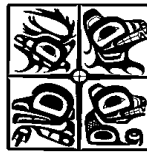


BACKGROUND

YINKA DENE ALLIANCE



Nadleh Whut'en



Wet'suwet'en



Saik'uz



Free, prior and informed consent: the international legal standard on dealings with First Nations on resource development projects

Canada endorsed the United Nations Declaration on the Rights of Indigenous Peoples¹ in November, 2010. The Declaration codifies the minimum content of the rights of Indigenous peoples at the global level, based on established international human rights law.

Free, prior and informed consent: “The standard means that Indigenous Peoples must be informed about and consent freely to resource development projects that affect their lands and resources, before the government approves the project.”

The Declaration sets out the international standard that governments “shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or resources” (Article 32).

Canada’s obligation: In addition to the UN Declaration, Canada is bound by numerous general and customary international legal principles which have been referred to in decisions and reports of the Inter-American Commission on Human Rights, such as the right of Indigenous Peoples to control and own their territories, and Indigenous Peoples’ ownership of lands, territories and resources that they have historically occupied.² These rights are contained in the American Declaration of the Rights and Duties of Man, which Canada is required to respect as a member state of the Organization of American States.³ Canada therefore has an international legal obligation to respect First Nations’ ownership and control over their own territories and resources.⁴

Legal and financial risks for Enbridge and its investors: A decision by the Canadian government to approve the Enbridge Northern Gateway Pipelines, and related oil tanker traffic, in the absence of First Nations consent, would violate Canada’s international legal obligations, and make Canada vulnerable to human rights challenge in an international forum. Such challenges bring the risk of a finding against Canada, and significant uncertainty for the Enbridge project and its investors. There is also the serious prospect of a lengthy series of legal challenges by First Nations in Canadian courts, based on the constitutionally-protected Rights and Title of affected First Nations.

Indigenous Nations’ decisions to reject the proposed Enbridge pipelines and tankers project: The five Nations of the Yinka Dene Alliance⁵ joined a group of 61 Nations in signing the Save the Fraser Declaration (www.savethefraser.ca) in December 2010, which enacted a ban on the proposed Enbridge Northern Gateway Pipelines, and similar oil sands transportation projects, crossing through their territories in the headwaters of the Fraser River watershed. The Coastal First Nations declared a ban on oil sands tankers and pipelines in their traditional territories and waters in March 2010. In making these Declarations, these First Nations used their own Indigenous laws, and exercised their right of ownership and control over their territories as recognized in international law. Indigenous Nations opposing the project have authority over more than 50% of the territories and waters of Enbridge’s proposed pipeline and tanker route.

The role of banks: As financiers for resource development and infrastructure projects on Indigenous lands, such as the Enbridge pipelines and tankers, banks have a central role to play in ensuring that of Indigenous peoples’ human rights protected. For this reason, Indigenous Nations such members of the Yinka Dene Alliance, as well as a variety of environmental organizations such as the Rainforest Action Network and the Indigenous Environmental Network, have been actively encouraging banks to adopt policies consistent with the international standard of free, prior and informed consent and to consider that requirement in making financing decisions.

¹ GA Res. 61/295, UN GAOR, 61st sess., Supp. No. 49, UN Doc. A/RES/61/295 (2007).

² See, for example, *Mary and Carrie Dann v. United States*, Inter-Am. C.H.R. Report No. 75/02 (2002), and *Maya Indigenous Communities v. Belize*, Inter-Am. C.H.R. Report No. 96/03 (2003).

³ *Hul'qumi'num Treaty Group v. Canada*, Inter-Am. C.H.R. Report No. 105/09 (2009) at para 27.

⁴ See Prof. S. James Anaya, *Indigenous Peoples in International Law* (2nd ed.) (Toronto: Oxford University Press, 2004) at p. 148.

⁵ Nadleh Whut'en, Nak'azdli, Takla Lake, Saik'uz and Wet'suwet'en First Nations.