western Copper Corporation v Yukon Water Board*, 2011 YKSC 16 at paras 119–126.
- 49 *Supra* note 18, s 4.
- 50 *Animal Alliance of Canada v Canada (Attorney General)*, [1999] 4 FCR 72, 1999 CanLII 8154.
- 51 *Supra* note 17, s 6.
- 52 *Adam v Canada (Environment)*, 2011 FC 962 [*Adam*].
- 53 *Ibid* at para 65.
- 54 *Ibid* at paras 66–67.
- 55 *Ibid* at para 33.
- 56 *Supra* note 11, s 2, and in s 40 (purpose of environmental assessment process).
- 57 *Castle-Crown Wilderness Coalition v Alberta (Director of Regulatory Assurance Division, Alberta Environment)*, 2005 ABCA 283 at para 55.
- 58 *Court v Alberta Environmental Appeal Board*, 2003 ABQB 456 at para 76.
- 59 *Supra* note 14, s 4.
- 60 *Supra* note 17, s 2. There are no court cases from Nova Scotia considering this section. In *Western Canada Wilderness Committee v British Columbia (Ministry of Forests)*, 2003 BCCA 403, the court commented on Nova Scotia's inclusion of the precautionary principle. See also *Spraytech, supra* note 37.
- 61 *Supra* note 17, s 2.
- 62 *Supra* note 20, s 1.
- 63 *Supra* note 17, s 9.
- 64 *Supra* note 9, s 8.
- 65 *Supra* note 16, s 6(2).
- 66 *Great Lakes United v Canada (Minister of the Environment)*, [2010] 2 FCR 515, 2009 FC 408 at paras 199–202.
- 67 It has been estimated that some 75% of Canada's planned megaprojects (\$100M+) will be in the Treaty 8 area.
- 68 SARA, note 17, s 7.
- 69 *Ibid*. Quotation edit to expand acronym in the legislation.
- 70 *Ibid*, s 8.1. Acronym added by way of edit in quotation.

- 71 *Ibid*, s 10.1.
- 72 *Ibid*, s 10.2(c).
- 73 *Ibid*, s 2(1) (“status report” means a report, prepared in accordance with the requirements of regulations made under subsection 21(2), that contains a summary of the best available information on the status of a wildlife species, including scientific knowledge, community knowledge, and Aboriginal traditional knowledge).
- 74 *Ibid*, s 15(1).
- 75 *Ibid*, s 15(2). Emphasis added.
- 76 *Ibid*, s 15(1)(ii).
- 77 *Ibid*, s 16(2). Emphasis added.
- 78 *Ibid*, s 18(1). Emphasis added.
- 79 *Ibid*, s 18(3).
- 80 *Aboriginal traditional knowledge: process and protocols guidelines* (2010), online: <<https://www.canada.ca/en/environment-climate-change/services/committee-status-endangered-wildlife/aboriginal-traditional-knowledge.html>>.
- 81 See *supra* note 17.
- 82 *Tsawwassen First Nation Final Agreement Act*, SBC 2007, c 39, Sched, c 10, Wildlife Management Plans, para 43 (provincial minister will take into account Tsawwassen First Nation ATK); *Maa-nulth First Nations Final Agreement Act*, SBC 2007, c 43, Sched, c 23, para 23.10.1 (“consult with applicable Maa-nulth [FN] ATK”).
- 83 *White River First Nation v Yukon Government*, 2013 YKSC 66 [*White River*].
- 84 *Ibid*, required under YESAA, s 74(2): “A decision body considering a recommendation in respect of a project shall consult a first nation for which no final agreement is in effect if the project is to be located wholly or partly, or might have significant adverse environmental or socio-economic effects, in the first nation’s territory.”
- 85 *Ibid*, paraphrased from paras 1–3 and 44–53.
- 86 *Ibid* at para 112.
- 87 *Ibid*, paraphrased from paras 56–73.
- 88 *Liard First Nation v Yukon Government and Selwyn Chihong Mining Ltd*, 2011 YKSC 55 at paras 25–37 [*Liard*].
- 89 *White River*, *supra* note 83 at para 123. See at para 112: “While s. 74(2) is drafted somewhat narrowly in that respect, I rely on the *Haida Nation*, *Taku River Tlingit* and *Rio Tinto* cases to find that it nonetheless requires an exchange or dialogue that gives the First Nation some meaningful input into the decision-making process.”
- 90 *Ibid* at para 106; and regarding exchanging Draft Decision Documents, paras 109 and 122.
- 91 Canadian Institute of Resources Law, Occasional Paper #44 *Alberta First Nations Consultation & Accommodation Handbook* (2014) [*Handbook*], online: <<http://dspace.ucalgary.ca/jspui/bitstream/1880/50216/1/ConsultationHandbookOP44.pdf>>; see also Chris W Sanderson, QC, Keith Bergner & Michelle S Jones, “The Crown’s Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty” (2011–2012) 49 *Alta L Rev* 821.
- 92 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].
- 93 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].
- 94 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*].
- 95 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*].
- 96 *Handbook*, *supra* note 91. See generally Part 3 and Appendix 4A & 4B. YESAA is in effect a legislated framework for satisfying the Crown’s duty to consult and accommodate in the Yukon see: *Liard*, *supra* note 88 at 113 and *White River*, *supra* note 83 at 96–112
- 97 *Handbook*, *supra* note 91 at 1.3; the cited quote is from *Haida*, *supra* note 92 at para 60.
- 98 *Ibid*.
- 99 *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011

- BCCA 247, leave refused 2012 CanLII 8361 (SCC).
- 100 *Ibid* at para 26.
- 101 *Supra* note 44.
- 102 *CEAA*, *supra* note 12, s 5. Provincial Environmental Assessment legislation does not include similar provisions.
- 103 *Ibid*, s 19(3).
- 104 Often historically under the *Fisheries Act*, RSC 1985, c F-14, but this has changed.
- 105 Recent JRPs include the same language: Jackpine Mine Expansion Joint Review Panel Agreement, section 6; the Enbridge’s Northern Gateway Pipeline Joint Review Panel Agreement, section 8; and the JRP for the New Prosperity Mine Report (2013) included the original Terms of Reference limiting the consideration of validity or strength, online: <<https://ceaa-acee.gc.ca/050/documents/p63928/95631E.pdf>> at 258.
- 106 *Council of the Innu of Ekuanitshit v Canada (Attorney General)*, 2014 FCA 189; leave refused 2015 CanLII 10578 (SCC) [*Ekuanitshit*].
- 107 *Ibid* at para 93.
- 108 *Ibid* at para 97.
- 109 *Ibid* at para 98.
- 110 *Ibid* at paras 101–102. The decision to not contest the specific findings of the JRP was fatal in that case, but it may have been influenced by the lack of funding to conduct studies to advance proper ATK: see paras 114 to 118.
- 111 *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*]. The companion decisions in *R v NTC Smokehouse Ltd*, [1996] 2 SCR 672, 137 DLR (4th) 528, and *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 [*Gladstone*] were similar
- “harvesting” cases decided at the same time, but they all applied the *Van der Peet* test.
- 112 *Van der Peet*, *ibid* at para 46.
- 113 In *R v Sappier*; *R v Gray*, 2006 SCC 54, [2006] 2 SCR 686, the SCC dealt with some confusion that had arisen with the application of the *Van der Peet* test. As to the distinctive test, the enquiry into culture (at para 45) “is really an inquiry into the pre-contact way of life of a particular aboriginal community, including their means of survival, their socialization methods, their legal systems, and, potentially, their trading habits.”
- 114 *Delgamuukw*, *supra* note 3 at paras 110–112.
- 115 *Ibid* at para 143.
- 116 *Ibid* at para 117; also see paras 128 to 130.
- 117 *Supra* note 4.
- 118 *Tsilhqot’ in Nation v British Columbia*, 2014 SCC 44.
- 119 Every Species at Risk Act, Wildlife Act, or Fisheries Act proscribes some form of hunting or fishing. One can speculate that the lower evidentiary standard of reasonable doubt may be a factor in the framing of Aboriginal rights.
- 120 [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].
- 121 [1996] 3 SCR 101, 138 DLR (4th) 657 [*Adams*].
- 122 For example, *SARA*, s 3.