

# Living in Perfect Harmony: Harmonizing Sub-Artic Co-Management through Judicial Review

Sari Graben

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>

 Part of the [Natural Resources Law Commons](#)

Article

---

## Citation Information

Graben, Sari. "Living in Perfect Harmony: Harmonizing Sub-Artic Co-Management through Judicial Review." *Osgoode Hall Law Journal* 49.2 (2011) : 199-236.

<http://digitalcommons.osgoode.yorku.ca/ohlj/vol49/iss2/1>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

# Living in Perfect Harmony: Harmonizing Sub-Artic Co-Management through Judicial Review

## **Abstract**

To foster the participation of Aboriginal peoples in resource governance, the Government of Canada has recently restructured a number of administrative regimes, converting them into institutions of co-management. Despite this restructuring, the degree to which Aboriginal peoples' participation can influence the regulatory output of co-management boards remains uncertain in law. This article deconstructs one interpretive method that can impact participation in co-management regimes: harmonization. Drawing on a trilogy of cases, I argue that recent judicial efforts to harmonize the Mackenzie Valley Resource Management Act with its predecessor, the Canadian Environmental Assessment Act, can limit the regional interpretive differences that Aboriginal peoples' participation in treaties and co-management is intended to foster. This outcome is problematic to the extent that it frustrates the participatory goals of the legislation and the substantive goals of contemporary treaties. In light of this problem, I advocate a cautious approach to statutory interpretation in which administrative boards tasked with ensuring Aboriginal participation in decision making can be expected to produce rules, decisions, and interpretations that differ from those produced under other regimes.

## **Keywords**

Indigenous peoples--Government relations; Natural resources--Co-management; Canada

## Living in Perfect Harmony: Harmonizing Sub-Arctic Co-Management through Judicial Review

SARI GRABEN\*

To foster the participation of Aboriginal peoples in resource governance, the Government of Canada has recently restructured a number of administrative regimes, converting them into institutions of co-management. Despite this restructuring, the degree to which Aboriginal peoples' participation can influence the regulatory output of co-management boards remains uncertain in law. This article deconstructs one interpretive method that can impact participation in co-management regimes: harmonization. Drawing on a trilogy of cases, I argue that recent judicial efforts to harmonize the Mackenzie Valley Resource Management Act with its predecessor, the Canadian Environmental Assessment Act, can limit the regional interpretive differences that Aboriginal peoples' participation in treaties and co-management is intended to foster. This outcome is problematic to the extent that it frustrates the participatory goals of the legislation and the substantive goals of contemporary treaties. In light of this problem, I advocate a cautious approach to statutory interpretation in which administrative boards tasked with ensuring Aboriginal participation in decision making can be expected to produce rules, decisions, and interpretations that differ from those produced under other regimes.

Dans le but de favoriser la participation des Autochtones à la gouvernance des ressources, le gouvernement du Canada a récemment restructuré un certain nombre de régimes administratifs en les convertissant en institutions de cogestion. Malgré cette restructuration, le degré auquel la participation des Autochtones peut influencer la production réglementaire des conseils de cogestion demeure incertain en droit. Cet article déconstruit une méthode interprétative qui peut avoir une incidence sur la participation à des régimes de cogestion, soit l'harmonisation. M'inspirant d'une trilogie de cas, je plaide que les récents efforts judiciaires en vue d'harmoniser la Loi sur la gestion des ressources de la vallée du Mackenzie

---

\* Arctic Policy Post-doctoral Fellow, Queen's Institute for Energy and Environmental Policy, Queen's University. This article is based on elements of my doctoral dissertation. I would especially like to thank Dr. Brian Slattery for his comments and critiques on the arguments contained here. I also thank the anonymous reviewers and staff of the Osgoode Hall Law Journal for their excellent comments and assistance and the Social Sciences and Humanities Research Council for the funding that supported this research.

avec son prédécesseur, la Loi canadienne sur l'évaluation environnementale, peut limiter les écarts d'interprétation régionale que la participation des Autochtones à des traités et à la cogestion vise à favoriser. Ce résultat est problématique dans la mesure où il contrecarre les objectifs participatifs de la législation et les objectifs substantifs des traités contemporains. À la lumière de ce problème, je milite en faveur d'une approche prudente envers une interprétation des lois en vertu de laquelle les conseils d'administration qui se voient confier la mission de s'assurer de la participation des Autochtones à la prise de décision devraient produire des règles, décisions et interprétations qui diffèrent de celles qui sont élaborées en vertu d'autres régimes.

---

I.	THE PARTICIPATORY OBJECTIVES OF THE <i>MVRMA</i> .....	209
II.	IMPLEMENTING PARTICIPATION IN THE COURTS .....	216
	A. <i>North American Tungsten Corp Ltd v Mackenzie Valley Land and Water Board</i> .....	217
	B. <i>Canadian Zinc Corp v Mackenzie Valley Land and Water Board</i> .....	220
	C. <i>De Beers Canada Inc v Mackenzie Valley Environmental Impact Review Board</i> .....	222
III.	ASSESSING ARGUMENTS FOR AND AGAINST HARMONIZATION .....	224
	A. For Harmonization .....	224
	B. Against Harmonization .....	228
	C. A Cautious Approach .....	231
IV.	CONCLUSION .....	234

---

**IS IT APPROPRIATE FOR COURTS** to use the language and meaning of the *Canadian Environmental Assessment Act (CEAA)*<sup>1</sup> to interpret a statute that expressly precludes the *CEAA*'s application? Statutes that stem from contemporary Aboriginal treaties and purport to establish new administrative regimes have made this question particularly significant because they engage issues of participation in co-management. These new administrative regimes, known as co-management boards, have been tasked with governing resource use in parts of British Columbia, Quebec, Labrador, Nunavut, the Yukon, and the Northwest Territories. In this article, I analyze three cases from the Northwest Territories in which courts used the text of the *CEAA* to interpret the statute that establishes co-management in the Mackenzie Valley—the *Mackenzie Valley Resource Management Act*.<sup>2</sup> Through these cases, I analyze the impact of harmonization as an interpretive methodology on the participatory goals of co-management regimes.

---

1. SC 1992, c 37 [*CEAA*].

2. SC 1998, c 25 [*MVRMA*]. The three cases are *North American Tungsten Corp Ltd v Mackenzie Valley Land and Water Board* (2002), 118 ACWS (3d) 897 (NWTSC) [*Tungsten SC*], rev'd (2003), 125 ACWS (3d) 516 (NWTCA) [*Tungsten CA*] [collectively, *Tungsten*]; *Canadian Zinc Corp v Mackenzie Valley Land and Water Board* (2005), 139 ACWS (3d) 411 (NWTSC) [*Canadian Zinc*]; *De Beers Canada Inc v Mackenzie Valley Environmental Impact Review Board* (2007), 156 ACWS (3d) 378 (NWTSC) [*De Beers*].

The role of co-management boards in the Mackenzie Valley is to license most undertakings related to the use of land, water, and wildlife in their respective regions or to make recommendations related to environmental impacts. However, because they have been established pursuant to contemporary land claims agreements, the boards and their enabling statutes also reflect Aboriginal peoples' goal of participating in resource governance by engaging in shared decision making.<sup>3</sup> Co-management is intended to instantiate accountability to Aboriginal peoples and the general public by linking decision making to independent boards comprised of members nominated by Aboriginal, federal, territorial, or provincial governments.

In the Mackenzie Valley, co-management is one of a series of institutional structures aimed at addressing the historical absence of the Sahtu,<sup>4</sup> Gwich'in,<sup>5</sup> and Tlicho<sup>6</sup> First Nations from governmental resource management decisions. Co-management is also a response to the federal government's past attempts to license development without the participation of these groups.<sup>7</sup> To address these problems, the *MVRMA* authorizes the establishment of an environmental assessment board for the region, the Mackenzie Valley Environmental Impact Review Board (Review Board). The *MVRMA* also establishes explicit assessment procedures that implement the treaty provisions and, with some limited exceptions, expressly precludes the application of the *CEAA*. Taken together, these changes reflect an intention to fulfill the terms of the treaties and implement a distinct environmental assessment regime in the Mackenzie Valley.

- 
3. For different permutations, see Stephen R Tyler, *Co-management of Natural Resources: Local Learning For Poverty Reduction* (Ottawa: IDRC, 2006); Gerett 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 (Ottawa: IDRC, 1997), online: <<http://web.idrc.ca/uploads/user-S/10219953490rusnak.pdf>>; Donna Craig, "Recognizing Indigenous Rights through Co-Management Regimes: Canadian and Australian Experiences" (2002) 6 NZ J Env't L 199.
  4. *Gwich'in Comprehensive Land Claim Agreement* (1992), online: <<http://www.gwichin.nt.ca/documents/GCLCA.pdf>> [*Gwich'in Land Claim Agreement*].
  5. *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (1993), online: <[http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/sahmet\\_1100100031148\\_eng.pdf](http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/sahmet_1100100031148_eng.pdf)> [*Sahtu Land Claim Agreement*].
  6. *Tlicho Land Claims and Self-Government Agreement* (2003), online: <<http://mvlwb.com/files/2011/07/Tlicho-Agreement.pdf>> [*Tlicho Land Claim Agreement*].
  7. For greater insight into federal government decision making in the north prior to contemporary treaties, see Thomas Berger, *Northern Frontier, Northern Homeland: The Report Of The Mackenzie Valley Pipeline Inquiry* (Vancouver: Douglas & McIntyre, 1988).

For example, the *MVRMA* implements treaty terms that subject development in the Mackenzie Valley to its detailed assessment processes. These terms establish a stand-alone environmental impact assessment process for lands covered by the agreements. This environmental impact assessment process itemizes the roles, responsibilities, and jurisdiction of the boards, Aboriginal governments, territorial governments, and the federal government in exacting detail. The intention to subject development in the Mackenzie Valley to a distinct environmental assessment regime is also evidenced by the treaties. Thus, the *Sahtu Dene and Metis Comprehensive Land Claim Agreement* states, "All development proposals in the Mackenzie Valley, including development proposals in relation to Sahtu lands, shall be subject to the process of environmental impact assessment and review as set out in 25.3."<sup>8</sup> Similarly, the *Tlicho Land Claim Agreement* states, in part, "The process of environmental impact assessment and review as set out in 22.2 applies to every proposed project that is wholly or partly in the Mackenzie Valley... ."<sup>9</sup>

Article 25.3 of the *Sahtu Dene and Metis Comprehensive Land Claim Agreement*, article 22.2 of the *Tlicho Land Claims and Self-Government Agreement*, and article 24.3 of the *Gwich'in Land Claim Agreement* define an assessment process analogous to that found in the *CEAA*.<sup>10</sup> However, the articles use language and processes that reflect an agreement to depart from the *CEAA*'s approach to environmental assessment. For example, both the *MVRMA* and the *Tlicho Land Claims and Self Government Agreement* employ a use of the term "environment" that includes the social and cultural environment.<sup>11</sup> This definition is markedly dissimilar to that of the *CEAA*.<sup>12</sup> As would be expected of any statute, differences in statutory language have led to distinct interpretations of the respective boards' mandates and jurisdictions. As a result of the distinct definition of "impact on the environment" in the *MVRMA*, the Review Board considers direct and indirect impacts on heritage resources or the social and cultural environment, independent of changes to the biophysical

---

8. *Supra* note 5, art 25.3.1.

9. *Supra* note 6, art 22.2.1.

10. For elaboration on similarities see Part III(A), below.

11. *Tlicho Land Claim Agreement*, *supra* note 6, art 1.1.1 ("environment"); *MVRMA*, *supra* note 2, s 111 ("impact on the environment").

12. The definition of "environment" in the *Tlicho Land Claim Agreement* and "impact on the environment" in the *MVRMA* should be contrasted against the corresponding definition of "environmental effect" in the *CEAA*. *CEAA*, *supra* note 1, s 2(1).

environment.<sup>13</sup> This approach can be contrasted with that of the *CEAA*, which limits assessment of effects on socio-economic factors, on heritage, and on Aboriginal resource use to those that come about as consequences of changes to the physical environment.<sup>14</sup>

In addition to implementing processes that formalize authority to govern assessment in the region, the *MVRMA* declares its intention to preclude other assessment regimes in section 116, which states that barring limited exceptions discussed below, the *CEAA* does not apply in the Mackenzie Valley in respect of proposals for development.<sup>15</sup> This preclusion of the *CEAA* from the Mackenzie Valley is not a mere administrative side effect of the *MVRMA* coming into force. In the Mackenzie Valley, the legal framework for environmental assessment has changed dramatically over the last twenty years because of contemporary land claims. Prior to the *MVRMA*, almost all land and water use in the Northwest Territories was regulated pursuant to federal legislation by a territorial or federal body.<sup>16</sup> The *CEAA* and its predecessor, the *Environmental Assessment and Review Process Guidelines*,<sup>17</sup> governed environmental assessment and were criticized as tools for centralized decision making. The main criticism was that federal assessment permitted non-local and non-Aboriginal persons to determine how developments would affect lands claimed by Aboriginal peoples. The terms of the treaties on which the *MVRMA* is based were negotiated in light of this criticism and with the expectation that a new administrative regime would decentralize decision making and account for local perspectives through First Nations participation.<sup>18</sup>

- 
13. Mary Tapsell & Alistair MacDonald, "The 'awakening' of SEIA in the Northwest Territories, Canada—The Mackenzie Valley Environmental Impact Review Board's Experience" (Paper delivered at the 27th Annual Meeting of the International Association for Impact Assessment, Seoul, 3-9 June 2007), online: <[http://www.reviewboard.ca/upload/ref\\_library/s%20Experience\\_1186093586.pdf](http://www.reviewboard.ca/upload/ref_library/s%20Experience_1186093586.pdf)>.
  14. Federal Environmental Assessment Review Office, *A Reference Guide for the Canadian Environmental Assessment Act: Determining Whether A Project is Likely to Cause Significant Adverse Environmental Effects* (Ottawa: Federal Environmental Assessment Review Office, 1994), online: <[http://www.ceaa.gc.ca/D213D286-2512-47F4-B9C3-08B5C01E5005/Determining\\_Whether\\_a\\_Project\\_is\\_Likely\\_to\\_Cause\\_Significant\\_Adverse\\_Environmental\\_Effects.pdf](http://www.ceaa.gc.ca/D213D286-2512-47F4-B9C3-08B5C01E5005/Determining_Whether_a_Project_is_Likely_to_Cause_Significant_Adverse_Environmental_Effects.pdf)>.
  15. *MVRMA*, *supra* note 2, s 116.
  16. For example, the Northwest Territories Water Board granted licences permitting the use of water and the deposit of waste under the *Northwest Territories Waters Act*, SC 1992, c 39 [*Waters Act*].
  17. *Environmental Assessment and Review Process Guidelines Order*, SORJ84-467.
  18. Graham White, Vern Christensen & Alan Ehrlich, "Involving Canada's Indigenous Peoples in Environmental Impact Assessment: Co-management through the Mackenzie Valley

Lastly, section 116 of the *MVRMA* sets out the exact and limited condition in which the *CEAA* may apply to the Mackenzie Valley: where a proposal is subject to joint federal-territorial environmental reviews.<sup>19</sup> Should the Minister of the Environment and the Review Board be unable to come to an agreement on the establishment of a joint review panel, a review panel shall still be convened in the Mackenzie Valley, pursuant to the *CEAA*.<sup>20</sup> However, it is noteworthy that the application of the *CEAA* does not bar the Review Board's continuing jurisdiction to conduct an environmental impact assessment pursuant to the *MVRMA*.<sup>21</sup> In fact, the *CEAA* mandates that even if a panel review is ordered, it is to be coordinated with the *MVRMA* environmental impact assessment.<sup>22</sup> Moreover, the Minister is to consider the *MVRMA* environmental impact assessment report and consult with persons or bodies to whom the report is distributed prior to taking action.<sup>23</sup>

The provisions establishing an assessment regime under the *MVRMA* are intended to create a regime that acts in place of the *CEAA* and other environmental assessment processes. More precisely, this regime reflects the understanding reached in contemporary treaties that a separate and distinct legal regime will govern environmental assessment in the Mackenzie Valley. The reason why this type of provision is consistent among the various treaties in the Mackenzie Valley is straightforward: Environmental assessment has become one of the key processes for analyzing, permitting, or preventing development. Contemporary treaties therefore create new regulatory regimes in which decision-making processes reflect Aboriginal participation so that

Environmental Impact Review Board" (Paper delivered at the 27<sup>th</sup> Annual Conference of the International Association for Impact Assessment, Seoul, 3-9 June 2007), online: <[http://reviewboard.ca/upload/ref\\_library/LAIA%20paper%20re%20Co-mgmt%20through%20the%20MVEIRB;%20Seoul%20Korea%20June%202007%20\\_1182980894.pdf](http://reviewboard.ca/upload/ref_library/LAIA%20paper%20re%20Co-mgmt%20through%20the%20MVEIRB;%20Seoul%20Korea%20June%202007%20_1182980894.pdf)>.

19. In accordance with the *MVRMA*, joint reviews can arise by one of two methods. The first method is where a joint review is deemed to be in the national interest of the country. In this circumstance, section 130(1)(c) of the *MVRMA* permits the Minister of Aboriginal and Northern Affairs to refer a proposal to the Minister of the Environment, who is required to refer the matter to a joint review panel pursuant to the *CEAA*. *CEAA*, *supra* note 1, s 28(2); *MVRMA*, *supra* note 2, s 130(1)(c). Similarly, where there is a trans-regional development, the Review Board may enter into an agreement with the Minister of the Environment to provide for joint review panel in the area where the *CEAA* would apply. *MVRMA*, *supra* note 2, s 141(2)(a).
20. *CEAA*, *supra* note 1, s 40(2.2).
21. *MVRMA*, *supra* note 2, s 141(4).
22. *CEAA*, *supra* note 1, s 40(2.3).
23. *Ibid*, s 40(2.4).



these groups can influence resource development.<sup>24</sup> In the Mackenzie Valley, this objective is enacted through the *MVRMA*.

In light of the political and legal history behind the *MVRMA*, what was the basis for recent decisions about the relevance of the *CEAA* to the interpretation of the *MVRMA*? I argue that the legal basis for the *CEAA*'s application or non-application rests on how courts interpret parliamentary intent with respect to the meaning and effect of the two statutes. The critical question that guided the interpretation and application of the *MVRMA* in these cases was whether Parliament intended the *MVRMA* to be harmonized (interpreted in accordance) with the *CEAA*. Where the courts found an intention to harmonize the two statutes, the *CEAA* was deemed relevant to interpretation. Where the courts found an intention to differentiate these pieces of legislation, the *CEAA* was deemed irrelevant to interpretation. However, where the courts found an intention to harmonize the statutes, they imported the pre-established meaning of the *CEAA* into the *MVRMA*, thereby preventing it from developing as a distinct regime. This importation is problematic in so far as it limits differences in statutory language and interpretation that are central to the purpose and object of the treaties on which the *MVRMA* is based.

Harmonization is a process that results in progressively greater levels of uniformity between laws or legal systems.<sup>25</sup> Where harmonization relates to making

---

24. See *Quebec (AG) v Moses*, [2010] 1 SCR 557 [*Moses*]. Surprisingly, the majority of the Supreme Court of Canada did not interpret the *James Bay and Northern Quebec Agreement* as vesting these same rights in the Cree. Article 22.2.1 of that agreement states that “[t]he environmental and social protection regime applicable in the Territory shall be established by and in accordance with the provisions of this Section.” *James Bay and Northern Quebec Agreement* (1975), online: <<http://www.gcc.ca/pdf/LEG000000006.pdf>> [*JBNQA*]. The Court interpreted article 22.7.5 as conferring a right on the federal government to conduct *CEAA* assessment as “external” to the treaty (*Moses*, *ibid* at para 11). Article 22.7.5 states that:

[n]othing in the present Section shall be construed as imposing an impact assessment review procedure by the Federal Government unless required by Federal law or regulation. However, this shall not operate to preclude Federal requirement for an additional Federal impact review process as a condition of Federal funding of any development project.

Whether constitutional law, including treaties, permits processes that are both internal and external to the *JBNQA* is a matter for future deliberation. Regardless, its holding is unlikely to be of application to the Mackenzie Valley treaties. Unlike the *JBNQA*, the treaties of the Mackenzie Valley purport to deal with assessment in its entirety insofar as they establish the roles and responsibilities of the boards, Aboriginal governments, territorial governments, and the federal government in exacting detail and insofar as they do not contemplate the precise conditions under which another assessment regime, such as the *CEAA*, may apply.

25. H Patrick Glenn, “Harmony of Laws in the Americas” (2003) 34 *U Miami Inter-Am L Rev* 223 at 246.

domestic laws more alike, debates as to its value usually revolve around issues of efficacy and efficiency. However, where harmonization relates to the importation of laws into distinct legal systems or the adoption of laws that conflict with cultural norms, it also raises debates about legal and political objectives. In essence, harmonization and the idea of using a common core of legal standards reflect the assumption that law may be separated analytically from the social, political, and economic context in which it operates.<sup>26</sup> Scholars and practitioners who research this subject have identified a number of problems with this assumption, one of them being that harmonization can preclude laws that reflect distinct values of a particular region or culture.<sup>27</sup>

I examine the use of harmonization as an interpretive technique because it raises questions about the role of the court in effecting the participatory goals of contemporary treaties more generally. It is clear that co-management's goals are to be achieved through the formal legal arrangements that create a framework for participation.<sup>28</sup> However, it remains unclear in what way Parliament intended Aboriginal participation to impact the substance of resource management. The trilogy of cases canvassed here is important because through harmonization, the judges grapple with why the federal government enacted distinct legislation in the Mackenzie Valley, whether it intended that legislation to have a different effect from its predecessor, and who will determine that difference.

There are many unresolved questions in Canadian law about the practical and theoretical nature of co-management and the way it accounts for the participation

- 
26. For an example of this kind of approach to law, see Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974). Watson asserts that law is like a technical invention, such as the wheel. Compare this against O Kahn-Freund, "On the Use and Misuses of Comparative Law" (1974) 37 *Mod L Rev* 1. For discussion, see William Ewald, "Comparative Jurisprudence (II): The Logic of Legal Transplants" (1995) 43 *Am J Comp L* 489.
27. See e.g. Katharina Pistor, "The Standardization of Law and its Effect on Developing Nations" (2002) 50 *Am J Comp L* 97 at 98. Pistor argues that harmonization may undermine the development of effective legal systems because it ignores two of their characteristics: interdependence of law, and law as a cognitive institution. See also Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, "Relationships Between Development, Legality and Transplants" 47 (2003) *Eur Econ Rev* 165 at 173-175; Nehal Bhuta, "Against State-Building" (2008) 15 *Constellations: Int'l J Critical & Democratic Theory* 517.
28. Co-management can be sourced to political organization for greater autonomy, and the power to nominate members to a co-management board remains with the Aboriginal government. However, it would not be accurate to characterize the powers of an institution of public government as an exercise of Aboriginal autonomy. The term "autonomy" best references provisions that confer legislative and executive authority on an Aboriginal government.

of Aboriginal peoples. A number of decisions in the Mackenzie Valley and other treaty jurisdictions have dealt with Aboriginal peoples' right to participate in decision making. For example, courts have begun to contemplate what political or social role Aboriginal government nominees play on co-management boards<sup>29</sup> and what impact such representation may have on other areas of law, such as the duty to consult.<sup>30</sup> Courts have also begun to debate approaches to contemporary treaty interpretation and to consider how best to reflect the negotiations that led up to the signing of the treaties.<sup>31</sup> In addition, courts are increasingly called upon to deal with disputes between co-management boards and the governments that have nominees on those boards.<sup>32</sup>

The legal issues, statutory provisions, and treaties in many of these cases differ and are not easily compared. However, these cases reflect collectively an attempt to grapple with the practicalities of implementing new administrative regimes premised on Aboriginal participation. They also reflect an effort to uphold the constitutional objective of contemporary treaties: the reconciliation between Aboriginal and non-Aboriginal Canadians.<sup>33</sup> In essence, as the administrative state is increasingly required to consider treaty rights, courts must find ways to review decisions in a manner that accounts for rights and treaties more generally.<sup>34</sup>

- 
29. See e.g. *Kala'Gee Tu First Nation v Canada (Minister of Indian and Northern Affairs)*, [2008] 2 FCR 473 at paras 43-47 (FC) [*Kala'Gee*]; *Dene Tha' First Nation v Canada (Minister of Environment)* (2006), 303 FTR 106 at paras 65-67 [*Dene Tha'*]; *De Beers*, *supra* note 2 at para 20.
30. *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 [*Beckman*]; *Dene Tha'*, *ibid*; *Yellowknives Dene First Nation v Canada (Attorney General)* (2010), 377 FTR 267; *Nunavut Wildlife Management Board v Canada (Minister of Fisheries and Oceans)*, [2009] 4 FCR 544 (FC); *Qikiqtani Inuit Assn v Canada (Minister of Indian Affairs and Northern Development)* (1998), 155 FTR 161.
31. *Moses*, *supra* note 24; *Western Copper Corp v Yukon Water Board* (2011), 57 CELR (3d) 193 (YKSC). For a discussion of emerging judicial attitudes to contemporary treaties, see Dwight Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011) 54 SCLR (2d) 475.
32. *Tlicho v Mackenzie Valley Impact Review Board*, [2011] AWLD 3309 (NWTSC) [*Tlicho*]; *Qikiqtani Inuit Assn v Canada (Minister of Natural Resources)*, [2010] 4 CNLR 190 (NUCJ).
33. *Beckman*, *supra* note 30 at para 10.
34. Questions about implementing rights are just beginning to take root in the scholarship and have mostly focussed on the duty to consult, one aspect of treaty participation. See e.g. Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009). However, scholars have begun to theorize interpretive principles that assist an inquiry into how the common law can account for participation in treaty regimes. For comments on generative rights that grow and change, see Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 Supreme Ct L Rev (2d) 595. For an argument on the need to displace law and policy that conflict with rights, see James [Sa'ke'] Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional

These cases therefore raise a host of questions about how co-management treaty rights are to be interpreted to account for participation and for the values and perspectives that arise from such participation.

In this article, I consider one of the many questions raised by co-management: Does an interpretive method that harmonizes the language of a new statute in accordance with its predecessor undermine the objective of Aboriginal participation entrenched in contemporary treaties? In order to answer this question, I analyze three cases from the Northwest Territories that used the *CEAA* to interpret the *MVRMA*. While there are an increasing number of contemporary treaty cases that engage the *CEAA*,<sup>35</sup> I draw on these three cases and the region of the Mackenzie Valley in particular because, to date, they alone explicitly use the *CEAA* to interpret a statute enacted pursuant to a contemporary treaty. Through these cases, I deconstruct one particular method by which courts assess the relevance of Aboriginal peoples' participation to statutory interpretation. I also consider the effect of this assessment on contemporary treaty regimes more generally.<sup>36</sup> These insights will be relevant to future applications of the *CEAA* and to the categorization of interpretive methodologies within participatory regimes.

In an attempt to unpack the role of participation in statutory interpretation, Part I of this article introduces the objectives of the *MVRMA*. Linking participation with the goals of power sharing and better resource management, I argue that Parliament intended the *MVRMA* to promote participation as a technique to achieve these aims. This reading of the *MVRMA* is derived from the language of the statute and treaties and from their roots in the political movement for self-government and resource management. Part II considers the three cases where the courts have considered harmonizing the meaning of the *MVRMA* with that of the *CEAA*. In two of the cases, the courts found the meaning of the *CEAA* to be determinative. The court in the third case expressly rejected this approach. In Part III, I reflect upon the use of harmonization in these cases and the participatory

---

Governance" (2009) 72 Sask L Rev 29. For a discussion of the need to place communities at the centre of debates to illuminate knowledge and allow for effective representation, see John Borrows, *Recovering Canada: the Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 43.

35. See generally *supra* notes 29-32. See also *Moses*, *supra* note 24, where the Court interpreted the treaty as permitting the operation of the *CEAA* as separate from the treaty. However, no decisions have explicitly drawn on the *CEAA* to interpret the meaning and intent of the statute in question or the original agreement.
36. I note that while there are commonalities among contemporary treaties, each treaty jurisdiction employs distinct language to address further assessment. Furthermore, recent judicial direction to rely on the text in interpretation warrants caution in making broad comparisons without accounting for their differences. See *Moses*, *supra* note 24 at para 6.

goals of the treaties. I caution against harmonization where it fails to account for differences in statutory interpretation. Further, I argue that harmonization is problematic where it disconnects procedural requirements for participation in the *MVRMA* from its corresponding substantive objective of creating a distinct regulatory and assessment regime premised on participation.

## I. THE PARTICIPATORY OBJECTIVES OF THE *MVRMA*

Upon coming into force in 1998, the *MVRMA* established a number of resource management boards tasked with regulating resource development in the Mackenzie Valley. With some exceptions, the *MVRMA*'s jurisdiction applies to the Northwest Territories and includes five regions governed by the Gwich'in, Sahtu, Deh Cho, Akaitcho, and Tlicho peoples. Its stated purpose is to provide for an integrated system of land and water management in the Mackenzie Valley and to establish certain boards for that purpose.<sup>37</sup> As such, the *MVRMA* vests these regulatory boards with permitting authority over land and water in the settlement areas.

The *MVRMA* is set out in seven parts. Part 1 sets out general provisions respecting all of the boards within its purview. Parts 2–5 establish particular boards related to land use planning, land and water regulation, and environmental impact review. Part 6 establishes environmental monitoring and audit requirements, and Part 7 deals with implementation and amendment. The effect of the *MVRMA* is to establish a land use planning board and a land and water board for each of the three settlement areas. For overlapping jurisdictional issues, it establishes the Mackenzie Valley Land and Water Board; for environmental impact assessment, it charges the Mackenzie Valley Environmental Impact Review Board (the Review Board) with responsibility. In short, any development that requires the use of land or water must go through at least one of the permitting boards and, if needed, an environmental assessment.

While each of these boards regulates particular resources, as a whole, the *MVRMA* reflects a broader shift to co-management as a form of participatory governance.<sup>38</sup> Formed as an alternative to the centralized decision making typical of resource management, it is a model for shared decision making that uses the direct participation of affected citizens. The *MVRMA* bolsters public participatory procedures that are meant to legitimize public administration but that can ex-

37. *MVRMA*, *supra* note 2, s 9.1.

38. Sari M Graben, "Assessing Stakeholder Participation in Sub-Arctic Co-Management: Administrative Rulemaking and Private Agreement" (2011) 29 Windsor YB Access Just 195.

clude or silence particular kinds of marginalized communities.<sup>39</sup>

The *MVRMA* and the treaties on which it is based pose interpretive challenges because they do not explicitly establish substantive goals for participation. To be sure, the *MVRMA* incorporates a number of procedures meant to promote the participation of particular First Nations in resource management. For instance, the preamble links the purpose of legislation to the treaties where it states:

WHEREAS the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim Agreement require the establishment of land use planning boards and land and water boards for the settlement areas referred to in those Agreements and the establishment of an environmental impact review board for the Mackenzie Valley, and provide as well for the establishment of a land and water board for an area extending beyond those settlement areas; ...<sup>40</sup>

Moreover, the preamble links the purpose of the boards to the treaties where it states:

AND WHEREAS the intent of the Agreements as acknowledged by the parties is to establish those boards for the purpose of regulating all land and water uses, including deposits of waste, in the settlement areas for which they are established or in the Mackenzie Valley, as the case may be; ...<sup>41</sup>

Furthermore, several important provisions in both the treaties and the *MVRMA* implement distinctive participatory rights of Aboriginal governments and persons in the Mackenzie Valley. These provisions relate generally to new

---

39. For discussion of the issue more generally, see Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990). In many ways, this observation confirms similar scholarship that questions whether Indigenous participation in the state's legal institutions has resulted in the incorporation of Indigenous perspectives on the law. For examples of these accounts, see James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Houghton Boston, 2006) at 128-77. See also Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our People Will One Day be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); Menno Boldt, Anthony J Long & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985); Leroy Little Bear, Menno Boldt, & Anthony J Long, eds, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984). In the administrative realm, see Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004); Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 *Can J Admin L & Prac* 93.

40. *MVRMA*, *supra* note 2, Preamble.

41. *Ibid.*

institutions, numerical representation,<sup>42</sup> traditional environmental knowledge,<sup>43</sup> and public concern.<sup>44</sup> They also address the protection of social, cultural, and economic well-being;<sup>45</sup> the particularization of benefits to certain management areas;<sup>46</sup> and the duty to consult.<sup>47</sup>

Despite these innovations to increase opportunities to address Aboriginal peoples' perspectives, the statute does not state how participation affects the interpretation of the *MVRMA* or decision making. For example, the *MVRMA* requires that nominees of Aboriginal governments nominate 50 per cent of board members, but it leaves the purpose of those nominations to inference.<sup>48</sup> A second example is the Review Board's obligation to ensure that the concerns of Aboriginal people and the public are taken into account.<sup>49</sup> The statute gives no guidance as to the relative weight to be accorded to such concerns, nor does it clarify the difference between Aboriginal concerns and those of the general public.

Ultimately, the language of the *MVRMA* and the treaties does not explicitly indicate the substantive goals of Aboriginal participation. In order to understand the role of the *MVRMA* in achieving participation, it is therefore essential to return to the political objectives of co-management and their manifestation in the treaties. Co-management has two main objectives: resolving the political conflicts between Aboriginal peoples and state government by restructuring relations and improving the technical management of natural resources through cooperation.<sup>50</sup>

As it relates to improved management, participation is expected to offer a

---

42. *Tlicho Land Claim Agreement*, *supra* note 6, art 22.2.3; *Gwich'in Land Claim Agreement*, *supra* note 4, art 24.3.7.

43. *MVRMA*, *supra* note 2, s 115.1; *Tlicho Land Claim Agreement*, *ibid*, art 22.1.7.

44. *MVRMA*, *supra* note 2, s 125; *Tlicho Land Claim Agreement*, *ibid*, art 22.2.12.

45. *MVRMA*, *supra* note 2, s 115(b); *Tlicho Land Claim Agreement*, *ibid*, art 22.2.26(a); *Gwich'in Land Claim Agreement*, *supra* note 4, art 24.3.12.

46. *MVRMA*, *supra* note 2, ss 58, 58.1; *Tlicho Land Claim Agreement*, *ibid*, art 22.2.26 (a), (d).

47. *MVRMA*, *supra* note 2, ss 123.1, 127.1; *Tlicho Land Claim Agreement*, *ibid*, art 22.2.11.

48. In relation to the Review Board, see *MVRMA*, *supra* note 2, ss 112(1)-(3). In relation to the Mackenzie Valley Land and Water Board, see *ibid*, s 99. In relation to the Sahtu Land Use Planning Board, see *ibid*, s 38. In relation to the Sahtu Land and Water Board, see *ibid*, s 56. In relation to the Gwich'in Land Use Planning Board, see *ibid*, s 36. In relation to the Gwich'in Land and Water Board, see *ibid*, s 54. In relation to the Wekeezhii Land and Water Board, see *ibid*, s 57.1. See also *Tlicho Land Claim Agreement*, *supra* note 6, art 22.2.3; *Gwich'in Land Claim Agreement*, *supra* note 4, art 24.3.7.

49. *MVRMA*, *supra* note 2, s 114(c).

50. David Natcher, Susan Davis & Clifford G Hickey, "Co-Management: Managing Relationships, Not Resources" (2005) 64 *Human Organization* 240 at 240. The authors add a third goal: recognizing the knowledge and wisdom of Aboriginal peoples.

greater base of knowledge with which to address the problem of unsustainable, ineffective, or unfair resource management regimes. Advocates expect that the integration of traditional and science-based knowledge and devolution to local organizations will result in more holistic ecosystem management and will alter regulation.<sup>51</sup> This expectation is mirrored in the *MVRMA* and the treaties. For example, statutory provisions that require the use of traditional knowledge reinforce the power of the agencies to search out and use oral histories and elder testimonies as part of the evidentiary record.<sup>52</sup>

As it relates to political conflict, Indigenous participation in co-management is expected to resolve challenges to the legitimacy of state management by redistributing rights and duties in order to promote community involvement in decision making.<sup>53</sup> Although there are differences in the arguments advanced by scholars who advocate for conceptualizing participation as power sharing, they each posit co-management boards as conduits for political authority aimed at empowering Aboriginal peoples.<sup>54</sup> More to the point, an understanding of the

- 
51. For a summary of this approach and contrary evidence, see Gary P Kofinas, "Caribou Hunters and Researchers at the Co-management Interface: Emergent Dilemmas and the Dynamics of Legitimacy in Power Sharing" (2005) 47 *Anthropologica* 179 at 180. For an argument that decentralized management is effective for resource use, see Evelyn Pinkerton, ed, *Co-operative Management of Local Fisheries: New Directions for Improved Management and Community Development* (Vancouver: University of British Columbia Press, 1989); John Donihee, *The Evolution of Wildlife Law in Canada* (Calgary: Canadian Institute of Resources Law, 2000) at 17. For difficulties with implementation, see Graham White, "Cultures in Collision: Traditional Knowledge and Euro-Canadian Governance Processes in Northern Land-Claim Boards" (2006) 59 *Arctic* 401.
52. *MVRMA*, *supra* note 2, ss 115.1, 146, 150.
53. Kofinas, *supra* note 51 at 180. See also Joseph J Spaeder & Harvey A Feit, "Co-management and Indigenous Communities: Barriers and Bridges to Decentralized Resource Management: Introduction" (2005) 47 *Anthropologica* 147 at 151; M E Mulrennan & C H Scott, "Co-management—An Attainable Partnership? Two Cases From James Bay, Northern Quebec and Torres Strait, Northern Queensland" (2005) 47 *Anthropologica* 197 at 198; Peter J Usher, "Contemporary Aboriginal Land, Resource and Environmental Regimes: Origins, Problems and Prospects," CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission for Aboriginal Peoples* (Ottawa: Libraxus, 1997).
54. A significant body of empirical research contradicts claims that numerical representation is sufficient for meaningful participation. Scholars have observed that local decision-making capacity is effectively stifled by the failure to imbue the resource management process with Indigenous values and beliefs and by the persistent authority of the federal government. Both phenomena can have the effect of tokenizing local input. See *e.g.* Marc G Stevenson, "The Possibility of Difference: Rethinking Co-management" (2006) 65 *Human Organization* 167; Marc G Stevenson, "Decolonizing Co-Management in Northern Canada" (2004) 28 *Cultural Survival Quarterly* 68; Stella Spak, "The Position of Indigenous Knowledge in Canadian Co-management Organizations" (2005) 47 *Anthropologica* 233; Paul Nadasdy,



*MVRMA* as a deliberate effort to promote political participation derives from its connection to contemporary treaty negotiation in the Mackenzie Valley. Starting in the 1970s, the federal government began to pursue resource development in the region. In response to this development and to the growing recognition of Aboriginal rights, groups began to assert their political autonomy to determine resource use in the region.<sup>55</sup> This assertion laid the groundwork for the political and participatory arrangements contained within contemporary treaties, including co-management.

The treaties reflect these goals for political participation through a number of provisions. For instance, the preamble of the *Gwich'in Land Claim Agreement* declares a number of objectives, including:

To provide the Gwich'in with wildlife harvesting rights and the right to participate in decision concerning wildlife harvesting management; [and]

[t]o provide the Gwich'in the right to participate in decision making concerning the use, management and conservation of land, water and resources.<sup>56</sup>

The same agreement addresses participation in environmental assessment where it states:

An Environmental Impact Review Board ("the Review Board") shall be established as the main instrument for the conduct of environmental impact assessment and review in the Mackenzie Valley.

The Review Board shall have equal membership from nominees of aboriginal groups and of government, not including the chairperson. No less than one member of the board shall be a nominee of the Gwich'in Tribal Council.<sup>57</sup>

Thus, Parliament's intent to increase participation is partially realized through the requirement that persons nominated by First Nation governments constitute equal or majority membership on the boards. Each of the First Nation governments in the region nominates or appoints members to the board.<sup>58</sup> The

*Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon* (Vancouver: UBC Press, 2003).

55. Peter J Usher, "Environment, Race and Nation Reconsidered: Reflections on Aboriginal Land Claims in Canada" (2003) 47 *Can Geographer* 365 at 374.

56. *Supra* note 4, arts 1.1.6-1.1.7.

57. *Ibid*, art 24.3.2.

58. Pursuant to the *MVRMA*, 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. See *MVRMA*, *supra* note 2, ss 11(1), 112(1)-(3).

territorial minister and federal government nominate the remaining members. This use of representative membership institutes a participatory model and challenges the principle that centralized management is an appropriate tool for resource management in the Mackenzie Valley.

Moreover, representation in co-management is directly related to regulatory interest. As might be expected, representation is delineated in accordance with the type of rights that a First Nation government holds in relation to the land. Where the First Nation government is thought to have a greater vested interest in the outcome, such as a project conducted on its settlement 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 decreased correspondingly. The shifting composition of a board reflects an attempt to allocate board membership in accordance with an estimation of a First Nation government's interest in the proposal. Thus, while the *MVRMA* does not itself delineate self-government, it is a part of the larger movement to actualize Aboriginal rights to self-government in Canada over the past forty years.<sup>59</sup> Seen in this context, the purpose of the *MVRMA* is to use innovative participatory techniques in order to share resource management and the exercise of related administrative powers, such as interpreting the *MVRMA*.

A good example of this same reasoning is found in applications for judicial review of decisions affecting the Mackenzie Valley. These cases reflect the general principle that the constitution of co-management boards demonstrates a clear intent to represent the perspective of the relevant Aboriginal peoples in decision making. For example, in the Federal Court decision in *Ka'da'Gee Tu First Nation v Canada (Minister of Indian and Northern Affairs)*,<sup>60</sup> Justice Blanchard considered the connection between the purpose of the boards and their composition. Citing *Hansard*, he concluded that representation on the board is meant to give Aboriginal peoples and other Northerners a role in resource management decisions.<sup>61</sup> Similarly, in *Dene Tha' First Nation v Canada*,<sup>62</sup> Justice Phelan discussed the roles of the Dene Tha' and other Aboriginal peoples in the region with respect to resource management. He remarked that the land claim agreements established the means

---

59. For a discussion of the origins of co-management in Canada and whether it is a success, see Paul Nadasdy, "The Anti-Politics of TEK: The Institutionalization of Co-Management Discourse" (2005) 47 *Anthropologica* 215 at 216 [Nadasdy, "Anti-Politics"].

60. *Supra* note 30.

61. *Ibid* at paras 43-47 (citing *House of Commons Debates*, 36th Parl, 1st Sess, vol 135, no 023, (19 October 1997) at page 1296; *Debates of the Standing Senate Committee on Aboriginal Peoples*, 36th Parl, 1st Sess, no 10 (17 June 1998)).

62. *Supra* note 29 at paras 65-67, 70.

by which Aboriginal peoples could have an ongoing say in land use and that nominating membership is the means by which it is achieved.

The approach to statutory interpretation advocated in the recent Supreme Court decision *Quebec (AG) v Moses* lends further support to the inference that Parliament intended co-management to facilitate Aboriginal participation in decision making.<sup>63</sup> In *Moses*, a slim majority of the Court declared that interpretation should be decided on the basis of the written terms of the *James Bay and Northern Quebec Agreement* that the parties had negotiated. This approach was advocated by the majority as preferable to the dissent's reliance on an interpretation that was reasonable and consistent with parties' intentions and overall context, including the legal context of negotiations.<sup>64</sup> Nevertheless, both the majority and dissent incorporated the treaty's objective of Cree participation into their analysis and used it to support their dichotomous findings. The dissent denied the legality of a CEAA assessment that did not account for procedures outlined in the treaty and found that it undermined the terms for Cree participation. The majority disagreed and held that the creation of new assessment procedures was consistent with the terms of the agreement and did not put the participatory rights of the Cree at risk. However, irrespective of whether the Court agreed on whether the decision upheld or denigrated the rights of the Cree to participate in environmental assessment, the Court affirmed Cree participation as a central principle of the treaty itself and emphasized that interpretation should uphold this principle.<sup>65</sup>

What is important for the purposes of this article is that both objectives of co-management—resolution of political conflict and technical management—rely on the use of a procedural technique: participation. Of course, for some time now, Aboriginal peoples have used participatory processes available to the public as well as processes particular to Aboriginal peoples, such as the duty to consult, to present their views.<sup>66</sup> However, in contrast to these participatory mechanisms, co-management allows Aboriginal citizens to move beyond procedure and partic-

---

63. *Supra* note 24.

64. *Ibid* at para 6; *JBNQA*, *supra* note 24.

65. *Moses*, *supra* note 24 at paras 17, 83. However, it is arguable that in *Moses*, the majority conveyed that it will uphold the terms of the treaty strictly, even if it undermines participatory rights that the parties might have intended.

66. See e.g. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550. Whether the duty to consult can be characterized as a process defined by procedure rather than by substantive powers is still unsettled in the law. For discussion on its characteristics vis-à-vis other procedural rights, see Sossin, *supra* note 39.

ipate as substantive decision makers at multiple stages of regulation.<sup>67</sup> Aboriginal 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, Aboriginal peoples are now part of the institutions in which collective decisions are deliberated in order to achieve better power sharing and better technical management. The *MVRMA* incorporates participants who can presumably contribute knowledge about how development will impact Aboriginal peoples in the region. Thus, the treaties assume that having Aboriginal persons make decisions will result in the achievement of better resource management and shared power. Through this reasoning, the substantive objectives of the *MVRMA* become enmeshed with the procedural ones, and participation becomes a technique of regulation.<sup>68</sup>

## II. IMPLEMENTING PARTICIPATION IN THE COURTS

If the resolution of political conflicts and better technical management are the objectives of co-management and participation is the technique, the salient legal question is whether the *MVRMA* operates in a manner which promotes or prevents the realization of these objectives. The role that participation plays in the interpretation of contemporary treaties has so far gone unexamined in the legal scholarship. However, examples taken from the trilogy of cases presented here suggests that implementing legal norms that result from participation could be complicated for the courts.

There are only a handful of cases that interpreted the *MVRMA*,<sup>69</sup> and only three have interpreted it in light of other statutory schemes. So far, the courts have unanimously stated that nothing in the *MVRMA* suggests that Parliament intended to completely shelter boards' decisions from scrutiny.<sup>70</sup> However, the level of deference owed to board decisions is not settled. The courts have gener-

---

67. For discussion of comparable regimes, see Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance* (London, UK: Verso, 2003); Nadasdy, "Anti-Politics," *supra* note 59 at 216.

68. For discussion of this effect in regulation more generally, see Julia Black "Proceduralizing Regulation: Part I" (2000) 20 *Oxford J Legal Stud* 597 at 597. Black describes procedures, participation, and institutional design as the common solutions to perceived regulatory problems.

69. See e.g. *Ka'a'Gee*, *supra* note 29; *Tungsten*, *supra* note 2; *Nahanni Butte Dene Band v Canadian Zinc Corp* (2005), 285 FTR 26; *Canadian Zinc*, *supra* note 2; *De Beers*, *supra* note 2; *BHP Billiton Diamonds Inc v Wek'ezhii Land and Water Board*, [2010] WWR 682 (NWTSC); *Tlicho*, *supra* note 32.

70. *Tungsten CA*, *supra* note 2 at para 16.

ally interpreted the *MVRMA* to incorporate the principle of increasing Aboriginal participation.<sup>71</sup> These cases reflect the principle that the constitution of co-management boards demonstrates a clear intent to have the perspective of the relevant Aboriginal peoples represented and incorporated into decision making. Based on this understanding, the courts have so far adopted the standard of reasonableness for review of factual issues and a standard of correctness for issues of law.<sup>72</sup>

It has been within this paradigm of correctness that the courts, through a series of decisions, have recently reviewed statutory interpretations of the *MVRMA* proffered by the Mackenzie Valley Land and Water Board and the Review Board. Of those cases that have subjected board interpretations of the *MVRMA* to judicial review, three cases have interpreted its meaning in light of its predecessor statute, the *CEAA*. These three cases highlight the different outcomes that result depending on whether the two legislative schemes are viewed as harmonious or distinct. Through these cases, the courts have explicitly and implicitly grappled with the relationship between participation and statutory interpretation. Assumptions about the drafting and intention of the *MVRMA* influence whether it is seen as similar to or different from the *CEAA*. Thus, where the *MVRMA* is understood to incorporate much of the same structure of the *CEAA*, it is interpreted as carrying forward much of the same meaning. In these cases, however, little thought has been given to how the boards' interpretations of the *MVRMA* represent particular meaning that is not represented in the *CEAA*. In contrast, where the participatory goals of the *MVRMA* are distinguished from the *CEAA*, interpretive differences are allowed. The following three summaries introduce the central interpretive issues upon which the decisions turned.

**A. NORTH AMERICAN TUNGSTEN CORP LTD V MACKENZIE VALLEY LAND AND WATER BOARD**

In *North American Tungsten Corp Ltd v Mackenzie Valley Land and Water Board*,<sup>73</sup> the Northwest Territories Supreme Court and Court of Appeal considered the interpretive similarities between the *MVRMA* and the *CEAA*. In this case, North American Tungsten applied for a water licence renewal for a mine and milling operation. It first received the licence in 1975 and renewed it at various intervals. The company argued that because it sought a renewal, it fell under a clause that grandfathered its exemption from environmental assessment. Due to concerns that the mine had been closed for many years, that it was under new ownership,

---

71. *Ka'a'Gee*, *supra* note 29 at para 47.

72. *Canadian Zinc*, *supra* note 2 at paras 18-33.

73. *Tungsten*, *supra* note 2.

that there had been a spill following its recent re-opening, and that there was little planning for imminent mine closure, various parties advocated that North American Tungsten was applying for a new licence, not for a renewal. The Mackenzie Valley Land and Water Board decided that the exemption did not apply and that the licence application required an environmental assessment.

The case turned on the interpretation of section 157.1 of the *MVRMA*. Generally, the *MVRMA* requires that proposals comply with an environmental assessment process consisting of a preliminary screening by the regulatory authority and, if applicable, an environmental assessment by the Review Board. Section 157.1 exempts a “licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before 22 June 1984.” The case and its subsequent appeal turned on whether section 157.1 grandfathers a *licence* issued prior to 22 June 1984 or an *undertaking* licensed prior to 22 June 1984.

The Mackenzie Valley Land and Water Board focussed on whether Tungsten’s current water licence was a continuation of a licence issued before 22 June 1984. The Board concluded that the application was, in effect, an application for a new licence and therefore not exempted. Tungsten applied to the Northwest Territories Supreme Court for judicial review of the Board’s decision. On judicial review, Tungsten and the Attorney General argued that section 157.1, when read in its statutory context and in light of section 74(4) of the *CEAA*, exempted Tungsten’s application. They argued that despite different language, section 157.1 was meant to mirror the meaning of section 74(4) of the *CEAA*, which grandfathers undertakings or projects that were commenced or underway before 22 June 1984.<sup>74</sup> Thus, the Attorney General argued that the exemption in section 157.1 applied to Tungsten and that the Board was incorrect in holding that it did not.

Justice Schuler of the Northwest Territories Supreme Court disagreed with the interpretation offered by Tungsten and the Attorney General. Most importantly, he disagreed with the premise that the *MVRMA* should be interpreted in accordance with the *CEAA*.<sup>75</sup> Using a purposive approach to statutory

---

74. Section 157.1 of the *MVRMA* states, “Part 5 does not apply in respect of any licence, permit or other authorization related to an undertaking that is the subject of a licence or permit issued before June 22, 1984 ... .” See *MVRMA*, *supra* note 2. Section 74(4) of the *CEAA* states, “Where the construction or operation of a physical work or the carrying out of a physical activity was initiated before June 22, 1984, this Act shall not apply in respect of the issuance or renewal of a licence, permit, approval or other action under a prescribed provision in respect of the project ... .” See *CEAA*, *supra* note 1.

75. The court found this assumption inconsistent with the intent to vest regulatory power in Indigenous peoples, as set out in the *MVRMA* preamble. See *Tungsten SC*, *supra* note 2 at para 33.

interpretation,<sup>76</sup> he interpreted section 157.1 in the context of the entire statutory scheme, the object of the *MVRMA*, and the intention of Parliament. To Justice Schuler, the preamble and purpose section of the *MVRMA* revealed that the statute's object was to create a differentiated scheme for land and water use management in the Mackenzie Valley. To this end he stated, "Since the *MVRMA* replaces the *CEAA* and contains different language from the latter, it is clear that the intent was not simply to re-create the *CEAA* regime under the auspices of new legislation."<sup>77</sup> Based on the principle that the *MVRMA* and *CEAA* are to be interpreted distinctly, he argued that the change in wording from section 74(4) of the *CEAA* to section 157.1 of the *MVRMA* is significant. The change in wording "indicates a shift away from grandfathering 'old', that is, pre-June 22, 1984 undertakings, to grandfathering only those undertakings which still hold a licence issued before June 22, 1984."<sup>78</sup> He recognized that the consequence of this interpretation was that undertakings that would be grandfathered under the *CEAA* would not be grandfathered under the *MVRMA*. However, he ascribed this intention to the legislators.<sup>79</sup>

The Northwest Territories Court of Appeal did not share Justice Schuler's interpretation. It overturned his findings and held for Tungsten. Interestingly, the court also used a purposive approach to interpretation and read the section in the context of the statute as a whole.<sup>80</sup> However, it found that the object and intent of the statute supported the position that section 157.1 was meant to parallel the *CEAA* by grandfathering old undertakings and exempting them from review. The court noted that the stated purpose of the statute was to establish boards that would enable residents of the Mackenzie Valley to participate in resource management. However, the court argued that another purpose of the *MVRMA* was to grandfather existing developments in order to balance competing interests.<sup>81</sup> Against this construction of the object of the *MVRMA*, the Court of Appeal examined the specific wording of section 157.1 and read it as complementary to the *CEAA*.<sup>82</sup> The court found that similar wording as to the date before which licences are grandfathered reflected Parliament's intention to have the provisions treated similarly.<sup>83</sup> However, different wording was meant

---

76. *Bell Express Limited Partnership v Rex*, [2002] 2 SCR 559 at paras 26-27.

77. *Tungsten SC*, *supra* note 2 at para 18.

78. *Ibid* at para 31.

79. *Ibid*.

80. *Tungsten CA*, *supra* note 2 at para 21.

81. *Ibid* at para 24.

82. *Ibid* at para 29.

83. *Ibid*.

to reflect an attempt to address some interpretive difficulties that had arisen around the word “initiated” in the *CEAA*, an issue unrelated to this case.<sup>84</sup> In short, the court denied that the difference in wording between the two statutes was meant to reflect a parliamentary intention to broaden the scope of projects subject to assessment.<sup>85</sup>

In its concluding remarks, the Court of Appeal focussed on the policy implications of the lower court’s holding. It reasoned that if the lower court’s holding was correct, then as of 22 June 2009, no undertakings requiring water licences would be grandfathered since the longest water licence possible under the *Waters Act* was twenty-five years.<sup>86</sup> Absent a clear intention of Parliament, the court rejected an interpretation of section 157.1 that would require all water licence renewals to be subject to a full-scale environmental review by that date. To the court, such an approach seemed inconsistent with the concept of grandfathering and would strip section 157.1 of certainty, fairness, and ultimately effect because grandfathering would be understood as a passing state under the *MVRMA*.

#### B. *CANADIAN ZINC CORP V MACKENZIE VALLEY LAND AND WATER BOARD*

A subsequent case that considered the same issue in the context of a licence to use a winter road came before Justice Schuler in *Canadian Zinc Corp v Mackenzie Valley Land and Water Board*.<sup>87</sup> Canadian Zinc Corp. (CZC) bought mine assets from Cadillac, a bankrupt corporation that held an expired licence to use the winter road. On applying for a licence, CZC submitted to the Mackenzie Valley Land and Water Board that it should have the benefit of the section 157.1 exemption because Cadillac held a permit issued before 22 June 1984. The Board concluded that CZC was involved in a different undertaking than that in which Cadillac was involved before 22 June 1984. Consequently, it held that the permit sought by CZC “[was] not in respect of the undertaking originally permitted to Cadillac.”<sup>88</sup> The issue was whether an exempted licence under section 157.1 must

---

84. According to the court, prior uncertainty over what is meant by the word “initiated” under the *CEAA* provoked Parliament to alter section 157.1 to refer to an event which could be easily and conclusively established for a given project without litigation, that is, the actual date on which a licence or permit had been issued. *Ibid* at para 30.

85. *Ibid* at para 29. On the contrary, the court mused that the *MVRMA* exemption may be broader than that under *CEAA* since the *MVRMA* exemption applies as long as the relevant licence or permit was issued prior to 22 June 1984, regardless of whether physical work on the project had been initiated by that date.

86. *Waters Act*, *supra* note 16.

87. *Canadian Zinc*, *supra* note 2.

88. *Ibid* at para 10.



have some relationship in terms of subject matter, substance, and direct linkage to the licence in respect of which a renewal application has been filed.

Justice Schuler considered the meaning of “undertaking” under section 157.1. CZC argued that the undertaking in question was the winter access road. In contrast, the intervenors argued that the undertaking was the larger enterprise engaged in by CZC. Both relied in part on the Northwest Territories Court of Appeal decision in *Tungsten* to support their positions. For his part, Justice Schuler relied on *Tungsten* for the proposition that the *MVRMA* and the *CEAA* are meant to complement each other. Consequently, he interpreted “undertaking” in a way that would align its meaning with the language of the *CEAA* even though section 74(4) of the *CEAA* does not use the word “undertaking.”<sup>89</sup> He advocated consistency and stated:

In my view, to be consistent with the *CEAA* and the context and purpose of the legislation as described in *Tungsten*, the definition of undertaking must parallel the wording used in the *CEAA* and not focus solely on the physical “thing”, that is, the winter access road.<sup>90</sup>

Based on his declared need for interpretive consistency with the *CEAA*, Justice Schuler substituted the Board’s interpretation of the scope of the undertaking with its own interpretation premised on the terms “work” or “activity” used in the *CEAA*.<sup>91</sup> By doing so, he reduced the scope of the Board’s oversight of the mining operation by confining it to the operation of the winter road. This interpretation divorced the use of the road from the larger mining operation carried on by CZC.

In turning his mind to whether there needed to be a direct linkage between the permit that expired prior to 22 June 1984 and the current one being sought by CZC, Justice Schuler again turned to the *CEAA* for interpretive guidance. He reasoned that a purpose of both the *CEAA* and the *MVRMA* is to exempt projects from environmental assessment when significant resources have already

---

89. Section 74(4) of the *CEAA* uses the language “physical work or the carrying out of a physical activity” and “project.” “Project” is defined as “in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work.” See *CEAA*, *supra* note 1, ss 2(1), 74(4).

90. *Canadian Zinc*, *supra* note 2 at para 51.

91. *Canadian Zinc*, *ibid* at para 54. The court stated:

If the *MVRMA* and *CEAA* are meant to be complementary pieces of legislation, one would not expect the legislators to change the focus from a physical work or activity under *CEAA* to the larger business or enterprise within which that physical work or activity takes place under *MVRMA*, in determining whether a project is grandfathered and exempt from environmental assessment.

been expended on them. As such, he reasoned that where a project has been taken over by a new owner who has also expended significant resources to acquire the project, the exemption follows the project: "In other words, it is the project or undertaking that is exempt from s. 157.1, not the owner or the permit holder."<sup>92</sup>

Based on this understanding, Justice Schuler concluded that the mere desire to operate the winter access road was a sufficient connection in terms of subject matter and substance between CZC's proposed undertaking and Cadillac's undertaking. He denied the need to establish the continuity of ownership in order to benefit from the exemption, even though the licence had lapsed. The mere fact that it had existed prior to 22 June 1984 allowed it to vest in the new owner of the mine.

### C. *DE BEERS CANADA INC V MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD*

The third and most recent case to contemplate the relationship between the *MVRMA* and the *CEAA* is *De Beers Canada Inc v Mackenzie Valley Environmental Impact Review Board*.<sup>93</sup> The reasoning in this case departs significantly from the earlier decisions and, importantly, differentiates the *MVRMA* from the *CEAA*. In this case, De Beers sought judicial review of a Review Board order for an environmental impact review, where an environmental assessment had been started but not completed. This order ran contrary to requirements established pursuant to the *CEAA*.

The case turned on three issues. The first issue was whether the Review Board had the authority to order a more stringent examination of the development's effects through an environmental impact assessment, without first completing an environmental assessment. The second issue was whether the Review Board committed other errors that exceeded its jurisdiction (such as sub-delegating, pre-judging the issue, and considering irrelevant factors). The last issue was whether the Review Board erred in finding that the project was likely to be a cause of significant public concern.<sup>94</sup>

The court's reasoning on each of the three issues presented in the case reflected a particular construction of parliamentary intent. For instance, vis-à-vis the interpretation of the term "public concern" in the *MVRMA*, the court inferred that

---

92. *Ibid* at para 68.

93. *Supra* note 2.

94. *Ibid*. The court characterized the first two issues as matters of statutory interpretation, for which no deference was owed to the Review Board. It characterized the last issue, whether there was public concern, as an issue of fact, for which considerable deference was warranted.

Aboriginal people were intended to have meaningful input into this process. Parliament intended that potential environmental impacts and public concern be important factors for the Review Board in making decisions. Parliament also intended that the preservation of social, cultural and economic well-being of the residents of the region and the importance of conservation to well-being and way of life of aboriginal people be taken into account.<sup>95</sup>

In relation to process, the court recognized Parliament's intent to use the Review Board's composition to balance the complex and potentially conflicting factors it must take into account in an environmental assessment.<sup>96</sup> Based on this particular argument, the court addressed De Beers's position that the court should use the same understanding of "consideration" as used in section 16 of the *CEAA* and interpreted in another case.<sup>97</sup> Interestingly, the court found the analogy to the *CEAA* unconvincing. Justice Charbonneau recognized the use of similar language in different statutes as helpful to interpretation but rejected its application here. Instead, she declared, "I am not persuaded, however, that the meaning given to the term 'consideration' in the context of the *CEAA* is particularly helpful in resolving the statutory interpretation issue in this case."<sup>98</sup>

Justice Charbonneau cited various reasons for this interpretive turn: that the term "consideration" is not a particularly technical word, that use of the word "consideration" instead of "determination" is significant, and that the ordinary meaning of the word does not imply exhaustive review. In addition, the court distinguished the *MVRMA* from the *CEAA*. Justice Charbonneau noted that while there are some similarities between the two statutes, there are also some differences. More specifically, she noted that the *MVRMA* is "unique in the context of its adoption, the importance of the role given to the Review Board, and the importance it places on public concern."<sup>99</sup>

Based on this interpretive difference, the court upheld the Review Board's interpretation and its power to order an environmental impact assessment without first completing the environmental assessment. In doing so, the court allowed the Review Board to implement different requirements than those used in other jurisdictions. Interestingly, the court grounded its support for the Review Board's actions in its distinctive goals.

---

95. *Ibid* at para 25.

96. *Ibid* at para 26.

97. *Alberta Wilderness Assn v Cardinal River Coals Ltd* (1999), 165 FTR 1.

98. *De Beers*, *supra* note 2 at para 37.

99. *Ibid*.

### III. ASSESSING ARGUMENTS FOR AND AGAINST HARMONIZATION

To date, these are the only three cases to explicitly contemplate the relationship between the *MVRMA* and the *CEAA*. Because there are only a limited number of cases to draw upon, it is difficult to formulate durable conclusions about their authority and meaning. That being said, the Court of Appeal in *Tungsten* is currently the leading authority on this issue in the Northwest Territories. Both *Tungsten* and *Canadian Zinc* stand for the proposition that Parliament intended the meaning of section 157.1 in the *MVRMA* to be harmonized with that of the *CEAA*. The courts did not use the term “harmonization” in their judgments, preferring the term “complementary.”<sup>100</sup> However, the critical question guiding the interpretation and application of the *MVRMA* in these cases was whether Parliament intended the *MVRMA* to be interpreted in accordance with the *CEAA*. In *Tungsten*, the principle of harmonization led to the finding that, like the *CEAA*, the *MVRMA* grandfathers undertakings (rather than licences). In *Canadian Zinc*, this principle led to the finding that the *MVRMA* grandfathers undertakings, as defined by the terms “work” or “activity” that dictate assessment in the *CEAA*.

#### A. FOR HARMONIZATION

Despite the fact that the *CEAA* no longer applies to determine issues of environmental assessment in the Mackenzie Valley, it is arguable that the courts are not precluded legally from comparing analogous language in order to derive parliamentary intent. This comparative exercise is a common tool of statutory interpretation used across jurisdictions. It is also arguable that the courts are correct to assume that Parliament is partial to harmonization and intended the *MVRMA* to be interpreted in accordance with the *CEAA* at certain times. There are three indicators of this intention, which can be derived from the construction of the *MVRMA*.

First, there are striking similarities between the two statutes, suggesting that the *CEAA* is the *MVRMA*'s template for environmental assessment.<sup>101</sup> While there are differences, a comparison of the two statutes reveals that the general

100. *Tungsten CA*, *supra* note 2 at para 29; *Canadian Zinc*, *supra* note 2 at paras 54, 65.

101. For the argument that greater attention should be paid to how administrators or their associated interest groups impact the promulgation of legislation by bringing legislation into existence, commenting on proposed legislation, and consulting on technical language, see HW Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 135.

purpose and procedures of the two statutes are similar. Environmental assessment is a planning tool that requires early identification and evaluation of all potential environmental consequences of a proposed development and its alternatives. This tool is combined with a decision-making process that attempts to reconcile any approval of the proposed development with environmental protection and preservation.<sup>102</sup> To this end, both the *CEAA* and *MVRMA* set up the regulatory scheme for environmental assessment and establish its process. They both aim to use their procedures to predict the environmental effects of proposed projects before they are carried out, to propose measures to mitigate those effects, and to predict whether there will be significant adverse effects even after mitigation is implemented. Thus, commentators have remarked that while the *MVRMA* represents a geographically sensitive approach to environmental assessment, it incorporates much of the same structure as the *CEAA*.<sup>103</sup>

In terms of procedure, both statutes subject proposals to a graduated assessment scheme that routes the proposals to different levels of assessment depending upon the likelihood of significant adverse impacts. Consequently, both statutes subject certain proposals to a preliminary screening (a succinct examination of a proposed development), while others are subjected to further environmental assessment. For example, both statutes require a preliminary screening where the government is involved with permitting, licensing, or authorizing a type of project enumerated in the regulations. If the screening determines that a proposal might have a significant adverse impact or might be a cause of public concern, both statutes subject the proposal to further assessment. Both statutes also exempt a proposal from screening where it does not involve a permit, licence, or authorization and where the impact on the environment is insignificant or where the proposal involves an activity listed in an exempted or excluded regulatory list.

It is noteworthy that the similarities just discussed are also shared with other environmental assessment regimes across Canada.<sup>104</sup> Therefore, just as commonalities between provincial statutes may indicate an intention to incorporate similar meaning irrespective of jurisdiction, so too may commonalities between the *MVRMA* and the *CEAA* evince such an intent. Nonetheless, if one

---

102. For an overview of environmental assessment and other means of regulating mining in Canada, see Joseph F. Castrilli, "Environmental Regulation of the Mining Industry in Canada: An Update of Legal and Regulatory Requirements" (2000) 34 UBC L Rev 91.

103. *Ibid* at 121.

104. For discussion of schemes in Canada, see Kevin S. Hanna, *Environmental Impact Assessment: Practice and Participation* (Toronto: Oxford University Press, 2005).

assumes that common intent can be deduced from common purpose or process, no conclusive statement can be made about Parliamentary intent vis-à-vis the *MVRMA*, given its procedural differences from the *CEAA*. In light of how similar environmental assessment regimes tend to be, it is arguably the small differences in process that can determine intention in any given case. For example, under the *MVRMA*, the Review Board has the power to refer projects for environmental assessment on its own motion<sup>105</sup> or determine the scope of the project for assessment,<sup>106</sup> whereas review panels struck pursuant to the *CEAA* possess no comparable powers.

A second indicator that the two statutes warrant harmonization is their shared use of regulatory lists that determine which proposals are automatically included or excluded from screening. This explains why the Department of Indian and Northern Affairs stated in its Regulatory Impact Analysis that the Preliminary Screening Requirement Regulations and the Exemption List Regulation of the *MVRMA* have been “modelled on, and work in a similar fashion to, the *Canadian Environmental Assessment Act (CEAA) Law List Regulations* and the *Exclusion List Regulations*.”<sup>107</sup>

However, it is noteworthy that in rejecting the proposal that the *MVRMA* should use exactly the same inclusion and exclusion regulations as the *CEAA*, the department argued that the “proposed regulations are adapted to the circumstances in the Mackenzie Valley. They carry out Canada’s obligation respecting the implementation of the Gwich’in and Sahtu Land Claim Settlement Agreements.”<sup>108</sup> Nonetheless, the department asserted that “[g]iven their similarity to *CEAA*, they offer some familiarity and continuity throughout the federal system.”<sup>109</sup> Also, in weighing the benefits and costs of a different system in the Mackenzie Valley, the department stated:

A system so similar to the *CEAA* regulations does not require much adaptation from stakeholders, proponents and federal regulatory authorities or increase operating costs. ...the level of EAR [environmental assessment review] would not significantly

---

105. *MVRMA*, *supra* note 2, s 126(3). Contrast this with the *CEAA*, *supra* note 1, s 29(1), which authorizes only the Minister.

106. *MVRMA*, *ibid*, s 117. Contrast this with the *CEAA*, *ibid*, ss 15(1), 16(3), which vest scoping authority in the Minister or responsible authority.

107. Preliminary Screening Requirement Regulations (Regulatory Impact Analysis Statement), (1998) C Gaz I, 1798 at 1799 [Government of Canada, “Impact Analysis Statement”]. For a discussion of regulatory impact analysis statements see J Paul Salembier, *Regulatory Law and Practice in Canada* (Markham, ON: LexisNexis Canada, 2004) at 83-94.

108. Government of Canada, “Impact Analysis Statement,” *supra* note 107 at 1800.

109. *Ibid* at 1799.

increase in the Mackenzie Valley. It is therefore not anticipated that these regulations would limit competitiveness or unduly affect small and medium business more than the current *CEAA* regulations.<sup>110</sup>

It is questionable whether harmonization has resulted from a shared exclusion list. The Review Board has already interpreted differences between the lists in light of the treaties.<sup>111</sup> However, these governmental statements reveal an intention to create a system of northern resource management that implements treaty obligations but generally maintains continuity with systems already in place.<sup>112</sup>

Lastly, the courts' approach in favour of harmonization aligns with the federal government's long-standing goal of harmonizing environmental standards across the country. In Canada, federal environment ministers have prioritized the harmonization of federal and provincial environmental standards for the last twenty years. This tendency towards harmonization has resulted in initiatives such as the Canada Wide Accord on Environmental Harmonization, a framework agreement between the federal and provincial governments to coordinate environmental programs and policies.<sup>113</sup> Aimed at achieving the benefits of harmonization, its objectives are to "enhance environmental protection, promote sustainable development; and achieve greater effectiveness, efficiency, accountability, predictability and clarity of environmental management for issues of Canada-wide interest ...".<sup>114</sup> This preference for harmonization is evident in the

110. *Ibid* at 1800-01.

111. Mackenzie Valley Environmental Impact Review Board. *Preliminary Screening Conducted by Governments and First Nations as Developers: Subsection 124(2) of the Mackenzie Valley Resource Management Act* (Northwest Territories: Mackenzie Valley Environmental Impact Review Board, 2005), online: <[http://www.reviewboard.ca/upload/ref\\_library/Ref\\_Bulletin\\_Govt\\_FNs\\_as\\_Developers\\_1198103760.pdf](http://www.reviewboard.ca/upload/ref_library/Ref_Bulletin_Govt_FNs_as_Developers_1198103760.pdf)>.

112. For further evidence that the *MVRMA* is a product of federal conceptualizations of resource management, see Julia Christensen & Miriam Grant, "How Political Change Paved the Way for Indigenous Knowledge: The Mackenzie Valley Resource Management Act" (2007) 60:2 *Arctic* 115 at 120.

113. In November 1993, the Canadian Council of Ministers of the Environment agreed to make harmonization a top priority. Following long consultations, negotiations, and draft attempts, the thirteen ministers of the environment, representing the provincial, federal, and territorial governments, signed the Canada-Wide Accord on Environmental Harmonization (1993), online: <[http://www.ccme.ca/assets/pdf/accord\\_harmonization\\_e.pdf](http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf)> [Canada-Wide Accord]. See Canadian Council of Ministers of the Environment, *Guide to the Canada-Wide Accord on Environmental Harmonization* (29 January 1998), online: <[http://www.ccme.ca/ourwork/environment.html?category\\_id=25](http://www.ccme.ca/ourwork/environment.html?category_id=25)>.

114. Canada-Wide Accord, *supra* note 113 at 1. For the benefits of harmonization, see Steven A Kennett, "Interjurisdictional Harmonization of Environmental Assessment in Canada" in Steven A Kennett, ed, *Law and Process in Environmental Management: Essays from the Sixth*

language of the *MVRMA*, which permits joint reviews to operate pursuant to the *CEAA*.<sup>115</sup> Based on its long-standing attempts to promote harmonization, it is safe to assume that the federal government would likely advocate interpretations of the *MVRMA* that are consistent with the *CEAA*.

## B. AGAINST HARMONIZATION

Despite the authority of the decisions to date, the principle of harmonization, as used in these two cases, should be of limited application where Aboriginal participation is apparent and relevant to an interpretation by a board in the region. The limited application of both *Tungsten* and *Canadian Zinc* can be ascribed to the fact that neither of the cases speaks effectively to the broader issues of Aboriginal participation, the origins of the *MVRMA* in treaties, or the impact of harmonization on the participatory goals of Parliament. Instead, *De Beers* is the leading case on interpretation when Aboriginal participation is involved. *De Beers* stands for the proposition that when Aboriginal participation comes to the fore, courts can rely on Parliament's intent for the *MVRMA* to reflect the value of such participation in board decision making and related interpretation.

It is commonly acknowledged in the cases dealing with the *MVRMA* that the context of its adoption (*i.e.*, contemporary treaties) reflects a process aimed at achieving political autonomy. Similarly, the central innovation of co-management is its incorporation of participants who can presumably contribute knowledge about the technical, social, or political issues of Aboriginal peoples in the region. However, neither the court in *Tungsten* nor the court in *Canadian Zinc* interpreted Aboriginal participation or the statute's origin in treaties to be relevant to the construction of the Act's object vis-à-vis grandfathering. Instead, the decisions in *Tungsten* and *Canadian Zinc* are characterized by their reliance on related, but not exact, language found in the *CEAA*.

The importation of technical meaning from other statutes is common to statutory interpretation. However, the normative basis for the courts' interpretations can be sourced to their construction of the purpose and object of the legislation.<sup>116</sup> The Court of Appeal in *Tungsten* noted that the stated purpose of the statute was to establish boards to enable residents of the Mackenzie Valley to participate in resource management. However, it argued that the relevant purpose of the *MVRMA* was to grandfather existing developments in order to balance

---

CIRL *Conference on Natural Resources Law* (Calgary: Canadian Institute of Resource Law, 1993) 297.

115. *MVRMA*, *supra* note 2, s 130(1)(c).

116. *Tungsten CA*, *supra* note 2 at para 21.



competing interests.<sup>117</sup> Against this construction of the object of the *MVRMA*, the Court of Appeal turned its attention to the specific wording of section 157.1 and characterized it as complementary to the *CEAA*.<sup>118</sup> In short, the courts did not seem to consider Aboriginal participation or the *MVRMA*'s origin in treaties to be relevant to its interpretive task.

Because the decisions do not address the relevance of participation, jurists can only postulate whether it was an issue. Interestingly, both decisions reflected on the expertise of co-management boards in establishing the standard of review and found that the boards did not hold any special knowledge that warranted deference to their views on statutory interpretation. The courts' view that the boards lacked expertise may explain why they did not consider whether First Nation perspectives on the statute were an issue.<sup>119</sup> Alternatively, the meaning of grandfathering in legal doctrine may be so entrenched in law that the court would have deemed First Nation perspectives irrelevant. Irrespective of the reason, the courts overrode the boards' interpretations. In so doing, they did not consider parliamentary intent vis-à-vis treaties or participation in enough detail to permit conclusions about its relevance to statutory interpretation.

Similarly, neither of the courts in these two cases conveyed any thoughts on the broader impact of harmonization on Aboriginal participation. While the courts advocated harmonization, neither of them reflected on its positive or negative impacts. This lacuna is problematic where harmonization supplants the differentiated approaches to resource management that are reflected in boards' statutory interpretations. Thus, courts may use harmonization to justify the imposition of uniform norms instead of allowing for differentiated interpretation. This rationalization is especially problematic in light of the *MVRMA*'s intention to reflect regional and Aboriginal perspectives on resource management—

---

117. *Ibid* at para 24.

118. *Ibid* at para 29.

119. The Dehcho Government was an intervenor in *Canadian Zinc*, *supra* note 2. The Tlicho Government was an intervenor in *De Beers*, *supra* note 2. There was no Aboriginal government intervenor in *Tungsten*, *ibid*. However, the Liidlii Kue First Nation made submissions at the hearing for North American Tungsten's water licence renewal before the Mackenzie Valley Land and Water Board. Letter from Chief Rita Cli, Liidlii Kue First Nation, to Bob Wooley, Mackenzie Valley Land and Water Board (20 June 2002) online: <[http://www.reviewboard.ca/upload/project\\_document/EA02-003\\_DOC000\\_1186676061.PDF](http://www.reviewboard.ca/upload/project_document/EA02-003_DOC000_1186676061.PDF)>. The Liidlii Kue First Nation also applied for party status to the Mackenzie Valley Environmental Impact Review Board. Letter from Acting Chief Keyna Norwegian, Liidlii Kue First Nation, to Luciano Azzolini, Environmental Assessment Officer, Mackenzie Valley Environmental Impact Review Board (6 August 2002) online: <[http://www.reviewboard.ca/upload/project\\_document/EA02-003\\_DOC011\\_1186688300.PDF](http://www.reviewboard.ca/upload/project_document/EA02-003_DOC011_1186688300.PDF)>.

perspectives that may be different from other regulatory schemes. However, no aspect of this debate is reflected in the decisions. Instead, both *Tungsten* and *Canadian Zinc* have found an intention to harmonize the meaning of the two statutes in accordance with the meaning of the *CEAA*. The *MVRMA* will therefore be interpreted in accordance with principles that dictate outcomes in other legislative schemes.

Ultimately, the courts' methodology is topical because they did not consider whether the importation of meaning from the *CEAA* could have implications for participation or treaty rights. Despite this omission, the courts nonetheless developed principles that may affect these rights. The likelihood that courts will continue to rule on divergent interpretations, especially where Aboriginal participation is substantial, makes the methodological approach to ascertaining parliamentary intent important. The potential effect of harmonization is notable in these cases because the rationales used to justify harmonization can allow courts to divorce the potential impact of the *MVRMA*'s participatory provisions from statutory interpretation. A focus on the parliamentary intent to harmonize the statutes can preclude differences and divert attention from the potential impact of co-management on the meaning of the *MVRMA*. This preclusion results from reasoning that does not consider whether Aboriginal participation can affect statutory interpretation. By doing so, the decisions convey a message that co-management boards should not develop the meaning of their governing legislation to reflect the region in which they must operate.<sup>120</sup> In contrast, a more complex conception of participation would reflect an understanding that stakeholder participation can alter what the regulatory output looks like and that board members play an essential role in achieving that change. In short, effective participation is a reflection of the ability to instantiate Aboriginal peoples' perspectives in various regulatory outputs.

In addition, harmonization can impart a message that participation in co-management regimes is a formal procedural requirement that has little to no bearing on statutory interpretation. By failing to account for participation, the courts unintentionally utilized a conception of participation that makes procedure (*i.e.*, the physical presence of Aboriginal persons on a board or before a

---

120. For extensive discussion of statutory interpretation and standards of review, see Sara Blake, "The Standard of Review Applied to the Interpretation of Statute" (Paper delivered at Administrative Hot Topics, Best Practices: Everything You Need to Know In 2006!, OBA Institute of Continuing Legal Education, Toronto, 23 January 2006); Marie-Hélène Blais et al, eds, *Standards of Review of Federal Administrative Tribunals*, 2007 ed (Markham, Ontario: LexisNexis Canada, 2006). See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Markham, ON: Butterworths Canada, 2002).

board) and not substantive change the primary objective of the *MVRMA*. Under this conception, the goals of participation are met when the procedural requirements of the *MVRMA* are satisfied instead of when power sharing or better resource management is achieved. Thus, once the statutory requirements for the composition of a co-management board are fulfilled, there is no further thought given to how a board might impact the use and interpretation of law. Rather, meeting the formal requirements of the *MVRMA* is sufficient for the court to pre-emptively assume that its substantive objectives have been met.

Should the courts apply the principle of harmonization to situations in which Aboriginal participation is apparent and relevant, it can lead to facile assumptions that undermine the central objective of promoting Aboriginal participation in the Mackenzie Valley. If the reasoning used in *Tungsten* and *Canadian Zinc* precludes participation in statutory interpretation, it becomes unclear when or how co-management promotes the perspectives of Aboriginal peoples. Instead, judicial reasoning should ask whether an interpretation that is at odds with a board's interpretation has the potential effect of ignoring the impact of participation on regulatory output.

### C. A CAUTIOUS APPROACH

All this is not to say that harmonization should never occur. Taken together, the trilogy highlights that both harmonization and difference have a foundation in the *MVRMA*. If, however, the conflicting cases and statutory provisions illustrate how the legislative intent of the drafters can justify both harmonization and differentiation, which one is correct? The most likely (and unspoken) reality that undermines either rationalization is that Parliament's intentions are probably multiple and dichotomous. In all likelihood, its drafters intended both harmonization and differentiation. As in other legislative schemes that attempt to appease multiple and conflicting stakeholders, the *MVRMA* was drafted to contain the possibility for difference (in accordance with treaty obligations) as well as consistency with other environmental assessment schemes (which are familiar and recognizable to industry-based users).

In light of this reality, the interpretive methodology used in the cases behooves asking whether the meaning of the rules surrounding co-management *should* be harmonized with those of the *CEAA*. The cases discussed here raise the concern that harmonization of meaning can allow courts to ignore the context from which rules came and where they are applied. It can allow resource management rules to be treated as universal, despite significant differences in context. Rather than recognizing the assumptions in the *CEAA* about such things as the

value of resource management and how to talk about it, harmonization treats those assumptions as immediately applicable to Aboriginal communities in the Mackenzie Valley. This approach is problematic because those assumptions were forged through a long history of social and political development that is not necessarily part of the northern Indigenous experience. Instead, assumptions that resource management in the Mackenzie Valley can or should be consistent with resource management in other jurisdictions should be reconsidered where Aboriginal peoples' participation indicates otherwise.

The decision in *De Beers* provides an alternative approach to differentiated interpretations based on a parliamentary intent to implement Aboriginal participation. In *De Beers*, Justice Charbonneau considered the potential application of the *CEAA*. However, she rejected its application and allowed differentiated interpretations in that particular case based on a reading that Parliament intended for diversity to be a product of participation. The court's reasoning on each of the three issues presented in the case reflected a particular construction of parliamentary intent: an intention that Aboriginal people would have meaningful input and an intention that the board's composition would allow it to balance the various factors that go into decision making.

For example, based on the unique context of the statute's adoption, the importance of the role given to the Review Board, and the importance placed on public concern, the court rejected the submission that the meaning of the term "consideration" in the *CEAA* is helpful to the interpretation of the *MVRMA*.<sup>121</sup> The court further rejected the submission that the Review Board must consider all factors in depth prior to ordering an environmental impact assessment. Instead, Justice Charbonneau stated:

On the contrary, taking into consideration this *Act* as a whole and the unique context of its adoption, ... I am of the view that the powers given to the Review Board should, wherever possible, be interpreted in a manner that gives the Review Board the flexibility it needs to carry out its broad and complex mandate.<sup>122</sup>

The court addressed the jurisdictional issues in a similar way. *De Beers* had submitted that the Review Board prejudged the issues, fettered its own discretion, or took into account irrelevant factors that arose in community workshops and hearings. The court noted that the Review Board's reports confirmed that community members raised many issues at these hearings. However, the court

---

121. *De Beers*, *supra* note 2 at para 37.

122. *Ibid* at para 45.

differentiated between the Review Board's reports on those submissions and the Review Board's reasons, the latter of which is where the court argued the focus of inquiry should be. Showing an understanding for how participation works, the court noted:

[A]ny process that is designed, among other things, to engage the public and seek input from various sources, has the potential of generating information and comments that are not relevant to the decision that has to be made.<sup>123</sup>

The court characterized these hearings as meaningful participation from the community and not as evidence of prejudgment. It therefore distinguished it from the Review Board's findings.<sup>124</sup>

Lastly, the court addressed De Beers's submission that the Review Board erred in finding there to be a cause of significant public concern. While not entirely clear from the written decision of the court, it seems that De Beers had submitted that the Review Board had failed to evaluate whether the public concern expressed in community workshops was justified. The court rejected this interpretation. Instead, it argued that the unique context within which the *MVRMA* was enacted and its stated purpose showed an intention that the mere existence of public concern is an important factor. The *MVRMA* does not require the Review Board to be satisfied that concerns are insurmountable, unappeasable, or justified.<sup>125</sup>

According to Justice Charbonneau's construction, the Review Board does not only implement Aboriginal participation through its final recommendations. The Board also implements participation through its power over processes developed pursuant to the *MVRMA*. Where those processes reflect parliamentary intentions vis-à-vis Aboriginal peoples, it is to be expected that they may be different than those developed in other legislative schemes. Pivotal to the court's approach was its acceptance of the *MVRMA* as legislation that reflects the terms and goals of the treaties and that reflects a different process for environmental assessment. This approach is illustrated by Justice Charbonneau's construction of the intention of Parliament to be the creation of a differentiated scheme for land and water use management in the Mackenzie Valley. Through this approach, the court justified the Board's interpretive authority as representative of that differentiation.

Notably, the decision did not cite *Tungsten*. However, *De Beers* can be distinguished from *Tungsten* by its holding that where Aboriginal participation

---

123. *Ibid* at para 52.

124. *Ibid* at paras 55-56.

125. *Ibid* at paras 65-66.

in co-management is relevant to an issue, harmonization is not appropriate. *De Beers* exemplifies caution when inquiring whether a judicial interpretation of a statute that is at odds with a board's interpretation ignores the impact of participation on statutory interpretation. Assumptions that the *MVRMA* can or should be used in the same manner as other Canadian jurisdictions should be tempered by a consideration of the role of Aboriginal peoples' participation in its suggested use. A solitary focus on the intention of Parliament to have the same meaning applied to both pieces of legislation permits the *CEAA*'s meaning to prevail. The effect may be to silence Aboriginal perspectives. Instead, *De Beers* indicates another, more adaptive approach to interpretation that warrants further consideration by the courts.

Ultimately, it should be expected that administrative boards constituted pursuant to treaties and expressly tasked with consideration of Aboriginal perspectives on resource management may produce rules, decisions, and interpretations that can be differentiated from other regimes. Seen in this light, the provisions of the *MVRMA* that allow for participation also permit participation to impact its interpretation. Judicial review of a board's decisions without consideration of unique perspectives contradicts the essence of the *MVRMA* as a legislative attempt to institutionalize such perspectives through participation. That is, while harmonization and differentiation are both very much a part of the *MVRMA*, they must both account for the incorporation of Aboriginal perspectives in order to be just. Within this suggested approach, limiting the impact of Aboriginal perspectives without recognizing it as such is problematic.

#### IV. CONCLUSION

Whether courts are cognizant of the impact of statutory interpretation on the objectives of participation or not, judicial review of co-management boards will only increase in the years to come. Courts will likely be asked to interpret the meaning of new environmental assessment regimes in light of the *CEAA*. Functionally, that increase can be ascribed to the proliferation of contemporary treaties that use participation as a procedural technique for achieving power sharing and resource management. Yet, the increase can also be ascribed to the expectation, or rather the hope, that treaties will bring certainty to long-standing disputes. It is in this context that courts will grapple with the practicalities of implementing new administrative regimes premised on participation and thereby uphold the broader constitutional objectives of contemporary treaties: the reconciliation between Aboriginal and non-Aboriginal Canadians.

What authority obligates courts to account for Aboriginal peoples' participation in judicial review of co-management board decisions? There are many ways this question can be answered. For instance, analysis of a statute, its purpose, the provisions that authorize participation, the treaties that gave rise to the statutes, the standard of review, and their interpretation all provide insights into the requirements of law. In this article, I use this last suggested technique—that is, analysis of how a co-management statute has been interpreted—to examine the ways in which courts recognize Aboriginal peoples' participation as relevant or irrelevant to statutory interpretation. I therefore set out to analyze whether harmonization of a statute with its predecessor can undermine the objectives of Aboriginal participation entrenched in a contemporary treaty.

An examination of the case law indicates that in reviewing issues of fact, courts are deferential to the role of the boards in effecting the participatory goals of the *MVRMA* and the treaties from which it arose. Moreover, the law to date seems settled that determinations of law by a co-management board are to be reviewed for their correctness and that boards are not due any special deference in this regard. However, it remains unclear whether the objective of achieving Aboriginal participation in resource management is relevant to the review of board decisions pursuant to the *MVRMA*. I have established that the substantive objectives of co-management—more effective resource management and power sharing—are not made explicit in the text of the *MVRMA* or the treaties. Moreover, it is because the substantive goals of participation remain unexpressed that it remains unclear to what extent these participatory initiatives may impact the regulatory output of the boards. Essentially, the text remains ambiguous about whether Aboriginal participation is only procedural, so that meeting the requirements of the *MVRMA* are sufficient to establish participation, or whether Aboriginal participation also creates the potential to alter the regulation in accordance with the substantive content of Indigenous traditions or perspectives on resource management.

Despite political and historical evidence that Parliament intended to create a new assessment regime and allow the participation of Aboriginal peoples to affect decision making, the courts have found that Parliament intended to harmonize the *MVRMA* and the *CEAA*. However, as discussed here, harmonization is problematic where it reduces the impact of such participation to a mere procedural requirement of the statute. This discounting of participation can undermine the analytical significance of institutions purposefully designed to integrate Aboriginal governments and their viewpoints in decision making. While procedure is most certainly essential for achieving par-

ticipation, the approach adopted in *Tungsten* and *Canadian Zinc* illustrates the effect of divorcing the procedural and substantive objectives of co-management. Instead, building on the approach championed in *De Beers*, it is more appropriate to see the *MVRMA* as reflecting an expectation that participation can result in interpretations that are distinguishable from those of built into the *CEAA*. Ultimately, this conclusion means that courts are not precluded from drawing on the *CEAA* to interpret the *MVRMA*, but they should be extremely cautious of harmonization's impact on treaty origins and objectives.