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WRITING THE RULES OF SOCIO-ECONOMIC IMPACT ASSESSMENT: ADAPTATION THROUGH PARTICIPATION

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Abstract: New governance initiatives like co-management can be made effective through the use of agency rulemaking. Using the Mackenzie Valley Environmental Assessment Board as a case study, this paper affirms that it is possible for marginalized stakeholders to participate in new governance arrangements like co-management and to alter decision-making. The study of participation presented here illustrates: 1) that a high level of agency support for community participation in rule-making can lead to rules which reflect community values; and 2) that agency implementation of community values has led to the increased use of stakeholder collaboration through private agreement. Nonetheless, the paper also reveals that there are limitations on the ability to translate social needs into privately negotiated agreements. Where negotiations depart from highly commoditized terms and attempt to include diverse community values, stakeholder participation is bounded. Consequently, this paper questions the use of negotiated agreements to meet the goals of stakeholder participation, as conceived by deliberative democratic strands of new governance.

Keywords: Law, Regulation, New-Governance, Co-Management, Indigenous, Participation, Socio-Economic Impact Assessment, Environment

JEL Classification: K23, K32, K12, D73, D74, D78, O20, Q56

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Writing the Rules of Socio-Economic Impact Assessment: Adaptation through Participation

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I. INTRODUCTION

Co-management arrangements ('co-management') are increasingly important as a mechanism for resource management by Indigenous peoples in Canada.[1] As a model for shared decision-making, co-management's aim is to increase the participation of marginalized stakeholders in regulatory decision-making.[2] In the Northwest Territories, co-management is a product of a political movement against centralized development of the region's resources by the Federal government. The result of this political movement was the negotiation of several self-government and land claim agreements between Indigenous governments and the Federal government over a 20 year period.[3] The agreements established Indigenous ownership over vast tracts of land. They also established autonomous legislative jurisdiction within defined territories and the right to participate as decision-makers in resource management agencies in the region. What is relevant for the purposes of this paper is that these agreements led to the promulgation of multiple co-management boards which now govern resource use in particular regions of the Northwest Territories.

The co-management of resources in the Northwest Territories offers insight into how law and politics can both support and marginalize stakeholder participation within new approaches to governance ('new governance') operating around the world.[4] Simply understood, new

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[1] The term 'Indigenous peoples' is used here to avoid misnaming particular groups who would not identify with the term First Nation or Aboriginal. Periodic references to the term 'Aboriginal' reflects a particular legal meaning identified with s. 35(1) of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.) 1982 c.11. (which recognizes and affirms the rights of Aboriginal peoples, defined as Indian, Metis and Inuit peoples).

[2] Co-management's central characteristic is that half the members of each board are nominated by local Indigenous governments. For further definition of co-management see *infra* Part II.

[3] The Gwich'in Comprehensive Land Claim Agreement was signed on April 22, 1992 and came into force as the *Gwich'in Land Claim Settlement Act,* S.C. 1992, c. 53. The Sahtu Dene and Metis Comprehensive Land Claim Agreement was signed on September 6, 1993 and came into force as the *Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c. 27. The Tlicho Comprehensive Land Claim Agreement was signed on August 25, 2003 and came into force as the *Tlicho Land Claims and Self-Government Act*, S.C. 2005, c. 1. There other contemporary treaty finalized in the region is the *Western Arctic (Inuvialuit) Claims Settlement Act* (1984, c. 24).

[4] As a school of thought see O. Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minn. L. Rev*. 342-470.

governance is an alternative to the formulation and implementation of top-down, government-sourced rules. It advocates for the creation of rules by stakeholders through a bottom-up process premised on decentralization, adaptive learning, participation, and public-private collaboration. New governance predicts more effective and legitimate regulation[5] will result from broad stakeholder input (including marginalized stakeholders) during the construction and implementation of regulatory rules. This predicted improvement is attributed to the increased ability of stakeholders to influence regulation in a manner which reflects their perspective. Where the rules are not to their advantage, stakeholders are expected to benefit from the deliberation itself.[6]

The design and practice of co-management arrangements in the Northwest Territories reflect many of these trends. By virtue of their representation on the boards, co-management in the Northwest Territories purports to increase the participation of Indigenous stakeholders. More to the point, co-management replaces centralized processes with de-centered decision-making that aims to use the knowledge of communities impacted by resource development.[7] It also expects co-management to produce more equitable power sharing between the Federal and Indigenous governments in the region. Both of these goals are to be achieved through increased participation of Indigenous stakeholders in decision-making.[8] In effect, co-management expects stakeholder participation to provide knowledge and power to resource management and, in doing so, alter decision-making accordingly.

While new governance scholarship focuses on the positive aspects of stakeholder collaboration, it rarely analyzes one of its fundamental assumptions: that the community stakeholder is a single and unified entity, capable of bringing its knowledge to bear on decision-making.[9]

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[5] Although this paper focuses on the regulatory activity of an administrative state agency, it uses a broader definition of regulation to capture the regulatory effects of unintentional and 'intentional activity of attempting to control, order, or influence the behaviour of others.' C. Parker, C. Scott, N. Lacey, J. Braithwaite (eds) *Regulating Law* (Oxford University Press, 2004) at 2.

[6] Deliberation is defined as the 'debate of alternatives on the basis of considerations that all take to be relevant.' J. Cohen and J. Rogers, 'Power and Reason' in *Deepening Democracy: Innovations in Empowered Participatory Governance* Archon Fung and Erik Olin Wright (eds) (London: Verso, 2003) 237-258, 241.

[7] *Stephen R. Tyler,* In_Focus: *Comanagement of Natural Resources Local Learning For Poverty Reduction* (IDRC 2006) 21-30.

[8] E., Pinkerton, *Cooperative Management of Local Fisheries* (UBC Press, 1989) (knowledge sharing leads to better technical management) and M.E., Mulrennan, and C.H., Scott, 'Co-management - An Attainable Partnership? Two Cases from James Bay, Northern Quebec and Torres Strait, Northern Queensland' (2005) 47(2) *Anthropologica* 197-213 (power sharing).

[9] A. Agrawal and C. Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27, No. 4 *Yale World Development* 629-649, 633

Moreover, new governance has yet to turn its attention to how its processes disempower certain sub-groups or individuals within communities.[10] Instead, it posits the stakeholder as possessing certain interests that are defined as a result of negotiations. While it may be useful to theorize the community stakeholder as one indivisible entity, it is not analytically descriptive of the diversity of opinions within communities.

This paper affirms that it is possible for marginalized stakeholders to participate in new governance arrangements like co-management and to alter decision-making. The study of participation presented here illustrates: 1) that a high level of agency support for community participation in rulemaking can lead to rules which reflect community values; and 2) that agency implementation of community values has led to the increased use of stakeholder collaboration as a mechanism for community empowerment. Nonetheless, the paper also reveals that there are limitations on the ability to translate social needs into privately negotiated agreements. Where negotiations depart from highly commoditized terms and attempt to include diverse community values, stakeholder participation is bounded. Consequently, this paper questions the ability to use community participation, as conceived by new governance, to meet the goals of deliberative democratic theory. To be clear, it does not take issue with the beneficial impact of private agreements for communities. However, it does question the apparent failure of these private agreements to grapple with social goals and argues that this failure poses a challenge to using new governance as a replacement for traditional public administration.

Part I of this paper explains the relationship of new governance scholarship to participation by exploring its origins in traditional regulation and participatory rights. Part II of this paper draws parallels between new governance and co-management theory. It explains their shared commitment to techniques of decentralization, participation, collaboration, and learning as well as their shared expectation that these techniques will enhance marginalized stakeholder participation. This part also identifies some problems with the conceptualization of community stakeholder upon which new governance and co-management rely. Part III uses a case study of rule-making and rule application by the Mackenzie Valley Environmental Impact Review Board (Review Board) to support the argument that co-management reflects new governance's trends to incorporate greater stakeholder participation. Specifically, it examines the role of the agency in making and implementing guidelines. With this in mind, Part IV introduces a critique that the difficulty of translating certain community values into negotiated terms means that effective participation may be more limited than new governance has so far allowed in its prognosis of stakeholder collaboration.

[10] For issues that result from participation see Stijn Smismans, 'New Governance - The Solution for Active European Citizenship, or the End of Citizenship' (2007) 13 *Colum. J. Eur. L*. 595-622.

II. NEW GOVERNANCE AND PARTICIPATION

A. STANDING ON THE SHOULDERS OF LIMITED PARTICIPATORY RIGHTS

New governance theory is generally understood as a response to traditional administrative regulation. The legitimacy of traditional administrative regulation is generally premised on broad statutory authorization as well as the technical and administrative expertise needed to grapple with highly technical decision-making.[11] The common criticism of this model is that it vests agencies with significant power since they operate with little oversight in the establishment of regulatory goals and the decisions needed to achieve them.[12] The gradual rise of participatory processes has arguably altered the level of deference enjoyed by an expert administration. Essentially, through various liberal democratic procedures, the public can access relevant information and make submissions through supplementary consultative processes, such as notice and comment requirements.[13] These participatory procedures are rationalized as bolstering the legitimacy of the decisions by encouraging public acceptability and by altering the substantive policy to reflect public input.

According to deliberative democrats, the central problem with participatory proceduralism is that it does not provide the chance to challenge elite power.[14] Because citizen viewpoints are incorporated only as far as the bureaucratic structure permits, proceduralism does not permit citizen deliberation to permeate decision-making.[15]As it relates to marginalized persons, participatory procedures are accused of using ostensibly neutral rationalistic practices which exclude or silence particular kinds of oppressed subjects.[16] Consequently, scholars raise the

[11] For an example of this approach see James M. Landis, *The Administrative Process* (Yale University Press, 1938). In the Canadian context see John Willis, 'Administrative Decision and the Law: The Views of a Lawyer' *The Canadian Journal of Economics and Political Science*, (1958) Vol. XXIV, No. 4, Nov. 502-511.

[12] R. B. Stewart, 'The Reformation of American Administrative Law', (1975) 88 *Harv. L. Rev*. 1667-1813, 1676-1688.

[13] In addition to rights made explicit in the written constitution, liberal democratic procedures includes doctrines such as the rule of law and procedural fairness which underpin individual protection against unchecked governmental power.

[14] R. B. Stewart, *Administrative Law in the 21st Century*, (2003) 78 *N.Y.U. Law Review* 437-460, 445.

[15] J. Habermas, *Between Fact and Norm: Contributions to a Discourse Theory of Law and Democracy* (translated William Rheg) (MIT Press, 1998).

[16] I. Young, *Justice and the Politics of Difference* (Princeton University Press, 1990).

need for democratic politics to concern itself first and foremost with the recognition of the particular perspectives of historically-oppressed segments of the population.[17]

One suggestion has been to reform state structures to better accommodate difference. To these deliberative democrats, the institutions of the liberal state (constitutional assemblies, legislatures, courts, and administration) remain significant venues for deliberation. Consequently, they have suggested ways in which those institutions can better accommodate different perspectives. [18] However, the modification of institutions to be more tolerant of difference has been criticized as failing to address the broader problems of insufficient participation in the regulatory process. This criticism laid the groundwork for an approach aimed at the both the justice and effectiveness of legal institutions premised on participation - new governance.[19]

Building on these critiques, new governance theorists argue that traditional structures provide limited opportunities for marginalized groups to meaningfully participate in establishing the means and ends of regulation.[20] Consequently, criticism aimed at liberal democratic proceduralism partly stems from concerns with its deliberative democratic credentials. Essentially, new governance theorists reject state structured institutions in which deliberation is proceduralized and codified via binding general laws. They reject a reading of popular sovereignty in which a single deliberative legislature purports to legitimately represent the plurality of people and associations which empower it.[21] Instead, the theory expects citizens to deliberate as part of a de-centered civil society characterized by a multiplicity of associations.[22] Within it, citizens are expected to generate collective decisions that are determined via reasoned debate between all concerned.[23]

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[17] I. Young, *Inclusion and Democracy* (Oxford University Press, 2000).

[18] For an example of the reformist position see Anne Phillips, 'Dealing with Difference: A Politics of Ideas or a Politics of Presence?' in S. Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 139-152. For an example of the radical position see Chantal Mouffe, 'Democracy, Power, and the 'Political' ' in S. Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political*, (Princeton University Press, 1996), 245–56.

[19] A. Fung and E. Wright (ed) 'Thinking About Empowered Participatory Democracy' *in Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003) 3-41.

[20] Id.

[21] W. E. Scheuerman, 'Critical Theory Beyond Habermas' in *The Oxford Handbook of Political Theory*, J.S. Dryzek, B. Honig, and A. Phillips (eds.) (OUP, 2006) 85-105, 97.

[22] S. Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy' in *Democracy and Difference: Contesting the Boundaries of the Political*, (ed) (Princeton University Press, 1996) 67- 94 at 73; J. Cohen and J. Rogers, 'Secondary Associations and Democratic Governance' (1992) 20 *Politics & Society* 393.

[23] Jurgen Habermas, Between Fact and Norm: *Contributions to a Discourse Theory of Law and Democracy* (trans William Rheg) (Cambridge: MIT Press, 1998). Habermas envisions a public civil society. However, new governance

In deliberative decision-making, participants are meant to listen to each other, give due consideration to each position and choose a decision as a group. Participants are expected to persuade one another by offering reasons that others can accept. Importantly, participants are not entitled to adopt absolute values or positions.[24] Rather, to deliberate means to debate alternatives on the basis of considerations that all participants take to be relevant. However, what is relevant is disciplined by the reasons supported by other participants.[25] Achieved through ongoing deliberative processes, new governance stands in contrast to limited procedural rights in which citizens engage in one-shot consultation. Instead of merely creating processes by which persons have rights of access to relevant information, to make submissions and to use courts to enforce consideration of their viewpoints, deliberation expects to convert the local citizenry into decision-makers. Ultimately, both the motivating ideology which drives new governance and the legalities needed to support this objective vary from a procedural concept of public participation. Instead, it offers participation in deliberation. To this extent, deliberative democracy promises to emancipate the powerless or oppressed in so far as it promises to hear their arguments and empower those arguments deemed reasonable.[26]

B. STAKEHOLDER PARTICIPATION IN NEW GOVERNANCE

Legal theorists propose that one cure to the democratic deficit caused by central administration is to increase the participation of stakeholders in decision-making.[27] Regulatory methods that permit stakeholders more input in decision-making and its regular alteration are expected to ease the problems created by over reliance on centralized command and control.[28] Consequently, stakeholder participation has become the key mechanism for establishing the normative authority of regulation in new-governance.

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scholars would argue that broad public participation includes private as well as public actors. For example, A. Fung and E. Wright (ed) 'Thinking About Empowered Participatory Democracy' in *Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003).

[24] A. Fung and E. Wright, 'Thinking About Empowered Participatory Democracy' in *Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003) at 20.

[25] J. Cohen and J. Rogers, 'Power and Reason' in A. Fung and E. Wright (ed) *Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003). 237-258 at 241.

[26] Id.

[27] C. Sabel and M. Dorf, *A Constitution of Democratic Experimentalism* (Harvard University Press, 2006).

[28] R. B. Stewart, *Administrative Law in the 21st Century*, (2003) 78 *N.Y.U. Law Review* 437-460, 447.

For example, one way that new-governance expects participation to legitimate regulation is through the sharing of knowledge which participants possess. Of course, participation has long been used as a legal mechanism which permits groups to communicate views on a public issue. However, participation takes on a grander role in new governance.[29] While premised on the complex ways information travels, information is expected to come from the participation of stakeholders impacted by the regulation in question. Consequently, many participatory theories advocate for new methods by which regulatory agencies and citizens can share information. Instead of command and control, new governance advocates call for smart regulation, responsive regulation[30], reflexive regulation,[31] democratic experimentalism,[32] and collaborative governance.[33] Similarly, 'empowered participatory governance' is intended to produce "effective problem solving, equity, and broad and deep participation premised on the institutionalization of the ongoing participation of ordinary citizens."[34] Its goal is to allow citizens (as represented by communities or as individuals) to exchange knowledge, thereby disrupting decision-making premised on the domination by hierarchical structures.

A second way that new-governance expects stakeholder participation to legitimate regulation is by achieving participant agreement. At its core, this scholarship takes the legitimating power of participation (previously applied to traditional governmental institutions) and applies them to those of the de-centered regulatory state.[35] It seeks to broaden room for decision-making by involving more actors at various stages and types of decision-making.[36] In doing so, it expects stakeholders to stabilize the final decision as well as all the smaller decisions along the regulatory path. To this end, new governance advocates for the use of more flexible and coordinated techniques to allow for negotiation and deliberation between stakeholders (e.g.

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[29] A. Fung and E. Wright, 'Thinking About Empowered Participatory Democracy' *in Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003) 3-41, 17.

[30] Ayres and J. Braithwaite, *Responsive Regulation* (New York: Oxford University Press, 1992);

[31] G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239.

[32] C. Sabel and M. Dorf, *A Constitution of Democratic Experimentalism* (Harvard University Press, 2006).

[33] J. Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 *UCLA L. Rev.* 1-98; B. Karkkainen, 'Collaborative Ecosystem Governance: Scale, Complexity and Dynamism' (2002) 21 *Va. Envtl. L. J.* 189-244.

[34] A. Fung and E. Wright, 'Thinking About Empowered Participatory Democracy' *in Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003) 3-41, 25–27.

[35] De-centering presumes non-state centres as decision-makers. For distinction between de-centered and polycentric regulatory regimes see J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137–164.

[36] O. Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 Minn. L. Rev. 342-470 at 373.

government, industry, and the public) and to produce innovative decision-making.[37] For example, scholars advocate for a 'rolling rule regime' in which local units of stakeholders collaboratively set targets and report to regulatory agencies.[38] Others call for 'collaborative governance' which emphasizes negotiation, multilateralism, adaptation, and provisionalism between stakeholders and an agency.[39] Similarly, advocacy for a 'bargaining model' relies on regulatory contracts to achieve dynamic regulation.[40] Taken together, these techniques rely on increased tolerance for methods such as negotiated and consensus-based approaches to regulation so that each of the stakeholders will accept the process and its outcome.

III. CO-MANAGEMENT AS NEW GOVERNANCE

A. WHAT IS CO-MANAGEMENT

There is not, as yet, a clear and precise definition of the term 'co-management' which can include a range of institutional arrangements. The term describes institutions which rely on various degrees of integration between local representative bodies and state level management systems. [41] In Canada, co-management arrangements are decision-making bodies

[37] See for example, P. Harter, 'Negotiating Regulations: A Cure for the Malaise' (1982) 71 *Georgetown Law Journal*, 17. For environmental techniques see D. Farber, 'Triangulating the Future of Reinvention: Three Emerging Models of Environmental Regulation' (2000) *U. Ill. L. Rev.* 61-82; In Canada, these procedural mechanisms are implemented through statutory requirements, common law requirements and administrative procedures developed by administrative agencies. Paul Salembier, *Regulatory Law and Practice in Canada* (LexisNexis Butterworths, 2004) For a discussion of co-management as an adaptive system, see D. Armitage, F. Berkes, and N. Doubleday (eds) *Adaptive Co-Management: Collaboration, Learning and Multi-Level Governance* (UBC Press, 2008). For application to environmental assessment see J. Holder, *Environmental Assessment: The Regulation of Decision-Making* (Oxford: OUP, 2004).

[38] C. Sabel, A. Fung, and B. Karkkainen, 'Beyond Backyard Environmentalism', in J. Cohen and J. Rodgers (eds) *Beyond Backyard Environmentalism*, (Boston: New Democracy Forum, 2000) 3-48.

[39] J. Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 *UCLA L. Rev.* 1-98, 21-33; J. Freeman and D. Farber, 'Modular Environmental Regulation' (2006) 54 *Duke L.J.* 795-939; B. Karkkainen, 'Collaborative Ecosystem Governance: Scale, Complexity and Dynamism' (2002) 21 *Va. Envtl. L.J*. 189-244, 193-94. For a broader discussion of collaborative management for natural resources see Julia M. Wondolleck & Steven L. Yaffee, *Making Collaboration Work: Lessons from Innovation in Natural Resource Management* (Washington D.C.: Island Press 2000).

[40] J. Freeman & L.I. Langbein, 'Regulatory Negotiation and the Legitimacy Benefit', (2000) 9 *N.Y.U. Envtl L. J*. 60-151, 75-121; J. Rossi, 'Bargaining In The Shadow Of Administrative Procedure: The Public Interest in Rulemaking Settlement' (2001) 51 *Duke L.J.* 1015-1058. D. Farber, 'Triangulating the Future of Reinvention: Three Emerging Models of Environmental Regulation' (2000) *U. Ill. L. Rev*. 61-82, 68-81.

[41] J. Kooiman et al, *Fish for Life: Interactive Governance for Fisheries* (Amsterdam University Press, 2005) at 14-24 (co-management as co-governance); P.J. Usher, 'Contemporary Aboriginal Land, Resource and Environmental

comprising particular Indigenous governments and state agencies. However, as a term, co-management is not confined to arrangements with Indigenous peoples nor does it preclude local non-governmental actors or individuals. Formed as an alternative to centralized decision-making prototypical of resource management, it is a model for shared decision-making over natural resource use. Beyond this colloquial understanding there is a significant degree of controversy over the goals and methods of co-management.[42] Consequently, there is a limited ability to use the term as an analytical tool.

Co-management arrangements vary with the nature of the resource, the political context, the expertise of participants, the authority exercised, and the range of management decisions involved.[43] At one end of the spectrum, natural resource management remains with the state, which consults communities only on specific issues. At the other end of the spectrum, communities make resource management decisions but report to the state. In between, there are a wide range of institutional possibilities. Co-management describes dealing with both renewable and nonrenewable resources; single resource and multi-resource development, as well as both single jurisdiction and multi-jurisdictional circumstances. In addition, membership can be strictly limited to local resource users and governments or can include any number of stakeholder groups. Each type of board uses different regulative methods for decision-making. These methods can include policy-making, planning, setting rules, allocating harvests, investing in resource productivity, monitoring, enforcement, determining membership in user groups, and adjudicating conflicts. The scope of the resources being managed can also vary between boards as does the formality of the arrangement.

The co-management board studied here, the Mackenzie Valley Environmental Impact Review Board (Review Board), is one of several co-management boards in the Mackenzie Valley, a region in the Northwest Territories.[44] Like other boards in the region, it was established pursuant to the *Mackenzie Valley Resource Management Act (MVRMA*).[45] The *MVRMA* was itself established pursuant to the terms of several formal contemporary treaties with Indigenous peoples in the region.[46] As a product of treaty negotiations, the authority of the

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Regimes: Origins, Problems and Prospects' in *For Seven Generations: An Information Legacy of the Royal Commission for Aboriginal Peoples CD-ROM*. (Ottawa: Libraxus, 1997) (co-management as institutionalized relationships).

[42] S.R. Tyler, *In_Focus: Co-management Of Natural Resources: Local Learning For Poverty Reduction* (International Development Research Centre 2006).

[43] For different permutations see Id. at 21-30.

[44] G. Rusnak, 'Co-Management of Natural Resources in Canada: A Review of Concepts and Case Studies' Working Paper 1, *Rural Poverty and the Environment Working Paper Series.* (International Development Research Centre, 1997).

[45] *MACKENZIE VALLEY RESOURCE MANAGEMENT ACT*, S.C. 1998, c.25.

[46] See *supra*, note 3.

Review Board is constitutionally protected and would be difficult to alter.[47] Tasked with environmental assessment, the Review Board has a broad mandate to consider any significant impact of a proposed project, including both biophysical and human environments. It is not a community based arrangement because it includes nominees of both Indigenous and non-Indigenous governments. Nor does it have any formal obligation to report to communities. Instead, the Review Board is an agency made up of nominees of the Indigenous, Federal and Territorial governments. Moreover, like all co-management boards in the region, the Review Board is an institution of public government. It is established pursuant to Federal statute, funded by the Federal government and reports to the Federal Minister of Indian and Northern Affairs. Clearly, the Review Board represents a formal and highly bureaucratic type of co-management arrangement.

This paper offers a detailed case study of one agency's ability to act as a proponent of stakeholder participation. While conclusions about new governance often involve multiple case studies, the sheer volume of disparate arrangements which fall under the ambit of 'co-management' means that its analysis benefits from a specific approach which identifies successful or poor results.[48] That being said, the transnational proliferation of co-management arrangements makes it a global phenomenon which invites generalizations. Beyond its relevance to other co-management institutions, it is also part of a suite of participatory arrangements used in resource management.[49] Therefore, rather than being a limited example of Canadian institutions, co-management is one of a series of institutional arrangements aimed at furthering participatory governance. Likewise, the shared characteristics and techniques of co-management and new governance make it one of several techniques of environmental regulation within new governance. For instance, civic environmentalism,[50] eco-pragmatism,[51]

[47] The agreements are constitutionally protected pursuant to s.35 (1) of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

[48] For a discussion of case specific approaches see S.R. Tyler*, In_Focus: Co*-management of Natural Resources Local Learning For Poverty Reduction (International Development Research Centre, 2006).

[49] For examples, J.P. Brosius, A. Lowenhaupt Tsing and C. Zerner (eds) *Communities and Conservation: Histories and Politics of Community Based Natural Resource Management* (Altamira Press: 2005).

[50] DeWitt John, Civic Environmentalism: Alternatives to Regulation in States and Communities (Washington D.C.: Congressional Quarterly Books, 1994) and William A. Shutkin, the Land That Could Be: Environmentalism and Democracy in the Twenty First Century (Boston: MIT Press, 2000). For contrary views see T.D. Abel and M. Stephen, 'The Limits of Civic Environmentalism' (December 2000) vol. 44(4) *American Behavioral Scientist*.

[51] Daniel A Farber, 'Building Bridges over Troubled Waters: Eco-pragmatism and the Environmental Prospect' (2002-2003) 87 *Minn. L. Rev.* 851.

and collaborative management,[52] has each drawn significant attention to new methods of problem solving for environmental disputes. Co-management is also one such method.

B. SHARED CHARACTERISTICS - NEW GOVERNANCE & THE REVIEW BOARD

From a formal legal perspective, the Review Board might be characterized as a traditional administrative agency. However, the legal derivation of the Review Board's authority does not do justice to its political origins, goals or techniques, all of which are better reflected in new governance trends. Like new-governance, co-management uses participation as a technique of regulation. This is why the current turn to new governance is often contrasted with the technical tools of traditional regulatory government. If the traditional model is hierarchical, state-centric, bureaucratic, top-down, commanding, controlling, and expert-driven, participatory governance means to break with these characteristics.[53] As a general rule, it prescribes techniques which are participatory, bottom-up, consensus-oriented, contextual, flexible, integrative and pragmatic. A brief review of these similarities makes their shared techniques more apparent.

One of the seminal ways that the Review Board follows the broader trends in new governance is its commitment to an expanded role for stakeholder participation in decision-making.[54] Much like new governance, the Review Board facilitates the participation of community stakeholders as representatives in public governance.[55] Stakeholder participation is primarily achieved through the requirement that persons nominated by Indigenous governments constitute at least equal or majority membership on the boards. For instance, all licensing and permitting related to resource use in the Mackenzie Valley are conducted by boards whose membership comprises specific numerical representation. Each of the Indigenous governments in the region

[52] Bradley C. Karkkainen, Collaborative Ecosystem Governance: Scale, Complexity and Dynamism, (2002) 21 *Va. Envtl. L.J*. 189-244.

[53] Richard B. Stewart, 'A New Generation of Environmental Regulation?' (2001) 29 *Cap. U.L.* Rev. 21-182, 27-38.

[54] D. Armitage, F. Berkes, and N. Doubleday (eds) 'Introduction: Moving Beyond Co-Management' in *Adaptive Co-Management: Collaboration, Learning and Multi-Level Governance* (UBC Press, 2007) 1-15, 1.

[55] Lisa Alexander categorizes three types of institutionalized forms of participation in new governance: 1) local and periodic public meetings; 2) community based elected representatives in public and private governing bodies; 3) third sector non-profit or privatized organizations with community based boards. Lisa Alexander, 'Stakeholder Participation in New Governance' (Winter 2009) Vol. XVI *The Georgetown Journal on Poverty Law & Policy* 117-185, 128. Other examples are governance councils that include public officials, local administrative officials, service providers and citizen users. M. C. Dorf & C. F. Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Colum. L. Rev.* 267-473, 316.

nominates or appoints members to the board.[56] The remaining members are nominated by the territorial minister and federal government.

The use of representative membership subverts the central tenet that centralized management is an appropriate tool for resource management in the Mackenzie Valley. Like new governance, representation in co-management is directly related to regulatory interest. As might be expected, resource management representation is delineated in accordance with the type of rights an Indigenous government holds in relation to the land. Where the Indigenous government is thought to have a greater vested interest in the outcome, such as a project conducted on its fee simple land, it is granted greater representation on the boards. Where its interest is deemed lesser or is only one among other interested governments, its representation is lessened correspondingly. In short, the shifting composition of a board reflects an attempt to allocate board membership in accordance with an estimation of interest in the proposal.

In contrast to participatory proceduralism, new governance allows Indigenous citizens to move beyond procedural rights and participate as decision-makers at multiple stages of regulation.[57] Co-management matches this innovation as it allows Indigenous citizens to participate as decision-makers in resource management. Indigenous peoples have been identified in the common law as stakeholders in resource management.[58] However, it is through co-management that the relevance of being a stakeholder has increased participation in decision-making.[59] While the degree of participation varies, the underlying principle of co-management is the same. Indigenous peoples are now part of the institutions in which collective decisions are deliberated. Indigenous stakeholders do not merely have procedural rights to access relevant information, to make submissions on environmental decisions and to use courts to enforce consideration of their viewpoints. Instead, like new governance, co-management offers participation in deliberation.

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[56] Officially, the Federal minister appoints all members of the board and the Sahtu and Gwich'in each nominate their members for appointment. The notable exceptions are those members who are directly appointed by the Tlicho government, *MVRMA* s.11 (1). *MVRMA*, s.112 (1) (2) and (3).

[57] A. Fung and E. Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003).

[58] *Haida Nation v. British Columbia* [2004] SCC 73; *Taku River Tlingit First Nation v. British Columbia* [2004] SCC 74.

[59] P. Nadasdy, 'The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse' (2005) *Anthropologica* 47(2) 215-232 at 216.

A second similarity between co-management and new governance is the affirmation of decentralization and subsidiarity as central organizing principles.[60] Like other co-management boards in the Mackenzie Valley, the Review Board was created in opposition to centralized resource management.[61] Understanding co-management as a deliberate effort to decentralize decision-making derives from its contextualization in contemporary treaty negotiation in the Mackenzie Valley and Indigenous claims to self-government.[62] As stated in the introduction to this paper, co-management in the Mackenzie Valley was a product of a political movement against resource development by the Federal government. The combination of the Federal government's property claims and its regulatory power to license development led to the widespread authorization of projects without consultation with local Indigenous communities.[63] Growing political consciousness fueled the development of territorial political autonomy and Indigenous peoples in the region began to assert themselves as distinct peoples with inherent rights. Not only were the boards formed on the basis of rights recognition preceding the treaties. Those rights were then re-formulated in treaty provisions delineating Indigenous representation on resource management boards. In short, the phenomenon of co-management is part of a larger movement to actualize Aboriginal rights to self-government in Canada over the past 40 years. Those rights have been channeled into new agencies that are physically located in the region and staffed with governmental appointees, half of which are nominated or appointed by local Indigenous governments. As such, co-management mimics the shift away from centralized development which characterizes new governance initiatives.

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[60] O. Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 Minn. L. Rev. 342-470, 381.

[61] J.J. Spaeder and H.A. Feit, 'Co-management and Indigenous Communities: Barriers and Bridges to Decentralized Resource Management - Introduction' (2005) 47(2) *Anthropologica* 147-164.

[62] Many scholars share the view of co-management boards as conduits for political authority that empower Indigenous peoples. For examples see M.E. Mulrennan, and C.H. Scott, 'Co-management - An Attainable Partnership? Two Cases From James Bay, Northern Quebec and Torres Strait, Northern Queensland' (2005) 47(2) *Anthropologica* 197-214; G.P Kofinas, 'Caribou Hunters and Researchers at the Co-management Interface: Emergent Dilemmas and the Dynamics of Legitimacy in Power Sharing' (2005) 47(2) *Anthopologica,* 179-196; P.J. Usher, 'Contemporary Aboriginal Land, Resource and Environmental Regimes: Origins, Problems and Prospects' in *For Seven Generations: An Information Legacy of the Royal Commission for Aboriginal Peoples* CD-ROM. (Ottawa: Libraxus, 1997); G. White, 'Cultures in Collision: Traditional Knowledge and Euro Canadian Governance Processes in Northern Land Claims Boards' (December 2006) 59(4) *Arctic* 401-414. For discussion of decentralization's efficacy see L.C. Gray, Decentralization, Land Policy and the Politics of Scale in Burkina Faso in Karl Zimmerer (ed) *Globalization & New Geographies of Conservation* (University of Chicago Press: 2006) 277-295, 277. For the Canadian context see E. Pinkerton (ed) *Co-operative Management of Local Fisheries: New Direction for Improve Management and Community Development* (UBC Press, 1989).

[63] T.R. Berger, *Northern Frontier, Northern Homeland: The Report of The Mackenzie Valley Pipeline Inquiry* (Vancouver: Douglas & McIntyre, 1988).

A third similarity with new governance is that co-management expects stakeholders to engage in deliberation which puts collaboration and flexibility at the forefront.[64] Co-management scholars and practitioners describe a similar shift towards adaptive processes, feedback learning, and flexible partnerships through collaboration and learning.[65] This manifests in the deliberation required of representative board members as well as expectations for stakeholder collaboration. Hence, this paper will describe how community stakeholders become involved in generating the rules which regulate environmental assessment.[66] However, the case study will also describe how the Review Board uses stakeholder participation to facilitate multiparty cooperation and exchange of information in environmental assessment itself. In truth, environmental assessment processes are prone to collaborative techniques. For example, developers are commonly tasked with generating their own assessment report which the agency uses to evaluate environmental impacts. Therefore, in contrast to the traditional model, the Review Board is already changed from strict regulator to facilitator by virtue of environmental assessment procedures.[67] However, within co-management, collaborative forms of management reflect the belief that natural resource use is a question of negotiation and agreement among stakeholders.[68] Much like new governance, informal and negotiated processes dominate much of co-management's regulatory output.[69]

A fourth characteristic shared in common with new governance is that both theories advocate for a holistic and dynamic approach to problem solving.[70] This approach recognizes that doctrinal boundaries between legal issues will be overcome if parties can question impacts and relationships between domains.[71] Similarly, co-management expects increased knowledge will

[64] J. Freeman, 'Collaborative Governance in the Administrative State' (1997) 45 *UCLA L. Rev.* 1-98.

[65] D. Armitage, F. Berkes and N. Doubleday (ed) *Adaptive Co-Management: Collaboration, Learning and Multi-Level Governance* (UBC Press, 2008).

[66] *Infra,* Part III.

[67] Jane Holder, *Environmental Assessment: The Regulation of Decision-Making* (Oxford: OUP, 2004).

[68] D. Armitage, F. Berkes, and N. Doubleday (eds) 'Introduction: Moving Beyond Co-Management' in *Adaptive Co-Management: Collaboration, Learning and Multi-Level Governance* (UBC Press, 2007) 1-15, 4.

[69] P. Salembier, *Regulatory Law and Practice in Canada* (LexisNexis utterworths, 2004). For an Australian case study see C. O'Faircheallaigh, 'Making Social Impact Assessment Count: A Negotiation-based Approach for Indigenous Peoples' (1999) 12 *Society and Natural Resources*, 63-80.

[70] O. Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minn. L. Rev*. 342-470 at 385-387

[71] Id.

lead to the overall improvement of resource and wildlife management.[72] Advocates expect that "more holistic insights into ecosystems dynamics would result from an integration of traditional and science based knowledge."[73] For example, statutory provisions which permit reliance on Traditional Knowledge reinforce the power of the agencies to search out and use oral histories and elder testimonies as part of the evidentiary record.[74] This use of alternative knowledge expects it to alter regulation much like new governance expects that participatory processes will continuously change regulation to reflect new information transmitted by stakeholders.

Ultimately, co-management arrangements can be traced to the same post-socialist project of the Left as certain scholarship identified with new governance.[75] Both work with a limited belief in the competence and capacity of the central state to address the economic and social needs of its citizenry.[76] Rather than limiting itself to procedural rights, co-management builds on the same participatory democratic strand of new governance. It looks to construct models in which local marginalized stakeholders can be involved more directly in regulation and collective problem solving, with some form of centre that coordinates local efforts.[77] This is rationalized as providing a more equitable distribution of resources and more effective problem solving.

C. COMMUNITY AS STAKEHOLDER

1. How NG Structures Community as Stakeholder

A by-product of both co-management and new governance arrangements has been the identification of communities as stakeholders. Community is implicated in resource management through the development of participatory initiatives that seek to include local actors in decision-making. Much like other governance arrangements, community stakeholders are rationalized as those closest to the problem and therefore best thought to navigate

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[72] E. Pinkerton (ed) *Co-operative Management of local Fisheries: New Direction for Improve Management and Community Development* (Vancouver: University of British Columbia Press 1989. For critiques see White, Graham 'Cultures in Collision: Traditional Knowledge and Euro Canadian Governance Processes in Northern Land Claims Boards' (December 2006) *Arctic* vol. 59 No. 4 401.

[73] G.P Kofinas, 'Caribou Hunters and Researchers at the Co-management Interface: Emergent Dilemmas and the Dynamics of Legitimacy in Power Sharing' (2005) 47(2) *Anthopologica,* 179-196 at 180.

[74] *MVRMA*, s.115.1, s. 60.1(b), s. 146, and s.150.

[75] J. Cohen and J. Rogers, 'Power and Reason' in Archon Fung and Erik Olin Wright (eds) *Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003) 237-258 at 237.

[76] Id.

[77] Id.

environmental regulatory conflict.[78] This can be traced to conceptualizing bottom-up participation and devolution as key to participatory initiatives.[79] Within this conceptualization, local actors are rarely identified as individuals.[80] Rather, the institutionalized participation of select organizations is expected to represent the needs of individuals.[81] As Stijn Smismans writes on the relationship between new governance and citizenship:

> Although in theory, individual stakeholders could be involved in policy making, in practice this happens mainly through the participation of functional intermediaries. Stakeholder participation normally implies group participation.[82]

Primarily through board representation, co-management applies this same principle of stakeholder participation to Indigenous communities. It is expected that Indigenous perspectives will be represented by individuals appointed or nominated by local Indigenous governments. The allocation of representative status to governments reflects the reality that Indigenous persons in the Mackenzie Valley are members of a community that is defined by its governmental authority as well as its traditional clan or tribal membership.

In addition to board representation, co-management agencies also incorporate concepts of community through the exercise of their mandates. For example, the Review Board in this case study regularly draws on public participation to obtain feedback on the numerous steps involved in environmental assessment including, but not limited to, the design of rules, the

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[78] O. Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minn. L. Rev*. 342-470, 425. For discussion of the efficacy of decentralized management see L.C. Gray, 'Decentralization, Land Policy and the Politics of Scale in Burkina Faso' in Karl Zimmerer (ed) *Globalization & New Geographies of Conservation* (University of Chicago Press: 2006) 277-295.

[79] A. Fung and E. Wright (eds) 'Thinking About Empowered Participatory Governance' in D*eepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003) 3-42 at 16.

[80] J. Cohen and J. Rogers, *Associations and Democracy*, *The Real Utopias Project* Vol. 1 (London: Verso, 1995). A. Fung and E. Wright, 'Thinking About Empowered Participatory Democracy' *in Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003) 3-41 at 20.

[81] Conceptualizing communities as stakeholders is also captured by decentralization - the de-concentration of governmental administrative and financial functions from the national to the more local levels, with a greater role for civil society institutions and actors. L.C. Gray, 'Decentralization, Land Policy and the Politics of Scale in Burkina Faso' in K. Zimmerer (ed) *Globalization & New Geographies of Conservation*, (University of Chicago Press: 2006) 277-295, 277.

[82] S. Smismans, 'New Governance - The Solution for Active European Citizenship, or the End of Citizenship' (2006-2007) 13 *Colum. J. Eur. L.* 595, 618.

terms of a particular assessment, and factual determinations. It works intimately with communities to obtain their input into environmental decisions. The board effectively uses its authority to generate regulation that reflects deliberation on community-centered decision-making. By doing so, the board allows what it represents as community norms to take a greater role in decision-making than previous assessment regimes have allowed.

The case presented here affirms that the process by which Indigenous stakeholders' values are incorporated and implemented in rulemaking is evidence of how new governance mechanisms can increase participation of marginalized stakeholders. Consequently, this paper demonstrates that the Review Board has used its formal authority to generate guidelines that reflect community values. Moreover, it argues that this evidences that the Review Board has effectively undertaken the task of contextualizing environmental assessment in community-based perspectives. In addition, the implementation of the guidelines provides further evidence that the use of agency discretion to support negotiation has resulted in increased participation for communities in a way that impacts development.

2. Stakeholder as Community is Problematic Because Community is not Homogenous

If new governance and co-management theories both rely on communities as stakeholders, they must also contend with the diverse ways community can be conceptualized and the impact this conceptualization has on theorizing participation. Essentially, the theories must ask, who is the community? As documented by Arun Agrawal and Clark Gibson, current writing on development and participation has championed the role of community in the realization of decentralization, participation, autonomy and conservation.[83] However, the concept of community rarely receives the attention or analysis it would require for effective discussion of resource use and management.

The most fundamental difficulty with the notion of community for environmental decision-making is that it often portrays the community as a single and unified entity capable of bringing its knowledge to bear on decision-making.[84] Thus, literature on community-based conservation is criticized as operating with "the mythic community: small, integrated groups using locally evolved norms to manage resources sustainably and equitably." [85] Agrawal criticizes these approaches as unreliable descriptors of how communities effect resource conservation.[86]

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[83] A. Agrawal and C. Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27(4) *Yale World Development* 629-649.

[84] Id. at 633.

[85] The three characteristics of community as 1) a small spatial unit; 2) a homogenous social structure; or 3) a group with shared norms. Id. at 630.

[86] Id.

In contrast, empirical studies and common sense reveal a much more complex conceptualization of community at work. For starters, Indigenous communities are not comprised of a single group of individuals with similar goals and capacities. Nor are communities homogenous groups that possess common characteristics with respect to ethnicity, religion or language. Instead, communities are comprised of sub-groups and individuals with varying preferences for resource use and distribution.[87] Agrawal argues that recognition of heterogeneity "indicates that empowering local actors to use and manage their natural resources is more than the decentralization of authority over natural resources from the central government to a 'community' ".[88] It is better described as the devolution of authority to a set of institutions and actors that mediate, structure, mold, accentuate, and facilitate particular outcomes and actions. To Agrawal, one cannot characterize a community without characterizing the institutions which make the decisions.

Similarly, Tania Murray Li questions how a narrative which differentiates between government and community makes sense when the community is often a unit of local government.[89] "[T]he development of new institutions that allocate more control over resources and management authority to local units cannot really be seen as the transfer of power from state to community, envisaged as separate entities."[90] Li argues that instead, communities should be seen as the internalization of the state system through territorialization. By this Li means that decentralization which conceptualizes communities as separate from the state ignores the state's role in forming territorially bounded communities and the incorporation of the community into the state apparatus. Li's observation focuses attention on how communities can be constructed or reconstructed through law and politics. Moreover, it refocuses attention on how political institutions speak in the name of community and the relationship of the community to the larger governmental apparatus.

Once institutions and actors are identified as the relevant focus of attention, researchers can better identify divergent interests in development and recognize that these interests may change as new opportunities emerge. An institutional or actor-based approach also helps identify how these divergent interests are empowered by the legal systems which establish and support communities as stakeholders. For example, the effect of centralized approaches to

[87] Id. at 635.

[88] Id. at 637.

[89] T. Murray Li, 'Boundary Work: Community Market and State Reconsidered' in A. Agrawal and C. Gibson (eds) *Communities and the Environment: Ethnicity, Gender and the State in Community Based Conservation* (Rutgers University Press, 2001) 157-179, 162.

[90] Id. at 164.

resource management is to undermine the legitimacy and formal powers of local communities. The act of reclaiming authority by the local community over resource management requires re-establishing their legitimacy and formal powers. The problem, as Ostrom observes is that, "one does not re-create a functioning community by fiat".[91] Nonetheless, legislation which integrates Indigenous communities in decision-making presumes that they are automatically capable of organizing to exercise these rights effectively. Law is used to achieve effective devolution to local communities previously under-represented. This use presumes that liberal democratic structures which legitimate decision-making elsewhere will operate similarly in local communities. Scholars critical of simplified notions of community argue that such notions generate unrealistic expectations of how conflict will arise and be resolved in those communities.[92] It can gloss over substantial internal inequalities such as the construction of gender,[93] relationships to other communities and markets,[94] and the strategic use of conflicting legal systems to gain advantage.[95]

Rather than presuming that the new system will easily layer on top of the previous system to promote a community perspective, critics argue that this approach reflects the naïveté of resource management policies founded on simplified notions of community. Instead, effective democratization requires asking who within the institution controls the task, the decision-making, and the benefits.[96] The corollary of this requires asking whether increased participation allows those sub-groups and individuals who are not in control a voice. For example, devolution to 'traditional' institutions tends to reinforce existing power relations, which are often male-dominated.[97] Divisions in community by kinship and religion can also undermine

[91] E. Ostrom, 'Foreword' in A. Agrawal and C. Gibson (eds) *Communities and the Environment: Ethnicity, Gender and the State in Community Based Conservation* (Rutgers University Press, 2001) at x.

[92] M. Hughes McDermott, 'Communities and the Environment: Ethnicity, Gender and the State' in A. Agrawal and C. Gibson (eds) *Communities and the Environment: Ethnicity, Gender and the State in Community Based Conservation*,. (Rutgers University Press, 2001) 32-61.

[93] R. Menzen-Dick and M. Zwarteveen 'Gender Dimensions of Community Resource Management: The Case of Water Users' Associations in South Asia' in A. Agrawal and C. Gibson (eds) *Communities and the Environment: Ethnicity, Gender and the State in Community Based Conservation*,. (Rutgers University Press, 2001) 63-81.

[94] T. Murray Li, 'Boundary Work: Community Market and State Reconsidered' in A. Agrawal and C. Gibson (eds) *Communities and the Environment: Ethnicity, Gender and the State in Community Based Conservation*,. (Rutgers University Press, 2001) 157-179.

[95] B. Ng'weno, Reidentifying Ground Rules: Community Inheritance Disputes among the Digo of Kenya in A. Agrawal and C. Gibson (eds) *Communities and the Environment: Ethnicity, Gender and the State in Community Based Conservation*,. (Rutgers University Press, 2001) 111-137.

[96] R. Menzen-Dick and M. Zwarteveen 'Gender Dimensions of Community Resource Management: The Case of Water Users' Associations in South Asia' in A. Agrawal and C. Gibson (eds) *Communities and the Environment: Ethnicity, Gender and the State in Community Based Conservation*,. (Rutgers University Press, 2001) 63-81, 64.

[97] Id. at 70.

conceptualizations of community conceived in accordance with liberal democratic principles.[98] Equally, accusations that lawful decisions lack cultural authenticity undermine their perceived legitimacy. Conceptions of what is legitimate within an Indigenous community can be tied to what is considered authentic of a particular culture. Whether contemporary laws or policies that are unreflective of traditional Indigenous culture but implemented by resident Indigenous decision-makers are legitimate is part a growing debate that engages conceptualizing community.[99]

For its part, new governance is just beginning to consider how its processes empower or disempower certain sub-groups of community stakeholders.[100] Nor has it come to terms with the fact that that the community stakeholder is not a single unified entity capable of bringing its knowledge to bear on decision-making. Instead, it generally theorizes the stakeholder as possessing certain interests that are defined (albeit flexibly) prior to bargaining. One commentator ascribes the trend to a focus on the individual.[101] Within an approach which privileges the individual, a community is simply a composite of individuals and can, itself, be treated as an individual. Therefore, communities are treated as "willful and bounded actors capable of occupying a seat at the negotiation table, creating alliances, managing risk, making choices and ultimately pursuing their own strategic ends."[102]

The following case study demonstrates that co-management can also conceptualize the community as an individual actor. However, expectations of unity most likely flow from the identification of community with representative government - which itself derives from the claim to self-determination by Indigenous peoples. Current governmental structures are a

[98] B. Ng'weno, 'Re-identifying Ground Rules: Community Inheritance Disputes among the Digo of Kenya' in A. Agrawal and C. Gibson (eds) *Communities and the Environment: Ethnicity, Gender and the State in Community Based Conservation* (Rutgers University Press, 2001) 111-137.

[99] C. Zuni Cruz, 'Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporation Customs and Traditions into Tribal Law' (Jan. 2001) 1 Tribal L.J. For similar concerns in Canada see, T. Alfred**,** *Wasase Indigenous Pathways of Action and Freedom* (Broadview Press, 2005).

[100] Considerations of power have dominated the critical reflection on how participation is constructed. For example, J. Cohen and J. Rogers, 'Power and Reason' in A. Fung and E. Wright (eds) *Deepening Democracy: Innovations in Empowered Participatory Governance* (London: Verso, 2003) 237-258; L. Alexander, 'Stakeholder Participation in New Governance' (Winter 2009) Vol. XVI *The Georgetown Journal on Poverty Law & Policy* 117-185. For a impacts on individual citizens see S. Smismans, 'New Governance - The Solution for Active European Citizenship, or the End of Citizenship' (2006-2007) 13 *Colum. J. Eur. L*. 595-622.

[101] A. Cohen, 'Dispute System Design, Neoliberalism and the Problem of Scale' (2009) 14 *Harvard Negotiation Law Review*, 51-80 at 60.

[102] Id. at 61.

product of contemporary land claim and self-government agreements. The result is the legitimized conceptualization of communities as geographically bounded localities represented by Indigenous governments. This structure is repeated for each Indigenous people in the region. Much like Li's characterization of the community as territorialization, treaty negotiation has led to the creation of community-based institutions which can be identified as state-based governments. As governments, their submissions to agencies and their legal authority to bind their constituents are backed by liberal democratic ideals that they speak for the community as a whole.

While an expectation of community stakeholder unity may be legally accurate, it is not analytically descriptive of the diversity of opinions within communities. Rather than presume that representative government is entirely reflective of public interests, it would be more accurate to suggest that local governments represent particular perspectives on an issue. These difficulties are not raised here to cast aspersions on governments, Indigenous or non-Indigenous. On the contrary; they are raised here to illustrate that Indigenous governments must currently contend with effectively representing diverse public interests in the face of expectations that the public interest will be defined and made certain. Without an investigation of how community stakeholders are constructed and empowered by governance regimes, new governance and co-management fail to recognize that there are values which operate at the community level but are not operationalized in negotiations. These limitations can be attributed to the failure of negotiation to account for effective representation of those groups' values and interests.

With these insights in mind, this paper queries whether the inclusion of community perspectives through negotiation can be easily characterized as participatory as conceived by deliberative democratic theory. As explained earlier, deliberative democracy promises to emancipate through its power to hear arguments and empower those arguments deemed reasonable. Participation is the mechanism to achieve this objective. Because the community has a greater impact on the terms of development and the agreements may have a regulative effect, negotiation is rightly theorized as participatory. However, the limitations on its ability to reflect social values and objectives prevent it from being theorized as a successful conduit for the hearing of reasoned arguments. Instead, it would be more accurate to identify participation in making the agreements as participation in the resource market or as an unrealized attempt to reflect the participatory ideals of deliberative democratic decision-making. Neither of these characterizations precludes the possibility that private agreements can have regulatory effect. However, they do suggest that the failure of these agreements to address certain social objectives make them an imperfect replacement for regulation led by public institutions.

IV. CASE STUDY: ADAPTING SOCIO-ECONOMIC GUIDELINES

The previous discussion established that there are shared characteristics and objectives for marginalized stakeholders in both co-management and new governance. The seminal question becomes whether either theory can deliver what it promises. In the hopes of providing some

answers, this section critically documents the implementation of participatory objectives by the Review Board. In particular, this section examines the Socio-Economic Impact Assessment Guidelines developed by the Review Board.[103] The new rules were formulated as a result of extensive consultation with multiple stakeholders but are highly responsive to feedback from Indigenous stakeholders. The result is a set of rules which encourages private stakeholders to engage in participatory practices directly with communities as an alternative to agency evaluation.

Guidelines are secondary rules used by administrative agencies to set out the general approach that an agency plans to take in exercising its statutory powers. The Review Board's legal authority to generate the SEIA guidelines is derived from section 120 of the *MVRMA*.[104] It authorizes the Review Board to establish guidelines respecting processes, including guidelines for the determination of the scope of developments, the form and content of reports and the submission and distribution of environmental impact statements. The Review Board has so far produced three sets of guidelines as follows: 1) *Environmental Impact Assessment Guidelines; 2) Socio-Economic Impact Assessment Guidelines; 3) Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment.*[105] The SEIA guidelines outline the Review Board's expectations for assessment of proposed developments that may have socio-economic and cultural impacts. By examining the creation and application of rules on socio-economic assessment, this section describes how the Review Board replaces traditional regulatory schemes with participatory and decentralized arrangements.

A. SEIA GUIDELINE CREATION

1. Guideline Consultation

Prior to formulating the SEIA guidelines, the Review Board undertook extensive consultation with each of the impacted stakeholders. Documenting the alterations made to the SEIA guidelines from their original formulation in the discussion paper to finalized guidelines, this section details how the SEIA guidelines were adapted as a result of community participation.

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[103] MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW SOCIO-ECONOMIC IMPACT ASSESSMENT GUIDELINES *available at* http://www.reviewboard.ca/reference_lib/index.php?section=18 (May 17, 2010) (hereinafter, SEIA guidelines)

[104] *MVRMA*, s.120.

[105] All guidelines are on file with the Review Board. Copies of the guidelines *available at* http://www.reviewboard.ca/reference_lib/index.php?section=7, (April 16, 2009).

The Review Board began drafting the SEIA guidelines with a discussion paper titled "Issues and Recommendations for Social and Economic Impact Assessment in the Mackenzie Valley."[106] Written with the assistance of an external consultant the paper outlined the requirement for SEIA processes under the *MVRMA* and suggested improvements for future assessments. The Review Board circulated that paper to various stakeholders.[107] In addition to obtaining feedback on the paper, the Review Board was also introducing the idea of socio-economic assessment to the region. Hence, the Review Board adopted a pedagogic approach to discussing socio-economic impacts. Identifying the need to "raise the bar" for SEIA[108] Review Board staff spearheaded an effort to "awaken" the Mackenzie Valley to the benefits of this assessment. [109]

The paper identified a number of socio-economic impacts, many of which were later echoed by communities. However, the language of the guidelines most definitely reflected the concerns of Western scientific literature on environmental protection. For instance, the paper posed sustainable development as a solution to impacts from development.[110] Prominent in environmental assessment, sustainable development would almost be a given in any discussion. Moreover, the paper focused on the stages of SEIA and what technical tools are required to achieve each stage. For instance, in regards to economic analysis the paper notes that "[a]nalysis of economic impacts is technical and quantitative, and requires fiscal and technical capacity if it is to be undertaken in the course of economic impact assessment."[111] Consequently, the discussion paper recommended the use of fiscal analysis, cost-benefit analysis, input-output analysis and measuring intangibles.[112]

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[106] Mackenzie Valley Environmental Impact Review Board with assistance from Consilium and Gartner Lee Limited, *Issues and Recommendations for Social and Economic Impact Assessment in the Mackenzie Valley*, (2002) http://www.reviewboard.ca/upload/ref_library/SEIA_paper.pdf. (April 16, 2010).

[107] The Review Board also held focus groups with governmental and industry users. Mackenzie Valley Environmental Impact Review Board, *Report on Focus Groups on Discussion Paper on Socio-Economic Impact Assessment Guidelines for Environmental Assessment in the Mackenzie Valley* June 28 & 29, 2005 (July 18, 2005) http://www.reviewboard.ca/upload/ref_library/Focus_Group_Report-July20.pdf (May 17, 2010).

[108] Mackenzie Valley Environmental Impact Review Board, *Socio-Economic Impact Assessment Workshop Report: Raising the Bar for Socio-economic Impact Assessment*, (May 29, 2006) http://www.reviewboard.ca/upload/ref_library/SEIA_Workshop_Report_May_29_2006.pdf. (April 16, 2010).

[109] Mary Tapsell and Alistair Macdonald, ''The 'Awakening' of SEIA in the Northwest Territories, Canada - The Mackenzie Valley Environmental Impact Review Board's Experience' presented at the International Association for Impact Assessment (Seoul, Korea, 2007) at 5 *available at* http://www.reviewboard.ca/upload/ref_library/1186093586_s%20Experience.pdf. (April 16, 2010) ('Awakening').

[110] Mackenzie Valley Environmental Impact Review Board and Consilium and Gartner Lee Limited, *Issues and Recommendations for Social and Economic Impact Assessment in the Mackenzie Valley* (2002) *available at* http://www.reviewboard.ca/upload/ref_library/SEIA_paper.pdf. (April 16, 2010) at 9.

[111] Id. at 35.

[112] Id. at 33-39.

Using the paper as a starting point for discussion, the Review Board then adopted an iterative process to obtain stakeholder input into the content of the guidelines. Starting in September 2005, the Board actively engaged every party it thought should have input into designing effective SEIA. It canvassed developers, government departments, consultants involved in SEIA and other parties in focus groups. It also spent a good deal of time canvassing the residents and communities of the Mackenzie Valley. The Review Board undertook extensive community visits and meetings to discuss socio-economic impact assessment.[113] The Board summarized community feedback in a report titled, "Community Visits 2005: Raising the Bar for Socio-Economic Impact Assessment, A Report on What Communities Told Us"[114]

The Report organized the various concerns expressed by communities under two headings: concerns with impacts and concerns with process. Importantly, much of the language prominent in the circulated discussion paper was absent from the community report. In comparing the initial discussion paper and the community report real differences in language and approach become apparent. First and foremost, the language of sustainable development was completely absent from the community report. While some literature considers there to be many similarities between the principles of sustainable development and Indigenous resources use, the discourse of sustainable development has not been widely used in Northern communities and may be at odds with decision-making.[115] Hence, its absence from any community recommendations is notable but not unexpected.

Also absent from the community report are references to the technical tools needed to determine socio-economic impacts. In place of a technical expert or bureaucrat who will determine impacts and mitigation, communities repeatedly stated that they are the experts of their own social and economic conditions. More to the point, proponents should consult with them about their needs, how to address them and what tools best achieve mitigation. The

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[113]The Board reports having conducted over 50 meetings with approximately 550 people in 13 different communities. The goal was to speak to front-line workers: those dealing with social, economic and cultural impacts everyday. This included nurses, social workers, health and social services agencies, interagency committees, economic development officers, renewable resource committees, impact advisory groups, social and cultural institutes, land corporations, drug and alcohol counselors, community leadership, elders and youth groups. Mackenzie Valley Environmental Impact Review Board, *Community Visits 2005: Raising the Bar for Socio-Economic Impact Assessment, A Report on What Communities Told Us* (2005), http://www.reviewboard.ca/upload/ref_library/Socio-Economic_Impact_Assessment_Community_Tour_Report-2005.pdf (April 16, 2010) at 5.

[114] Id.

[115] Mark Stevenson, 'The Possibility of Difference: Rethinking Co-management' (Summer 2006) 65, 2 *Human Organization* 167-180 (co-management replaces Aboriginal discourse with environmental resource management)

following chart (Table 1) summarizes the information provided in the community report and evidences this seismic shift to community consultation in assessment.

Table 1

Impacts	**Sample Description**	**SEIA - Community Suggestions**
Pressures On Social And Physical Infrastructure	Population influx causing pressure on service demands (i.e health services). Qualified local personnel move to industry	Assessment of the infrastructure and human resources needed to meet needs of the increased population. Government and industry prepare communities before development
In-Migration And Out-Migration Effects	Family and community dynamics change as result of migration to work	Better consideration of case studies of in-migration effects, as well as of alternative work scheduling
Boom And Bust Economic Cycles Of Mining	Non-renewable resource development is a relatively short term activity	Do Pre-development planning. Use impact benefit agreementss and socio-economic agreements to deal with training in money management, alternative sources of economic and social capital and economies which work in harmony with subsistence lifestyles.
Training, Education And Job Retention	Unskilled residents restricted to unskilled work	Use agreements to address job-creation with personal growth potential, long-term planning to provide training in sectors with growth potential; early proactive planning.
Pace Of Change On Vulnerable Communities	Social programming cannot handle new issues arising from industrial development	Assessment of cumulative impacts to identify local strengths and vulnerabilities, wellness infrastructure prior to development (parenting training, treatment centres, counselors, youth programs, healing strategies). Training to self-assess social economic and cultural strengths.
Language And Cultural Maintenance	Maintaining culture in face of different set of values from development	Assessment to address loss of culture and funding for: “bush schools”, use of elders, traditional teachings in curricula, language and cultural programs
Housing And Cost Of Living	Increased demand for housing during in-migration inflates housing costs and overcrowding	Prepare communities for economic changes; manage expectations of increased standard of living
Protection Of Cultural And	Development physically destroys archaeological	Use community environmental monitors onsite for any new development with

Impacts	Sample Description	SEIA - Community Suggestions
Heritage Resources;	resources and harms the spiritual powers of these areas	capacity to stop work if found. Use traditional knowledge to identify areas and suggest other land uses during environmental assessment.
Impact On Traditional Economy And Harvesting	Participation in wage economy prevents traditional economy and development harvesting success.	Use harvester compensation agreements to compensate for change. Companies to liaise with community for scheduling harvesting
Maintaining Jobs, Business And Revenue In North	Communities cannot take advantage of positive changes	Use agreements to institute the principle that pre-existing disadvantages should have preferential access to benefits.
Vulnerable Sub-Populations (Women, Elders, Youth)	Influx of women into wage economy puts strains on children "left to their own devices"	Use gender based assessment for greater understanding of community social dynamics
Addictions And Criminal Activity	Outside cultural influence, lack of skills in managing money, pre-existing social and economic ills lead to unhealthy behaviour	Assessment of community vulnerability and prediction of impacts leading to more prevention and mitigation

Essentially, this documents a shift in suggested methods for obtaining information from expert-focused to community-focused sources. This contrasts sharply with the draft paper. While the draft paper did address the relevance of community input, it focused on the use of adaptive management and broad institutional participation. In the draft paper, the Review Board is expected to determine what constitutes a socio-economic impact and whether the suggested measure mitigates it. In contrast, the community report indicates that the community is to play a larger role in those determinations.

For example, the community report identifies a need for developers to do pre-development planning on how it will prepare citizenry for the impacts of boom and bust cycles of development. However, instead of using external technical data to determine the needs in boom-times and bust-times, the community report suggests the use of impact benefit and socio-economic agreements aimed at addressing the need for pre-development planning in the community. It makes the community, as party to the agreement, the authority on whether an impact exists and whether it has been sufficiently mitigated. A second example relates to the determination of impacts on traditional economies and harvesting. Instead of the Review Board determining the impact of development on communities, the report suggested the negotiation between the developer and the community for harvester compensation agreements. The agreements are expected to compensate communities for change and build scheduled

harvesting into development programs. A quick look at the above chart shows that other impacts evidence a similar pattern. For almost every impact identified, the communities suggested the need for their input in assessment.

Ultimately, communities identified themselves as the best source of data required for socio-economic assessment and mitigation. Moreover, the importance of community input into identifying impacts and mitigation are not confined to what has been characterized as the traditional domain of culture (e.g. language, education, traditional economies). While the report did identify impacts on culture, many impacts refer to the broader socio-economic impacts of industrialization. Impacts include pressure on physical and social infrastructure such as roads, health, and social services, housing, education and job training, etc. In short, the most salient message the Report identified was the importance of involving communities in planning every stage of development.

2. Finalized Guidelines

Following a multi-year process, the Review Board released the SEIA guidelines in January 2007. In accordance with the broad use of guidelines to publicize a board or tribunal's policy position and expectations, the SEIA guidelines achieve two main objectives: 1) they informed users what substantive goals the Review Board is trying to achieve and 2) they informed users what process to follow.

a. Substantive Requirements

The substantive goals of SEIA are generally to identify and evaluate the potential socio-economic and cultural impacts of a proposed development on people. In the SEIA guidelines issued by the Review Board the main focus are the impacts on Indigenous peoples who have based their economies on Mackenzie Valley lands. If the impacts are significant and adverse, the SEIA guidelines aim to assist the reduction, removal or prevention of those impacts. If the impacts are beneficial, the SEIA guidelines aim to assist their maximization.

Like most environmental assessment, SEIA is proponent-led. Therefore, the developer determines which communities and which socio-economic components the proposed development may impact. However, the SEIA guidelines play an essential role in telling the developer what goals they are to achieve and how. Thus, the SEIA guidelines adopt a normative position on healthy communities and the responsibility of private corporations to ensure their existence. They itemize seven components of a healthy community, namely: health and well-being, sustainable wildlife harvesting and land use, protection of heritage and cultural resources, equitable business and employment opportunities, population sustainability, adequate services and infrastructure, adequate sustainable income and lifestyle.[116]

[116] SEIA guidelines, ch. 2 at 7.

This list has a number of remarkable aspects. The first is that it itemizes markers of a healthy Aboriginal community in the North and impacts specific to Aboriginal peoples. For example, the first component, Health and Well Being, is broken down into issues regarding: a) individual and population health, b) community and cultural group cohesion, c) family cohesion, and d) cultural maintenance.[117] The second component, Sustainable Wildlife Harvesting and Land Use, is broken down into issues regarding: a) hunting trapping and gathering -traditional economy, b) recreational and traditional economy - access to land, and c) value of alternative land uses.[118] These two components give a snapshot of the diverse issues in Aboriginal communities which are potentially affected by development. They reveal that Aboriginal communities suffer from ills similar to those suffered by many communities close to extractive resource development. For example, seasonal work, migration, pressure on services such as health care and education etc. However, for each of these issues, Aboriginal communities are impacted differently.

The second and even more remarkable aspect of this list is that it vests responsibility for identifying and mitigating impacts in private corporations. A quick glance at the seven components reveals a list of public issues generally believed to be governmental responsibilities. The preservation of health, food supply, culture, education, and infrastructure are not the usual purview of private enterprise - unless they are providing services for a fee. Yet, these guidelines require developers to consider the health and well being of communities that service or interact with resource workers in isolated regions. For instance, the SEIA guidelines observe that increased levels of sexually transmitted diseases and increased alcohol and drug use are associated with development. These two impacts put immense pressure on families, as well as the community's service providers. That a diamond drilling company is now responsible for the ripple effect of a mine on a nearby community is notable. To be sure, this shift to developer responsibility is not unique to the Mackenzie Valley. However, insofar as these guidelines address the direct and indirect socio-economic impacts of a proposal on Aboriginal communities, it is at the forefront of impact assessment. This shift would explain why the Review Board publicly reported that one of the challenges of implementing the *MVRMA* "has been the acknowledgement and acceptance of new roles and responsibilities related to socio-economic impact assessment."[119]

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[117] Id.

[118] Id.

[119] Mary Tapsell and Alistair Macdonald, 'The 'Awakening' of SEIA in the Northwest Territories, Canada - The Mackenzie Valley Environmental Impact Review Board's Experience' presented at the International Association for Impact Assessment (Seoul, Korea, 2007) at 5 *available at* http://www.reviewboard.ca/upload/ref_library/1186093586_s%20Experience.pdf. (April 16, 2010).

b. Procedural Requirements

In addition to the normative goals just discussed, the procedural requirements of the SEIA guidelines also reinforce the centrality of community involvement in socio-economic assessment. The focus on community involvement in development planning seems to reflect community-based suggestions on how to improve the process, such as: early and continuous community engagement, attention to community concerns, and avoidance of community burnout. The impact of this approach on the finalized SEIA is the wholesale commitment to the role of community involvement at each stage.

In many ways, the procedural requirements of SEIA are similar to those used for environmental impact assessment.[120] For instance, both require developers to go through six steps for each level of assessment. The levels of assessment are: A) the Preliminary Screener; B) the Environmental Assessment; and C) the Environmental Impact Review. For each level of Assessment the developer must undertake the six steps: 1) scoping, 2) profiling, 3) identifying and predicting impact, 4) identifying mitigation, 5) evaluating significance, and 6) imposing mitigation and follow-up. Despite these similarities, there are differences between the two processes in regards to data collection, information sources, significance determination and analytical tools. These differences have a noteworthy impact on assessment. More specifically, these differences purposefully empower communities to determine socio-economic impacts and how they can be mitigated by making communities the direct source of socio-economic information or making community acquiescence a central feature.

Ultimately, the SEIA guidelines expect community engagement to undermine false assumptions of SEIA. For example, developers often assume that increased disposable income can create stronger families with greater opportunities for education and health. This is contradicted by community evidence that increased disposable income can increase wasteful spending, alcohol consumption, and migration of community members to urban centres - all of which weaken families.[121] Aimed at achieving appropriate knowledge, community engagement saturates all stages of the Preliminary Screening.

For example, at the 'Scoping' stage of a Preliminary Screening developers must determine what issues should be analyzed in an SEIA and what level of SEIA is required (basic, moderate or comprehensive). The Guidelines direct developers to three primary sources for socio-economic data: communities, governments and prior written research. The Guidelines instruct developers that "early community engagement is required before the developer submits an application for preliminary screening."[122] Moreover, the Review Board may conclude a

[120] Mackenzie Valley Environmental Impact Review Board, Environmental Impact Assessment Guidelines (2004) *available at* http://www.reviewboard.ca/upload/ref_library/1195078754_MVE%20EIA%20Guidelines.pdf.

[121] SEIA guidelines, ch. 3 at 39.

[122] Id. at 17.

development application is incomplete if it lacks evidence of early community engagement.[123] Because scoping is meant to identify community and public concerns early in the process, a superficial attempt to contact the community or circulate material will be deemed insufficient by the Review Board. Instead, a developer is expected to use a variety of tools for early engagement including: plain language discussions, individual and group interviews, focus groups, community meetings, open houses, surveys and polling.[124] Similar direction to engage communities is found at the 'Profiling' stage, the 'Predicting Impacts' state and the 'Mitigation'stage.

In summary, community involvement is crucial for the guideline's to achieve their substantive and procedural objectives. It is notable that for almost every stage of assessment there is reference to the need for community input. This can be attributed to community involvement in making the guidelines. Communities identified themselves as the best source of data required for socio-economic assessment in the community report and this became seminal to the finalized guidelines. Within the assessment process, community engagement is meant to elicit answers as to whether the public has concerns with the proposed development. The strong language of the SEIA guidelines ensures that a community's response is integral to the preliminary screening. Hence, by focusing on community input, the SEIA guidelines evidence an intention to create a regulatory framework that reflects Aboriginal communities in the region.

B. GUIDELINE APPLICATION: PROMOTING PRIVATE AGREEMENTS

The guideline requirements for community involvement have had an impact on the process of conducting SEIA. Incorporating the value of community involvement has made successful environmental assessment contingent upon community involvement. The Review Board's enforcement of this principle has fostered the negotiation of private agreements between Indigenous communities and project proponents. In many ways, the process by which guidelines are used to promote private agreements is a very simple story and mirrors much resource development around the world. In essence, the Review Board uses various soft law requirements for consultation with impacted communities to ensure that project proponents have community approval. Failure to obtain approval results in a highly adversarial process with unpredictable results. However, approval rarely comes by way of simple acquiescence. Community approval is usually dependent upon some form of private agreement that address community requirements.

[123] Id.

[124] Id. at 19.

The private agreements discussed here are the same or similar to the type of legally binding agreements commonly struck between mineral developers and stakeholder communities in resource-rich areas around the world. The precise content of the agreements varies but they commonly involve the provision of consent and/or support for mining or exploration on lands within their jurisdiction. In return, developers give commitments designed to mitigate the detrimental effects of development while enhancing the beneficial effects on the economy, society and environment.

In the Mackenzie Valley, three types of agreements are most commonly used to address impacts: 1) impact and benefit agreements, which itemize the benefits that an Aboriginal community can expect from the development of a local resource; 2) socio-economic agreements, which address territorial economic development; and 3) environmental agreements, which focus on mitigation, monitoring and follow-up. Although each type of agreement serves different purposes and the terms are tailored for each community, there are certain commonalities between them that allow them to be grouped as negotiated agreements. In Canada, the legal requirement for negotiated agreements principally comes from three legal sources: 1) statutory requirements, including land claim or settlement agreements; 2) the common law duty to consult under s. 35 of the *Constitution Act*, 1982; and 3) administrative regulations or guidelines. While the Review Board can draw on any of these legal requirements, the most common authority for requiring consultation is its own guidelines. What follows is a description of how the Review Board uses the guidelines to make its recommendations contingent upon community approval, which is generally achieved through the negotiation or promise to negotiate private agreements.

Once a proposal goes to the Review Board for environmental assessment the developer has the onus to convince the Review Board that it is unlikely the proposed development will cause the significant adverse impacts or public concerns raised at the preliminary screening.[125] The Review Board issues Terms of Reference (TOR), which inform the developer which environmental or socio-economic issues must be addressed. The developer is meant to address the TOR in its Developer Assessment Report (DAR). At the Review Board, the developer is faced with a choice. It can refute the evidence of public concern over socio-economic impacts or it can agree that there will be impacts but submit that they can be mitigated.

Where it refutes the evidence or fails to address the TOR, the SEIA guidelines outline a variety of information sources to compare against the developer's sources. In this case, the SEIA guidelines state that the Review Board may obtain further SEIA information using a number of techniques. These include but are not limited to 1) accepting technical submissions from any party to the environmental assessment, including traditional knowledge reports and socioeconomic studies; 2) hiring experts to examine the evidence; and 3) holding public hearings where parties and members of the public may speak with, and ask questions of, any

[125] *MVRMA*, s. 125(1)(a).

party. [126] The Guidelines also state that the role of Aboriginal communities and other potentially affected groups at this stage is to comment on the developer's SEIA, submit complementary or contrasting evidence to the Review Board and propose mitigation to manage, reduce and/or avoid impacts.[127]

Because the Review Board can premise its assessment on evidence presented by the public, it encourages communities and individuals to present. Setting up a somewhat adversarial model, the SEIA guidelines encourage parties to refute each other's evidence.

> [P]arties may submit comments on the accuracy of impact predictions and preferred mitigation options in the form of technical reports, and/or at technical or public hearings. Parties to the environmental assessment are responsible for submitting their concerns or a comment about the developer's chosen methods and findings to the Review Board….they should make these concerns known to the Review Board.[128]

The SEIA guidelines require all parties to "consider the assumptions inherent to the methods, tools and models the developer used to determine mitigation." Thus, they direct the other parties to "identify strategies for mitigating impacts, and implementing measures and mitigation in adaptive management programs.[129] Moreover, the SEIA guidelines provide methods for the developer to address impacts through negotiation.[130]

The prominent role of community-based evidence in the Review Board's evaluation of the report acts as a disincentive against failing to consult communities. Rather than act at odds with communities, developers are encouraged to use communities as a source of data and to answer community concerns prior to seeking approval. While the Review Board has little formal legal authority to force the parties to negotiate, the effect of enforcing the consultation requirements in the SEIA guidelines is to foster negotiation. In this account, negotiated

[126] SEIA guidelines, ch. 5, at 50-52.

[127] Id. at 51.

[128] Id. at 52.

[129] SEIA guidelines, ch. 7, at 63.

[130] The SEIA guidelines itemize: 1) voluntary adoption of mitigation measures by developer or government; 2) Review Board measures; and 3) contractual agreements with governments and communities as methods. SEIA guidelines, ch. 5, at 53.

participation is a result of the deterrent effect of contradictory evidence that comes from community participation in the agency's socio-economic assessment.

V. CHARACTERIZING PARTICIPATION

A. NEGOTIATION AS PARTICIPATION

Contextualizing negotiation in the consultation requirements of the SEIA guidelines is significant. It grounds the Review Board's support for private negotiation in the intention to allow local participation to determine the terms of development. Essentially, the Review Board supports negotiation as a method of socio-economic assessment because it perceives it to offer a better participatory model than the Review Board can offer alone. In this light, negotiation is theorized as positive because Indigenous participation rationalizes the outcome. The integration of socio-economic assessment with private negotiation designed to address the aspirations and concerns of Indigenous peoples is consequently seen as a positive step consistent with participatory governance.[131]

In so far as private negotiation can incorporate community perspectives, a number of scholars in diverse fields of study would likely agree with its characterization as participatory. The shift to private negotiation matches the trend to characterize various types of decentralized regulation as participatory. For example, arguments for collaborative problem-solving, adaptive management, and increased stakeholder participation each rely on increased tolerance for methods such as negotiated approaches to regulation and permitting. As it relates to environmental regulation, the change to flexible and coordinated legal forms is pervasive. As Jane Holder remarks it "marks a vital shift in environmental law, as elsewhere, in favour of law which, arguably, allows for negotiation and deliberation between government, industry, and the public and makes room for innovation and creativity in decision-making."[132] Contextualizing the Review Board's shift to negotiation in these broader trends supports its characterization as participatory.

Scholars interested in the use of negotiation by Indigenous peoples see the shift to negotiation as a de-centering of regulation that empowers Indigenous stakeholders through their participation. For example, in his seminal work on impact benefit agreements, Kennett argues that the agreements reflect two primary goals for Aboriginal signatories: 1) to address the adverse effects of large-scale mineral development and 2) to ensure benefits of mineral development flow to local communities.[133] For Galbraith, Bradshaw, and Rutherford, impact

[131] C. O'Faircheallaigh, 'Making Social Impact Assessment Count: A Negotiation-based Approach for Indigenous Peoples' (1999) 12 *Society and Natural Resources*, 63-80.

[132] J. Holder, *Environmental Assessment: The Regulation of Decision-Making* (OUP, 2004) 20.

[133] S. Kennett, *Issues and Options for a Policy on Impact Benefit Agreements for the Northern Territories* (Canadian Institute of Resource Law, 1999) 1.

benefit agreements are supra-regulatory agreements that address deficiencies in the Northern assessment process.[134] This same argument is echoed in the work of O'Faircheallaigh, who argues that insufficiencies in Australian and Canadian impact assessment have led to private agreements.[135] In short, socio-economic problems are not resolved by formal participatory processes in co-management. Instead, negotiated instruments have the potential to address those deficiencies. To this way of thinking, the private agreement is not only an 'adjunct' to the public environmental assessment process but reflects and serves to redress its failings.

Ultimately, these accounts of negotiated instruments and the account provided in this paper support the claim that new governance processes can increase the participation of marginalized stakeholders in development. As seen here, the Review Board's support for private negotiation reflects its conscious attempt to allow communities to participate in the licensing of a development project. That support is institutionalized through the creation of SEIA guidelines and its enforcement by the Review Board. Consequently, the description of how this agency uses soft law mechanisms to increase stakeholder participation affirms the effectiveness of new governance initiatives aimed at improving marginalized stakeholder participation.

B. SOME LIMITS ON NEGOTIATION AS PARTICIPATION

While theorizing negotiated initiatives as participatory is on the rise, it should be recognized that not everyone would agree that the use of negotiated instruments reflect community member views *vis* a *vis* resource development. A growing scholarship questions whether impact benefit agreements are a panacea to Indigenous communities or whether they maintain inequity through market controls or private regulation.[136] Rather than manifest traditional

[134] L. Galbraith, B. Bradshaw, and M. Rutherford 'Towards a new supraregulatory approach to environmental assessment in Northern Canada.' (2007) 25(1) *Impact Assessment and Project Appraisal* 27-41.

[135] C. O'Faircheallaigh, 'Making Social Impact Assessment Count: A Negotiation-based Approach for Indigenous Peoples' (1999) 12 *Society and Natural Resources*, 63-80, 67. She lists a number of deficiencies in social impact assessment including but not limited to: 1) its failure to acknowledge those values and perspectives of Indigenous people that conflict with the dominant social ethos of the country; 2) its design and timing as inconsistent with the needs of those impacted; 3) its focus on negative impacts, rather than supporting beneficial impacts; and 4) its failure to effectively convert the findings and recommendations into final decision-making

[136] K.J. Caine and N. Krogman, 'Powerful or Just Plain Power-Full? A Powerful analysis of Impact Benefit Agreements in Canada's North (2010) 23(1) *Organization and Environment* 76-98; J. Keeping, 'Local Benefits and Mineral Rights Disposition in the Northwest Territories: Law and Policy' in M.M. Ross & J.O. Saunders (eds) *Disposition of Natural Resources: Options and Issues for Northern Lands*, (Yellowknife: Canadian Institute of Resource Law, 1997) 180-210; J. Keeping, *Local Benefits from Mineral Development: The Law Applicable in the Northwest Territories* (Canadian Institute of Resource Law, 1999); L. Galbraith, B. Bradshaw, and M. Rutherford, 'Towards a new Supraregulatory Approach to Environmental Assessment in Northern Canada.' (2007) 25(1) *Impact Assessment and Project Appraisal* 27-41, 32-33.

Indigenous values, these agreements are highly legalistic contracts which implement market-based policies for resource development. To sub-groups that disagree with these terms, theorizing negotiations as participatory is problematic where negotiations are pre-conditioned to undermine their input and values.

This criticism, essentially a complaint about representation, reflects a concern that the interests of community members can be sidelined in negotiation. While the agreements are negotiated by community representatives, the agreements might not be representative of community members' values or interests. In truth, this is a complaint endemic to political representation. However, it has a particular resonance in relation to community stakeholders. This is because the complaint brings into question the characterization of the community, upon which the validity of community stakeholder participation rests. Moreover, the complaint complexifies theorizing negotiation as deliberative democratic participation because negotiations can prevent deliberation on terms that community members posit as reasonable but which industry stakeholders reject and because industry can press for negotiations on issues community members see as non-negotiable. The following discussion addresses these issues in more detail.

As discussed above, the most fundamental difficulty with the reliance on community for environmental decision-making is that it often employs a false notion of community. As it relates to private negotiations, community is often conceptualized as a single and unified entity capable of bringing its knowledge to bear on decision-making.[137] In the Mackenzie Valley, external expectations of community unity would mostly flow from the identification of community with representative Indigenous governments. As governmental representatives, the legal authority to bind their constituents is backed by liberal democratic ideals that they speak for the community as a whole.

This conceptualization, however, relies on potentially inaccurate assumptions about the representative infrastructure of communities. It presumes there to be unitary internal processes by which the community representative obtains authority to negotiate when, in fact, processes are multiple and pluralistic. To be sure, authority to negotiate necessitates formal legal authority. However, it also presumes that the representative possesses a high degree of normative authority. While liberal democratic theory can collapse these two requirements, this may not accurately describe decision-making in Indigenous communities in the Mackenzie Valley. Effective representation of community interests does not necessarily follow from a position in local government. Rather, the regular struggle over leadership among community members and the continuing importance of hereditary chiefs and elders as sources of guidance means that electoral positions may not legitimate negotiations. It is important to note that many communities use regular and effective discussions to provide leadership with a mandate on a particular issue. However, this is not always the case. A recent example illustrates this point.

[137] A. Agrawal and C. Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27, No. 4 *Yale World Development* 629-649, 633.

Numerous proposals for Uranium development in the Upper Thelon River Basin in the Northwest Territories were recently before the Review Board. The Upper Thelon basin is world-renowned as a unique and pristine eco-system of huge ecological significance. The area is also spiritually important to the Akaitcho, a Denesuline people, who regard the region as "the place where God began".[138] Akaitcho community members and representatives of the Akaitcho government expressed their concerns about the proposals. Based on extensive testimony, the Review Board refused to recommend most of the projects. However, in accordance with Federal government plans for the region, the proponents persevered. Subsequent to the decisions of the Review Board news stories[139] and letters from proponents indicated that there were talks with a newly elected Chief of an Akaitcho community for exploration in the region.[140] In agreement with the new Chief, the proponents sponsored a local event and purportedly began negotiations. To date, no further exploration proposals have emerged. It seems that continuing widespread community disapproval prevents it. However, the example precisely illustrates the inaccuracy of assuming that the legal power of a political representative to negotiate correlates with community perspectives on an issue.

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[138] *Mackenzie Valley Environmental Impact Review Board, Report of Environmental Assessment and Reasons for Decision on Ur Energy Inc. Screech Lake Uranium Exploration Project* (EA 0607-003) (May 7, 2007) 1-67 at 1.

[139] CBC Online, *Lutselk'e Dene Learn About Uranium Mining* (September 2, 2009) ava*ilable at* http://www.cbc.ca/canada/north/story/2009/09/02/nwt-lutselke-uranium.html and CBC Online, *Lutselk'e Shocked by Chief's Support of Ur-Energy Exploration* (September 3, 2009) *available at* www.cbc.ca/canada/north/story/2009/09/03/lutselke-ur-reax.html.

[140] On May 7, 2009 Uravan Minerals Inc. withdrew its Land Use Application from the Mackenzie Valley Land and Water Board. Letter from Larry Lahusen, CEO Uravan Minerals Inc., to Wanda Andersen, Mackenzie Valley Land and Water Board (May 7, 2009) *available at* http://www.reviewboard.ca/upload/project_document/1244589201_Uravan_letter_of_withdrawal_of_LUP_applications.PDF.

On May 14, 2009 Cameco Corporation, a partner company to Uravan Minerals Inc., wrote "Cameco has already begun to work closely with all parties…a proactive and comprehensive community engagement process needs to occur…This plan will follow the timeline set out in talks with the NWT regional INAC authority and local communities." Letter from Gary Merasty, Vice President Corporate Social Responsibility, Cameco Corporation to The Honourable Chuck Strahl, Minister of Indian and Northern Affairs (May 14, 2009) *available at* http://www.reviewboard.ca/upload/project_document/1244590243_Correspondence_from_Cameco_to_INAC_re_Uravan_LUP_withdrawal.PDF. On June 29, 2009 Bayswater Uranium withdrew its Land Use Application from the Mackenzie Valley Land and Water Board with these stated reasons: "[H]eld fruitful discussions with the Chief and Band Council from Lutsel K'e and it seems apparent that they would now like to work together with exploration companies towards formulating a plan which would allow responsible mineral exploration to resume in the Upper Thelon basin." Letter from

Gordon I. Davidson, Vice President Exploration Bayswater Uranium Exploration to Manik Duggar, Acting Director Mackenzie Valley Land and Water Board (June 29, 2009) *available at* http://www.reviewboard.ca/upload/project_document/1246639812_Baywater_notice_of_withdrawal_of_land_use_permit_applications.PDF.

Questions of representation illustrate the point that Indigenous governments must currently contend with effectively representing diverse public interests in the face of expectations that the public interest will be defined and made certain in negotiations. While an expectation of community stakeholder unity may be legally accurate, it is not analytically descriptive of the diversity of opinions within communities.[141] Rather than presume that representative government is entirely reflective of the community's interest, it would be more accurate to suggest that local governments represent particular perspectives on an issue. Moreover, it is certain groups within community stakeholders that are constructed and empowered by governance regimes. By failing to recognize this, new governance and co-management fail to identify that there are values which operate at the community level but are not operationalized in negotiations. That these limitations can be attributed to the failure of negotiation to account for effective representation undermines a deliberative democratic account of negotiation.

Beyond the question whether negotiators are willing to represent sub-group interests, the more fundamental criticism of negotiated agreements is their limited *ability* to reflect the social objectives of Indigenous communities. Even if there are no concerns about the willingness of negotiators to represent certain values, there are still structural impediments to negotiating terms which do them justice. This is the second reason why negotiated instruments may not fully reflect community values *vis* a *vis* resource development. The inability of negotiations to fully reflect participant values undermines their characterization as participatory in a deliberative democratic sense.

Some theorize that traditional Indigenous values could never be reflected in private agreements because they are incommensurable with market-based values of resource development.[142] To this way of thinking, when choices arise (for example: choices over the development of territory for hunting versus mining) market values trump Indigenous values because the two cannot be reconciled. Scholarship on how incommensurable values are navigated in co-management portrays this as an issue of knowledge systems. This scholarship mostly analyzes how Indigenous knowledge systems interact with bureaucratic ones. However, the insight is the same. The two types of knowledge are incommensurable because they are situated in particular social systems. For example, Paul Nadasdy accepts the incommensurability of Indigenous and non-Indigenous knowledge.[143] To Nadasdy, the Kluane people's relationship to hunting, animism, and experience is knowledge that cannot be actualized through institutional processes of the state. While he concedes that cross-cultural

[141] For a discussion of communal representation related to Indigenous self-determination see B. Slattery, 'The Paradoxes of National Self-Determination' (1994) 32 4 *Osgoode Hall L.J*. 703.

[142] Advocacy for incommensurability between Indigenous and especially Western traditions is characteristic of authors like Takaiae Alfred. T. Alfred, *Wasase Indigenous Pathways of Action and Freedom*, (Broadview Press, 2005) at 104.

[143] P. Nadasdy, *Hunters and Bureaucrats: Power, Knowledge and Aboriginal State Relations in the Southwest Yukon* (UBC Press, 2003).

communication is possible, he argues that bureaucrats cannot do anything with the knowledge because:

> [A]ny attempt at knowledge integration is at least as much a political process as an epistemological one…Neither government biologists nor Kluane people are merely vessels containing different kinds of knowledge. They are social beings embedded in a system of unequal power relations that not only have a direct bearing on what qualifies as knowledge but that also dictate how they can interact with one another and what kinds of actions are seen as legitimate.[144]

A similar contention is that there is a fundamental incompatibility between the industrial development of the land and its traditional uses for Indigenous peoples.[145] This is related to the argument that the objectives of conservation and development are at odds but it is more specific to the particular use of the land. The argument is quite straightforward. Traditional hunting practices and social arrangements require the resources to have a certain level of holistic integrity. Large-scale mining operations interrupt that integrity. Although operations can be hundreds of miles from each other, the cumulative effect of development will eclipse the possibility for traditional uses. Hence, communities are in fact choosing between two incompatible uses of the land.

Concerns with incommensurability and incompatibility are related to other concerns with bargaining inequalities highlighted in emerging scholarship on impact benefit agreements.[146] Concerns with the relative inequality of the parties in negotiations stem from an imbalance in financial resources, negotiating experience, knowledge about the particular resource and its development, and structural assumptions about the benefit of commoditization. However, these concerns seem to offer less absolute impediments to theorizing negotiation as participatory in so far as one can conceive of procedures that would overcome the power imbalances these differences produce. In contrast, concerns with the ability of negotiations to capture the social ideals of communities, push their characterization as deliberative to the limits.

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[144] P. Nadasdy, *Hunters and Bureaucrats: Power, Knowledge and Aboriginal State Relations in the Southwest Yukon* (UBC Press, 2003) at 113

[145] For differences between incommensurable and incompatible legal systems see P. Glenn, 'Are Legal Traditions Incommensurable?' (2001) 49 Am. J. Comp. L. 133.

[146] For example of these concerns see C. O'Faircheallaigh, 'Environmental Agreements, EIA follow-up and Aboriginal Participation in Environmental Management: The Canadian Experience', (2007) 27(4) *Environmental Impact Assessment Review*, 319-42; C. O'Faircheallaigh, 'Mining Agreements and Aboriginal Economic Development in Australia and Canada' (2006) 5(1) *Journal of Aboriginal Economic Development* 74-91.

Scholarship on the relationship between negotiation and social goals addresses this phenomenon of incompatibility *vis* a *vis* new governance methodology more generally.[147] This scholarship reveals that the pragmatic goals of negotiation in new governance intend to constrain interests and ends that are incompatible with collaborative negotiation. New governance requires orientation away from fixed, zero-sum, foundational, rigid, sacred or moral demands and towards achieving flexible, creative, long-term collective economic and social gain.[148] This converts incommensurable values into forms of capital that can be traded, supplanted, or enhanced by other interests. In short, it assumes that everything is negotiable. The problematic effect of this methodology is it discourages marginalized stakeholders from holding certain kinds of non-negotiable values or positions. Consequently, it pre-determines the inequality and imbalance of power in negotiations.

These criticisms bring to light that although the agreements have been given the effect of regulating socio-economic impacts, they can fail to reflect the public objectives of socio-economic assessment. Rather than a mechanism for democratic participation, agreements seem more indicative of market participation. Theorizing negotiation as participation thus overlooks the difficulty of translating "collective considerations of social obligations, social entitlement and social costs in individuated exchanges.[149] In addition, the method meets few indicia of public participation in so far as negotiations are neither transparent nor accountable to the general public.[150] Lastly, the outcome is not premised on any measure of justice outside the rationales of contract. Impact benefit agreements are currently understood as private contractual agreements. As such, they are not currently subject to any legal principles that do not already apply to any given contract dealing with the provision of services. Thus, market dominance is realized by the legal frameworks which condition participation so that the satisfaction of its procedural requirements (agreement) is sufficient to rationalize its substantive content, regardless of its effect. In truth, these are the relative inequalities built into contracting which the law takes as part of market dealings. Once however, these agreements are understood as standing in for other types of public regulation and serving some public good, the constraint on regulatory objectives which results from the importation of the principles of contract law and practice should be understood as problematic. As Hugh Collins argues, once contracts are seen as regulatory, different questions arise as to the rules of

[147] For example see A. Cohen, 'Negotiation, Meet New Governance: Interests, Skills and Selves' (Spring 2008) 33(2) *Law and Social Inquiry* 503-562.

[148] Id. at 541.

[149] A. Cohen, 'Dispute System Design, Neoliberalism and the Problem of Scale' (2009) 14 *Harvard Negotiation Law Review* 51-80 at 75.

[150] For similar criticism see K.D. Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 *Wash. U.L.Q*. 487; W. Funk, 'Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest' (1997) 46 *Duke L.J*. 1351-1388, 1382-87; S. Rose-Ackerman, 'American Administrative Law Under Siege: Is Germany a Model?' (1994) 107 *Harv. L. Rev*. 1279-1302, 1296.

contract law. New governance is forced to ask whether there are mechanisms in negotiation for accountability and whether the absence of these mechanisms can be justified by benefits to regulatory effectiveness.[151]

The recognition of these limitations does not destroy the characterization of negotiated agreements as participatory. Such a conclusion would fail to grasp the potential benefits of negotiation to communities and their appreciation of the process. There is no question that direct negotiations between Aboriginal governments and developers offer a greater opportunity for the community to determine the benefits of resource management than ever before. Rather, the recognition of limitations forces a more specific characterization of participation in private negotiations as market-based. The purposes of the agreements are related to the commoditization of resources and the financial benefits communities can obtain in exchange for those resources. This characterization does not mean to imply that the agreements do not have regulatory effects. However, as parties to these agreements, communities and corporations are using private contracts to participate in the market economy not to achieve the goals of public administration. This characterization forces the Review Board to take a more active role in determining whether the terms meet the social goals of socio-economic assessment. Alternatively, it forces attempts to make negotiated instruments more sensitive to the ideals of deliberative democratic participation to which strains of new governance scholarship aspire.[152]

VI. WHERE TO FROM HERE?

If the discussion in this paper has revealed some difficulties in characterizing negotiation as participatory, what is yet to be examined in the new governance literature is what role regulatory agencies play in further endorsing these limitations. Ultimately, the discussion raises questions as to the proper role of public government in relation to privately negotiated agreements more generally. Whether an agency should play a more active role in ensuring the deliberative democratic character of negotiations is highly debatable for new governance advocates. Strong proponents of new governance would argue the role of administrative agencies is to provide the infrastructure for information exchange between and among units. Instead of solving the problems themselves, the agency's task is to facilitate dialogue between stakeholders by providing them with information benchmarks by which their outcomes can be measured. Proposed solutions to the types of problems raised here would likely point to the need for better collection and dissemination of information.

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[151] H. Collins, 'Regulating Contract Law' in C. Parker, C. Scott, N. Lacey, J. Braithwaite (eds) *Regulating Law* (Oxford University Press, 2004) 13-31, 24.

[152] Id. at, 24.

This paper affirms that greater information about negotiations would go a long way to addressing the significant democratic deficits of private negotiation. The current confidential nature of agreements limits the amount of information the Review Board obtains from community stakeholders. Additionally, confidentiality limits the type of contrary evidence an agency will hear about the agreements' terms. The effect is to put the Review Board into a position of passive acceptance. It must assess the environmental and socio-economic impacts in the absence of substantive knowledge. This is despite the fact that the agreements are directed at the same public purpose as that of the Review Board, the socio-economic mitigation of development.

However, the difficulties with negotiating the types of values impacted by resource development suggest that more information is unlikely to be sufficient. Rather, there is a greater role here for the agency to act as more than a facilitator. As a proponent of stakeholder participation, it should be examining what type of participation it supports and whether it is sufficient in any given case. If the Review Board purports to support deliberative democratic principles, then it must begin to develop practices which pressure each of the stakeholders to take responsibility for their realization. If they cannot be realized through negotiation, then the Review Board must take responsibility for their realization for itself. What those practices would look like is a subject for future research.

VII. CONCLUSION

This paper explored the extent to which new governance arrangements like co-management permit community stakeholders to participate in and transform regulation. The study of participation in co-management presented here illustrates: 1) that a high level of agency support for community participation in rule-making can lead to rules which reflects community values on consultation; and 2) that agency implementation of consultation requirements has led to the increased use of stakeholder negotiation as a mechanism for community empowerment. Therefore, it affirms that it is possible for community stakeholders to participate in new governance arrangements like co-management and transform decision-making.

The first finding, that agency support for community participation can alter regulatory rulemaking, is consistent with a deliberative democratic account of stakeholder participation in new governance. However, the paper questions whether the use of stakeholder negotiation meets the objectives of democratic participation as conceptualized in a deliberative account of new governance. Using a heterogeneous understanding of community, the paper has argued that characterizing negotiations as participatory remains tied to asking who within the community is represented in negotiation and what kind of values can be negotiated. Criticism that negotiations fail to translate certain community values means that agreements may offer a limited type of participation, at least more limited than new governance has so far allowed in its prognosis of stakeholder collaboration. Rather than offering a mechanism for deliberation, agreements presume market participation. This illustrates the criticism that negotiations

necessitate the commoditization of all values or demand their abandonment undermines its deliberative democratic characterization. Consequently, it may be more helpful to characterize these agreements as market-based in order to be able to identify democratic deficiencies and address them in the future.