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COMMENTARY:

# Honouring indigenous treaty rights for climate justice

C. S. Mantyka-Pringle, C. N. Westman, A. P. Kythreotis and D. W. Schindler

Expansion of the oil sands industry in Canada has caused land destruction and social friction. Canada could become a leader in climate governance by honouring treaty commitments made with indigenous peoples.

Energy extraction in western Canada has impacts on global climate, local ecologies, human health and indigenous cultures, causing an increasingly controversial public profile. More than 100 protests objecting to the extraction of bitumen from oil sands and the construction of pipelines for transporting this bitumen to domestic and world markets have been held in various First Nations and cities across Canada (for example, Ottawa, Montreal, Winnipeg, Victoria, Edmonton, Calgary, Toronto and Saint John; see Fig. 1). More than half demanded climate change action. Oil sands development is Canada’s fastest growing source of greenhouse gas (GHG) emissions and is responsible for the country’s most significant set of environmental issues in recent history<sup>1–3</sup>. Pressing social issues have also accompanied oil sands development, such as infringements of treaty and Aboriginal rights, inequalities in economic benefits, health care, housing shortages, substance abuse, food insecurity and high suicide rates<sup>4</sup>.

In 1982, the existing treaties and rights of Aboriginal peoples in Canada were recognized and affirmed in Section 35 of its constitution. Any Aboriginal or treaty rights that existed in 1982 should therefore enjoy constitutional protection. Instead those rights remain largely undefined and subject to interpretations by the courts,

leaving Aboriginal people in limbo. Governments must consult Aboriginal communities when developments are proposed on lands in which the community has an interest<sup>5</sup>. However, consultation as currently practised is largely one-sided, with many communities feeling powerless, often pragmatically accepting new developments, hoping the financial benefits will outweigh the social and/or environmental consequences. For example, in ethnographic and interview research with northern Alberta First Nations (C.N.W., unpublished data), representatives identified the limited likelihood of stopping the ongoing ‘tsunami’ of development proposals as a reason for their pragmatic decisions to gain whatever benefits are possible while opposing the most damaging aspects of oil sands projects on their territories. Some First Nations leaders launched court action to recognize and protect their treaty rights — for example, the case of the Athabasca Chipewyan First Nation and the Beaver Lake Cree Nation.

We argue that honouring the treaties with many Canadian First Nations would expedite environmental and social benefits to all Canadians, globally repositioning Canada as a leader in sustainability and climate governance. We use the oil sands in Treaty Eight as an example.

The numbered treaties were signed between 1871 and 1921 across much of

Canada (see Fig. 2). Based on the written text of treaties (signed by generally illiterate Aboriginal leaders), governments view them as land surrender agreements, providing benefits such as reserve lands (which are small in relation to the territory surrendered) and economic advantages including nominal cash payments, farm implements, ammunition (for hunting) and twine (for fishing) in return. First Nations, who often cite oral traditions, tend to view the treaties as sacred agreements to share the land with newcomers only “to the depth of a plow”, while entering into kin-like relations with them. One matter of general agreement, and of foremost importance to northern First Nations, is the livelihood (hunting, fishing, gathering and trapping) rights recognized in the treaties.

Thus, among other provisions negotiated in 1899, Treaty Eight guaranteed First Nations people the right to a subsistence livelihood. Despite this, some legal scholars have upheld that the current extent of development in northern Alberta constitutes a *de facto* breach of the rights guaranteed in Treaty Eight<sup>6</sup>. Indeed, Treaty Eight First Nations have ongoing grievances, these including:

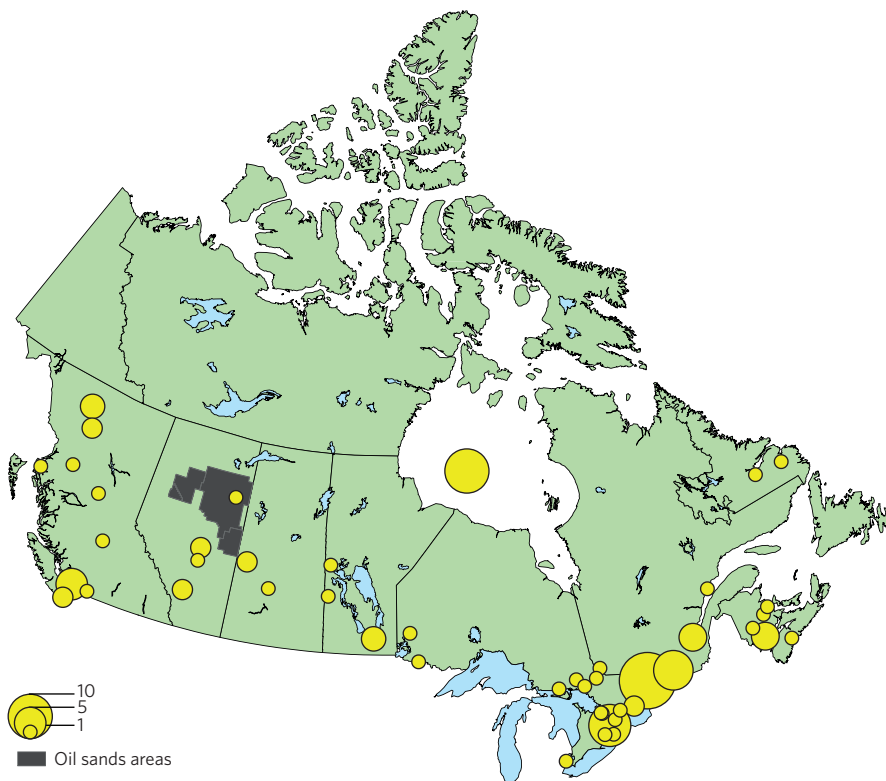
- The leasing of traditional lands for oil sands exploitation without proper consultation with Aboriginal people. The resulting habitat destruction has

affected populations of woodland caribou, bison and other plant and animal species essential to hunting and gathering. As a result, woodland caribou are endangered in the region<sup>7</sup>.

- The contamination of air, water, game, plants and fish with toxins emitted by the oil sands industry<sup>8</sup>. Fish are high in mercury, so health advisories are in effect for eating some species and consuming the eggs of fish-eating birds<sup>9</sup>. The increasing incidence of fish malformations has also been a complaint of Aboriginal communities for more than 20 years, recently confirmed by scientific analysis<sup>10</sup>.
- The increasing presence of Euro-Canadians.

Together with other impacts, including those of hydroelectricity, roads and forestry, the rapid expansion of oil sands extraction (in addition to conventional oil and natural gas) can be viewed as a cumulative assault on the ecosystems of the Treaty Eight territory and the rights of the First Nations signatories of Treaty Eight. Similar environmental grievances are also common among First Nations in other provinces that are faced with economies dependent on a particular resource at the expense of indigenous rights and the promotion of healthy environments (for example, New Brunswick's Elsipogtog First Nation fight against hydraulic fracking and shale gas production<sup>11</sup>).

Since 1995, the government of Canada has recognized an 'inherent right' to Aboriginal self-government as part of their Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-government policy. While this policy has not had wide success in ushering in self-determination, some Aboriginal communities and organizations elsewhere in Canada have succeeded in negotiating self-government agreements entailing law-making authority in areas such as wildlife management, resource development, environmental protection and impact assessment over portions of their traditional lands. For a variety of reasons, not least pertaining to the interests and politics of the provincial government and the lack of a common vision of the treaty relationship among parties, no such self-government agreements have been negotiated in northern Alberta. Bilateral discussions to negotiate treaty-based self-government approaches with Treaty Eight and Treaty Six First Nations have floundered. Therefore, with the exception of projects occurring on small Indian reserves, Aboriginal people in Alberta do



**Figure 1** | Location of protests held throughout Canada objecting to the extraction of bitumen from oil sands, the construction of pipelines for its transport to markets, and/or demanding climate change action. The yellow circles reflect the number of protests at each location recorded by the Canadian parliament House of Commons between January 2006 and May 2014<sup>16</sup>. Ten events were recorded as 'various locations held throughout Canada and the USA', which are added to the map as a separate circle in Hudson Bay.

not have law-making authority or the rights of an owner regarding energy development. They have only the right to be consulted.

**Government action**

For years, the oil sands industry and provincial and federal governments claimed that there could be no effects of the industry on ecosystems or human health, as their monitoring programmes detected no impacts on the aquatic environment. However, the lack of detection was discovered to be due to the inadequacy of the monitoring efforts<sup>12</sup>, a conclusion supported both by federal and provincial expert reviews<sup>13</sup>. In response, an independent panel was set up to ensure a 'world class' monitoring programme, the Alberta Environmental Monitoring, Evaluation and Reporting Agency. Yet, it is still not known how the programme will relate to existing monitoring efforts or federal, provincial and Aboriginal governments.

In response to criticisms of damage to wildlife and ecosystems, the Alberta government implemented its Lower

Athabasca Regional Plan, which is supposed to balance economic activity with social and environmental needs. However, many of the recommendations by indigenous people were largely ignored in the plan. For example, Aboriginal recommendation that water withdrawal by the oil sands should be cut to zero during extreme low flow periods was ignored, suggesting that economic activity is the major driver of policies. In spite of the legislative provisions in the Canadian Environmental Assessment Act 2012 that require consideration by the federal government of impacts on Aboriginal traditional land use and Aboriginal health, assessment and monitoring programmes for sociocultural and livelihood impacts in the oil sands region remain inadequate<sup>14</sup>.

A series of environmental laws have been weakened in an attempt to expedite industrial development. The Fisheries Act no longer takes an ecosystem approach to species protection<sup>15</sup>. The Species at Risk Act now requires approval from parliament before a species can be listed. The Canadian Environmental Assessment

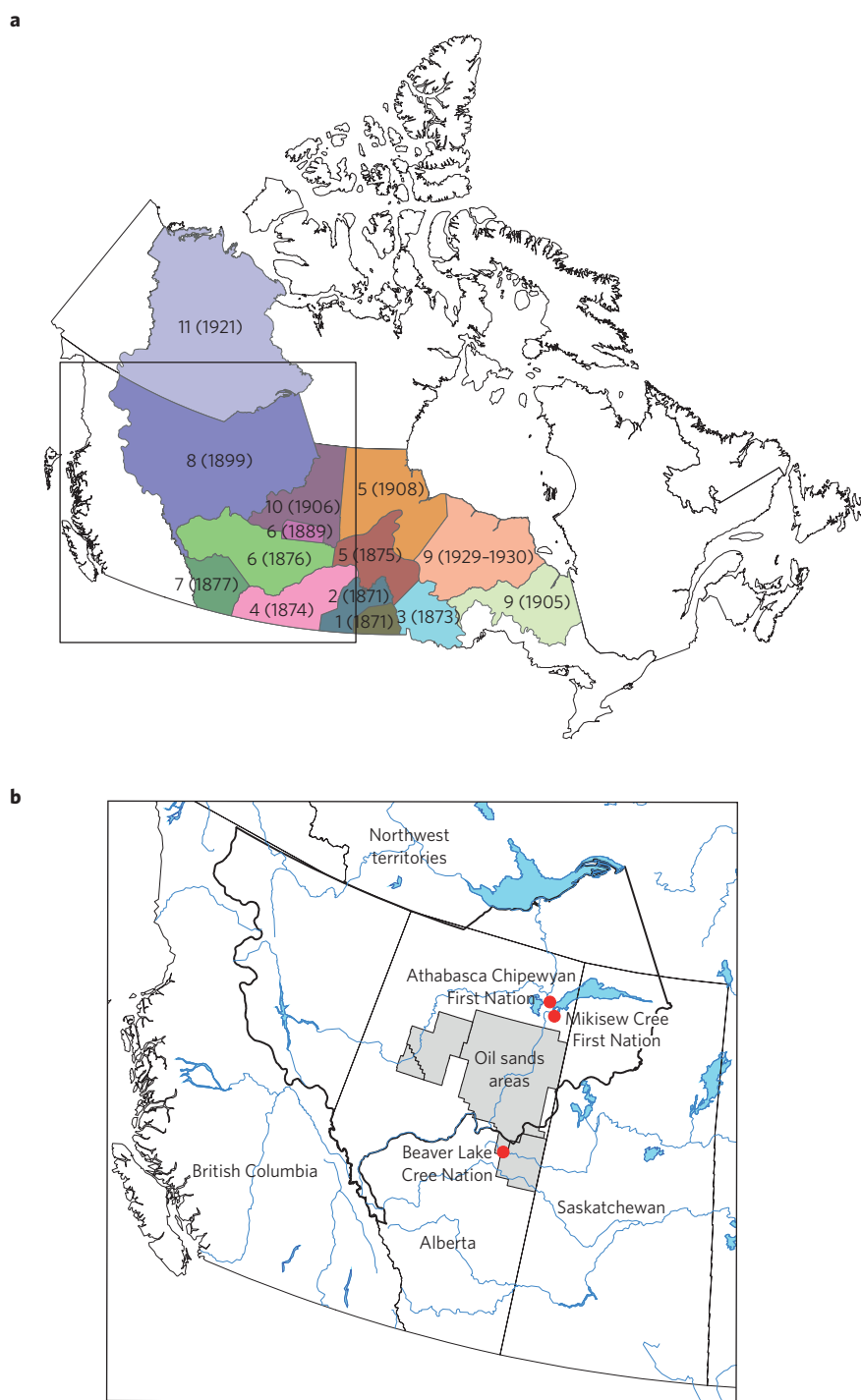
Act 2012 no longer requires assessment of all new large projects. Provincial legislation that was promised to replace damaged wetlands now preferentially restores only rare wetlands, jeopardizing critical caribou habitat. The Navigation Protection Act no longer guarantees federal protection to the navigability of waters that Aboriginal people use to access traditional territories.

Neither the government of Alberta nor the government of Canada has made any substantial changes to slow or prevent emissions of GHGs. In fact, most environmental legislation has been substantially weakened to facilitate rapid expansion of the fossil fuel industry. For instance, the Canada Economic Action Plan 2012 repealed requirements to report on climate change initiatives. It is therefore no surprise that Canada has been ranked 24th out of the 25 wealthiest nations in the Organization for Economic Coordination and Development for environmental performance ([www.oecd.org/environment/country-reviews/about-env-country-reviews.htm](http://www.oecd.org/environment/country-reviews/about-env-country-reviews.htm)). Additionally, the reluctance of the federal government to commit to the second commitment period of the Kyoto Protocol to reduce GHG emissions is symptomatic of Canada's overall policy trajectory regarding energy production and therefore climate emissions. A policy of honouring Treaty Eight and slowing down the exploitation of oil sands would be relationally beneficial to Canada, both domestically and internationally. Such a domestic policy would reduce the country's overall net emissions, slowing down local environmental degradation in the tar sands fields. Canada would also be seen as (re)embracing collective international climate governance. This could potentially catalyse a federal policy rethink in signing the second commitment period of the Kyoto Protocol, because Canada's financial penalties would be clearly reduced.

### Solutions and policy implications

With a slump in oil prices slowing new developments, it seems an ideal time to rethink the impact of development on the environment and Aboriginal people in the Treaty Eight area, in hope that it might serve as a model for other similar regions of Canada and the world.

A moratorium is required on new major projects to allow for monitoring and assessment to catch up with existing cumulative impacts, and to plan strategic responses for future impacts, including social and ecological effects. Governments should cease subsidizing and incentivizing fossil fuel production. Political pressure should also be ramped up through existing



**Figure 2 |** Treaty boundaries in Canada. **a**, Historical numbered treaties of Canada negotiated between 1871 and 1921 (dates in brackets). **b**, Area covered by Treaty Eight showing oil sands (shaded grey), provincial boundaries and Aboriginal communities (red circles), as discussed in the main text. Geographic information system data provided by Aboriginal Affairs and Northern Development Canada, government of Canada ([www.aadnc-aandc.gc.ca/eng](http://www.aadnc-aandc.gc.ca/eng)).

political institutions such as the United Nations Declaration on the Rights of Indigenous Peoples. A global policy of collectively working towards a legally binding mechanism should account for the

cultures and rights of indigenous peoples, and this should be mainstreamed through all relevant global governance platforms to enhance political traction between national signatories.

In Canada, success in governing the oil sands region depends on building trust among stakeholders and rights holders — and this must be established at federal, provincial and municipal levels of government. The history of the Treaty Eight region is not one that has built trust with Aboriginal people. Aboriginal communities should be welcomed into decision-making, governance and profit sharing from existing oil sands developments. Moreover, it should be expected that, under such circumstances, Aboriginal people will often choose environmental protection over economic development, therefore slowing down development. The principles of Treaty Eight would be a suitable guideline for these processes. With Aboriginal participation, Canada and Alberta should empower a treaty commissioner and a Métis rights commissioner with considerable authority to address disputes over lands, livelihood and governance.

Monitoring of sociocultural and ecological impacts alike is critical, as these processes are interrelated. Agencies must become more responsive to local communities; this would include training programmes helping Aboriginal communities to become more directly involved in monitoring and assessment activities. Furthermore, baseline studies and monitoring of social impacts on Aboriginal communities are required. Aboriginal communities should consider attempting to enter self-government negotiations to take new powers over environmental assessment and management in their traditional territories.

Sustainability includes the traditional practices and knowledge of indigenous people, and requires rethinking alternatives to the dominant capitalist paradigm based on non-renewable resource dependency as a source of infinite growth. Such a paradigm remains at odds with what constitutes true sustainability and stewardship. Rather than relying on rapid expansion of the oil sands in Alberta, one option would be to use current oil production to support new manufacturing within smaller communities, supporting Aboriginal people and moving beyond total reliance on resource extraction industries. This will aid the transition towards 'true' sustainability and stewardship that encapsulates indigenous rights and cultures.

Finally, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples' principle of free, prior and informed consent, policymakers must respect the right of indigenous peoples to say no to development on their traditional territories. □

C. S. Mantyka-Pringle<sup>1\*</sup>, C. N. Westman<sup>2</sup>, A. P. Kythreotis<sup>3</sup> and D. W. Schindler<sup>4</sup> are at <sup>1</sup>School of Environment and Sustainability, Global Institute for Water Security, University of Saskatchewan, Saskatoon S7N 5B3, Canada. <sup>2</sup>Department of Archaeology and Anthropology, University of Saskatchewan, Saskatoon S7N 5B1, Canada. <sup>3</sup>Cardiff School of Planning and Geography, Sustainable Places Research Institute, Cardiff University, Cardiff CF10 3WA, UK. <sup>4</sup>Department of Biological Sciences, University of Alberta, Edmonton, Alberta T6G 2E9, Canada. \*e-mail: c.mantyka-pringle@usask.ca

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## Correction

In the Commentary 'Development incentives for fossil fuel subsidy reform' (*Nature Clim. Change* **5**, 709–712; 2015), in the Acknowledgements, J. Steckel's surname was incorrectly spelled. This has been corrected in the HTML and PDF versions after print 6 August 2015.