Unpacking Self-Government & Indigenous Law for First Nations, Métis and Inuit Governments

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Harnessing the Power of DRIPA in the Resource Sector

• Self-Government has many paths in BC: (1) Modern-day treaties, (2) Reconciliation G2G agreements; (3) Sechelt/West Bank Interim Self-Govt; and (4) FN-Industry Project specific

• Obligation to obtain FPIC may be strictly the Crown’s, but pragmatic industry will negotiate consent since their life of project success is dependent upon legal certainty

• Nations advocate for consent as emerging standard for IBAs and G2Gs in BC, refusing to settle for consultation game

• FN-Industry negotiations will likely witness the most concrete implementation of UNDRIP:
  ◦ FPIC for development projects affecting Indigenous territory (Articles 26 and 32 of UNDRIP);
  ◦ Project agreements reflecting Indigenous legal orders as the source of Indigenous rights + title = inherent rights;
  ◦ FPIC is an expression of Indigenous jurisdiction and law:
  ◦ FPIC and consent in general is a relational, on-going process, not a one-time “yes” or “no”: and,
  ◦ Nations and project proponents looking to implement consent-based decision-making models.
• Moving from a consultation standard to a consent standard means:

**Breathing Consent into Resource Decision-Making**

Meaningful application of Nation laws to the Project - living and evolving set of standards that recognize Nations' laws and legal institutions and inform consent decision.

Consent-based decision-making in Core Areas - dynamic process and criteria for maintaining consent must keep pace with developments in law.
Breathing Consent into Resource Decision-Making

• Moving from a consultation standard to a consent standard means

Exercising Nation jurisdiction and governmental authority - project agreements reflect legal plural reality

Less resource-wasting, focusing on decisions that matter

Project proponent must continue to earn Nation’s support of the Project by following agreed process
Case Study - Consent Standard

• To be consistent with the DRIPA and international human rights standard, Proponents must secure **AND maintain** Nation consent to the Project throughout all Project Phases
• Consent as a dynamic and living obligation - not absolute and may be withdrawn if Nation conditions are not met
• IBA practice of "non-derogation clause" seeking to bind Nation in a one-time expression of support is outdated, as it:

Is inconsistent with Nation's inherent rights, FPIC, and DRIPA

Does not consider Nation articulation and application of its laws

Lacks a firm relational and legal foundation = lacks certainty
## Consent Mechanics

- Core Areas for Consent-based Decision-Making Standard could include:
  - Water Management and Protection
  - Tailings Storage Facility Management
  - Cultural Heritage Preservation and Restoration
  - Fish and Fish Habitat Protection and Restoration
  - Closure, Reclamation and End Land Use Requirements
  - Other Nation priority?

- Where consent cannot be provided, parties will re-engage in the process until they: (1) reach consent and the applicable Nation conditions; or (2) the activity/decision does not proceed; or (3) dispute resolution process is triggered.

- Clear processes create mutual degree of certainty.
Is there anything that can be done to protect the current relationship from a change in leadership?

• First, the question highlights an important universal requirements of all IBAs - they must provide a degree of legacy and equality that outlast the election cycle
  ◦ If there is inequity, the deal will be scrutinized

• Second, IBAs are no different that any contract, they must be dynamic in their implementation. The words are only skeletal, it is the implementation where life is breathed into the agreement.

• Develop clear review mechanisms that generally match election cycles to ensure that everyone remains on board, if not, allow a process of co-management of the IBA to adapt and amend, if necessary

• Having clear reporting requirements to community for ratification, ongoing engagement and annual public meetings can also allow disenfranchised to be heard and concerns addressed.
Consent is the penultimate of legal certainty for a deal that has legacy

Need to reframe FPIC as mutual consent in the IBA or JV context

- Reality is that First Nations are gaining legal footing on sent as a safe harbour
- Indigenous legal orders resurgence; UNDRIP Implementation; Tsilhqot’in consent requirement for title holders and just the general view of seeing Indigenous Peoples as partners all trend towards a mutual consent environment
- Important to think it through... do not think of consent as a simple one-off, it is a consent maintained and possibly withdrawn
- Another opportunity is to further explore graduated consent on a spectrum of:

**Non-opposition - Conditional support - Support - Conditional consent - Consent**
Q&A

Thank you.

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