Breakout 1B: Consent and Consultation

Chair: Michelle Corfield

Speaker 1: Martin Papillon

Presentation: Implementing Free Prior and Informed Consent (FPIC) – Challenges and opportunities in the Canadian context.

Idea of consent is not new, but is informed by UDRIP etc. and ongoing practice.

Indigenous consent encompasses three principles:

1. Consent is based on self determination or jurisdiction
2. Democratic legitimacy principle, i.e. voicing the views of the community
3. Consent is relational, i.e. there are processes for communication

There are three main interpretations of consent in the context of UNDRIP (e.g. section 19 and 32):

1. A duty to consult in order to seek consent
2. A veto
3. A right to participate in decisions

There is also ambiguity over scope. Who can express FPIC, when and under what circumstances?

Canada's acceptance of UDNRIP is couched in being compliant with Canadian law. Courts have had a tendency to interpret FPIC as an extension of the duty to consult, until the supreme court's Tsilhqot'in decision. Current federal policy (2017 principles) is more in line with the "right to participate" interpretation. In the case of environmental assessments of industrial projects, the idea is to move to a model of participatory consent via collaborative processes.

Proponent driven processes: Impact and Benefit Agreements (IBAs) are a mechanism to seek and express consent.

Indigenous driven processes: Assert jurisdiction by establishing processes. E.g. Squamish Nation (Vancouver) created its own Environmental Assessment process for an LNG project. Clear community involvement. The proponent committed to accepting the outcome.

Conclusions (see presentation):

- FPIC is hear to stay
- It is still an uncrystallised norm
- Failure to establish consistent transparent and democratic framework in Canada
- Political ambiguity
- It is a political process

Speaker 2: Allan MacDonald

The duty to consult is the subject of evolving interpretation by the courts. Meaningful consultation always includes the consideration of accommodation. In the modern treaty context, common law (including duty to consult) still applies (LSCFN 2010). There is now a policy shift to go beyond the duty to consult to building relationships and collaboration.

Canada will implement UNDRIP, including FPIC. There is a strong desire to see things done differently, as seen in the restructuring of INAC and the new focus on Indigenous-Crown relations.

Speaker 3: Jessica Orkin

Presentation: Consent and consultation: Case study of the Cree Nation's stand against uranium

The Cree Nation is a signatory to the James Bay Northern Quebec Agreement (JBNQA). The Cree Nation has entered into many agreements with proponents for mining and exploration projects. Cree Nation Mining Policy (2010) states that "No mining development will occur in Eeyou Istchee unless there are agreements with our communities."

In the case of the Matoush uranium project, the federal Environmental Assessment review panel found a lack of "endorsement" of the project by the community. The provincial EA panel's first condition on the project was to "obtain the Cree's consent".

The proponent challenged the rejection of the project on the grounds of social acceptability. This challenge has been (so far) rejected by Quebec courts.

Q&A

Cree Policy on Mining has a scaled process based on scale of impact, e.g. from mineral exploration to full development.

Can FPIC be implemented through Land Use Planning, e.g. through joint processes with recognition of consent? There is not much success in Canada with Land Use Planning that manages underlying conflict effectively.

FPIC is not a Canadian standard, it is an international standard under UNDRIP.

There are additional challenges to implementing consent in areas where the industry is made up of numerous small scale proponents (e.g. placer mining in Tr'ondek Hwech'in territory in Yukon) rather than a few large scale proponents (e.g. uranium mining in James Bay Cree territory in Quebec).