2022 Virtual Mackenzie Valley Resource Management Act (MVRMA) Workshop Series: Session 3: Engagement and Consultation

APPENDICES

Submitted To

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Appendix A: Agenda

DAY 1: WEDNESDAY, SEPTEMBER 28, 2022 (9AM – 12PM MDT)

8:45 - 9:00	**Virtual check-in** We ask that you sign in to Zoom in advance to ensure a proper start at 9am
9:00 – 9:30	**Welcome & Overview: Engagement & Consultation in the Mackenzie Valley** Welcome and overview of the workshop objectives and agenda. We will engage the audience on the topic of engagement and consultation and clarify the meaning and scope of what these terms mean as it relates to the MVRMA.
9:30 - 10:15	**Presentation: Understanding the legal underpinning of engagement & consultation with regards to the MVRMA** **John Donihee (Willms & Shier Environmental LLP)** John will share a retrospective about MVRMA board practice as a comparison to the evolution of the law on consultation and/or the way the Courts have developed the role of tribunals as participants in the consultation process. Presentation will be followed by a Q&A session.
10:15 - 10:30	Break
10:30 - 11:45	**Panel Discussion – Perspectives on Engagement and Consultation – Are we getting this right?** **Janet Bayha McCauley (Tulita Land Corporation), Nuri Frame (Pape Salter Teillet LLP), Tim Heron (NWT Métis Nation), Sara Mainville (JFK Law), Nuri Frame (Pape Salter Teillet LLP)** A panel of practitioners with different backgrounds (legal, government, community perspectives) will share their perspectives on how it's going now and what we should be striving for when it comes to good consultation and engagement. We will also engage the audience members on their sense on "are we getting this right?", offering the panelists time to reflect on what they hear from the audience.
11:45 – 12:00	**Closing and wrap up Day 1**

DAY 2: THURSDAY, SEPTEMBER 29, 2022 (9AM – 12PM MDT)

8:45 - 9:00	**Virtual check-in** We ask that you sign in to Zoom in advance to ensure a proper start at 9am
9:00 – 9:05	**Opening and welcome back**
9:05 - 10:15	**Presentation: Innovative approaches to engagement – TMX-IAMC by Tracy Sletto, Executive Vice President, Transparency and Strategic Engagement at Canada Energy Regulator and Chief Marcel Shackelly, Member of the Indigenous Advisory and Monitoring Committee** An example outside of the MVRMA regulatory system of how Indigenous peoples are providing advice to regulators regarding the monitoring of the Trans Mountain Expansion (TMX) Project through the Indigenous Advisory and Monitoring Committee (IAMC). **Presentation: International perspectives on engagement & consultation by Jennifer Duncan (Duncan Law Office, Barrister and Solicitor)** Presentation on international expectations regarding engagement and consultation (UNDRIP) and what that means at the community level.
10:15 - 10:30	Break
10:30 – 10:50	**Board/Government Updates and Presentations on Engagement/Consultation & Q&A** Brief presentations from the Land and Water Boards, the Review Board, the territorial and federal governments on ongoing policy initiatives and projects. Presentations will be followed by a short Q&A.
11:00 - 11:50	**Breakout Group Discussion: Improving engagement and consultation as it relates to the MVRMA** We will break into small groups for all audience members to reflect on what they've heard and share perspectives on how to improve engagement and consultation as it relates to the MVRMA.
11:50 – 12:00	**Closing**

Appendix B: Workshop Planning Committee

STRATOS DELIVERY TEAM

- Jane Porter, Facilitator
- Julia Ierullo, Notetaker
- Rebecca Lafontaine, Tech Support

MVRMA WORKSHOP PLANNING COMMITTEE

- Sarah Elsasser (WLWB)
- Ryan Fequet (WLWB)
- Mark Cliffe-Phillips (MVEIRB)
- Eileen Marlowe (MVEIRB)
- Kate Mansfield (MVEIRB)
- Tanya Lantz (MVLWB)
- Shakita Jensen (GNWT)
- Shelagh Montgomery (MVLWB)
- Jody Pellissey (WRRB)
- Melissa Pink (GNWT)
- Marcy MacDougall (CIRNAC)
- Michelle Lewis (CIRNAC)

About Stratos

Our Vision

A healthy planet. A productive and engaged society. A clean, diversified and inclusive economy.

Our Mission

We work collaboratively with governments, Indigenous peoples, business and civil society to navigate complex challenges, develop integrated and practical solutions and support societal transitions that result in sustainable outcomes.

Stratos runs its business in an environmentally and socially sustainable way, one that contributes to the well-being of our stakeholders – clients, employees and the communities in which we operate. Reflecting this commitment, we have an active Corporate Social Responsibility program. For more information about our commitments and initiatives, please visit our Web page: www.stratos-sts.com

Appendix C: Mentimeter Questions and Results

Mentimeter is a virtual engagement tool that allows facilitators to utilize interactive polls, quizzes, and Word Clouds to encourage feedback and interaction with the workshop audience. Throughout the workshop session, participants were invited to use the tool to answer various questions and prompts related to the workshop material. Over the two-day event participants used the platform to submit answers and feedback.

Below are the questions/prompts asked over the two-day period and all of the answers provided by participants.

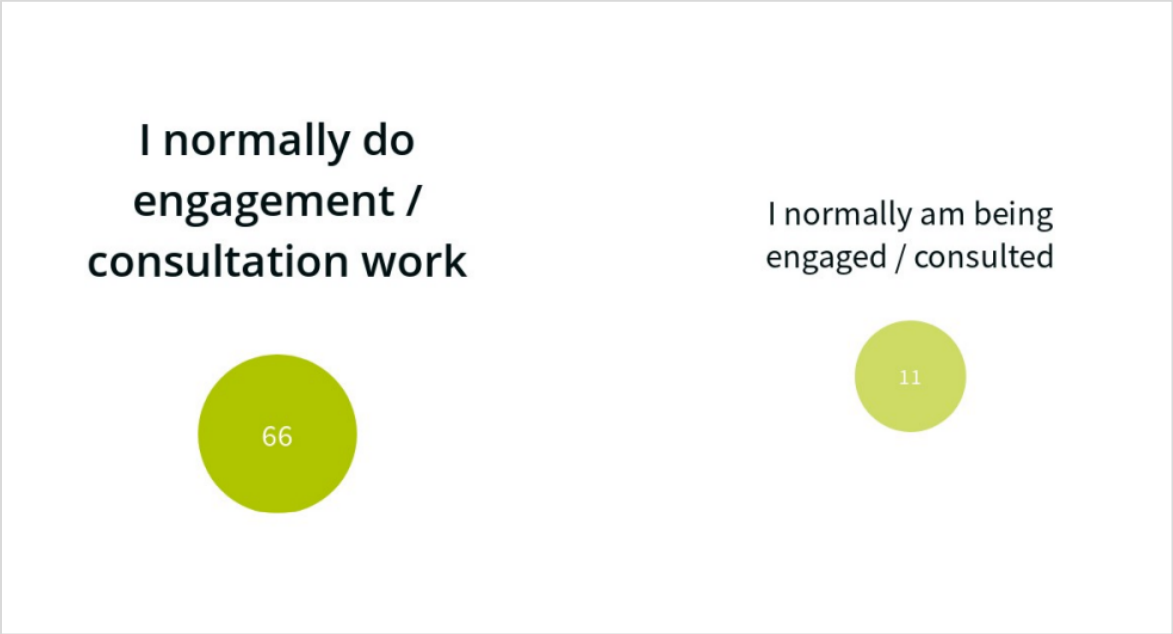
DAY ONE

When you hear the words "engagement and consultation" what words come to mind for you?

(57 responses - participants could submit up to 3 responses each)

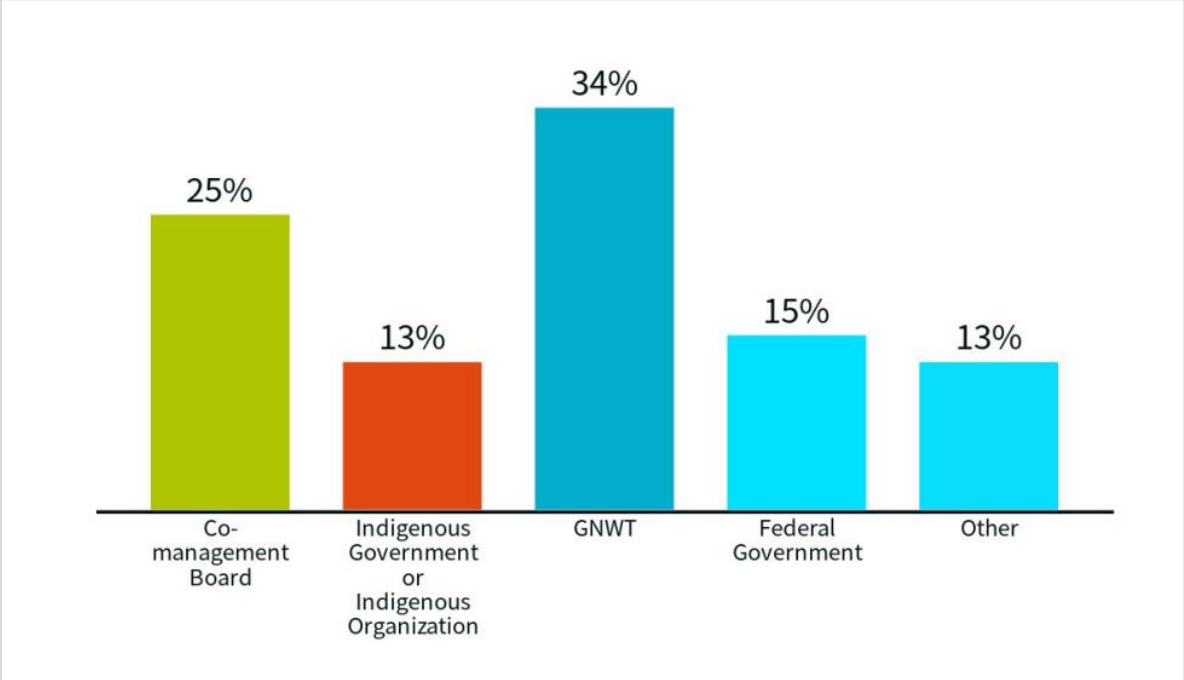
What description best fits your role?

(77 responses)



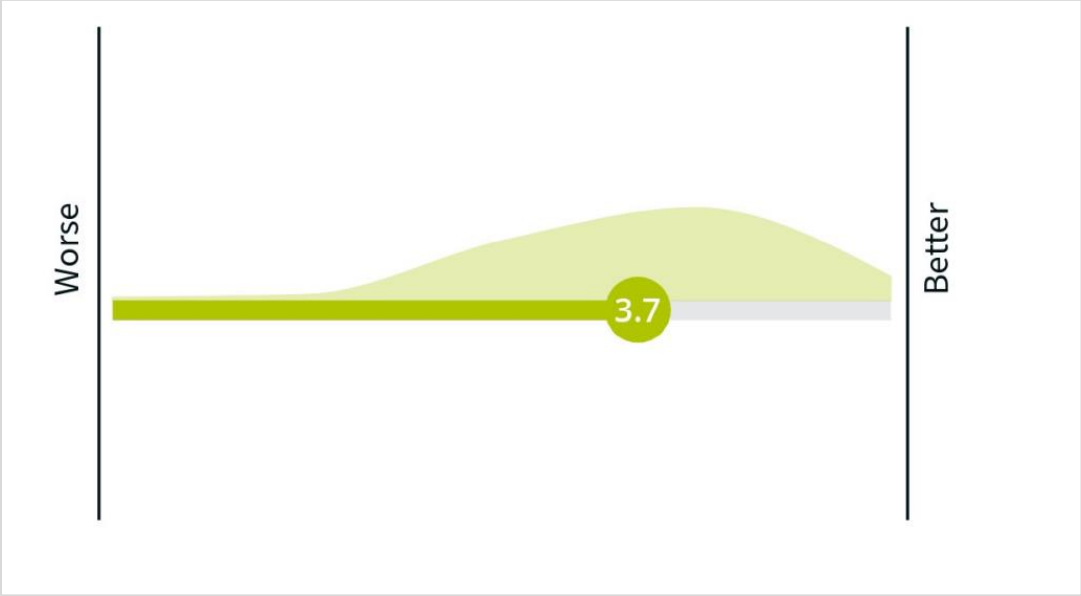
What type of organization do you work with?

(87 responses)



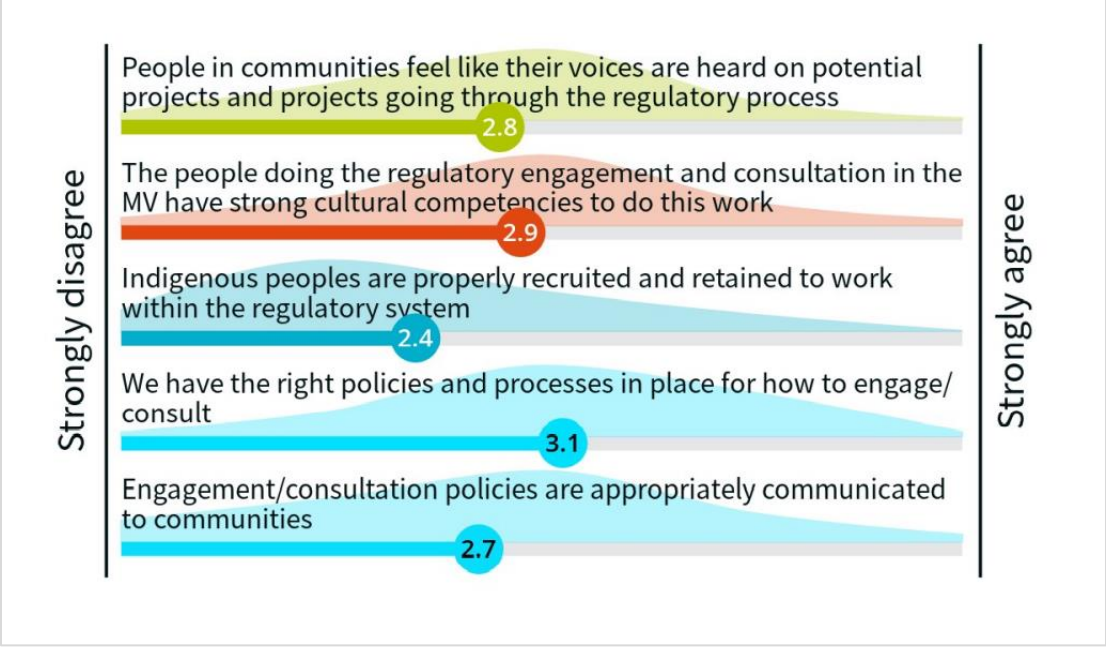
In your perspective, when it comes to engagement and consultation with the MVRMA regulatory system, what direction are we going?

(71 responses)



How much do you agree with these statements?

(71 responses)



DAY TWO

After the breakout groups, individuals were invited to use Menti (the online engagement tool) to share key insights from their conversations.

What were some key actions that came up in your groups?

(37 responses – participants could submit up to 3 responses each)

connecting and maintaining relationships	get outside of your organization (physically and mentally), get away from the paperwork, talk to people and listen. and listen some more.
Develop indigenous inclusion policy for workplace.	when booking flights and hotels, don't forget to break bread and authentically connect out on the land
participant funding	Documents in plain language/translated
ask communities how they wish to be engaged and build processes around that	More time in communities.
participant funding	Improving communication through addressing the language barrier by having one on one meetings/workshops with interpreters about the project/presentation material
Build consistent relationships.	The north does a pretty good job and needs to be responsive and transparent with stakeholders
- GNWT, Feds, Boards - work together to create and keep a calendar of key community events to help with planning engagement/consultation	Get out to communities more and build relationships. Report more often and more widely on progress (e.g.: strat planning) ... Educate as to what MVRMA is and Boards are to youth and public. Recruit more northern talent/build interest in co-management
visual representation of key messages	participant funding - hold workshops with Indigenous Governments and communities on how to apply for funding, and what to apply for.
Translation of language.	Tlicho Government is developing and Engagement Guidelines - this would be great to support other communities to do this. Perhaps GNWT/Fed funding to help support this.
Follow-up Get into communities Build relationships	Funding to travel to the communities
Improving participation of indigenous women	more in persons meetings. monthly letters sent to members or concerned people.
In person meetings - focus on conversation rather than presentation	community to dictate proper way to consult
funding for travel	make sure that NWT curriculum includes co-management system and history of the MVRMA so the youth understand
update the guidelines to avoid consultation exhaustion and streamline engagement requirements	Engagement efficiency and reducing fatigue
training and capacity building	Monthly letters to members

open and transparent communication and decision making	propose on-the-land community meetings rather than at the community hall.
- tailor community engagement to the community - radio ads are good approach, rather than social media	post consultation reflection "what we heard" reporting back. Helps with relationship building
Improving Interpretation and reducing language barriers	Government should not be afraid to go beyond their narrow mandates. Communities want broad discussions.
Are we helping to achieve well-being of communities?	reducing the bar in hiring Indigenous people, respecting others in workplaces, making use of feedbacks, talk less and listen more, reaching out to communities, communication, providing awareness/education to IGs on funding opportunities
Follow up on commitments made during engagement	plain language
Provide visuals	More inclusion and participation of indigenous peoples in the regulatory system
Collaborative work	Get out of the office
meaningful engagement ... once you start the process you must maintain communications for duration, transparency is key, consider language and approach to engagement to develop trust	Have discussions outside of formal events
invest the time required to build the relationship to then have a platform from which to consult from develop alternatives to volumes of text	don't underestimate what you can achieve with Facebook
use conversations, not presentations	Have the youth involved
Do some homework on the community - history, what other issues are they currently facing, how would they like to be engaged?	Train Indigenous northerners in regulatory review, not just as operators and monitors.
funding/support to create own engagement protocols	more funding for IGs to participate in regulatory processes
Government has major role in engagement and consultation (set out in law) and as such should do more/better.	avoid helicopter engagement
Indigenous women participating and working in the system is the best indicator of ensuring that we're meeting a lot of our objectives to improve engagement and consultation	Tie engagement to community events
Good translation	improved northern board staff hiring practices
indigenous cultural competency training within organizations and capacity building on all fronts for Indigenous Governments and/or organizations	have community tours and in-person communication with community members and leadership; make plain language and visual materials; reduce consultation fatigue by hosting annual meetings about smaller projects; codevelop legislation and policies
Participation of experts outside of the proponent, i.e., bringing an ENR biologist to explain possible impacts from a project to a community	get information sessions from the GNWT and the boards so that we don't only hear the perspectives of developers about their projects and what impacts they think will happen
less printed material, more visuals/video for	Let's be sure to acknowledge the excellent work happening in

engagement to broaden audience and make it more accessible	the Mackenzie Valley. While there is room for improvement, we are MUCH better off than Ontario, Alberta, etc.
use the traditional language and place names	Participant funding! Also supports for developers of small projects!
improving hiring practices in governments to increase indigenous representation - capacity building	Are we asking the appropriate questions to the right people?
understand why communities are not providing comments to LWB public registries. For example, is this due to capacity, the nature of the process, concerns being communicated through other methods, or other reasons?	Accountability to engagement and consultation outcomes!
find a way to communicate in the language of the people, directly, without needing to translate	Communities want to speak holistically. Engage that way., not in narrow subjects
Annual meetings that cover existing and future applications for work in the Community/boundary area. Not specific; but general conversation of - what is working, what is not working, what do you want to see happen, etc.	Community liaisons and engagement/ outreach staff from the communities working for government and the boards!
Find out how the community needs information to be communicated?	Better coordination!
Communities do not necessarily see themselves reflected in the engagement process. If people don't understand topics**,** they won't be interested in attending and participating?	Use and market new technologies to get a range of voices heard better.
capacity will address competency	Need RECURRING engagement to build trust
proponents should support culture camps whenever possible	More early work done by government and the Boards to deal with issues outside of the control of developers, such as social, health, cultural and economic issues.
Increasing Community resident participation in engagement events such as community meetings held by proponents and/ or public hearings held by Boards. Streamlining the scope of EA requirements on proponents - more Government direct involvement to inf	We discussed more of the previously used EA measures post implementation assessment and also asking those affected/impacted by development how they would like to see "accountability" - how do they measure accountability? Did the process work?
Need regular lessons learned, plus the ability to try new things, even if we make mistakes on the way.	Evolving the indigenous people in all activities of the projects (planning, capacity building, employment, monitoring and closing, ...etc.)

How can we be held accountable?

(25 responses - participants could submit up to 3 responses each)

Workshops like this one are one way	Hold sessions like these. This session was great to build capacity amongst partners (helps us strive and make improvements) and make time to reflect on the processes.
Build in time/funding for translating documents	must provide up to date engagement contact lists (names, phone numbers, addresses and email addresses). Also identify persons accepting engagement contact on behalf of key individuals.
focus on the human aspect, not just the logistics	Bringing it back to the reason for why we do this: people and environment.
Accountability comes naturally with relationship building	Improve outreach to communities
The Boards are held accountable by virtue of a completely public process.	Explain decisions in plain language, in the communities
require plain language, visual presentations, and translation summaries	ensure staff are trained in cultural competency
provide written reasons in shorter documents that describe how the views of communities were included/concerns were addressed	follow-up with communities on what you heard during community meetings or other engagement, and report back on any actions you made based on what you heard - or, what did you do about it
once you start engagement, DO NOT STOP, as it damages relationships!	Honesty and transparency to help build trust, continual follow up on communications, info packages
NWT Environmental Audit is an accountability mechanism built in to the MVRMA.	make sure local people work for them; they can help the boards make better decisions AND give feedback about what is/is not working
Make sure you have a shared understanding of what accountability looks like.	transfer staff capacity to IGs
Go to communities and directly ask the question: are we meeting your needs? Address the issues transparently.	Social, environmental, and behavioral accountability.
Again, thru regular reporting publicly (such as strategic planning tools and progress tracking). but also communication outwards... Getting into communities, .. Sharing what the MVRMA and Land Claims were about and where the Boards are today....	Understand what the community needs to help the board improve
ask the people how they would like to be engaged	Ensure that all organizations within co-management hire indigenous DENE.
Let the communities know how much power they have, request meetings/more outreach	Ensure that everything is as public as possible so everyone can see what is going on in a timely manner and have input as and when they wish.
Transparency in decision making	remove unnecessary board process steps
Build and maintain relationships - people will hold	create process for iteration and multilaterally agreed upon

themselves and others accountable to maintain it.	timelines
recognize and break down technology and language barriers	control LWB inconsistencies
frequent updates	Good engagement takes time. Spend the time to do it respectfully.
Ensure relationships are maintained to understand if a community is concerned about a project and to maximize participation	Engage at the right pace for communities. This is not always the pace developers wish for.
protocols for when engagement isn't satisfactory	improve LWB management leadership
When developers complain about timing, because they can't complain about respectful pace for engagement, it can be manipulative.	Internal barriers in risk-averse government make it hard for staff to conduct frequent community visits, but those are needed to build trusting relationships.
Try new approaches, even if it risks making mistakes. No mistakes = no learning = no growth. Need lessons learned after.	Survey community participants after EACH stage of an EA or regulatory process about how it went and ask for suggestions to make the engagement process better.

Appendix D: Presentation Slides

What is consultation and engagement under the MVRMA?

A brief overview presentation

MVRMA Virtual Workshop

September 28-29, 2022

Mark Cliffe-Phillips – Executive Director

Mackenzie Valley Review Board

What does the MVRMA say about the purpose of the Boards?

(S.s. 9.1) The purpose of the establishment of boards by this Act is to ***enable residents of the Mackenzie Valley to participate in the management of its resources for the benefit of the residents and of other Canadians.***

Why do the Boards consult and engage?

Consultation and engagement is the best way to hear about things that the Boards need to consider, like:

- the concerns of Indigenous people and the public
- the protection of the environment
- the protection of the social, cultural and economic well-being of people and communities in the Mackenzie Valley and
- the importance of conservation to the well-being and way of life of Indigenous people

Let’s take a step back- What is consultation?

- **Crown Consultation** refers to the legal obligations of the Crown (Government) when Aboriginal interests (rights and title) may be adversely affected by a Crown decision. **This is not the role of the Boards**
- **Governments rely on the Boards’ processes** to help fulfill their duty to consult
- In addition, there are specific consultation requirements laid out in the land claims and the MVRMA that the Boards’ and others must follow.

Who is being engaged/consulted?

- Land claims organizations
- Indigenous Governments
- Indigenous organizations
- Federal and territorial governments
- Any other person or group who might be affected by a development

In general, when engaging or consulting it's best to cast a wide net and seek to hear from as many voices as possible of those who may be impacted by a decision.

What is Engagement?

- Engagement is different than consultation.
- Engagement aims to build relationships and trust by exchanging information in the absence of legal consultation obligations.
- Engagement is done by applicants, Government and the Boards to help:
    - Inform
    - Gather feedback
    - Respond to concerns
- Engagement **can help fulfill consultation** requirements.

The Evolution of Consultation Law and Mackenzie Valley Boards' Consultation Practice

John Donihee

Of Counsel

This presentation provides general information and is not intended to provide legal advice.

2022 Virtual *Mackenzie Valley Resource Management Act* Workshop Series: Engagement and Consultation Workshop
September 28, 2022

Willms & Shier | Environment Indigenous Energy Law

Overview

- **Review of boards' statutory consultation requirements under land claims and MVRMA**
- **Trace the evolution of consultation case law and particularly the boards' roles in Crown consultation**
- **Make brief mention of consultation in relation to UNDRIP and FPIC**
- **Respond to questions**

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The Importance of History and Context

- **Consultation is about relationships and an understanding consultation practice in the Mackenzie Valley requires context**
- **Consultation is not a "product" it is a process intended to lead to accommodation and reconciliation**
- **Current MVRMA consultation practice is unique – it blends land claim, co-management, statutory and case law requirements**

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Influences on Consultation Practice in the NWT

- **Resource development and communities**
- **Land claims**
- **Co-management**
- **Implementation legislation**
- **Evolution of case law and board roles**
- **Boards' leadership, policies and processes**

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Land Claims and Statutory Consultation

- **Negotiators included a definition of consultation in land claims and specific provisions in the resource management chapters require consultation by governments and boards before decisions are made**
- **“consultation” definition is in MVRMA, s. 3 – it requires little more than administrative law fairness**
- **MVRMA and regulations require more, particularly in relation to MVEIRB**

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Land Claims and Statutory Consultation

- **Simply meeting statutory requirements would NOT satisfy the Honour of the Crown – the courts have gone much farther**
- **Co-management tribunals bring the community context and expectations to the environmental and regulatory decision-making process**
- **This workshop is an excellent example of the boards' commitment to improving consultation and engagement practices**

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The Evolving Case Law

- **Driven by s. 35 of the *Constitution Act, 1982***
- ***Sparrow* (1990), *Delgamuukw* (1997) governments' obligation to consult emerges**
- ***Haida* (2004) set out the foundation for modern Crown consultation law**
  - Consultation requirements proportionate to strength of claim and seriousness of potential adverse impact on the exercise of a s. 35 right
  - Honour of the Crown cannot be delegated

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The Evolving Case Law

- ***Haida* (2004) cont.**
  - But the consultation exercise can be delegated
  - A duty to accommodate may arise depending on the circumstances but consultation is not a veto over regulatory decisions
- **From 2004 to 2010 it is unclear what the role or responsibilities of administrative tribunals was in consultation – it was clear they could/should be involved – but their actual decision-making authority in consultation process was unclear**

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2010 *Beckman* and *Rio Tinto*

- ***Beckman* was the first consultation case brought in the context of a modern land claim**
  - "The Crown cannot contract out of its duty of honourable dealing with Aboriginal peoples"
- **In *Rio Tinto*, SCC confirmed that administrative tribunals *can* play a role in procedural consultation and/or assessing the adequacy of consultation**
  - Role depends on statutory authority of tribunal to decide questions of law

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2017 *Clyde River* and *Chippewas of the Thames*

- **Cases involved National Energy Board (now the Canadian Energy Regulator or CER)**
- **Crown can rely on a tribunal to fulfill its duty to consult**
  - BUT – tribunal or agency must possess both the "powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests"
  - Tribunal needs both procedural powers and remedial powers – this depends on tribunal jurisdiction

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Boards' Consultation Policies

- **LWB Consultation and Engagement Policy finalized in 2013 after *Rio Tinto* – almost 10 years of operational experience**
- **Rethinking and revision began after *Clyde River* and *Chippewas of the Thames* decisions**
- **MVEIRB adopted the policy in 2019 on a interim basis as a collaborative effort was initiated to address board consultation obligations**
- **LWBs' and MVEIRB's roles and decision-making authorities are different**

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Boards' Consultation Policies

- **Public consultation on LWBs updated policy has been completed**
- **MVEIRB still considering its approach**

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United Nations Declaration on the Rights of Indigenous Peoples

- **Free, Prior, and Informed Consent (FPIC)**
  - State obligation to consult and cooperate with Indigenous peoples to obtain FPIC
  - Many different interpretations of FPIC
- **Federal government's position**
  - FPIC "builds on and goes beyond the duty to consult"
  - Federal legislation in place to implement UNDRIP does not "immediately change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in legislation…"

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Takeaways about Boards' Roles in Consultation

- **The Boards are not the Crown which always holds ultimate responsibility for ensuring adequate consultation**
- **MVRMA boards are not the CER or BC Utilities Commission which are vested with extensive legal procedural and remedial powers**
- **Powers can vary with the decision required**
- **The case law must be applied in the proper context and with an understanding of what a board can and cannot do based on its statutory jurisdiction – the courts are clear on this**

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Coming Back to Context

- **MVRMA tribunals operate in a unique context – they are the negotiated outcome of settled land claims as well as statutory creations**
- **Co-management makes a difference – board members are community members – they share the historical knowledge, cultural experience and often the Indigenous languages of affected s. 35 rights holders in their proceedings**
- **The boards' are continuing to work on improvements to consultation – improvements are possible and necessary since the "consultation landscape continues to evolve**

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Coming Back to Context

- **In practice, consultation issues are worked out when they arise – there have been no legal challenges to boards' consultation practice since the *Ka'a'Gee Tu* cases in 2007**
- **The collaborative and consensus driven nature of environmental and regulatory decision-making in the Mackenzie Valley is a feature of this unique context**
- **Consultation and engagement are central components of this framework**

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Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **Environmental, Indigenous, and Energy law**
- **17 lawyers**
  - seven lawyers are certified as Environmental Law Specialists and one lawyer is certified as an Indigenous Legal Issues Specialist by the Law Society of Ontario
  - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and the Yukon
  - offices in Toronto, Ottawa, Calgary, and Yellowknife

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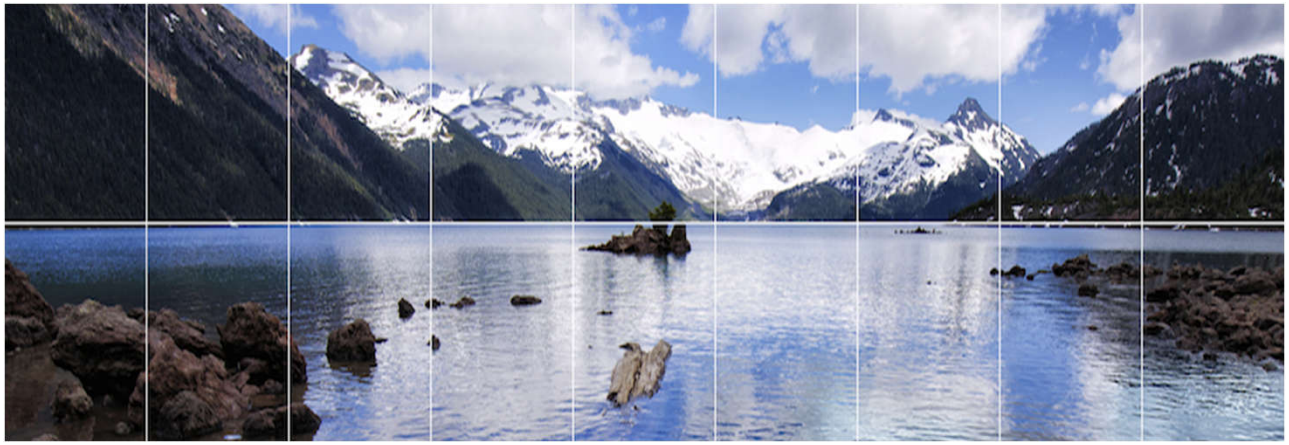
Canada Energy Regulator | Régie de l'énergie du Canada

Canada

Reconciliation, Engagement and the TMX-IAMC



Tracy Sletto
Executive Vice President Transparency and Strategic Engagement
Canada Energy Regulator (CER)

Chief Marcel Shackelly, TMX-IAMC member
(Mid-Fraser/Thompson)

INDIGENOUS
Advisory and Monitoring Committee
Trans Mountain Expansion and Existing Pipeline

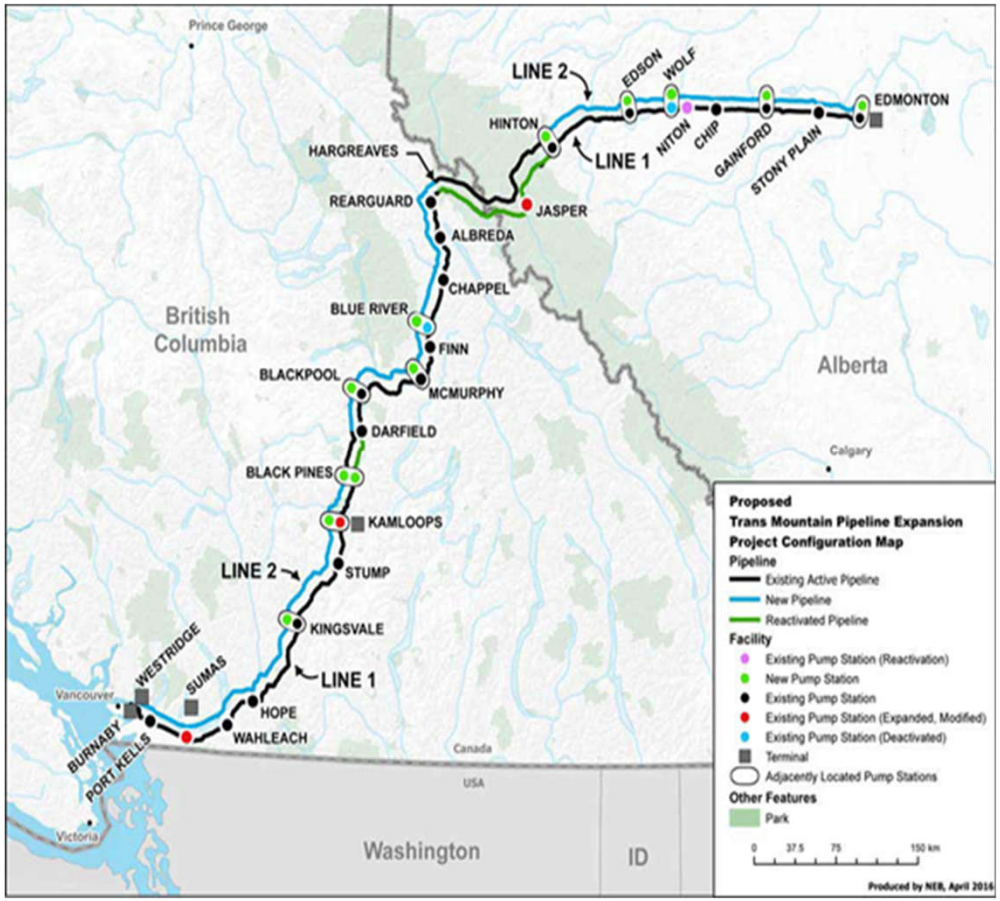
September 29, 2022

Overview of Presentation

- The Canada Energy Regulator (CER)
  - Role and mandate
  - Strategic Plan, including Reconciliation Strategic Priority
  - United Nations Declaration on the Rights of Indigenous Peoples Act (*UN Declaration Act*)
- The TMX-IAMC
  - Overview of the Committee
  - Key highlights and accomplishments
  - Look ahead - what's next

CER's Reconciliation Strategic Priority

IAMC-TMX Committee

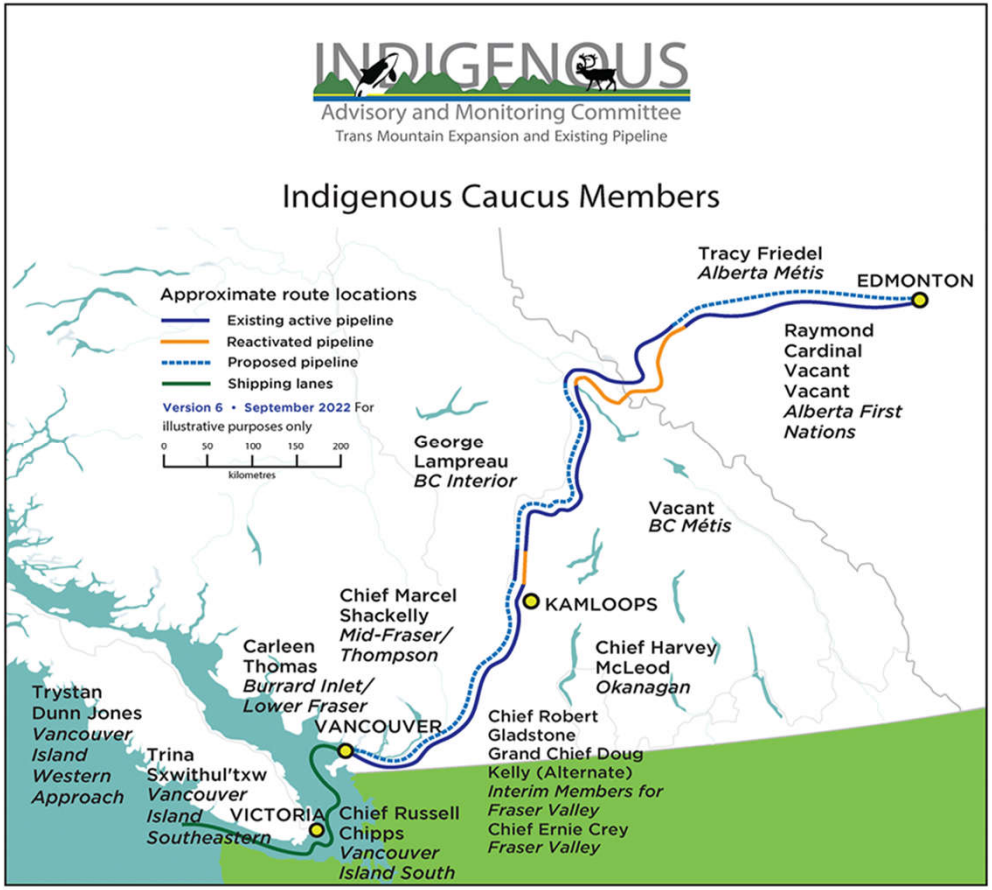


Canada Energy Regulator | Régie de l'énergie du Canada

Canada

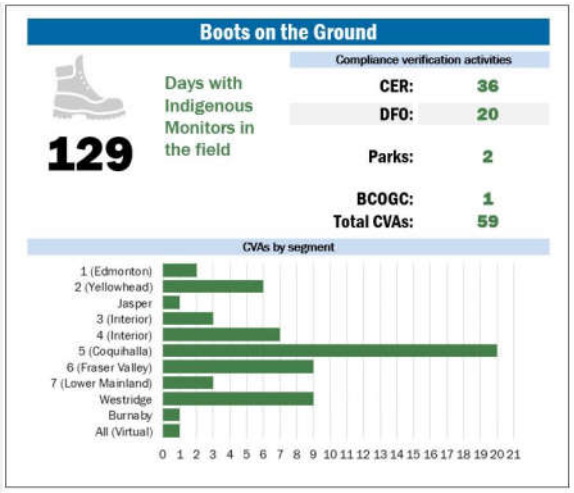
TMX-IAMC Snapshot

Operator:	Trans Mountain Corp.
Status:	Active Construction
Indigenous Nations:	129
Membership:	13 Indigenous and 6 Government seats
Indigenous Co-Chair:	Ray Cardinal(Alberta First Nations)
Gov't Co-Chair:	Joanne Pereira-Ekström, NRCan
Gov't Members:	Tray Sletto, CER Ian Chatwell, Transport Canada Chad Stroud, Canada Coast Guard Alice Cheung, Fisheries & Oceans Saul Schneider, Environment & Climate Change Canada
Indigenous Members:	13-member Indigenous Caucus

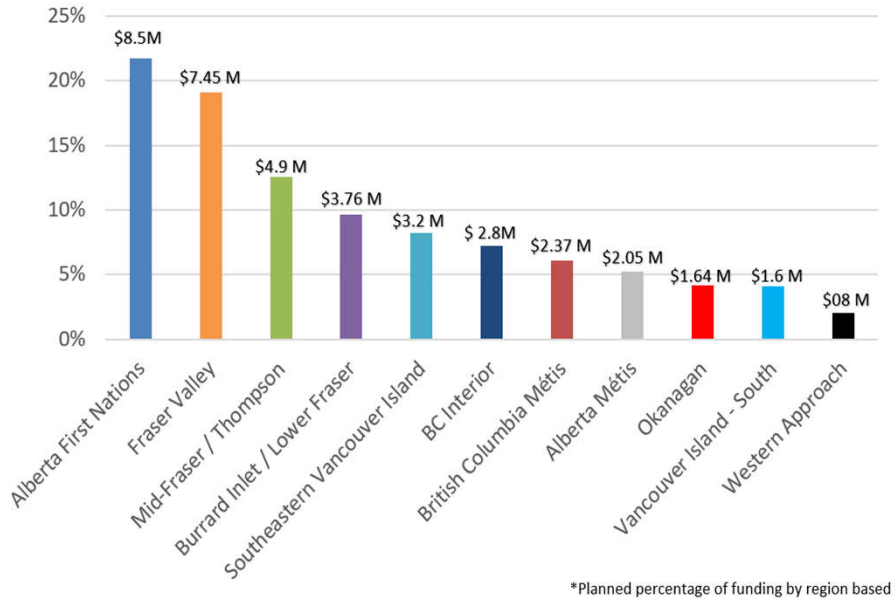


Key Accomplishments

2021 CVAs

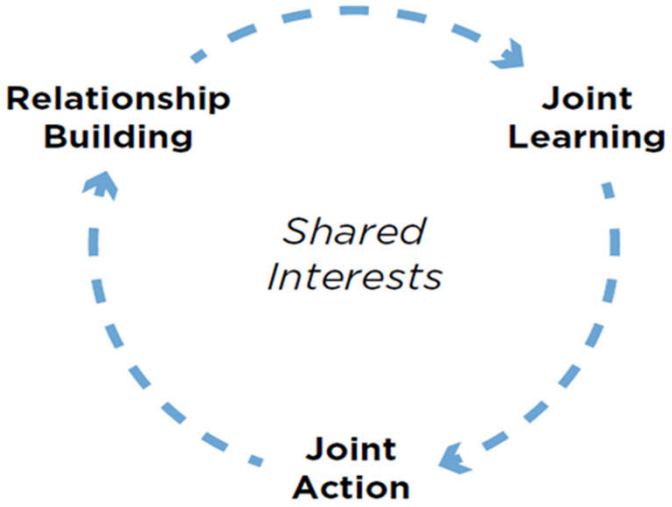


Indigenous Communities (129) – Funding Distribution per Region



*Planned percentage of funding by region based on applications received

Look-Ahead and Next Steps



Questions or Comments

Land and Water Boards of the Mackenzie Valley

LWB Engagement and Consultation Policy and Initiatives Update

MVRMA Workshop – September 28 & 29, 2022

Land and Water Boards of the
Mackenzie Valley

Engagement and Consultation Policy

June 5, 2018

Land and Water Boards of the
Mackenzie Valley

Engagement Guidelines for Applicants and Holders of Water Licences and Land Use Permits

June 5, 2018

LWB Engagement and Consultation Policy/Guideline Update Process

Policy Update

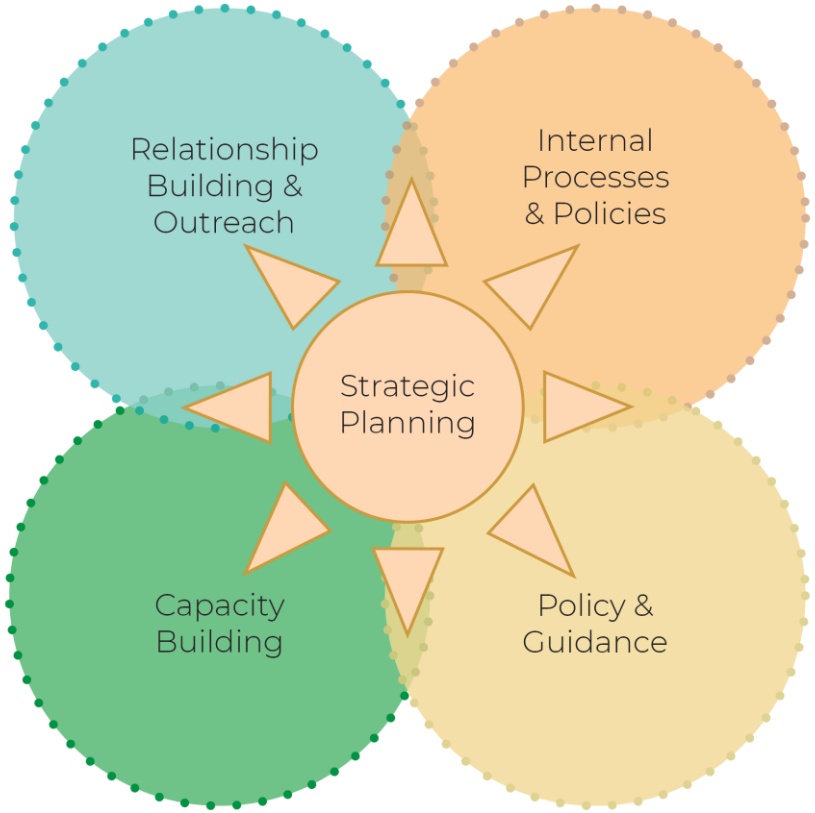
- Engagement commenced August 2019
- One-to-one meetings Fall 2019 to Summer 2021
- Open, virtual workshops June 9&10, 2021
- Public review of draft update from June 15 to Sept. 8, 2022
- Anticipated Board consideration December 2022

Guideline Update

- Engagement process similar to Policy update process, anticipated to commence in 2023 following Board approval of Policy

Relationship Building and Outreach

Focuses on initiatives that engage stakeholders in the work of the LWBs and helps satisfy the spirit of inclusive and integrated co – management system



Community Outreach Strategy: Overarching Key Messages

1. Improve on building relationships and trust
2. Increase effort and focus to build Indigenous Capacity
3. Increase general knowledge of the regulatory system in Communities
4. Promote accessibility for communities to be able to participate

Marsi cho

Consultation during environmental assessment in the Mackenzie Valley: GNWT-Canada joint consultation process

September 29, 2022

Canada

Government of Northwest Territories

- The GNWT and Canada encourage any Indigenous Government or Indigenous Organization, as well as the public, to participate in the Review Board's process.
- The process is the best way to have your voice heard.
- Government relies on the Board's process as the primary means to fulfill its duty to consult with Indigenous peoples

Government of Northwest Territories

Mahsi

Questions?

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Government of Canada
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Engagement Improvements

Mackenzie Valley Review Board

MVRMA Workshop - Engagement

September 28-29, 2022

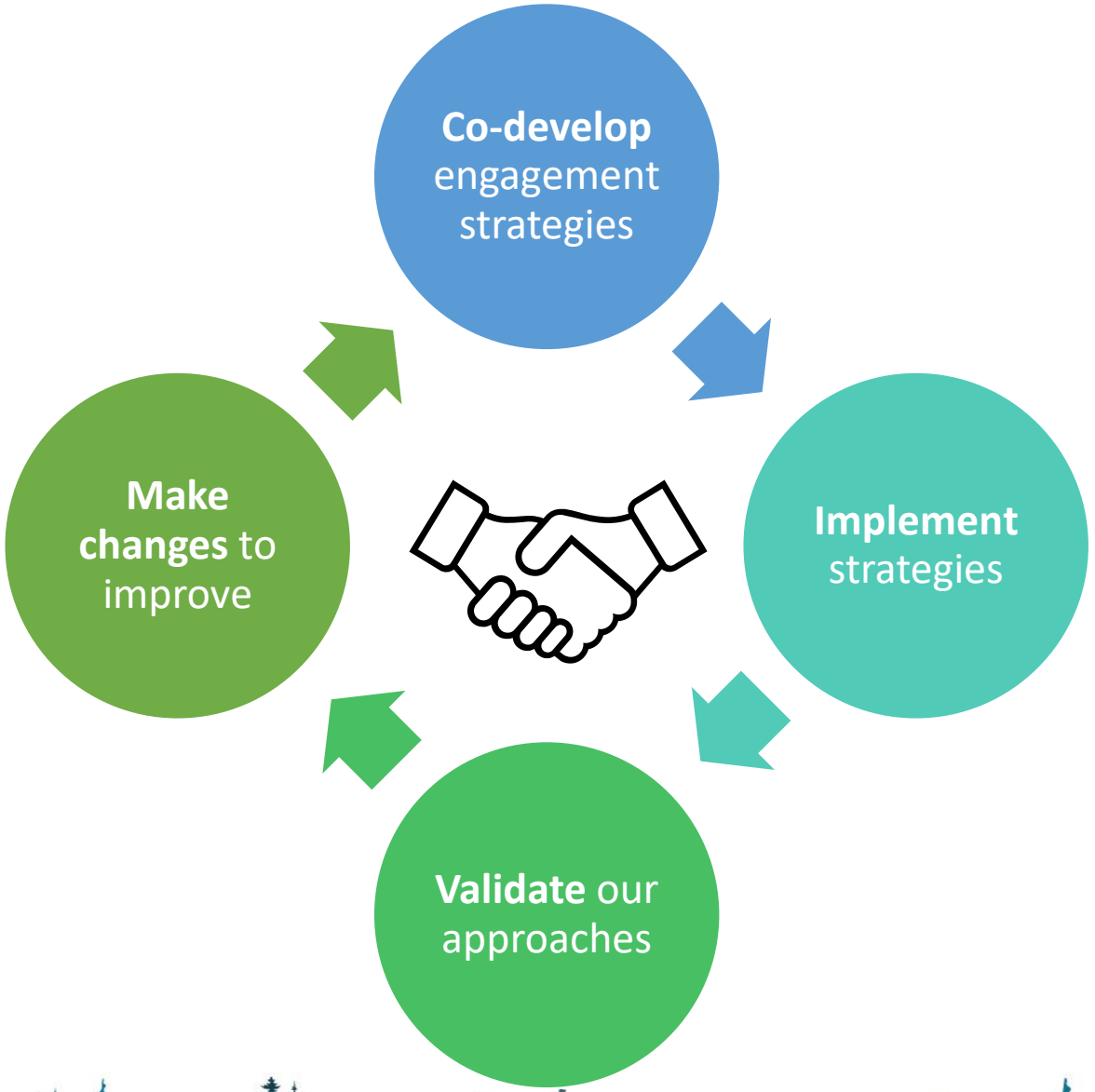
The Review Board's processes are rooted in consultation and engagement

- The Review Board understands its consultation obligations laid out in the land claims and the Act
- We want to go above and beyond these minimum requirements by:
  - designing processes that ensure meaningful participation and engagement and
  - providing opportunities for communities and IGs to share their concerns about developments
- good, strategic and meaningful engagement helps us fulfill our consultation obligations and leads to better decisions

Review Board's Approach to Engagement

Work together respectfully	Start early and engage throughout	Respect and consider local contexts	Reduce the burden of engagement	Support capacity building initiatives
• Co-develop engagement strategies • increase Indigenous representation at a staff level	• Include Indigenous governments and organizations in planning. • New guidelines promote collaborative project planning	• Language & translator workshops • Efforts to visit communities and meet people.	• collaborative initiatives • coordinated processes • Education & outreach activities to build relationships & strength local understanding	• everyone's job • advocating for participant funding

What's next?


Co-develop engagement strategies
Implement strategies
Validate our approaches
Make changes to improve

Marci Cho (*thank you*)

Appendix E: Speaker Bios

JOHN DONIHEE

Keynote

John Donihee holds graduate degrees in both Environmental Studies and Law. He practices law in all three northern territories. Between 1997 and 2004 John was a Research Associate at the Canadian Institute of Resources Law and Adjunct Professor in the Faculty of Environmental Design at the University of Calgary. He also taught Natural Resources Law in the first Akitsiraq law program in Nunavut. He is currently of counsel with Willms & Shier Environmental Lawyers LLP.

John's work includes advising co-management tribunals about land, resource, and environmental aspects of land claim implementation, including environmental impact assessment and land and water regulation. He has advised co-management tribunals in all three territories, been counsel to the Joint Secretariat tribunals for over two decades and is the past Chair of the Environmental Impact Review Board under the *Inuvialuit Final Agreement*. John has worked for co-management tribunals established by the *Mackenzie Valley Resource Management Act* since before the legislation came into force. A recipient of the NWT Premier's award for collaborative law in 2014 and repeatedly recognized as one of Canada's top Indigenous Law practitioners John's work focusses on problem solving and developing pragmatic solutions for northern environmental protection and resource development.

TIM HERON

Panelist

Tim Heron comes from a family of 11 and completed his schooling in Fort Smith. He worked for the Northwest Territory Métis Nation (NWTMN) for 24.5 years where he started out as their Land Use Mapping Coordinator and then became Fort Smith Community Negotiator. After 2.5 years in this position, Tim was asked to become the NWTMN Lands and Resources Manager. While in this role, he sat on various committees, including the NWT Protected Areas Strategy Development Committee, the NWT Water Stewardship Strategy Development Committee, the NWT/Alberta Bilateral Management Committee. Tim also spent a short time as NWT Climate Change Committee Chair before retiring this past January. He recently joined a committee to help develop a Draft Traditional Knowledge Framework for the Alberta/NWT Transboundary Water Agreement.

JANET BAYHA MCCAULEY

Panelist

Janet Bayha was born and raised in Deline and out on the land. She moved to Tulita 20 years ago, got married, and now has four beautiful children. She serves on many community/outside boards and committees, and volunteers for various recreation activities in the community. Janet is currently Vice President of the Tulita Land Corporation.

NURI FRAME

Panelist

Nuri Frame is co-managing partner of Pape Salter Teillet LLP. He specializes in Indigenous rights law, with an emphasis on litigation and dispute resolution, governance, and treaty negotiation and implementation. Nuri's litigation practice focuses on a range of areas impacting Indigenous peoples, including constitutional law, administrative law, environmental and regulatory law, treaty and self-government issues and disputes concerning implementation of impact benefits agreements. Nuri has appeared before numerous courts and regulatory tribunals in both Canada and the United States. Nuri appeared before the Supreme Court of Canada on behalf of interveners in the Behn, Keewatin, and Chippewas of the Thames cases. In addition to his litigation practice, Nuri also provides advice on a range of other legal issues affecting Indigenous communities, including governance, treaty negotiation and implementation, environmental and resource protection and negotiation and consultation with governments and resource developers. Nuri has worked extensively with Indigenous governments in Ontario, Alberta, British Columbia, Yukon and the Northwest Territories. In his practice, Nuri aims to provide his clients with legal and strategic advice that permits them to access the full range of options available for effectively resolving the issues they are presented with.

SARA MAINVILLE

Panelist

Sara Mainville has been called to the Ontario bar since 2005. Sara has a Management degree (Lethbridge) and a LL.B. (Queen's). She has earned an LL.M (Toronto) which has engaged her in a lifetime of study working with the Anishinaabe Nation in Treaty 3 and with Anishinaabe (Indigenous) law and legal orders. She has practiced law as a solo practitioner, and taught jurisprudence to undergraduate students at Algoma University, after being an Associate for a well-known Anishinaabe-led law firm in Ontario. In 2014, Sara was elected Chief of Couchiching First Nation after her friend, mentor, and long-term Chief had suddenly passed away. She returned to law in 2016 by joining a national law firm in Toronto, becoming partner in 2018. Sara has been honoured to work with the Chiefs of Ontario in creating First Nation Sovereign Wealth LP and assisting leadership in understanding emerging legal issues such as

the UNDRIP Act. Sara has worked on cannabis law with First Nations in many different provinces, her focus is on creating a legitimate and pragmatic legal framework that protects customers and respects Indigenous sovereign approaches to economic development and trade. Sara has been Lexpert® ranked as "Most Frequently Recommended" in Aboriginal Law since 2018, as one of the Best Lawyers in Aboriginal Law in Best Lawyers in Canada in 2021 and 2022. Sara has been a friend of JFK Law and is happy to join this prestigious law firm in 2022.

TRACY SLETTO

Presenter

Ms. Sletto joined the Canada Energy Regulator (CER) in 2011 with extensive experience strategic planning, policy development, finance, strategic communications, and public administration. She is responsible for the CER's Energy Information programs, Indigenous, Stakeholder and Northern engagement, Data and Information Management, and Communications. Before joining the CER, she worked with Western Economic Diversification Canada in Calgary and the Government of Saskatchewan in a variety of leadership roles.

CHIEF MARCEL SHACKELLY

Presenter

Chief Shackelly was re-elected for his second term as Chief of Nooaitch Indian Band in November 2016. Chief Shackelly studied at Simon Fraser University (Bachelor's in Economic Development); Nicola Valley Institute of Technology (Business Administration and Management); and the British Columbia Institute of Technology (Computer Systems).

JENNIFER DUNCAN

Presenter

Jennifer A. Duncan, B.A. (Hons), LL.B., is a sole practitioner specializing in Indigenous law with a primary focus on governance, corporate, regulatory, and international law. She has a Bachelor of Arts in Native Studies from the University of Alberta graduating with honours in 2000. Jennifer obtained her law degree from the University of British Columbia, graduating in 2004. She is member of the Law Society of British Columbia and the Law Society of the Northwest Territories. Jennifer is Dehla Got'ine from the Ts'oga Got'ine, and a member of the Behdzi Ahda" First Nation and the Ayoni Keh Land Corporation, located in the Arctic, Northwest Territories, Canada.

Willms & Shier | Environment Indigenous Energy Law

APPLICABILITY OF UNDRIP/FPIC TO RESOURCE CO-MANAGEMENT IN THE MACKENZIE VALLEY

Willms & Shier Environmental Lawyers LLP John Donihee & Raeya Jackiw, with assistance from Amanda Spitzig, Student-at-Law

January 30, 2020

This paper is being shared for background in the Virtual MVRMA Workshop Series: Engagement and Consultation Workshop 2022.Please note that the paper is two years old andhas not been updated for distribution.

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APPLICABILITY OF *UNDRIP*/FPIC TO RESOURCE CO-MANAGEMENT IN THE MACKENZIE VALLEY

1 INTRODUCTION

Co-management regimes in the North are premised on collaborative decision-making in land use planning, environmental assessment and impact review ("EA/EIR") and regulatory processes. In the Makenzie Valley, co-management is implemented through the *Mackenzie Valley Resource Management Act*[1] ("*MVRMA*") and regulations, and is constitutionally protected by land claim agreements.

This paper considers the extent to which the rights set out in the *United Nations Declaration on the Rights of Indigenous Peoples*[2] ("*UNDRIP*"), including the right to Free, Prior and Informed Consent ("FPIC"), are integrated into and recognized by the Mackenzie Valley co-management regime.

Based on a review of *UNDRIP* rights and commentary by Indigenous organizations on the scope and content of FPIC, we suggest that the existing Mackenzie Valley co-management regime fulfills several substantive and procedural elements of *UNDRIP*, and FPIC in particular.

2 THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

UNDRIP was adopted into international law by the UN General Assembly in 2007. *UNDRIP* is considered

> the most comprehensive international instrument on the rights of Indigenous peoples… it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples.[3]

UNDRIP addresses both individual and collective Indigenous rights, including rights to education, identity, health, employment, culture, and language. *UNDRIP* also affirms the right of Indigenous peoples to self-determination, and the right to pursue their own priorities in economic, social, and cultural development.[4]

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1 SC 1998, c 25 [*MVRMA*].

2 GA Res 61/295, 61st Sess, UN Doc A/RES/61/295 (2007) 1 [*UNDRIP*].

3 United Nations Department of Economic and Social Affairs: Indigenous Peoples, "United Nations Declaration on the Rights of Indigenous Peoples" (n.d.), online: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous- peoples.html>.

4 *UNDRIP*, *supra* note 2.

Many of the rights contained in *UNDRIP* relate directly to natural resource development on Indigenous lands. For example, *UNDRIP* provides that Indigenous peoples have the right to

- own, use, develop and control their lands, territories and resources (Article 26)
- the conservation and protection of the environment (Article 29)
- participate in a fair, independent, impartial, open, and transparent process to recognize and adjudicate the rights pertaining to their lands, territories, and resources. The process must give due recognition to Indigenous peoples' laws and traditions (Article 27)
- participate in decision-making in matters that would affect their rights through their own chosen representatives in accordance with their own procedures (Article 18)
- free and informed consent prior to the approval of any project affecting their lands, territories, or resources, i.e., FPIC (Article 32).

The full text of each Article referenced above can be found at **Appendix A**.

3 ADOPTION AND IMPLEMENTATION OF *UNDRIP* IN CANADA

UNDRIP is an international instrument, and is not legally enforceable unless and until its principles are incorporated into Canadian law by domestic legislation or other means (e.g. through a treaty with an Indigenous government).[5]

Canada was one of four states that initially voted in opposition to *UNDRIP*.[6] Canada had significant "concerns with respect to the wording of the current text, including provisions on lands, territories and resources [and] on free, prior and informed consent when used as a veto."[7]

Canada initially gave a qualified Statement of Support of *UNDRIP* under Stephen Harper's minority Conservative government in November 2010. In 2016, following the election of Justin

[5] *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 69: "International treaties and conventions are not part of Canadian law unless they have been implemented by statute" and para 79. See also:Kerry Wilkins, "Strategizing UNDRIP Implementation: Some Fundamentals" in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws* (Waterloo: Centre for International Governance and the Wiyasiwewin Mikiwahp Native Law Centre, 2018) 121.

[6] United Nations Department of Economic and Social Affairs, "United Nations Declaration on the Rights of Indigenous Peoples – Historical Overview" (2007), online: United Nations <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>. The United States, Australia, and New Zealand also voted in opposition to *UNDRIP*.

[7] UNGAOR, 61st Session, 107th Plen Mtg, UN Doc A/61/PV.107 (2007).

Trudeau's Liberal government, Canada announced its adoption of *UNDRIP* with no reservations or qualifications.[8]

3.1 FEDERAL IMPLEMENTATION OF *UNDRIP*

Prime Minister Trudeau has asked the federal Minister of Indigenous and Northern Affairs to implement *UNDRIP* in Canada. However, the federal government has not yet incorporated *UNDRIP* into domestic Canadian law.[9]

In April 2016, the New Democratic Party MP Romeo Saganash introduced Private Member's Bill C-262, the *United Nations Declaration on the Rights of Indigenous Peoples Act*,[10] in the House of Commons. Bill C-262 would have required the Government of Canada, in consultationand cooperation with Indigenous peoples, to "take all measures necessary to ensure that the laws of Canada are consistent with the *UNDRIP*" and would have recognized *UNDRIP* "as a universal international human rights instrument with application in Canadian law."[11] Bill C-262 would have also required the Government of Canada, in consultation and cooperation with Indigenous peoples, to "develop and implement a national action plan to achieve the objectives of *UNDRIP*."[12] Bill C-262 received support from the federal Liberal government in November 2017.[13] However, Bill C-262 died on the order paper before receiving royal assent.

The federal government has also considered *UNDRIP* in the context of environmental assessment. In August 2016, the federal Minister of Environment and Climate Change convenedan Expert Panel to provide recommendations to the federal government on how to improve the federal environmental assessment process.[14] In its report, the Expert Panel addressed how FPICcould be integrated into the then proposed changes to federal environmental assessment. The Expert Panel noted in its report that "[p]articipants expressed the view that [FPIC] is not

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8 Tim Fontaine, "Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples," CBC News (10 May 2016), online: <www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>.

9 Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (2017), online: <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

10 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016, (as passed by the House of Commons 30 May 2018).

11 *Ibid*, cl 3 and 4.

12 *Ibid*, cl 5.

13 John Paul Tasker, "Liberal Government Backs Bill that Demands Full Implementation of UN Indigenous Rights Declaration," CBC News (21 November 2017), online: <www.cbc.ca/news/politics/wilson-raybould-backs- undrip-bill-1.4412037>.

14 Government of Canada, Expert Panel Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: Canadian Environmental Assessment Agency, 2017), online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>. This report was prepared to assist federal decision-making about Bill C-69 (relevant portions are now the *Impact Assessment Act*). This report has no legal authority.

necessarily a veto but a process of mutual respect, trust and collaborative decision-making grounded in the recognition of Indigenous Peoples as equal partners."[15]

However, the new federal government ultimately did not adopt many of the Expert Panel's recommendations on FPIC and *UNDRIP*. Notably, the federal government did not integrate FPIC into the new federal *Impact Assessment Act*. [16] The new Act simply states that the federal government "is committed to implementing [UNDRIP]."[17]

3.2 PROVINCIAL IMPLEMENTATION OF *UNDRIP* – BRITISH COLUMBIA

British Columbia is the first province to implement *UNDRIP* through provincial legislation. Bill 41, the *Declaration on the Rights of Indigenous Peoples Act*,[18] was passed by the BC government in November 2019. The purpose of the Act is to affirm the application of *UNDRIP* to the laws of BC, contribute to the implementation of *UNDRIP*, and support the affirmation of, and develop relationships with, Indigenous governing bodies.[19] The legislation requires the BC government to prepare and implement an action plan to achieve the objectives of *UNDRIP*.[20]

BC's new *Environmental Assessment Act*[21] also supports the implementation of *UNDRIP* by recognizing the right of Indigenous nations "to participate in decision making in matters that would affect their rights, through representatives chosen by themselves."[22] In limited cases under the new Act, Indigenous nations have the final say on whether a project will receive final approval. Specifically, the Act states that a reviewable project may not proceed without the consent of an Indigenous nation where a treaty or final agreement with the Indigenous nation requires consent.[23] The Act also requires the chief executive assessment officer to achieve consensus with participating Indigenous nations in certain circumstances.[24]

4 DISCUSSION OF *UNDRIP* BY CANADIAN COURTS

Canadian courts have not yet explored the scope or content of the rights set out in *UNDRIP*, including the scope and content of FPIC. However, Canadian courts have provided limited commentary on how *UNDRIP* intersects with domestic Canadian law, including the Crown's constitutional duty to consult Indigenous peoples under s. 35 of Canada's *Constitution Act, 1982*.

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15 *Ibid* at p 28.
16 SC 2019, c 28, s 1.
17 *Ibid*, Preamble.
18 SBC 2019, c 44.
19 *Ibid*, s 2. "Indigenous governing body" is defined as "an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*."
20 *Ibid*, ss 3 and 4.
21 SBC 2018, c 51.
22 *Ibid*, s 2(2)(b)(ii).
23 *Ibid*, s 7.
24 *Ibid*, s. 16.

In *NunatuKavut Community Council Inc. v Canada (AG)*,[25] the NunatuKavuk Community Council ("NCC") argued that the Crown's duty to consult and accommodate should be read in light of *UNDRIP*.[26] The Federal Court explained that

> …UNDRIP may be used to inform the interpretation of domestic law. As Justice L'Heureux Dubé stated in *Baker*, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In *Simon*, Justice Scott, then of this Court, similarly concluded that while the Court will favour interpretations of the law embodying UNDRIP's values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada's international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.
>
> That said, in *Hupacasath*, Chief Justice Crampton of this Court stated that the question of whether the alleged duty to consult is owed must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. I understand this to mean that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty (emphasis added).[27]

However, the Federal Court noted that NCC's case

> does not identify an issue of statutory interpretation. Rather, it submits that UNDRIP applies not only to statutory interpretation but to interpreting Canada's constitutional obligations to Aboriginal peoples. No authority for that proposition is provided. Nor does the NCC provide any analysis or application of its position in the context of its submissions. In my view, in these circumstances, the NCC has not established that UNDRIP has application to the issues before me, or, even if it has, how it applies and how it impacts the duty to consult in this case.[28]

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25 2015 FC 981 [*NunatuKavut*].
26 *Ibid*, para 96.
27 *Ibid*, paras 103-104.
28 *Ibid*, para 106.

NunatuKavut Community Council Inc suggests that while *UNDRIP* may not apply to interpreting the Crown's duty to consult, it can be applied to interpret the *MVRMA* and the consultation obligations of co-management boards under the *MVRMA*.

In *Ross River Dena Council v Canada (AG)*,[29] the Ross River Dena Council ("RRDC") and Canada agreed "that UNDRIP can be used as an aid to the interpretation of domestic law, however, there may be an issue about whether UNDRIP can be used to interpret the Constitution."[30] The Supreme Court of Yukon did not have to resolve this issue, and instead considered whether Canada has failed to "implement" *UNDRIP*. The Court noted that:

- Minister of Indigenous and Northern Affairs, Carolyn Bennett endorsed *UNDRIP* at a meeting of the United Nations Permanent Forum on Indigenous Issues in New York City.[31]
- Minister of Justice, Jody Wilson-Raybould, gave a speech in Vancouver, British Columbia, where she acknowledged that Canada had endorsed *UNDRIP* without qualification.[32]
- Canada issued a press release announcing the creation of a working group of Ministers on the review of laws and policies related to Indigenous peoples.[33]

On the basis of these facts, the Court held that "it cannot fairly be said that Canada is refusing to implement *UNDRIP*."[34]

Overall, Canadian court cases provide little clarity on what is required to fulfill FPIC or other rights provided for by *UNDRIP*.

5 INTERPRETATION OF *UNDRIP* BY INDIGENOUS ORGANIZATIONS

Many Indigenous communities and organizations assert that Canada should implement *UNDRIP* and require FPIC of Indigenous parties prior to approval of development.

Some Indigenous organizations have provided their own interpretations of the scope and contentof *UNDRIP* rights, and specifically FPIC.

29 2017 YKSC 59 [*RRDC*].
30 *Ibid* at para 303.
31 *Ibid* at para 308.
32 *Ibid* at para 309.
33 *Ibid* at para 310.
34 *Ibid* at para 311.

5.1 ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations ("AFN") set out its interpretation of FPIC in a submission to the United Nations' Expert Mechanism on the Rights of Indigenous Peoples, for consideration in the Expert Mechanism's study on FPIC.[35]

AFN interprets FPIC as "more than consultation" and specifically as:

> protection from duress and coercion; disclosure of all necessary information; honesty and fair dealing on the part of government andother proponents; as well as capacity to deploy [the Indigenous Group's] own knowledge and values through the application of [the Indigenous Group's] own laws and to conduct, for example, assessments of the potential impacts; and assurance no actions will be taken until First Nations have had time and opportunity to cometo a decision according to [the Indigenous Group's] own processes and traditions.[36]

In its submission, AFN explicitly references northern co-management regimes as examples of situations where Indigenous groups' exercise of FPIC is "accommodated within the Canadian legal structure."[37]

AFN explains that

> agreements negotiated through the comprehensive land claims or 'modern Treaty' process set out areas where First Nations now exercise exclusive jurisdiction or participate in decision making through co-management and joint decision-making structures. For the most part, these processes have supported proposed resource development activities brought before them, albeit with conditions, and final approvals have subsequently been issued by the federal, provincial and territorial governments. However, there are also examples where decisions through these mechanisms to reject proposals for resource development activities within the governed territories have subsequently been upheld.[38]

[35] Assembly of First Nations, "Submission of the Assembly of First Nations (AFN) on Free Prior and Informed Consent (FPIC) for the Expert Mechanism on the Rights of Indigenous Peoples" (n.d.), online: <https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/AssemblyFirstNations_Canada.pdf.>

[36] *Ibid* at p 1 and 4.

[37] *Ibid* at p 15.

[38] *Ibid*.

AFN cites a decision of the Mackenzie Valley Environmental Impact Review Board ("MVEIRB") as an example of FPIC in operation.[39] In 2004, MVEIRB recommended that a proposed diamond exploration project in the Drybones area not proceed after the Yellowknives Dene raised serious concerns about the impact of the proposed exploration on Drybones Bay, an important cultural site.[40] The Federal Government adopted the Board's recommendation and rejected the proposal without EIR.[41] AFN also cites cases where the Nunavut Impact Review Board and panels appointed under the federal *Canadian Environmental Assessment Act* rejected proposed projects.

5.2 UNION OF BC INDIAN CHIEFS

The Union of British Columbia Indian Chiefs ("UBCIC") issued an open letter to Prime Minister Justin Trudeau in 2015 on *UNDRIP* and FPIC.[42] The UBCIC's open letter states that

> FPIC is the right of Indigenous Peoples to say 'no' to the impositionof decisions that would further compound the marginalization, impoverishment and dispossession to which they have been subjected throughout history. FPIC is also the power to say 'yes' to mutually beneficially initiatives that can promote healthy and vital Indigenous Nations for the benefit of present and future generations.[43]

The UBCIC called on the federal government to ensure that federal laws, regulations and policies – especially those dealing with resource development – are reformed to ensure that the FPIC of Indigenous Peoples is required for any decisions that have the potential for serious impacts on the environment and on Indigenous Peoples' rights.[44]

5.3 INUVIALUIT REGIONAL CORPORATION

The Inuvialuit Regional Corporation ("IRC"), in its intervenor factum before the Supreme Courtof Canada in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*,[45] put forward its opinion on the scope of the Crown's obligations when engaging in "deep consultation."

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39 *Ibid* at p 15-16.

40 See MVEIRB Online Registry re Drybones Bay Mineral Exploration at: MVEIRB, "Drybones Bay Mineral Exploration – EA03-004" (2020), online: <http://reviewboard.ca/registry/ea03-004>.

41 *Ibid* at p 15-16.

42 The Union of British Columbia Indian Chiefs, "Joint Open letter: Prime Minister Justin Trudeau - United Nations Declaration on the Rights of Indigenous Peoples & Free, Prior and Informed Consent" (2015), online: <https://www.ubcic.bc.ca/pmtrudeau_undrip_fpic>.

43 *Ibid*.

44 *Ibid*.

45 SCC 2017 40 [*Clyde River*].

The IRC submitted that "where deep consultation is required, the international legal principle of FPIC as outlined in *UNDRIP* offers an incremental, logical and necessary clarification of the scope and content of deep consultation in Canada in the context of a modern treaty."[46]

The IRC argued that the process required to achieve FPIC in situations of deep consultation includes six key elements:

1 *Freedom from force, intimidation, manipulation, coercion or pressure by a proponent*: if this element is not met, consent will not be valid.

2 *Mutual agreement on a process for consultation*: this includes accommodating the needs of the participant Aboriginal group, for example by setting a schedule for consultation that provides for different harvesting seasons or days of importance.

3 *Robust and satisfactory engagement with the Aboriginal group prior to approval*: this must take place before the government authorizes or commits to undertake any activity related to the project within Indigenous territory.

4 *Sufficient and timely information exchange*: this requires a demonstrated understanding of the Aboriginal right at stake and the specific nature of the potential impacts on the Aboriginal interests in question. The Crown also has a responsibility to receive and understand project concerns, including those based in Traditional Knowledge, from the rights holders.

5 *Proper resourcing, both technical and financial, to allow the Aboriginal group to meaningfully participate*: attention must be given to the implications of power imbalances. The Crown must also provide the Aboriginal people with a reasonable amount of time commensurate with the significance of the possible impacts.

6 *Shared objective of obtaining the reasonable consent of the Aboriginal group*: consent is a complex process of building a relationship, exchanging information, conducting analysis, and fully integrating an Aboriginal community in the process of discussion, analysis and decision-making. Consent is not a veto for rights holders.[47]

The IRC further argued that if the Crown has diligently pursued the requirements of FPIC and the Indigenous party withholds its consent

- unreasonably, then the approval may proceed

[46] *Ibid* (Factum of the Intervenor Inuvialuit Regional Corporation at para 6).
[47] *Ibid* at paras 23-30.

- reasonably, then the Crown may either accept the decision and not proceed with the project, or the Crown may proceed with the project without consent if the Crown can justify the infringement of the Aboriginal interest under the *Sparrow*[48] framework.[49]

6 RELEVANCE OF *UNDRIP*/FPIC IN THE MACKENZIE VALLEY RESOURCE CO-MANAGEMENT REGIME

The *MVRMA* obligates co-management boards to consider the impact of projects and approvals on Indigenous peoples, and provides for significant Indigenous involvement in both board hearing processes and in decision-making. Indigenous involvement in co-management is constitutionally protected through land claim agreements.

In the table below, we list *UNDRIP* rights and elements of FPIC, as articulated by Indigenous organizations and discussed above. We then compare these elements to the processes and rights provided in the Mackenzie Valley co-management regime. Specifically we consider the processes of MVEIRB and the Mackenzie Valley Land and Water Board ("MVLWB") and its regional panels.

Given the significant and constitutionally protected involvement of Indigenous peoples in board decision-making, we suggest that the existing Mackenzie Valley co-management regime fulfills several substantive and procedural elements of *UNDRIP*, and FPIC in particular.

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
Right to own, use, develop and control their lands, territories and resources (Article 26)	Land claim organizations own and therefore control and can develop large areas of land owned in fee simple (i.e., settlement lands). Beyond that, land claim organizations participate in co-management regimes covering the entirety of their respective settlement areas, through which the organizations are able to participate in decision-making about the use and development of land.

[48] *R v Sparrow*, [1990] 1 SCR 1075 at 1113.

[49] *Clyde River*, *supra* note 45 (Factum of the Intervenor Inuvialuit Regional Corporation at paras 36-37).

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
Right to conservation and protection of the environment (Article 29)	Pursuant to the *MVRMA*, MVLWBs must, in exercising their powers, consider "the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley."[50] The *MVRMA* also provides that the EA/EIR process must have regard to the importance of conservation to the well-being and way of life of aboriginal peoples.[51] Both the MVEIRB and MVLWB must ensure that the parts of the EA/EIR process for whichthey are responsible meet these objectives (preliminary screening for MVLWB, EA and EIR forMVEIRB).
Right to fair, independent, impartial, open and transparent process to recognize and adjudicate rights to territory. Processes must recognize Indigenous peoples' laws and traditions (Article 27)	Co-management boards, as administrative tribunals, are required by law to be procedurally fair (i.e., impartial and independent). Where boards fail to ensure procedural fairness, board decisions are subject to judicial review by courts. MVEIRB and the MVLWBs are required by law to engage with s.35 rights-holders and land claim organizations during decision-making, and to consider any views raised during consultation "fully and impartially."[52] The *MVRMA* also requires members of MVEIRB and the MVLWBs to be free of any conflict of interest relative to proposed projects.[53]

50 *MVRMA*, *supra* note 1, s 60.1(a).
51 *Ibid*, s 115(1).
52 *Ibid*, s 3.
53 *Ibid*, ss 16(1), 123.2(1), 144.33.

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
Right to participate in decision-making in matters that would affect their rights through representatives chosen by Indigenous peoples in accordance with their own procedures (Article 18)	The Mackenzie Valley land claims and the *MVRMA* mandate Indigenous involvement in decision-making. The appointment processes and membership of *MVRMA* Boards ensures Indigenous representation among decision-makers.[54] Indigenous self-governments are final decision-makers in some circumstances.[55]
Right to FPIC prior to approval of project affecting territory (Article 32)	
• Robust and satisfactory engagement prior to approval (IRC)	The level of engagement and consultation required prior to project approval in the Mackenzie Valley is unparalleled in Canada.
• Protection from duress and coercion (AFN) • Freedom from force, intimidation, manipulation, coercion or pressure by a proponent (IRC) • Honesty and fair dealing on the part of government and other proponents (AFN)	Mackenzie Valley co-management boards facilitate a public and accountable decision-making process with respect to resource development. Boards are required to consult with Indigenous decision-makers, and the parameters of consultation are clearly defined in the *MVRMA*.[56]

54 *Ibid*, ss 54(2), 56(2), 57.1(2), 99(4), 112(1).
55 See: MVRMA, *ibid*, ss 131.1(1) and 137.1.
56 *Ibid*, s 3.

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
• Disclosure of all necessary information (AFN) • Sufficient and timely information exchange (IRC)	Indigenous peoples can and do request and receive additional information from project proponents and the Crown about proposed developments via information requests. Indigenous peoples also make presentations, ask questions, and comment on the Crown and project proponents' presentations at public hearings. In the EA process, once the co-management processis complete, the Minister re-contacts all s. 35 rights-holders and asks whether MVEIRB's recommended mitigation satisfies their concerns. If the rights-holders are not satisfied, the Crown conducts a second round of consultations where rights-holders can request additional mitigation or accommodation.
• Proper technical and financial resourcing to allow meaningful participation (IRC)	Co-management boards have technical staff who ensure that the requirements of the *MVRMA* and land claims are addressed before an EA or other regulatory decision-making occurs. Board resourcesgo towards making a fulsome and properly analyzed decision. Fulsome and properly analyzed decisions benefit all parties. Further, the federal government (Crown-Indigenous Relations and Northern Affairs Canada) has recently implemented an intervenor program for EIA. It would be beneficial if that funding were available forlarge technical Type A Water Licencing proceedingsas well.

UNDRIP Rights	Mackenzie Valley Co-Management Regime and Land Claims
• Capacity to deploy Indigenous knowledge and values through the application of Indigenous laws and to conduct assessments of potential impacts (AFN)	MVEIRB and MVLWBs must, in exercising their powers, consider traditional knowledge as well as other scientific information where such knowledge or information is made available to the Boards.[57] MVEIRB in particular has developed detailed guidelines for incorporating traditional knowledge into EIA.[58] Where MVLWBs make decisions they are required to seek and consider the advice of the relevant Renewable Resource Boards to ensure such decisions are consistent with the knowledge base of those boards, which includes traditional knowledge about wildlife and wildlife habitat.[59]

[57] *Ibid*, ss 60.1 and 115.1.

[58] Mackenzie Valley Review Board, "Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment" (July 2005), online: <http://reviewboard.ca/upload/ref_library/1247177561_MVReviewBoard_Traditional_Knowledge_Guidelines. pdf> [MVEIRB TK Guidelines].

[59] *MVRMA*, *supra* note 1, s 64: Section 64 requires boards to seek and consider the advice of the renewable resources board established by the land claim agreement applicable in its management area respecting the presence of wildlife and wildlife habitat that might be affected by a use of land or waters or a deposit of wasteproposed in an application for a licence or permit.

***UNDRIP* Rights**	**Mackenzie Valley Co-Management Regime and Land Claims**
• Mutual agreement on a process for consultation, including accommodating the needs/schedule of the participant Aboriginal group (IRC)	The co-management consultation process is the result of negotiated agreements between Indigenous Governments and the federal and territorial government. Workplans prepared by co-management tribunals are designed to meet all legislative obligations. The Crown is ultimately responsible for the adequacy of consultation, although the Crown can rely on Board processes to fulfil its duty to consult in certain circumstances.[60] The MVLWB currently operates under its *Engagement and Consultation Policy*[61] and *Engagement Guidelines*.[62] MVEIRB does not have an official consultation and engagement policy, but has adopted the MVLWB Engagement Policy on an interim basis.[63] MVEIRB applies elements of the MVLWB Engagement Policy to EIA processes as applicable.[64] The MVLWB Engagement Policy requires proponents to consult and engage with affected Indigenous groups as a part of a complete application. The Boards provide translation services at hearings and frequently require participants to translate key documents into Indigenous languages.[65]

[60] *Clyde River*, *supra* note 45; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 4.

[61] The MVLWB Policy was originally released in 2013, and updated in 2018. See: Land and Water Boards of the Mackenzie Valley, "Engagement and Consultation Policy" (5 June 2018), online: <https://wlwb.ca/sites/default/files/mvlwb_engagement_and_consultation_policy_-_nov_25_19.pdf> [MVLWBEngagement Policy].

[62] Land and Water Boards of the Mackenzie Valley, "Engagement Guidelines for Applicants and Holders of Water Licences and Land Use Permits" (5 June 2018), online: <https://wlwb.ca/sites/default/files/mvlwb_engagement_guidelines_for_holders_of_lups_and_wls_-_october_2_19.pdf>.

[63] Mackenzie Valley Review Board, "Interim Policy Statement: Engagement and Consultation in Environmental Assessment and Impact Review" (2013), online: <http://reviewboard.ca/reference-library-page/policies-and-standards>.

[64] *Ibid*.

UNDRIP Rights	Mackenzie Valley Co-Management Regime and Land Claims
• Right to say 'no' to decisions that would further compound marginalization and power to say 'yes' to mutually beneficially initiatives that (Union of BC Indian Chiefs) • Assurance no actions will be taken until Indigenous communities/organizations have had time and opportunity to come to a decision according their own processes and traditions (AFN) • Shared objective of obtaining reasonable consent (a complex process of building a relationship, exchanging information, conducting analysis, and fully integrating Indigenous community in the process of discussion, analysis and decision-making, **not** a veto) (IRC)	Indigenous organizations in the Mackenzie Valley have negotiated rights to particular processes set out in land claims. The Supreme Court has held that processes established in land claims must be respected.[66] Where decision-making processes have been formalized in the context of a land claim, those processes must be followed. As land owners, Indigenous organizations that own settlement lands in fee simple under land claims are in a position to reject development proposed on their settlement lands. Section 35 rights-holders that are not land claim beneficiaries still have the benefit of the co-management process negotiated by Indigenous land claim organizations. Section 35 rights holders have the option of negotiating a different process with the federal and territorial government.

65 MVEIRB TK Guidelines, *supra* note 58 at p 25; Mackenzie Valley Review Board, "Rules of Procedure for Environmental Assessment and Environmental Impact Review Proceedings" (1 May 2005), online: <http://reviewboard.ca/process_information/guidance_documentation/rules_of_procedure>; MVLWB,"MVLWB Rules of Procedure Including Public Hearings" (December 2018), online: <https://mvlwb.com/sites/default/files/lwb_rules_of_procedure_-_dec_17_18.pdf>.

66 *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58.

APPENDIX A
KEY ARTICLES FROM UNDRIP

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.

ARTICLE 19:

States shall conduct and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

ARTICLE 26:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

ARTICLE 27:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

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.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

ARTICLE 32:

2. 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.

3. 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.

4. States shall provide effective mechanism for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environment, economic, social, cultural or spiritual impact.

ARTICLE 38:

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration