

# Adopting UNDRIP raises questions about resource development

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THE Justin Trudeau government has made much of its pledge to prioritize a new "nation-to-nation" relationship with Canada's aboriginal peoples. It recently moved to accept, without reservations (or objector status), the legally non-binding 2007 United Nations Declaration on the Rights of Indigenous People.

Particular mention should be made of Article 32, which deals specifically with the right of indigenous peoples "to determine and develop priorities and strategies for the development or use of their lands or territories and other resources." The clause also emphasizes that countries "shall consult and co-operate 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."

Lastly, it goes on to posit: "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."

This, in turn, raises a host of important and thorny questions about natural-resource development in Canada, the prospects for aboriginal-corporate partnerships, the role of governments and the establishment of a new legal framework.

As part of its commitment to implement the 94 "calls to action" of the 2015 Truth and Reconciliation Commission report, the federal Liberals promised to abide by the UN declaration. But what does that mean in terms of oil and gas pipelines that cross aboriginal territory — where land title is disputed or not? What are the practical implications of embracing wholeheartedly Free, Prior and Informed Consent in Canada?

Moreover, what will its impact be on aboriginal communities? How will corporate Canada have to adjust to free consent? And how will all of this play itself out in terms of repercussions for Ottawa and provincial governments?

Under the declaration, the centrality of aboriginal consent is unmistakable and thus is tanta-

mount to having veto power. While the Trudeau government is less than clear on this point, it appears to mean no pipeline projects in Canada can proceed without the approval of First Nations.

Future disputes in the area of resource development could very well end up before the courts. How will Canada's commitment to the UN declaration be interpreted by judges? Will they go beyond Canada's current jurisprudence on the duty to consult and accommodate? Will free consent become a key contextual and interpretative variable? As is often the case with aboriginal matters in this country, we will have to await the various court rulings.

But to avoid all of that legal wrangling and needless confrontation, resource and pipeline companies in Canada would be wise to secure aboriginal consent before embarking on any major oil and gas development projects on ancestral aboriginal lands.

As in the case of the Northern Gateway pipeline, the Federal Court of Appeal was very clear in its late June ruling — meaningful dialogue and consultation must first take place with aboriginal peoples.

Ottawa may, therefore, need to put in place a legislative framework and decisional structure — in conjunction with aboriginal governments and

communities — to diminish conflict and increase the likelihood of resource project approval.

Furthermore, companies in Canada will need to respect aboriginal rights, cultural sensitivities and traditional knowledge, and ecology/environmental considerations in order to partner with them successfully.

For their part, aboriginal peoples in Canada will need to state clearly and upfront to both governments and industry what their free and informed consent stipulations will be.

Given the international trend lines and court rulings here, it does seem likely that prior and informed aboriginal consent is going to be needed before mega-resource development projects will get off the ground.

That means accepting aboriginal communities and leaders as full participants — and not simply add-ons — in major oil and gas projects in this country.

For if that new reality is not recognized and respected going forward, future progress on resource development in Canada will be nearly impossible.

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