

Mining and Natural Resources and Environmental Law

May 4, 2017

Canada's Commitment to United Nations Declaration on the Rights of Indigenous People

On April 24, 2017, Canada's Minister of Indigenous and Northern Affairs, Carolyn Bennett, reconfirmed at the Opening Ceremony of the United Nations Permanent Forum on Indigenous Issues that Canada plans to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In May 2016, Canada announced that it would formally remove its "permanent objector" status; however it had maintained concerns regarding a commitment to consulting in good faith to obtain the "free, prior and informed consent" (FPIC) of Indigenous groups before adopting or implementing measures that may affect them. The Minister formally retracted Canada's concerns saying: "free, prior and informed consent, go to the heart of the declaration."

This endorsement of FPIC could significantly impact private sector companies engaged in resource extraction whose activity potentially affects Indigenous lands or territories, in any capacity.

Background

This year marks the 10th year anniversary of UNDRIP. Canada was one of four countries that originally voted against UNDRIP when it was first signed in 2007, alongside the United States, Australia and New Zealand. In 2010, Canada endorsed UNDRIP but maintained that it viewed the declaration as a non-legally binding aspirational document.

In May 2016, Canada announced that it would formally remove its "permanent objector" status and confirmed plans to fully adopt and implement the declaration;

however, Canada maintained certain concerns regarding paragraphs 3 and 4 of the 2014 Outcome Document from the World Conference on Indigenous Peoples which relate to UNDRIP and FPIC. For example, the previous government said that the wording could be seen as giving a veto to aboriginal groups and could not be reconciled with Canadian law. The April 2017 announcement has reinforced Canada's commitment to the adoption of UNDRIP by removing all objections Canada previously raised against the requirement for FPIC including its objections to the Outcome Document.

"Free, Prior and Informed Consent" and the Duty to Consult

The principle of FPIC is referenced throughout UNDRIP. For example, Article 32 obliges states to "consult and cooperate in good faith with Indigenous Peoples...in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."

Canadian law already mandates that the Crown has a duty to consult and accommodate, where applicable, Indigenous groups when it "has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it" (*Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73 at para. 35). While the legal duty rests with the Crown, it is well established that the procedural aspects of the duty to consult and accommodate can be delegated to industry proponents. The Crown can and often delegates the procedural aspects of consultation to proponents whether informally or by statute. For example, the Ontario *Mining Act* explicitly delegates procedural aspects of consultation to proponents. A failure to adequately and properly consult with affected Indigenous groups and to gain the appropriate social license to operate, has negatively impacted resource-related projects across Canada.

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Implications of Canada's Commitment

The implications of Canada's commitment to FPIC and UNDRIP more broadly are unclear. The declaration is still very new to Canada and there lacks a body of precedents, government action or jurisprudence interpreting its application in practice. While there is uncertainty as to the meaning and scope of FPIC, there is a growing acceptance that FPIC provides for a process of consultation that has *consent* as the ultimate objective but does not amount to a veto in all circumstances.

Canada's reaffirmation of its commitment to UNDRIP and the principle of FPIC is noteworthy for industry proponents operating in the extractives industry with operations that do, or have the potential to, adversely impact Indigenous rights. It is not clear what changes, if any, will be made to Canadian law and whether steps will be taken to implement FPIC above what currently exists. Canada has however announced its commitment to review all federal laws and policies as they relate to Indigenous Peoples and to find new ways to recognize Indigenous rights and jurisdiction across Canada. For further information on Canada's commitment to UNDRIP and FPIC, please contact any member of our Mining and Natural Resources Group or Environmental Law Group.

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