

UN Declaration on the Rights of Indigenous Peoples and Consent in Impact Assessments

**BC First Nations Energy and Mining Council
Webinar #4: Tuesday, February 2, 2021, from 10:00-12:00**

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FNEMC

- This presentation has been developed in response to a series of 8 questions provided by the BC First Nations Energy and Mining Council about environmental impact assessments, and the way that the introduction of the United Nations Declaration on the Rights of Indigenous Peoples affects those assessments with particular focus on Indigenous consent.
- First, basic background information on the topics will be provided to set the context for my comments in relation to the specific questions.

- Early Recognition of Need for Consent
 - Why did the desire for Coal Mining lead to the *Snuneymuxw Treaty of 1854* in the Crown Colony of Vancouver Island?
- From Recognition to Denial and Exclusive Crown Decision-making
- The Long Road from Denial to Recognition?
 - 2004 SCC *Haida Nation* and the Duty to Consult
 - 2007 UNDRIP, Self-determination, FPIC, and Redress
 - 2014 SCC *Tsilhqot'in Nation* and Consent
 - 2018 BC EAA and s. 7 Consent Agreements
 - 2019 BC DRIPA and s. 7 Consent Agreements
 - 2019 UNDRIP Silence in the Canada *Impact Assessment Act*
 - 2020 Canada Bill C-15 and Consistency

- Early Recognition of Need for Consent
 - Why did the desire for Coal Mining lead to the *Snuneymuxw Treaty of 1854* in the Crown Colony of Vancouver Island?
 - Royal Proclamation of 1763
 - Doctrine of Continuity
 - Recognition of Aboriginal Title
 - Accessing Coal Required Indigenous Consent
- From Recognition to Denial and Exclusive Crown Decision-making
 - Policy shifted to firm denial of the need to recognize Aboriginal Title or consent
 - The Crown operated from the basic premise that it was unconstrained in its decision-making from any concern about Aboriginal Rights or Title

- The Long Road from Denial to Recognition?
 - 2004 SCC *Haida Nation* and the Duty to Consult
 - 2007 UNDRIP, Self-determination, FPIC, and Redress
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- 2004 SCC *Haida Nation* and the Duty to Consult
 - What is most important for our purposes is that Haida Nation continued to adhere to the central idea that there is only one decision maker, and that is the Crown.
 - The Crown, in the exercise of its decision making power, must consult with Indigenous peoples about the project.
 - Indigenous peoples are not recognized as decision makers.

- 2007 UNDRIP, Self-determination, FPIC, and Redress
 - At the core of UNDRIP is the recognition of Indigenous Peoples right of self-determination, self-government, and autonomy
 - An outcome of that recognition is the need for Indigenous FPIC in relation to state decisions that would affect them
 - Further, there is a powerful theme of redress for any dispossession of lands, territories or resources by the state

United Nations Declaration on the Rights of Indigenous Peoples

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 8

2. States shall provide effective mechanisms for prevention of, and redress for:

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

United Nations Declaration on the Rights of Indigenous Peoples

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

United Nations Declaration on the Rights of Indigenous Peoples

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

United Nations Declaration on the Rights of Indigenous Peoples

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

- 2014 SCC *Tsilhqot'in Nation* and Consent
 - For the first time, after four decades of litigation by Indigenous Peoples, the courts provided a legal declaration of Aboriginal Title
 - Aboriginal Title amounts to the full beneficial interest in the land and includes decision-making power about the use of that land
 - As a result, the SCC indicated clearly that the Crown and Indigenous Peoples should shift into a paradigm of consent based relations
 - “The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders.” para. 76
 - “if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing” para. 92
 - “I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.” para. 97

DENIAL BACK TO RECOGNITION?

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- 2018 BC EAA and s. 7 Consent Agreements

ENVIRONMENTAL ASSESSMENT ACT
[SBC 2018] CHAPTER 51

Required consent

7 Despite any other enactment and whether or not an environmental assessment certificate is required, a reviewable project may not, without the consent of an Indigenous nation, proceed

(a) on treaty lands if the final agreement with the Indigenous nation requires this consent, or

(b) in an area that is the subject of an agreement, between an Indigenous nation and the government, that

(i) requires this consent, and

(ii) is prescribed by the Lieutenant Governor in Council.

Agreements

41 (1)The minister may enter into an agreement with respect to any aspect of an assessment or of an assessment under section 35 or 73 with the following:
(c)one or more Indigenous nations;

2019 BC DRIPA and s. 7 Consent Agreements

Declaration on the Rights of Indigenous Peoples Act, [SBC 2019] c. 44

Decision-making agreements

7 (1) For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:

- (a) the exercise of a statutory power of decision jointly by
 - (i) the Indigenous governing body, and
 - (ii) the government or another decision-maker;
- (b) the consent of the Indigenous governing body before the exercise of a statutory power of decision.

Impact Assessment Act, S.C. 2019, c. 28, s. 1

- This Act, unlike BC EAA, is silent on consent.
- It includes deeper participation for Indigenous Peoples, if they have a treaty or self-government agreement, or have negotiated an agreement for the purposes of the IAA
- However, there is no mechanism for Indigenous consent, as the only decision maker is the Minister or Cabinet.

BILL C-15

An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples

Rights of Indigenous peoples

(2) This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

Clarification

(3) Nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law.

Purpose

4 The purpose of this Act is to

(a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and

(b) provide a framework for the Government of Canada's implementation of the Declaration.

Consistency

5 The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.

Action plan

6 (1) The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration.

Time limit

(4) The preparation of the action plan must be completed as soon as practicable, but no later than three years after the day on which this section comes into force.

- Canada's Bill C-15, unlike BC DRIPA, does not include a specific provision to allow for the negotiation of consent-based agreements between Indigenous Peoples and the Crown.
- The Purpose provision of Bill C-15, assuming it is more than a mere interpretive provision, affirms the application of UNDRIP in Canadian law
- The Consistency provision of Bill C-15 requires Canada to take all measures necessary to ensure the laws of Canada, including IAA, are consistent with UNDRIP.
- Therefore, the IAA will need to be brought within the UNDRIP framework of recognizing Indigenous decision making and the need for consent-based approaches to decision making in Canada

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Questions and Discussion

Thank you

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