

# An Important Part of the Solution

A Twin River Consulting presentation  
made to the CEAA regarding the  
violations of Treaty and Aboriginal rights  
in Canada

The challenges for Aboriginal communities in Canada are for the most part not being addressed from the root but rather solutions often only address the symptoms. We at Twin River Consulting believe that to address the root problem the violations of Aboriginal and Treaty rights in Canada must be addressed directly by the Crowns through a process of consultation as indicated by several Supreme Court decisions. The fact remains that the Crowns have continued to ignore clear instructions from our courts to undertake proper consultation and compensate, reconcile and mitigate these violations. Until the causes of Aboriginal issues are resolved the challenges will continue to be re-created.

One of the potential opportunities to legislate this solution is in the amendment of the Canadian Environmental Assessment Act. In proposing solutions and approaches to amending the CEAA, Twin River Consulting (TRC) believes that there are two primary umbrella areas:

- 1) In Canadian Environmental Assessment, the use and abuse of Traditional Knowledge including Traditional Environmental Knowledge, Traditional Ecological Knowledge and Local Knowledge, and its relationship with traditional land use and Aboriginal rights, and
- 2) the treatment of impacts on Aboriginal rights under the Canadian Act, including specifically the importance, role and proper methodology for measuring cumulative impacts on Aboriginal rights and the role of longer term planning and monitoring.

If just these two areas of importance are properly addressed, it will initiate a process which will lead to healing of Aboriginal issues in Canada.

### **False Consultation: THE USE AND ABUSE OF TRADITIONAL KNOWLEDGE**

For many years now, Twin River Consulting has been asked to assist in gathering traditional knowledge for use in environmental assessments. But because of negative experiences, **we now recommend that our clients refuse to participate in any traditional knowledge processes initiated by any proponent of industrial projects or Government during an environmental assessment process.** The basic reason for this recommendation is that regardless of how potentially valuable the TEK may be, it is almost always taken out of context and used against the interests of the Aboriginal holders of the knowledge. Instead, I recommend that they conduct a rights based, comprehensive historical and current land use study (including traditional knowledge in context) which will provide the baseline information for cumulative impacts analysis and long term planning and monitoring relationships.

It is still important to address Traditional Knowledge here and discuss how it is perhaps one of the most misused and misunderstood concepts that regulators are attempting to use today. The effects of colonization have penetrated Aboriginal societies in such an overwhelming manner it is often difficult even to identify the characteristics of traditional thought. For discussion purposes, we will use a simplified categorization and refer to the two as: holistic Aboriginal versus western deconstructionism systems of knowledge. Ever since consultation became part of the regulatory process, consultants, legislators and others have attempted to separate Traditional Ecological or Environmental Knowledge (TEK) from the rest of Indigenous understandings.

**We should not try to separate TEK from the rest of the Indigenous culture, livelihood or systems. It is simple, TEK should not function out of context.**

There have been two primary motivations for the use of TK or TEK in modern environmental assessments. One of these is the earnest and honest attempt to obtain insights and information about environmental issues by sourcing the local Aboriginal knowledge acquired by those closest to the land or closest to the environment. This appears like a relatively innocuous and useful objective, but the effects of gathering such information is not innocent. Local Aboriginal knowledge comes from generations of participation in an ecosystem and its relationship with a people who consider themselves part of their surroundings. Any effort to extract “knowledge” from that world for purposes other than those sustainable purposes, is a misuse of the knowledge comparable to traditional knowledge piracy.

**The First Nations lived in camps and moved around with the seasons. Following an annual harvesting cycle, they frequented various locations where they knew the resources were. They returned to these locations to fish, hunt, trap, gather, and connect with family and friends.**



But, what happened to the ideal of reconciliation of the two cultures? Can't we share the knowledge and what better way to reconcile? The major problem with the reconciliation argument is that without a fulsome and complete reconciliation, the knowledge is separated from the rest of the Aboriginal culture, livelihood and society. One successful initiative, which has been working outside of the assessment process, is ECO Canada's BEAHR Environmental Monitor Program of National Occupational Standards Certification, which is designed to provide monitors within a longer-term planning structure after a proper assessment is established.<sup>1</sup> The BEAHR process is providing participants for the new generation environmental assessment process which will hopefully develop out of this inquiry as it adopts the complete cumulative impacts, planning and monitoring new generation assessment methodology.

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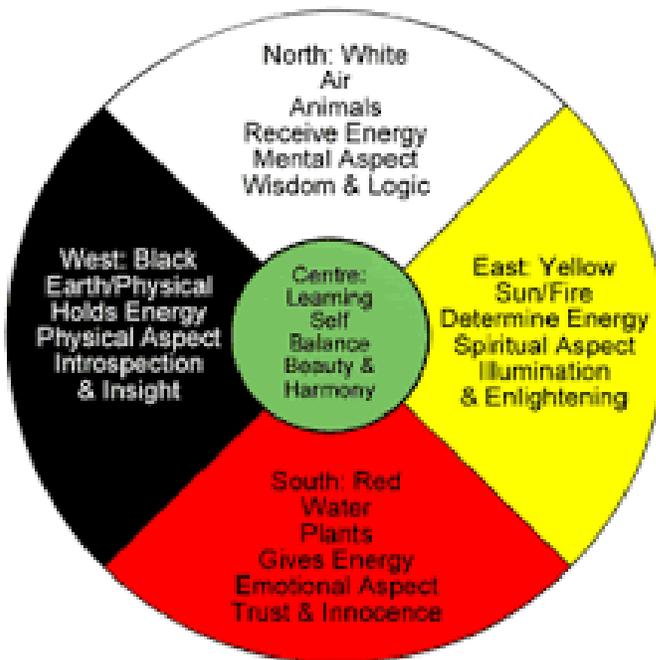
<sup>1</sup> I have worked with and supported the BEAHR process. This organization is primarily a certification organization which trains Aboriginal (primarily youth) in western science methodology and traditional practices. The goal is to optimize the wisdom of both systems.

Currently TEK assessments, rather than reconciling the two cultures, tend to take the western reductionist approach and isolate TEK as independent standalone data. This approach creates confusion and does not appropriately respect the source of the knowledge. There are significant differences between the traditional and western ways of knowing. Canadian laws, rather than dissecting Indigenous knowledge, need to foster a fuller understanding of the entire holistic livelihood and culture.

For example, one common ritual is to offer something back to the earth when harvesting. This is intended to help balance the energy but it also emphasizes the relationship between the harvester and the land. Before TEK or TK can be used, the main focus of the assessment must be to maintain the livelihood and relationship between the people and the lands.

The second and most unfortunate motivation behind gathering TEK or TK is because it is required by the regulatory agency. This requirement results in companies *sampling* Elders by paying one-time honourariums to get Elders to *share* so-called TK or TEK. Unfortunately, the most positive result of this process is the potential preservation of an endangered species while the rest of the traditional Aboriginal culture and livelihood is destroyed.

**An Aboriginal Medicine Wheel. The underlying web of meaning to Medicine Wheels is the importance of appreciating and respecting the ongoing interconnectedness and interrelatedness of all things.**



The overarching problem facing reconciliation and proper legislation is that **currently, Indigenous ways of knowing or Indigenous paradigms are not accepted as equivalent or as scientifically valid as the western science paradigm. This is a challenge faced by the BEAHR program and is not likely to be addressed quickly in mainstream Canadian settler society. But it will benefit both cultures to accept this reconciliation challenge.**

Indigenous societies view their people as an integral part of the environment while in western thought, prevalent in settler society, people are thought of as separate from the environment and nature is to be conquered or tamed for the use of 'civilization'. Although western

attitudes are slowly changing, these types of basic differences in world views underpin misunderstandings about our environment and shape different expectations of environmental assessment.

These challenges were faced by the communities in the Wood Buffalo Region with the proliferation of oil sands plants. The **Cumulative Environmental Management Association (CEMA)** was created through cooperation of First Nations and Métis, industry and governments to address the difficult issues of cumulative effects and the issue of the proper use of TEK. Over 10 years ago, TRC was asked to assist the Chairmen of the CEMA TEK Working Group, Elder Pat Marcel and Jumbo Fraser, Métis representative, to assist in recommending an equal structure to the group so that Aboriginal people would have effective control over the way that TEK was interpreted and used in the system. The resulting structure helped CEMA utilize TEK and educate the community about the nature of TEK and its proper use within a traditional Aboriginal livelihood. Due to recent cuts in expenditures CEMA funding has been terminated, however, the cumulative impacts assessment methodology has not been fully implemented by the longer term planning organizations.

### **Our Recommendation**

**The language of the Canadian Environmental Assessment Act should be philosophically consistent with the basic Aboriginal paradigm of living within our environment instead of separate from it.**

This I believe to be the underlying basis of the new generation of environmental assessment which will be discussed in the context of cumulative impacts and planning.

### **ABORIGINAL KNOWLEDGE SYSTEMS**

**The First Nations smudge is a First Nations ceremony that burns various medicine plants to make a cleansing smoke, used to connect with the spiritual world for balance and healing the mind, body and spirit.**



Our languages mirror the concepts of different world views or paradigms. Many Native languages are verb, action or process based while English, for example, is noun or object based. This shapes the fundamental approach to knowledge. Dr. Leroy Little Bear, commented that in English one would say “it is raining” while in Blackfoot they would say “raining” which is a process rather than an event.

Indigenous knowledge philosophers like Dr. Leroy Little Bear have brought some balance to this discussion by showing where western science is weak or contradictory such as in theoretical physics, but that area is where the traditional knowledge paradigm is strong and useful.

Traditional Knowledge is not challenged by curved space or a relationship between time, space and the speed of light. Indigenous thought tends to be based on relationships and whole or complete

systems, whereas western thought is based upon reductionism or analysis of separate ‘things’ and logical or numeric relations between those things. Dr. Little Bear states that the relationship between matter and

spirit are common in Indigenous thought and so Indigenous ways of knowing have much to offer understandings of the *Higgs Particle*, for example, or the success of the *Placebo Effect*. These differences in approach dictate the methods used in assessing the environment and are reflected in the type of resulting legislation.

Without going into complex details of theoretical physics, one interesting result of Dr. Little Bear's knowledge comparison was to show that while western thought conceives of the concept of cumulative knowledge, Native thought (he speaks specifically from a Blackfoot perspective) thinks of the same idea as renewal – emphasizing the relationship implications of the entire sustainable system, rather than the quantity or measurement of facts.

So contextual are the two ways of knowing and so often are they misunderstood that it has pushed some people into claiming that Traditional Knowledge can only be understood by Indigenous peoples. But, Dr. Little Bear comments that it was not so long ago, that Europe was filled with ancestors who followed similar ways of Traditional Knowledge. It is acknowledged that Indigenous knowledge has something special to offer society in our desire to understand the environment. So how can the knowledge be explained; how can it be used? When and how is it appropriate to integrate Traditional Knowledge into a regulatory or legislative process?

### **Recommendation**

Perhaps the most important contribution comes from the most basic approach. **If Traditional Knowledge is to be used, environmental assessment must be approached in a holistic rather than a reductionist manner.**

So first we must think of how we can live *within* the environment rather than how to tame it to our uses. We must think of the entire holistic system as one.

However, practically speaking, our legislative process is spawned from western legal traditions which do not lend themselves to the incorporation of new paradigms which contradict individual rights and conventional private property ownership. This is why respecting **Aboriginal and Treaty rights is so fundamental**, even a prerequisite, to discussions of reconciliation between two sometimes opposing systems.<sup>2</sup>

In this legal context, we can address one of the most flagrant exploitations of Traditional Knowledge; **Traditional Knowledge Piracy**. This is most practiced by those who steal Traditional Knowledge commonly about herbal remedies (drugs), patent them and market them as their own discoveries sometimes making millions of dollars from this stolen knowledge. This is a tragedy especially when the same Indigenous communities from which this knowledge is stolen are often plagued by western diseases

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<sup>2</sup> It is enlightening to understand that the British common law that gave rise to the understanding of Aboriginal rights comes from the relationship between the (1066) Norman rulers and the early “tribes” of what is now England. How did they reconcile these two old cultures? Through *voix-dire*. This means to see and to say or – **consultation**. The two cultures need to understand each other and through that reconciliation produce something new and better.

or diseases resulting from western cultural and environmental destruction and are in desperate need of drugs and remedies. Is there any wonder why First Nations Elders are suspicious of ‘collectors’ of Traditional Knowledge.

The Cree, Nakota and Saulteaux peoples view the forest as their pharmacy.<sup>3</sup> But herbal remedies are only one small portion of Traditional Knowledge which the people have been willing to **share**, like they agreed to **share** their lands under the numbered Treaties. The Carry the Kettle Nakota shared their knowledge of the prairie livelihood first with the Cree and then with the white traders. Then the bison were slaughtered. When the Elder tells the immigrant that the bison is a sacred animal – it meant nothing to those who did not understand the culture, it meant nothing to the US or Canadian governments who were obsessed with land ownership and settlement. When the bison were obliterated the entire livelihood of the Nakota people (Carry the Kettle) was obliterated. How can one **share** the land or knowledge if those who come to share destroy the resources and land so that you can no longer use what you so generously were willing to share? **How can Traditional Knowledge be shared if the ultimate goal is to use the knowledge to approve a project which will destroy the culture and livelihood?**

**One of many commercially manufactured ‘Lakota Products’ completely unrelated to First Nations Traditional Medicines.**



**Bison Bones at Saskatoon.Ca. 1890.**

**Bison hunting was sanctioned by the authorities in 1830 with the intent of undermining the Aboriginal traditional economic way of life, condemning them to starvation. The population of bison went from approx. 30,000,000 in 1830, to only a few hundred by 1885.**

**Buffalo Hide Stock Yard ca. 1870. Hides were shipped to the east and Europe while the animal carcasses were left to rot on the Plains.**



**1870 Pile of Buffalo Skulls being shipped for fertilizer.**



process? The answer is – ‘only within context’. Only within the context of the Indigenous relationship with the lands. Traditional

**lands and rights.**

<sup>3</sup> Willie Courtoreille, Elder, Mikisew Cree First Nation, 2005.



Knowledge could be shared when the Indigenous society is protected from exploitation, from obliteration and from infringements. **It can be shared under the sacred terms under which it was obtained in the first place**, within the culture of relationship, process and respect. This is why we say that the Treaties are sacred agreements.

Traditional Knowledge cannot be ‘collected’ to improve a pipeline’s environmental relationship unless the traditional livelihood, physical and spiritual aspects are also protected. Unfortunately, this is not the case when proponents conduct isolated discussions with groups of Elders to gather so-called ‘Traditional Knowledge’. It is nothing more than a fiction of consultation, created to pay meaningless homage to a dying society. It is much like TK piracy.<sup>4</sup>

However, TK can be used in traditional land use studies, regional planning studies like those begun in the NWT and Yukon in conjunction with the modern treaty processes and contemplated by BEAHR. These initiatives start from the beginning as holistic and inclusive plans dedicated to preserving and living within a natural environment.

**In order to fulfill the consultation responsibility of the Crown, traditional livelihoods must be understood and cannot be properly understood without an appreciation of the knowledge of the societies and how the people understand their relationship with the environment; with the lands. Traditional Knowledge cannot be separated from traditional land use and socio-economic - cultural studies.**

## **THE IMPORTANCE OF ENVIRONMENTAL ASSESSMENT FOR CANADA**

In 1970 Joni Mitchell sang, “*don’t it always seem to go, that you don’t know what you’ve got ‘til it’s gone? Paved paradise, put up a parking lot.*”<sup>5</sup> Among other things, this great Canadian song writer was expressing her shock at what was happening with the Canadian environment. Canadian politicians, civil servants and those contributing to proposed changes in Canadian environmental legislation must be

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<sup>4</sup> When Carry the Kettle and other First Nations participated in the National Energy Board hearings this year (2016) in a review process for the Energy East proposal, **they were told that in submitting their oral evidence the Elders could not present any “scientific” evidence. They were instructed that technical and scientific evidence would be received in another venue. This was an incredulous insult not only to the Elders but to Aboriginal society in general.**

If this is the bias towards Elder’s testimony or Traditional Knowledge – why would the Elders bother to present any evidence at all? If the NEB is already so biased towards the nature of Elder’s evidence, perhaps appealing to the courts is their only possible resort? When First Nations cried out about this obvious bias they demanded the Board members go through cultural training to correct this bias. The Board, who was responsible for reviewing their own conduct in this instance, just ignored the complaint and ruled that they did not need such cultural training! However, when the Board had one meeting with a political lobbyist from Quebec, the entire Board removed themselves from the process. The disrespect for Traditional Knowledge and Aboriginal evidence in this case was disgusting. **Clearly the NEB Panel was not qualified to rule on their fitness to hear the evidence** and the structure of the Board process should be changed to permit challenges to the Board to be referred to third parties in such matters.

<sup>5</sup> Joni Mitchell, Big Yellow Taxi, 1970.

keenly aware of the essential Canadian values when it comes to environmental protection. This Canadian music icon reflects **essential Canadian values** in her hit tune written before the environmental movement became prominent.<sup>6</sup> Canadians, in particular, are more aware of the contrast between pristine northern and mountain lakes and forests and the devastation further south because of the environment in which we live. This understanding has thrust some Canadians into leadership in the environmental movement. Unfortunately, some of the dire predictions of the early environmentalists have become painfully apparent (climate change) and now the environmental assessment process is struggling to catch up to our increasingly accepted knowledge base.

Perhaps Joni Mitchell took some of her understandings from friend and fellow (originally) Saskatchewan singer/songwriter Buffy Sainte-Marie who wrote very important songs like *Now that the Buffalo's Gone*,

**Buffy Sainte-Marie. Born in 1941 on the Piapot Plains Cree First Nation Reserve in the Qu'Appelle Valley, Saskatchewan, Canada.**



in 1964. Buffy, also in her songs, asked that the history books would be re-written to tell the truth about the genocide inflicted upon her people. Today, fifty years later, Chief Elsie Jack, descendent of Chief Jack, friend and ally of Chief Piapot, has corrected the history book showing the horrendous loss of their traditional livelihood and the resulting genocide has been recorded in the

Traditional Land Use of Carry the Kettle First Nation. This historical TLU book is the initial portion of a full cumulative impact analysis which should be performed under future requirements of the Canadian Environmental Assessment Act.

Aboriginal Leader Harold Cardinal addressed a similar challenge in 1969 when he published *“The Unjust Society”* in response to the then Trudeau government’s assimilationist *“White Paper.”* It was Harold’s living testimony that Traditional Knowledge could be integrated and respected in the rest of Canadian society but first we had to lift the “buckskin curtain”, the ignorance separating Native and settler societies. The environmental ‘paradise’ of the Dr. Cardinal’s Cree heritage was threatened and Cardinal led the rebellion against assimilation into the rest of Canada.

**Environmental Assessment is the front line of protection for Canadian and Aboriginal environmental values**, but our efforts at effectively translating these values into legislation are lacking. This failure has hurt Canada. It has hurt our healthy environment and our international reputation which has harmed our economy and well-being.

In order to help address the issues of reflecting Canadian and Aboriginal environmental values in the assessment process, Jim Tanner of Twin River Consulting describes a few of his experiences and

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<sup>6</sup> For example, Greenpeace was just started in 1971 by some Canadian and American activities.

frustrations faced while working under the current Canadian Environmental Assessment Agency (CEAA) framework.

### *Aamjiwnaang First Nation*

In 2013, in Sarnia, at the Aamjiwnaang First Nation, I (Jim Tanner) was asked to do a study of the traditional land use of the First Nation and how that might be affected by the construction of Enbridge Line 9, under the CEAA process as supervised by the NEB. When I first arrived, I was surprised to see how close the reserve was to the refineries and oil processing and shipping operations and amazed at the number of refineries adjacent to the reserve.



I discovered that the concentration of chemical and refinery companies was higher than any other location in Canada and that there had been a history of higher levels of cancer, birth anomalies<sup>7</sup> and other diseases in the First Nation population. I also discovered that the people were reluctant to or simply refused to fish in the St. Clair River because of the contamination of the fishery.

But my job was not to test air or water quality but to look at the ability of the First Nation to exercise their right to their traditional livelihood. I had years of experience working in the Alberta Oil industry and I was dismayed at the number of flare stacks and industrial emissions in the area. My study reviewed the historical failure to deal with an electrical plant's PCBs and oil spills into local reserve ditches. Now there was more than one filthy ditch marked with "keep out" signs. Then, when I interviewed several Elders, many with either cancer or respiratory disease, I became even more concerned. My job was to attempt to report on the potential effects of Enbridge's Line 9 on the traditional livelihood of the First Nation. From what I could see the previous approvals of the 10 or 20 other industrial sites adjacent to the reserve had already destroyed the traditional land left after the agriculture and commercial development had taken up the bulk of the lands. **The Canadian Environmental Assessment Act had failed this community.**

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<sup>7</sup> Declining Sex Ratio in a First Nation Community, Constanze A. Mackenzie, Ada Lockridge and Margaret Keith *Environmental Health Perspectives*, Vol. 113, No. 10 (Oct., 2005), pp. 1295-1298, Published by: [The National Institute of Environmental Health Sciences](http://www.niehs.nih.gov/), Stable URL: <http://www.jstor.org/stable/3436091>

The Aamjiwnaang First Nation in Sarnia is sandwiched between two oil refineries, Suncor Energy in the foreground and Shell Canada at top.



However, to bring the situation closer to home, during my relatively short stay I thought I was getting sick with the flu or a cold because my throat was scratchy. Then when I left the community, my throat got better. I went back to finish the interviews – I got the sore throat again. I noticed the numerous gas flares in the refineries just across the road, which from my experience in the industry, were generally used for emergency purposes. They seemed to be flaring too often and the flare stacks were close to the reserve houses.

During recent studies, I have noticed that there have been significant cleanup efforts in the St. Clair River, air quality monitoring in the community and a more conscious effort attempting to address the effects of pollution on health. These cleanup efforts resulted **not from initiatives by the NEB or CEAA** under the Line 9 assessment process, but from other independent studies of health statistics and air quality reports.<sup>8</sup>

I had never seen a group of people forced to live immediately adjacent to such a large industrial complex. **Unlike other Canadians, First Nations people cannot just sell their property and move.** They are restricted by a system which was originally designed to protect them from unscrupulous land deals.<sup>9</sup> Not only are they restricted from moving, but the nature of their culture and livelihood was to live off the local environment so they, more than others, would be the recipients of the toxic local environment. Also, the land in the general area of southwest Ontario was rapidly taken up early in Canada's development,

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<sup>8</sup> Specifically there was an application for a judicial review of a decision by the Ontario Government to increase the capacity of a Suncor facility in the area. Further concerns have been raised by the local environmental associations which were started over 10 years ago.

<sup>9</sup> The *Proclamation of 1763* was at least partially a response to the unscrupulous land transactions where settlers were exploiting the differences in land tenure between cultures to obtain Native lands.

restricting the ability of the First Nations to exercise their rights - complicated further by the proximity of the US Border.<sup>10</sup>



How can an assessment of yet another development (Enbridge line 9) fit into the historical violations of the Aamjiwnaang people's human and Aboriginal rights? After most lands have been taken up, after waves of pollution have affected the people for generations, they have now instituted a consultation policy to vet new developments, to assess only current or incremental effects. Going forward then, how does the Canadian Environmental Assessment Act and other legislation protect this First Nation from the infringements it has suffered and what they have already lost? More to the point – how can a study of **current** traditional land use be relevant in this dire situation? It appears that the right to exercise their traditional livelihood may have already been rendered illusory, which brings up the issue of consent and other breaches of Aboriginal and Treaty rights.

### **Recommendation**

**The answer is that a full historical rights-based traditional land use study must be completed which shows how their lands, health and culture have been systematically destroyed by a thousand cuts.** Neither a cumulative impacts study nor a full traditional land use study was funded in the Enbridge Line 9 process. The CEAA did not require these because it was focused on **current** or remaining traditional activities.

Who would be responsible to fund such a cumulative study? Are these previous infringements the fault of the current proponent? No? Then, clearly **such an undertaking should be part of a comprehensive assessment supported by the Crown, including regional impacts, Aboriginal values and long-term environmental planning co-management.** Yes, it must be part of a new generation of assessments. Before further proposals can be approved for such a critically endangered society, this full new generation assessment must be completed and our legislation must demand it.

**No Canadian would question the Aamjiwnaang right to a healthy environment and Canada cannot allow further projects to be approved without dealing with the previous effects of those projects already approved and literally suffocating this community.**

### **Fort Chipewyan - Bile Duct Cancer**

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<sup>10</sup> Some reports concerning air quality stem from Koch Oil's facility close to Detroit. This is another argument for regional assessments which may involve international agreement or regulation.

I would also like to bring up the issue of bile duct and other cancers in Fort Chipewyan. I remember in around 2006 when Dr. John O'Connor revealed that there were unusually high levels of bile duct cancer showing up in this small community. It was also shown that this type of disease was caused by exposure to the types of hydrocarbon chemicals in crude oil and byproducts from oil sands processes. But instead of dealing with this terrible tragedy, an Alberta bureaucracy frightened by any bad publicity about the oil sands, attacked the messenger. Dr. O'Connor's job was challenged but later he was vindicated. But the government has still refused to perform the studies necessary to address this festering problem. Since it was discovered, more people have contracted and died from this terrible disease and more evidence of connections between oil sands and the sicknesses is being found.

**Oil Sands extraction projects along the now polluted Athabasca River which flows downstream to First Nations communities contaminating their local water sources.**



A 2014 study by the Alberta Government finally admitted the high rates of cancer were real but denied any connection with oil sands production. In desperation, the community appealed to academics like Dr. David Schindler of the University of Alberta whose group of scientists produced corroborating evidence of leakage from tailings' ponds. In addition, researchers from the University of Manitoba have found higher levels of similar contaminants in traditional foods in the area.

I was sitting on a panel as an expert witness for TLU/TEK during the review process on an oil sands proposal in Fort McMurray when beside me the geophysical expert on tailings pond seepage was grilled by the proponent's lawyer. To make a long story short, his testimony on chemical seepage into the Athabasca River (which flows directly through the Fort Chipewyan community) was discredited and the project was approved without this concern.

**This again shows the failure of the CEEA review process specifically where the proponent and the oil sands projects had unconstrained support from the existing Provincial Government and the health authorities. This situation confirms the comments from other submissions to the Expert Panel that the legislative structure does not protect the First Nations from close relationships between the regulator and the proponents. The EIA process is not sufficiently independent and does not consider Aboriginal values.**

Since then, the issue of dirty oil has become a huge issue and it became much more of a problem that it had to be because of the treatment of Dr. O'Connor and the government and industry cover-up and denials which have done nothing more than convince the world that oil sands oil is somehow dirtier than

other forms of oil production, dirtier than even coal. The dirty oil movement worldwide has successfully penalized Canada financially and politically for this shortsighted cover-up behavior.

### **Wood Buffalo Region - Development of Full Consultation**

Around 2005 the oil sands development was on the verge of becoming a world example of how to properly consult and reconcile with Aboriginal peoples and how to safely and efficiently produce a reluctant but important resource.

As the scale of oil sands development in the region increased, it became obvious that the individual benefits agreements; repeated cumulative effects assessments; and traditional land use planning would benefit from a regional approach. It was also clear that the federal and provincial governments were not contributing their share of the consultation efforts, putting at risk the consultation approval process for this important resource.

Due to the ground-breaking efforts of industry and Aboriginal peoples in the Wood Buffalo region and the tremendous international value of the Canadian oil sands deposits, the parties wanted to develop a world class example of the proper consultation and development of such a huge industrial project and they convinced the governments to step up to the plate.<sup>11</sup> The oil sands proponents admitted that they were about to create devastating effects to the Treaty and Aboriginal rights of the local Cree, Dené and Métis People and agreed to bring the governments to the table to negotiate. Research was done and a proposal was made to implement a consultation, cumulative effects, planning and co-management system combined with compensation and an attempt at reconciliation of the devastating environmental effects.

As a result of this cooperation the CEMA, the Cumulative Environmental Management Association was formed and data from the long-term oil sands planning organization shared development data while the First Nations shared TEK and traditional land use data. Combined cumulative effects assessments were made possible through this cooperation and a longer-term regional planning process was proposed in cooperation with provincial authorities.

Traditional land use studies also went through several transformations including:

- Comprehensive regional land use studies were done based on historical land use rather than localized studies oriented towards one individual project.
- Aboriginal values were emphasized including temporal relationships between different types of harvesting, for example, trapping and hunting together in winter or berry picking and hunting in the summer /fall.
- The values and functions of different family members and their roles in traditional activities were important, for example the role of the camp preparation, hide tanning and the use and preparation of meats and other foods.

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<sup>11</sup> This was initiated primarily by Chief Jim Boucher of the Fort McKay First Nation and a group of prominent oil sands company Presidents.

- The Aboriginal environmental standards required for medicine gathering were taken into consideration.
- The kill site method was eliminated and replaced with land use areas focused on Aboriginal value based activities.
- Traditional Knowledge became a part of the land use study.
- Livelihood models were assessed to allow assessment of hunting and gathering supply/demand tipping points which would be compatible with longer term habitat planning.

**AND THEN the Harper government began its reversals.**

Canada went from almost completing an agreement for one billion dollars in compensation for losses, Aboriginal environmental monitoring agreements, joint land management agreements, reclamation agreements and better health studies to penalizing the local medical doctor for reporting cancer clusters, denying prize winning science and shunning Aboriginal rights. This was the beginning of the destruction of Canada's international reputation.

In 2005/ 2006 Jim Tanner of Twin River represented First Nations in intensive negotiations concerning Aboriginal rights in the oil sands region. In the Long-Term Benefits Agreement (LBTA) negotiations, the Federal Government had committed over 300 million dollars in compensation for infringements and the Provincial Government committed a similar amount. Fifteen of the largest oil sands companies in the world were willing to put up the rest in cash and benefits. It was a major gesture of good will.

But this LBTA was struck down by the new Harper government shortly after they gained power around 2006/2007. At that point, the agreement was close to being accepted and contained a **formula for addressing cumulative effects; cumulative impacts upon Aboriginal rights; long term planning; co-management; and more.** Because of the unprecedented value of the resource and the equally unprecedented environmental impacts forecasted to occur over a 50-year period, a consultation process was designed to measure the cumulative impacts on Aboriginal rights and a co-management system was on the verge of implementation.

Like so many Indigenous communities before them, the member nations of the Athabasca Tribal Council were about to lose the use of much of their traditional lands, their environment and their natural homes. In this case, the governments were willing to acknowledge that the Aboriginal People should be included in the benefits and compensated for their losses. The opportunity was huge for all concerned.



But this was destroyed by the Harper government. And now the fallout from global concerns over dirty oil have cancelled and delayed needed pipelines for lack of proper environmental assessment. The Provincial Government began to adopt the lead provided by the new Federal Government and tried to shut down any bad news or criticism of the oil sands. It backfired.

However, some of the ideas which were developed about cumulative impacts analysis in the process were continued and included in planning studies in the N.W.T. Legislation in the Yukon contains interesting language with respect to socio-economic assessments, similar to the language developed in Wood Buffalo. Models proposed to be used in the LBTA agreement process caught on in other arenas, and planning future developments further north has benefited from this early oil sands approach.

**Recommendation:**

- 1. Incremental individual project assessments must be first supported by regional assessments which must include:**
  - a. Regional traditional land use studies and resource requirements to meet Treaty promises and Aboriginal rights requirements (using up to date methodology) of all First Nations affected on a cumulative basis.**
  - b. A cumulative assessment of the land disturbance and resulting resource abundance effects on Aboriginal values.**
  - c. A comparison of the land use and resource requirements of all First Nations with the regional cumulative impacts of existing disturbance and resource abundance and sustainability.**
- 2. Once this cumulative framework is established it can be updated in each region for any new proposal under a CEAA process. The costs to each proponent will be reduced, the timeline for assessment will be reduced and the thoroughness of consultation greatly improved.**
- 3. The federal and provincial governments should identify priority regions for these cumulative studies and immediately fund the development of these processes as part of a new generation approach to environmental assessment.**
- 4. Methodologies will be more standardized when Treaty and Aboriginal rights are included in the legislation as required assessment criteria. This would apply across different regimes of Aboriginal status and authority and studies and plans will automatically adjust to these regional realities.**



A few of the historical and current Traditional Land Use activities of First Nations people.  
Left: Community livelihood fishing. Middle: Smoking harvested moose.  
Right: Drying Berries for winter use.

## CONCLUSIONS

**The conventional process of environmental standards and isolated incremental effects analysis does not address the true long term and socio-economic impacts on Aboriginal peoples in Canada.** These processes fall short of adequate consultation and perpetuate an unfair and oblivious attitude towards Aboriginal and Treaty rights.

Sure, since we have become aware of deadly emissions we have worked to clean them up, but by allowing projects to proceed in the past without proper assessment we have violated; infringed; and breached many Treaties and rights which were solemn and sacred commitments and are now protected by our constitution.

One of the fundamental prerequisites to approval of a project is to conduct proper consultation and based on that consultation to accommodate and reconcile the project with the continuing exercise of Aboriginal rights. Before this can be done first the rights must be properly understood and then the foreseen impacts must be compared with those rights. But in order to understand the rights the assessment must be able to show how the rights have already been impaired which is where the cumulative impacts assessment is required.

We must take into account these previous activities when a new project is proposed. How much additional impact will the new plant have over and above all the previous impacts? Do the First Nations still have the ability to carry out their rights or will this last impact put them over the edge?

If this process had been actually instituted, instead of spurned by the Harper government, the attitudes towards oil sands production would be different. We would be an example to the world, not of producing dirty oil, but of how to reconcile Aboriginal rights with industrial development. How can this take place?

There are things we need to understand and acknowledge:

1. We know that because of their use of the lands and their consumption of country foods, Indigenous peoples are more susceptible to adverse environmental effects of projects.
2. We also know that Aboriginal communities tend to exhibit higher rates of diabetes, heart disease and hypertension, however there needs to be studies resolving the debate and proving that these results are rooted in environmental conditions rather than racist genetics.
3. We also know that eating traditional foods is healthy and those who are unable to continue to eat traditional foods are more apt to develop diabetes. This is a health issue but also a cultural issue and an issue involving whether traditional practices are possible, but is also a socio-economic issue and an environmental effects issue; it is a holistic issue.

In conventional assessments, we are asked to show or assess if these higher rates of health problems are related to a specific industrial project. In the case of Aamjiwnaang in Sarnia, has one individual refinery surrounding the reserve caused the problems? Generally, the answer is no. Which new pipeline proposal is responsible for all these problems? Not one, but the cumulative effect is responsible. They are all cumulatively responsible.

The conclusion of the last hearing on Enbridge Line 9 was that the pipeline delivering oil to these refineries would cause minimal incremental effects and therefore was in the public interest.

What about Fort Chipewyan? Which oil sands plant or tailings pond is causing the health effects? Which one of the many projects in the area is causing the tipping point for boreal forest woodland caribou habitat? Which one is the guilty party reducing the consumption of moose meat causing another case of diabetes in the Fort McKay community or bile duct cancer in Fort Chipewyan? According to the regulatory process, each additional plant was in the public interest. Each additional plant caused minimal effects to moose habitat, air quality and water quality.

We do know, however, that the health effects pandemic in the Indigenous communities are paralleled by socio-economic challenges, higher incarceration rates, substance abuse and other social challenges. Often the health conditions are blamed on lifestyle causes. But the lifestyle, rather than being a moral choice, is most likely a reaction to the longer term cumulative effects. Again one must look at the whole system. Recently, after the National Energy Board (NEB) recommended the Enbridge Line 3 project, the Liberal government, probably in good faith, initiated an additional consultation process and contacted communities to ask about the pipeline. Carry the Kettle First Nation, in this consultation process, brought up the issue of long term cumulative impacts and asked that a proper impact assessment be done. **The response from the government investigators was that the NEB had already done a cumulative assessment and that the impacts were minimal.** Clearly, neither the NEB nor those responsible for assessing the consultation process know what a cumulative impact assessment on Treaty rights involves. They simply do not understand cumulative impacts on Aboriginal rights which is supposed to be part of a proper consultation process – that is to learn about the rights and practices of the Aboriginal people so that the impacts can be assessed. They did not even ask for or have access to the data required to do such a cumulative study.

But, the basic structure of the CEAA does provide a legislative skeleton within which environmental effects and impacts, including cumulative impacts, upon Aboriginal peoples could be properly assessed. Twin River Consulting believes that the CEAA could easily require cumulative impacts to be properly considered. But in order to prepare for such a process, in order to avoid unreasonable burdens upon individual proponents who were not responsible for previous impacts, the government must ensure that comprehensive Aboriginal rights studies take place for *every* Aboriginal community in Canada and as a priority they should start with those communities around which projects are proposed. Many communities are well on their way to accomplishing these studies but they need to be completed. Only then can a proper assessment be accomplished. Only then can Canadians begin to avoid the continuous legal battles plaguing our courts and draining government funds as First Nations, Metis and other Aboriginal peoples claim they have not been adequately consulted.

### **Valued Ecosystem Components**

Once these full reports are completed a Cumulative Environmental Assessment (CEA) would meet an appropriate standard of consultation. Only when a proper cumulative impact analysis is performed can a reconciliation process proceed. A proper CEA uses conventional environmentally based cumulative assessment concepts such as establishing a baseline and identifying valued ecosystem components (VEC).

However, the VECs are generally biophysical indicators based on academic value systems even when traditionally harvested items are chosen.



In a cumulative impact study of Aboriginal livelihood, the VECs must be based upon Aboriginal values which are protected by Aboriginal and Treaty rights. **The constitutional rights must be translated into Aboriginal value based VECs.** This is not difficult and was done in the Wood Buffalo region land use studies. For example, an Aboriginal valued VEC may be a sustainable supply of culturally harvestable moose. Another might be accessible non- disturbed plant colonies for herbs, berries and medicines.

These cumulative impact analyses must use the VECs based on Treaty and Aboriginal rights as a land use baseline from which to measure cumulative changes. This process requires an analysis of the preferred method of exercising rights and an ability to compare cumulative environmental and socio-economic effects with required resources. Such an assessment would finally allow appropriate compensation and reconciliation of Treaty and Aboriginal rights in Canada. Alternatively, without this proper assessment it is likely that endless lawsuits will continue to be filed claiming inadequate consultation has occurred. Governments will be unable to deal with the many layers of Aboriginal grief and disenfranchisement which has resulted from years of either purposeful or unintentional neglect. Without this full analysis, the basic consultation requirement will not be addressed.

**Pikangikum First Nation Home in Northwestern Ontario. The destruction of traditional ways of living, combined with the poorly organized set-up of reserves resulted in impoverishment for those on the reserves. Many Aboriginal people died due to lack of shelter, food, health care and money. 60% of Aboriginal children in Canada live in poverty.**



Unfortunately, in our experience, despite some honest efforts and good intentions of experts, proponents and regulators – adequate assessments of Aboriginal health, socio-economics nor traditional activities have never been accomplished and projects are approved and deemed to be in the public interest without the precondition that proper consultation is completed. It is as if Canadian Indigenous people are still not considered part of that public interest. The following section is intended to show how this grief can be avoided and how a proper process could be executed under the CEAA.

## **CUMULATIVE IMPACT ASSESSMENT EXAMPLE – CARRY THE KETTLE FIRST NATION**

The study of cumulative effects is based upon the idea of death by a thousand cuts. One small cut will generally not kill you but a thousand small cuts are more likely to cause serious problems and death. Cumulative effects analysis is complex not only because it may involve many separate small impacts but also because the study requires some sort of a baseline or starting point and it requires the ability to compare that point with changes over time. As a result, scholars have proposed cumulative effects methodologies for various environmental attributes or values, sometimes referred to as VECs.

Cumulative effects or impacts are not only relevant in a biological or ecosystem context but are also relevant in socio-economic and traditional scenarios. For example, if we look at the ability of a First Nation like Carry the Kettle to hunt for food, we know that in 1875, when they signed Treaty, that most of their meat came from bison. Shortly thereafter the bison were wiped out, first in Canada and not long after in the US. But not all of their traditional sustenance came from bison. They also hunted moose, deer, elk, bear, antelope and small game. They had a history of fishing and gathering berries and herbs as well as using rabbits, ducks, geese and grouse. Historically, the bison were able to supply a large quantity of meat capable of supporting many tribes. Once the bison were eliminated, there were other species available and the Treaty stated that they had the right to support themselves as they had done before.

**Bison was the primary resource for the Plains and Métis peoples. The bison hunt was the basis of the Plains way of life. Meat provided nutrition, sinew and bone became tools, and hides became clothing and shelter.**



For the Carry the Kettle ancestors, once the bison were gone the risk of starvation increased substantially. There were many tribes and bands which were disrupted and looked for alternatives. Some tried to escape further north. Others, who had adapted to the plains livelihood, had more difficulty. They had to stay in areas where other game was more plentiful which was closer to forested valleys, hills or mountains, rivers and northern boreal environments. The result was a crowding of sites like the home of the Assiniboine and Blackfoot; the Cypress Hills. But the Blackfoot could move further west into the mountains. Several other prairie tribes

from further north tried to escape into the Cypress Hills because they thought they might be able to hunt for more bison further south and use the Hills as a base. This resulted in quick depletion of the deer, fisheries and rabbits in the area.

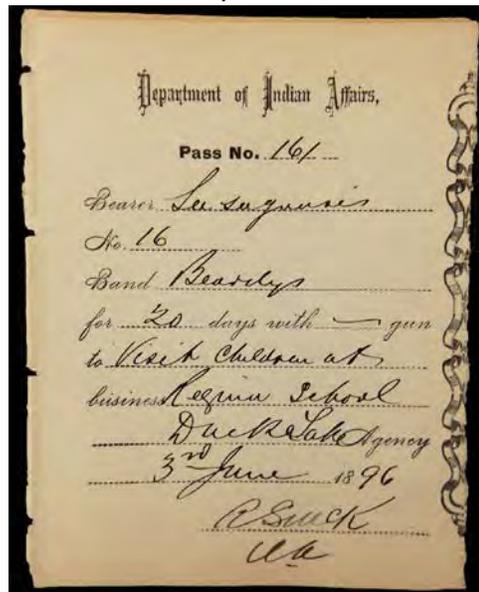
Other First Nations chose to move to the Qu'Appelle Valley where they had previously obtained bison, elk, deer and some moose. But competition for food also reduced game in these areas. Because of pressure from a belligerent US and fear of local violence, the Canadian government eventually forced CTK people to move to the bald prairie south of Indian Head, SK. Traditionally, the CTK would only have ventured on to this portion of their lands looking for bison or at least prairie elk during certain seasons. But the bison were destroyed to make way for the settlers and the settlers decimated the elk herds to survive on their early subsistence farms. The bald prairie was not the choice of the CTK people but they were forced to move there. It is here where they starved.

The CTK people originally had a lake on their bald prairie reserve, and that lake contained some fish. Fish were considered a fall back source of food when the buffalo were hard to find. However, after Chief Long Lodge passed away the government took away the lands providing access to the lake. No more fish, no more attraction of wildlife. The government then prohibited them from leaving the reserve – so they were forced to hunt only on the much smaller reserve.

Then to complete the plan, they were sent to residential schools – taking away the knowledge of their language and with it much of the experience and knowledge of their traditions including hunting traditions. They were required to get a permit or pass to leave the Reserve. How could they exercise their rights? Each cumulative cut took away some of their traditional self-reliance; took away their traditional livelihood. Each of a thousand cuts reduced their ability to practice their rights. Each move away from their traditional diets increased their risk of diabetes and other diseases – as if they had not already fought against the most horrendous disease epidemics possible.

Then, the government proceeded to take up all the lands around the reserves and further reduce the size of the local hunting area. Then the early oil and gas pipelines were built without consultation – no consultation even on the pipelines which cross the reserves of the First Nation! Telephone lines, roads, pesticides, invasive species, oil and gas flaring and sick animals and fish all combine to make the situation very serious. How much of their rights remain? Nobody knows! Yet this information is absolutely crucial in determining if an additional project is compromising the rights of the First Nation

**The Pass System introduced in 1885 was enforced for 60 years. Intended to keep First Nations separate from settlers, they required permission from an Indian Agent to leave the reserve for any reason. Any First Nation person caught outside their allotted reserve without a pass was returned immediately, sanctioned, or incarcerated.**



where compensation or reconciliation is required. Consultation is not complete or adequate until this question has been answered.

The first step in such an analysis is to perform a historical and current comprehensive traditional land use study. Twin River Consulting has recently completed such a study for the Carry the Kettle First Nation. Now that this study is complete, it provides the information required to model the traditional and cultural land use of the First Nation. From this model the researcher then chooses the VECs and determines the quantity, characteristics and habitat range of these VECs. There are two parallel processes which must be considered at this point:

- 1) What is the loss of habitat and or actual availability or supply of the VEC over time?
- 2) What are the legal and social impediments to obtaining the required foods, including consideration of competition from other Aboriginal peoples and other sports and food hunting or gathering.



Once this analysis is complete, the preferred method of exercising their rights must be considered. This will likely involve an estimate of the number of members in the Band who require or wish to have or continue their traditional livelihood. After this is all applied, the analysis can determine if the First Nation rights are compromised and if so how much. The incremental effects of the additional project are then added to the analysis and then a true assessment of the cumulative effects of this last project can be determined.

**The recommendation is to implement a firm requirement that a cumulative impacts assessment, based on Aboriginal and Treaty rights, must be done as part of the Environmental Assessment Process. These impact assessments must measure the ability of Aboriginal peoples to exercise their rights and the measure the significance of the socio-economic and environmental effects relating to those rights.**

This evidence would be used to determine if additional impacts caused by a new proposal would be in the public interest and or if compensation is required or adaptations are needed in the proposal planning. It would also represent a new level of adequate consultation in Canadian Aboriginal and Treaty rights.