

UNDERSTANDING CONSULTATION AND ENGAGEMENT WITH INDIGENOUS PEOPLES IN RESOURCE DEVELOPMENT[†]

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SUMMARY

The Federal Court of Appeal overturning approval for the Trans Mountain pipeline expansion in 2018 arguably signaled a new level in the difficult struggle between Canada's resource development and the Crown's duty to consult Indigenous Peoples directly affected by a development project. It may not be the last case where the federal government finds itself unable to adequately meet both of these goals. This is, at least in part, because Indigenous Peoples have a different understanding of consultation compared to industry and government. Indeed, all three groups frame these challenges in their own way. Until they begin to better understand one another, and particularly until government and industry begin to better understand the Indigenous perspective, the courts will continue to be the only avenue for the resolution of differing views.

A review of documents related to resource development and the duty to consult, sampled from all three groups, demonstrates the different worldviews each has on these subjects. One of the most critical issues emerging right now is the "free, prior and informed consent" required by the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada. To business and industry, that looks like a veto that Indigenous Peoples can use to stop any project they do not support. Indigenous groups, however, do not see it as a veto. Since, culturally, they tend towards making decisions by consensus, they are more likely see it as the need for everyone to keep talking until they reach an agreement.

Even when it appears the three groups agree on something, it can be for very different reasons, concealing deeper differences that can emerge later, and unexpectedly.

All three groups, for example, value the importance of getting Indigenous groups involved early on in a project's planning. Businesses would be driven to do so by their economic approach: the earlier Indigenous communities can be involved, the sooner concerns can be addressed, avoiding the risk of challenges further along the project's development. Government sees earlier involvement as a way to meet regulatory and government timelines. However, Indigenous groups see early involvement as an opportunity to take a larger role in the decision-making process. Thus, involving Indigenous groups earlier in the consultation means little if it does not provide an opportunity for increased input.

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Documents from Indigenous groups suggest that controversies over consultation and resource development exist because Indigenous Peoples lack control and input over activities that directly affect them. They tend to perceive consultation as an opportunity for them to assert their sovereignty and jurisdiction and as something directly connected to their history of disempowerment. Until governments and industry better understand that perspective, there will almost certainly be many more court battles to come.