BLOWIN' IN THE WIND: STRATEGIES FOR IMPLEMENTING FPIC AND MAINTAINING PEACE

Oliver W. MacLaren[*]
Olthuis, Kleer, Townshend LLP, Toronto, Canada
PACTA Asia Ltd., Singapore
oliver.maclaren@oktlaw.com
oliver.maclaren@pacta.fi

Paper prepared for presentation at the
"2015 WORLD BANK CONFERENCE ON LAND AND POVERTY"
The World Bank - Washington DC, March 23-27, 2015

[*] B.A. (Alberta), J.D. (Calgary); Member of the Law Society of Alberta and the Law Society of Upper Canada; Associate Lawyer at Olthuis Kleer Townshend LLP and Team Member of PACTA Asia Ltd. The views expressed here are those of the author and do not necessarily reflect those of either firm or their respective clients.

Abstract

The paper examines strategies for exploring development on lands where ownership and other interests are contested by groups with indigenous claims to the territory. First examined is the growing recognition of indigenous rights to land in both domestic and international forums, noting how these forums have served to inform one another. Next, the intervening period between the assertion of a right and its universal recognition is examined, marking this period as a time of heightened risk, where the potential for entrenchment of position, stalled development, and even violence, is present. The paper then examines the measures promoted by various bodies to encourage development in this period of risk, bringing activities of states and private developers into adherence with existing domestic and international law. A case study for successful development on contested lands follows, namely, the renewable energy policies adopted by the Canadian province of Ontario and the resulting McLean's Mountain Wind Project.

Key Words:

UNDRIP, FPIC, Peace Building, Renewable Energy, Project Finance

INTRODUCTION

Resource developers are facing growing uncertainty regarding their right to undertake development on contested land. On one hand is their reliance on the permits and certificates of formalized land tenure mechanisms developed by recognized nation states; on the other are declarations of sovereignty over traditional territory by indigenous peoples and the corresponding doctrines of autonomy, self-determination, and free prior and informed consent embodied in the United Nations Declaration on the Rights of Indigenous Peoples, and increasingly, domestic law. Indeed, as recognition has increased over the last decade, indigenous land interests have become one of the most significant and unpredictable challenges to development. Absent adequate tools to address the unpredictability, assertion of these rights may lead to entrenched positions and an increase in violence in a number of countries as information about successful claims in other jurisdictions spreads; more and more land tenure information is recorded outside of conventional government systems; and public support for indigenous rights swells. While one would expect this environment to trigger reform, a realistic timeframe for the satisfactory resolution of territorial claims in states with the willingness, stability, and capability to face this challenge is a decades-long process; in states lacking in any one of these qualities, far far longer. As fatigue with the resolution process sets in, the will to continue peacefully and productively deteriorates, with the resulting consequence of either stalled development (at best) or development marred by escalating human rights abuses. A certainty is the perpetuation of an unacceptable status quo. It is proposed that these present conflicts creating risk for development and perpetuating poverty and powerlessness can be resolved through instruments of law, policy and negotiation and lay the groundwork for the reconciliation necessary to subsequently resolve the territorial claim later. In this regard, the example of Canada can serve as instructive. With court cases concerning Aboriginal interests stretching back more than 40 years, the incremental adjustments to approaches in development during this time provides a useful contribution.

A. GROWING RECOGNITION OF INDIGENOUS RIGHTS

Recognition in Domestic Law. Acknowledging that creative solutions are needed to mediate the assertion of indigenous rights amidst resource development begins with an acknowledgement of the great strides that have been made over the last few decades in the recognition of these rights. Arising largely from the body of law of states formed by settler colonialism, indigenous rights reflect a recognition that the entitlement of people to their traditional land, and the ability to engage in certain practices on it, persists notwithstanding the assumption of sovereignty by a state whose borders encompass that land. While the contemplation of indigenous rights arose during an era of justification for colonialism's advancement (in the courts and parliaments of colonizing states,) modern conceptions of these rights have

emerged by this justification's retreat. The cultural impact and legal basis of colonialism in question, this body of law seeks to reconcile the historical impact of colonialism on indigenous peoples with the existence and sovereignty of a modern nation state.

Specifically, this body of law acknowledges a spectrum of rights accorded to a defined group of people, ranging from an entitlement to engage in spiritual ceremonies, to the protection of sacred areas, to the pursuit of traditional livelihoods, to a more robust right encompassing all of these and which in some jurisdictions resembles private property ownership. This broader right is largely known as indigenous or aboriginal title.[1] In domestic law, one form or another of indigenous title has been legitimately argued (with varying degrees of success) in each of Australia, Belize, Botswana, Canada, Malaysia, New Zealand, Papua New Guinea, South Africa, Tanzania, and the United States. While the content of the right differs across jurisdictions, the premise for the right is consistent: as a result of the prior use of the land by a group of defined people, there is a competing interest to the authority of a state and its delegates to deal unilaterally with the land.

In June of 2014, the Supreme Court of Canada released its ground-breaking judgment *Tsilhqot'in Nation v. British Columbia*[2] awarding aboriginal title to 1,750km^2 of land located in the interior of the Canadian province of British Columbia to the T'silhqotin Nation. This decision merits mention because it is the first time an award of this magnitude has been made in a stable advanced democracy with a long functioning land tenure regime supported by the rule of law. The judgment characterizes the collective right extensively, being akin to other private landowners: the right holder is entitled to occupy the land, decide how it is used, enjoy its economic benefits, and exclude others. Government infringement of the right is set at a very high hurdle: only a compelling and substantial purpose that requires either (i) the consent of the Aboriginal title-holders; or (ii) proof the infringing development is justifiable in the broad public interest. The Court further cautions against assuming this latter option a loophole, noting that projects begun without consent on claimed aboriginal title lands may need to be cancelled if the title claims are eventually proven and the government is unable to show justified infringement. In the absence of a proven right, consultation and accommodation are mandated in accordance with the strength of the asserted claim.

ILO 169, UNDRIP, and Free Prior and Informed Consent. In Canada, indigenous groups have access to the courts, the society is open and stable, and the country has witnessed some progressive efforts to

[1] 'Indigenous Title' and 'Aboriginal Title' are used interchangeably in this paper.
[2] 2014 SCC 44. For an analysis of the decision, see online at:< http://www.oktlaw.com/blog/in-a-first-for-a-canadian-court-scc-recognizes-aboriginal-title-for-tsilhqotin-nation/>; and news video outlining ruling, online at: <https://www.youtube.com/watch?v=z4D85H7lQxE>

reconcile the interests of indigenous groups with non-indigenous Canadians. Yet a review of international legal instruments demonstrates that Canada is as much informed by international law as it is a leader in this area. Indeed, Canada's progression in the acknowledgement of indigenous rights over the last 40 years has, until recently, generally kept pace with the work of international normative actors, moving hand-in-hand from the acknowledgement of the legal existence of indigenous peoples[3], to soliciting their input in projects impacting them, to the modern era in which their consent is to be sought.

Two key statements of authority have marked this progression at the international level, being the International Labour Organization's Indigenous and Tribal People's Convention, 1989, Number 169 ("**ILO 169**") and the 2007 United Nations Declaration on the Rights of Indigenous People ("**UNDRIP**"). ILO 169 marked a key codification of involvement of indigenous peoples regarding projects impacting their traditional territory, importantly setting out a clear end goal for the process of engagement by requiring consultation between states and indigenous communities about proposed projects "with the objective of achieving agreement or consent."[4] In force since 1991, ILO 169 has been ratified by 22 countries largely in Central and South America,[5] but as the ILO notes, the "provisions of Convention No. 169 are compatible with the provisions of the United Nations Declaration on the Rights of Indigenous Peoples, and the adoption of the Declaration illustrates the broader acceptance of the principles of Convention No. 169 well beyond the number of ratifications."[6]

In 2007, the UN General Assembly adopted UNDRIP[7]. While the goals of ILO 169 are encompassed by it, UNDRIP pushed further. The preamble is unequivocal about the past injustices faced by indigenous

[3] In 1984, United Nations Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities Jose Ricardo Martinez Cobo defined Indigenous Peoples as "those which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, and consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." For an updated definition, see the fact sheet released by the United Nations Permanent Forum on Indigenous Issues, online at: <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>

[4] *International Labour Organization's Indigenous and Tribal People's Convention, 1989, Number 169*, Article 6, Section 2

[5] Being Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela online at: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO>

[6] International Labour Organization, "The basic principles of ILO Convention No. 169," online at: <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>

[7] *United Nations Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295*. Initially adopted by 143 countries, with 4 countries against being Australia, Canada, New Zealand, and United States. All 4 countries have now endorsed the declaration. 11 countries abstained, two of which have since endorsed the document. 34 countries, mainly comprising African nations, were absent.

communities, and bluntly acknowledges the current tension between these communities and development as currently conceived:

> *Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests*
>
> ...
>
> *Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs*

Beyond this, and seven years before the *T'silhqotin* decision, UNDRIP adopted the doctrine of Free, Prior, and Informed Consent ("**FPIC**"). Article 10 prohibits state-enforced relocation of indigenous communities without FPIC; Article 28 grants a right to meaningful compensation for lands used without FPIC; and Article 32 requires FPIC before a project affecting the indigenous lands or resources, *particularly* in connection with mineral, water, or other resources, can proceed. As Baker points out, this language marks a "sea change in the development discourse. Previously, the free, prior, and informed 'consultation' with the goal of consent standard had provided the baseline for states. UNDRIP raised the bar from consultation to consent."[8] In practice, the sea change that it marks is a departure from a process that had largely become about procedure. Documenting meetings, delivering project information, and exchanging viewpoints through designated consultation officers and specialized sub-committees *evidences* consultation rather than substantively achieves it. While ensuring all project information makes its way into an indigenous group's possession, in the absence of the group's capability to comprehend, sift through, or obtain expert independent advice on such information, the actual exercise in drawing out legitimate concerns of impacted groups and making the necessary design changes to the project is lost. UNDRIP therefore moves to correct a process that had taken on the stain of paternalism, reminiscent of the very colonial rationalizations that the adoption of a consultation process was designed to avoid. In doing so, UNDRIP demands that the benefits of development not simply be assumed, but rather be justifiable and clearly demonstrable.

World Bank and the formation of an Indigenous Peoples Advisory Council. This is a demand that necessarily falls onto the shoulders of the World Bank (or the "**Bank**") to implement. To its credit, while

[8] Shalanda H. Baker, "Why IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) To Indigenous Communities Affected by Development Projects", *Wisconsin International Law Journal*, Vol. 30, No. 3: *IFC Policy and Indigenous Communities*, p. 668 – 705 at 677.

the march towards the adoption of FPIC by the World Bank has trailed the International Labour Organization and the United Nations, there is little doubt the Bank is moving conclusively in this direction: World Bank Operational Policy 4.10 ("**OP 4.10**")[9] has, since 2005, set out a process requiring free, prior, and informed consultation, and the provision of broad support by impacted indigenous peoples for all projects that are proposed for bank financing. Meanwhile, the private arm of the Bank, the International Finance Corporation ("**IFC**"), revised its *Policy and Performance Standards on Social and Environmental Sustainability* in 2011 to require that IFC-financed projects obtain FPIC of impacted indigenous peoples.[10] The associated Equator Principles[11] governing IFC associated financial institutions (constituting an overwhelming majority of the lenders involved in project finance in developing countries) were brought into line with these revised IFC standards two years later.

The Bank's reforms continue. During the 12th session of the United Nations Permanent Forum on Indigenous Issues ("**UNPFII**"), in response to a concern UNPFII had expressed about whether the Bank's policies fully supported UNDRIP, ILO 169, and the doctrine of FPIC, the Bank announced that it would be engaging in a comprehensive dialogue directly with indigenous peoples to inform a review process for updating OP 4.10. The Bank also committed to appoint a working group to establish an Indigenous Peoples Advisory Council to help improve communication and coordination between the Bank and indigenous groups directly to guide implementation of its policies and strategies.

As Baker notes, there exists a tension between the moral aspirations embodied by UNDRIP and ILO 169 on one hand, and the mitigation of risk embodied in the policies of the Bank, the IFC, and associated lenders on the other.[12] Moral aspirations urge rights to be declared, respected, and enforced where infringed, whereas the imperative sought in project finance is to eliminate conditions of instability to maximize the likelihood of loan repayment. While finance policies mitigating impacts to indigenous rights are designed to address risk by minimizing dissent, where an assertion of indigenous rights will act to destabilize an already weakened state, these differing policy motivations may conflict. This tension is reflected in the most recent draft of the *World Bank Environmental and Social Policy and associated*

[9] World Bank, *Operational Manual, OP 4.10 – Indigenous Peoples*, online at : <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>
[10] For a cautionary note on FPIC's limitations, see *Supra* note 8 at pp.668 - 705
[11] The 3rd version of the Equator Principles, or EP III, were approved on 4 June 2013, and include, at present, 79 financial institutions in 32 countries reportedly covering over 70% of international project finance debt in emerging markets. For a summary of the changes made in the third version of the Equator Principles see: <http://blogs.law.harvard.edu/corpgov/2013/06/18/equator-principles-iii-enters-into-force-this-june/>
[12] *Supra* note 8 at: pp. 674 - 676

Environmental and Social Standards[13], and the proposed safeguards for indigenous peoples[14] contained therein. Released on 30 July, 2014 the draft is commendable in requiring that FPIC be obtained where a proposed project will (i) have impacts on land and natural resources subject to traditional ownership or under customary use or occupation; (ii) cause relocation of Indigenous Peoples from land and natural resources subject to traditional ownership or under customary occupation or use; or (iii) have significant impacts on Indigenous Peoples' cultural heritage.[15] However, the inclusion of an 'alternative approach' clause[16], allowing states to opt out of the safeguards (and therefore the FPIC requirement) should they be concerned that the process of identifying groups for purposes of applying the safeguards would create a serious risk of "exacerbating ethnic tensions or civil strife, or where the identification of culturally-distinct groups as envisioned in [the safeguards] is inconsistent with the provision of the national constitution" is highly problematic.

The UNPFII has commended the Bank on this unprecedented adoption of FPIC, but on the 'alternative approach', UNPFII is unequivocal: "For the World Bank to now adopt a policy that leaves the applicability of specific international protections for indigenous peoples to the discretion of individual states and other borrowers would undermine gains that have been made at the international level and also set a troubling precedent."[17] One might ask whether the Bank should even be considering a state opting for such an 'alternative approach'? UNPFII's answer is that providing an 'opt-out' provision is incompatible with the characteristics that define an indigenous group, namely, a unique attachment to the land, and a particular vulnerability based on this unique attachment. Certainly with this conception adopted, UNPFII's answer is a compelling one regardless of the tensions faced by the Bank.

B. ENTRENCHMENT: DESTRUCTIVE ENVIRONMENT PERPETUATED BY HIGH-STAKES CONFLICT

The challenge, of course, is that the acknowledgment of indigenous rights amidst ongoing or proposed development brings a question to the fore that many would prefer left unasked, namely: *what authority does the state have to authorize development to proceed within its borders?* Absent the guidance of a judgment like *T'silhqotin*, an autonomous state views the answer to be self-evident, with varying degrees

[13] World Bank, *Environmental and Social Framework: Setting Standards for Sustainable Development, Draft for Consultation,* July 30, 2014. Online at: <http://www.worldbank.org/content/dam/Worldbank/Event/ECA/central-asia/environmental-and-social-standard-framework-en.pdf>
[14] *Ibid*. at p. 74, Environmental and Social Standard 7. Indigenous Peoples ("**ESS7**")
[15] *Ibid,* ESS7 s.19 – 22, at p. 78, 79 – Circumstances Requiring Free, Prior, and Informed Consent (FPIC)
[16] *Ibid*., s.9 at p. 76 – Scope of Application
[17] Dalee S. Dorough, Chairperson, United Nations Permanent Forum on Indigenous Issues, *Letter to Dr. Jim Yong Kim, President of the World Bank Group*, 6 Feb 2015, online at: <http://www.un.org/esa/socdev/unpfii/documents/News/2015/PFII-letter-to%20the-WB-6-Feb-2015.pdf>

of suppression accompanying any doubt. To indigenous groups and their supporters, meanwhile, the exercise of unilateral state authority without due consideration of their particular vulnerability is a deeply offensive affront to a uniquely impacted way of life, dignity, and right to self determination. Left unaddressed, assertions of self-determination may be implicated both as a justification for state violence and the suppression of unrest, as well as a motivation for domestic insurgency.[18]

This question won't simply go away. As the idea of indigenous rights has become more defined, and the use of technology for establishing their existence becomes more widespread, rights assertion will continue to increase. What was once ignored, suppressed, or otherwise patronizingly dismissed with vague and unenforceable expressions of good intention, the assertion of indigenous rights with the theoretical backing of domestic and international law has in many cases become a credible challenge to the legitimacy of state authorizations, orders, certificates, and permits allowing development to proceed.[19] Beyond history books and court pleadings, assertion can now take many forms: audio and video recordings of elders giving oral histories; go-pro videos evidencing the ongoing practice of traditional land use; maps generated by GIS with different layers of traditional use information mapped in real time over particular parcels of land. The possibilities increase alongside technological innovation. What is seen with increasing frequency is the establishment of a community-recognized tenure, well organized and legitimately asserted in a multitude of ways, consistently in formats that utilize the internet for wide dissemination. These assertions become particularly strong in otherwise remote areas that lack a large degree of state data.

As this re-balancing in assertion occurs, ultimately the potential for worsening conflict is underpinned by the length of time it takes for a claim to be resolved. Notwithstanding the technological progress in instruments aiding assertion, the heart of the answer to the question asked above lies in the process of proving an indigenous entitlement and having it subsequently recognized by the state, a process which remains sensitive and extremely lengthy. Given the implications in the award of indigenous title, especially in resource rich areas, legitimate assertions undoubtedly attract the full weight of the state's power to rebut them. Depending on the extent that the rule of law is established, this response ranges from an aggressive legal defense and political condemnation to a full-blown violent suppression. For example, in Canada, pursuing aboriginal title in the courts is a decades-long undertaking, costing at a minimum hundreds of thousands of dollars. A basis for the claim must be established by a plaintiff, pre-

[18] Take for example, the unrest between state police and ethnic Malays in Thailand's deep south, where a declaration of independence timed to coincide with a 'yes' vote in the Scottish Referendum of 2014 was made: <https://www.youtube.com/watch?v=xaiK1v0Gl80>

[19] See, for example: < http://globalnews.ca/news/1399967/vowing-to-fight-back-groups-opposed-to-northern-gateway-pipeline-approval-speak-out/>; See also, <https://www.facebook.com/video.php?v=475062562635256&pnref=story>

litigation research of an opaque historical record is conducted, consensus of a community to pursue the action is reached, pleadings are filed, interlocutory motions follow, document discovery and witness examinations are undertaken, the trial proceeds, a judgment is released, and the appeal process is exhausted. Political negotiations are at least as long. As a result, the time between initial assertion and final award is arduously lengthy. Meanwhile, this process is enviable compared with the quest for self-determination of the indigenous people of the Indonesian provinces of Papua and West Papua. The desire for a legitimate opportunity for Papuans to decide how they themselves will be governed, existing at least as long as the state organized and widely criticized "Act of Free Choice" in 1969, has been maintained for the last 40 years and has a strong legal foundation.[20] But in this time, at least 100,000 Papuans have lost their lives[21]. Recent incidents close to Grasberg – the world's biggest copper and gold mine – include mass arrests and alleged torture. Political expressions supporting Papuan self-determination, including the raising of the 'Morning Star' West Papuan flag of independence, can lead to jail terms of up to 15 years.[22]

In the great gulf of uncertainty between the time a right is asserted and a final legitimate determination is made, each party is motivated to act unequivocally in support of its position. As perspectives become entrenched and the focus on resolution is distracted by the immediate pressure of realizing the benefits of development, the seeds of irreconcilability are easily planted. Notwithstanding a judicial system that has been focused on steering the relationship between settler Canadians and the country's indigenous people towards reconciliation, and notwithstanding the recent conclusion of the Canadian Truth and Reconciliation Commission and its legacy to encourage a new dawn for the dignity, health, and prosperity of indigenous people within Canada, an alarming rhetoric has emerged in the Canadian government's current position towards those indigenous groups that peacefully stand in opposition to oil pipeline projects. Indeed:

> *"The Harper government has labeled opponents of the Northern Gateway Pipeline as 'extremists' and tried to use 'anti-terrorist' laws to go after them… Finance Minister Joe Oliver has suggested that pipeline opponents have a 'radical ideological agenda' and are out to 'hijack' Canada's economy. The government has used CSIS to spy on people involved in the indigenous rights movement, including vast spying on… meetings of indigenous activists. The government has spied on people trying to voice their concerns about fossil fuel development before the ostensibly neutral National Energy Board. The government has deemed anti-fracking protesters in Elsipogtog to be security threats and sent RCMP snipers to*

[20] See Melinda Janki, "West Papua and the Right to Self Determination under International Law", *West Indian Law Journal*, vol. 35, No. 1, pp. 69 – 110, May 2010
[21] *Ibid*. at p. 72, and <http://www.unpo.org/content/view/435/236/> cited therein.
[22] Survival International, "Papuans flee brutal military crackdown," News, 15 January 2015, online at: <http://www.survivalinternational.org/news/10639>

> *control the opposition there. To head the watchdog agency overseeing CSIS spying, the government… appointed Chuck Strahl who resigned after it was revealed that he was acting as a lobbyist for the Northern Gateway pipeline."*[23]

In the face of this alarming treatment, and understanding the threshold of consent in the midst of a proven right, the response by Canadian indigenous peoples to unilateral state authorizations permitting development to proceed is increasingly in kind: protests, litigation, peaceful blockades of on-the-ground operations and a resolute opposition to projects that have not acknowledged and worked to mitigate the impact on indigenous livelihoods. Countries with a graver human rights record and a weakened grip on claimed indigenous territories may see their authority over disputed resources dissolve completely, as has been the case in Myanmar/Burma with the Kachin people's control over first the Hpakant jade mining area in eastern Kachin State,[24] followed by timber concessions issued directly by Kachin organizations to Chinese logging firms, and most recently a tax levied by Kachin organizations on timber moving from the country's lowlands through claimed territory on its way to China.[25] Notwithstanding a proponent's state-sanctioned authority to develop a project, the commercial operation is unable to proceed without acknowledgment of the indigenous entitlement.

Canada, while far from being able to claim an unblemished record, and notwithstanding the alarming rhetoric of its resource focused federal government, has thus far avoided large scale violence associated with resource projects running up against the declaration to territory made by indigenous groups.[26] This is not the case elsewhere. Rather, the particular vulnerability of indigenous groups arising from their unique attachment to the land is evident in the sheer number of cases of mass murder, slavery, abduction, torture and mutilation, rape, displacement and the destruction of whole villages and livelihoods that, notwithstanding UNDRIP, continue to persist.[27] This environment therefore demands that *the approach* taken towards development in indigenous claimed territory be a matter of alignment between international

[23] Michael McClurg and Senwung Luk, "Bill C-51 Could be a Blank Cheque to the Government to Stifle Indigenous Dissent," blog, 10 Feb 2015, online at: <http://www.oktlaw.com/blog/bill-c-51-could-be-a-blank-cheque-to-the-government-to-stifle-indigenous-dissent/>

[24] Business Desk, Eleven Media Group, "Excessive Jade Mining Threatens Myanmar Town," *Asia News Network*, 8 Jul 2013, online at: <http://www.asianewsnet.net/Excessive-jade-mining-threatens-Myanmar-town-49996.html>

[25] Hereward Holland, "Myanmar's Pending Ceasefire Jeopardized by Skirmishes Over Illegal Logging," *National Geographic News*, 20 May 2014, online at: <http://news.nationalgeographic.com/news/2014/05/140520-myanmar-kachin-independence-army-illegal-logging-teak-china-world/>

[26] Canadian mining companies operating internationally, however, do not share this unblemished reputation. Indigenous Guatemalans have been successful in bringing Hudbay Minerals, Inc. before an Ontario court for the murder, rape, and attacks allegedly committed against indigenous Guatemalans by security personnel working for Hudbay's subsidiary, Compania Guatemalteca de Niquel. For more information, on this ongoing legal case see: <http://upsidedownworld.org/main/guatemala-archives-33/4501-the-end-of-impunity-indigenous-guatemalans-bring-canadian-mining-company-to-court>

[27] See, for example Survival International, online at: <http://www.survivalinternational.org/>. This London, UK, based NGO maintains a map of some of the world's threatened peoples, and links to reporting of ongoing human rights abuses arising from the interaction of state sanctioned resource proponents and indigenous claimed land.

normative actors, and be matter of urgent focus that seeks to resolve conflict notwithstanding that in some cases the ultimate claim-resolution remains uncertain.

C. PROCEEDING AMIDST UNCERTAINTY

A powerful theme characterizing Kofi Annan's tenure as secretary-general of the UN from 1997 – 2006, and the Nobel Peace Prize he shared with the UN in 2001, was the shift in focus from state to individual. This approach he rationalized in a number of ways: referencing the opening text of the UN Charter "We the peoples"; as way to re-invigorate the UN's legitimacy in a post-Cold War world; and as a reminder of the need to balance the unprecedented interconnectivity of international business, ensuring responsibility and accountability for its impacts accompany the opportunities created by its trans-boundary operation.[28] In his acceptance speech before the Nobel committee, he said:

> *In this new century, we must start from the understanding that peace belongs not only to states or peoples, but to each and every member of those communities. The sovereignty of States must no longer be used as a shield for gross violations of human rights. Peace must be made real and tangible in the daily existence of every individual in need. Peace must be sought, above all, because it is the condition for every member of the human family to live a life of dignity and security.*[29]

This theme serves both as a strong response against the 'alternative approach' proposed by the Bank, and the building blocks for the approach to be taken in reconciling the interests of indigenous people with natural resource development. Elevating the state over the individual will set the parties involved on a collision course that consistently leads to the untenable environments outlined above.

Yet this exhortation means little without a plan for its practical implementation, and as noted above, it is the practical implementation the World Bank and IFC are presently struggling with. How then to proceed? In its adoption of FPIC, the IFC has been unprepared to define a situation in which an agreement has *not* been reached, muddling the concept of consent. Some instruction can nevertheless be gleaned from reviewing the factors evidencing that it has. The IFC has laid out a guidance note that details the hallmarks of an agreement demonstrating that consent has been obtained, namely:

> *(i) agreed engagement and consultation process; (ii) environmental, social and cultural impact management (including land and resource management); (iii) compensation and disbursement framework or arrangements; (iv) employment and contracting opportunities; (v) governance arrangements; (vi) other commitments such as those pertaining to continued access to lands,*

[28] Kofi Annan with Nader Mousavizadeh, *Interventions: A Life in War and Peace*, Allen Lane: 2012 (London), at pp. 12-13, 219

[29] Kofi Annan, "The Nobel Peace Prize 2001 – Presentation Speech," *Nobelprize.org* Nobel Media AB 2014. Web. 25 Feb 2015. <http://www.nobelprize.org/nobel_prizes/peace/laureates/2001/presentation-speech.html>

contribution to development, etc.; and (vii) agreed implementation/delivery mechanisms to meet each party's commitments. The agreement between parties should include requirements to develop time-bound implementation plans such as a Community Development Plan or an [Indigenous Peoples Plan]. Examples of agreements include a memorandum of understanding, a letter of intent, and a joint statement of principles.[30]

This framework contains many of the elements set out in the IBA Community Toolkit,[31] a free resource targeting indigenous groups in Canada with the goal of assisting them to reach meaningful and comprehensive impact benefit agreements ("**IBA**") with natural resource proponents in their territories. As a contractual agreement detailing a proponent's social and environmental commitments to an indigenous group, an IBA is a legally enforceable instrument that can be relied on to ensure proponents make good on their word. They are welcomed by the project finance community as they serve as a marker of decreased risk – the likelihood of litigation or civil unrest against a project is lessened where there is an exchange of meaningful benefits, commitments, and compensation. And they have the added benefit of side-stepping a relationship of mistrust between indigenous groups and state governments, making them effective peacemaking tools during the claim assertion/resolution period of uncertainty.

Yet for the IFC consent agreements and related IBAs to achieve these aspirations, a few hallmarks need to be present. Firstly, they must be built upon a foundation of respect. An agreement characterized by provisions that simply uphold a historical power imbalance, allowing a proponent to proceed amidst vague and unenforceable environmental and social commitments creates a damage to trust that cannot be undone. If consent cannot be negatively defined, then the agreement must be clear on its face that it is an indisputable force of positive change from the indigenous group's perspective. Resources for skilled negotiators, technical capability to navigate complex project documents, and resources like those suggested in the IBA toolkit should be minimum standards for reaching agreement based on a foundation of respect.

Equally important is the ability to enforce the provisions of the agreement. In countries where the rule-of-law governs, this is less of a concern. But in countries with courts unwilling or unable to enforce the agreement's obligations, the agreement must be more than just a pre-requisite to obtain financing, quickly forgotten thereafter. Instead, at a minimum, provisions of cross default arising from the order of an impartial arbitrator must make their way into the project financing documents or other key project documents entered between the proponent and relevant third parties (i.e. the Bank, IFC, or associated

[30]International Finance Corporation, *IFC Guidance Note 7: Indigenous Peoples*, January 1, 2012 at p. 12 - GN38, online at: <http://www.ifc.org/wps/wcm/connect/50eed180498009f9a89bfa336b93d75f/Updated_GN7-2012.pdf?MOD=AJPERES>

[31] Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit*, The Gordon Foundation, 1 June 2011, online at: <http://gordonfoundation.ca/north/iba-community-toolkit>

lenders) to ensure a proponent remains motivated to fulfill its obligations contained in the consent agreement or IBA.

Additionally, a meaningful interest in the project itself should be something that is available to the indigenous group, if desired. As important as an appreciation for the impacted indigenous community is for a proponent, only an indigenous group's status as partial owner will allow it to cross the chasm of cultural difference that exists between themselves and large resource developers, and truly appreciate the environment such developers operate in. When the resource project has run its life, and the company departs, it will be the indigenous group that remains in the territory, its livelihood altered for the long term, perhaps forever. Absent an ownership role, even in the midst of significant economic benefits derived from IFC consent agreements or related IBAs, indigenous parties stand to remain on the outside looking in. Whether this is the case or not should be their choice.

D. CASE STUDY OF THE *GREEN ENERGY ACT,* FIT PROGRAM, AND McLEAN'S MOUNTAIN WIND PROJECT

In 2009, the government of the Canadian province of Ontario introduced the *Green Energy Act*[32], legislation designed to phase out coal production and rapidly introduce a renewable energy (wind, solar, biomass, hydro) economy to the Canadian province. Fixed price contracts for large renewable projects (greater than 500kW) were issued to eligible proponents by way of a Feed-in-Tariff Program ("**FIT Program**") to develop certainty regarding the return on investment. Policies proactively incentivizing indigenous ownership were implemented to minimize project interference. Side-stepping the question of veto, the Province of Ontario set out to implement policies that would facilitate consent from indigenous groups by way of their meaningful participation in these projects.

Rather than mandating agreement, the province instead established a regime to assist indigenous communities to become part-owners alongside project proponents. This was accomplished through a number of policy instruments. The province created an Aboriginal Renewable Energy Fund ("**AREF**") to allow communities to explore potential partnerships related to proposed projects in their territories, engage in pre-feasibility studies, and contribute partnership negotiations with a view to reaching agreement.[33] Priority points were awarded to project applicants seeking to develop a project with an indigenous partner, thereby increasing the likelihood of a successful application. Over and above this, an increased electricity purchase price called an 'Aboriginal Price Adder', indexed to proportionate

[32] *Green Energy Act, 2009,* SO 2009, c12, Sch. A
[33] For more information on the current iteration of Aboriginal Renewable Energy Fund, see online at: <http://www.aboriginalenergy.ca/aboriginal-renewable-energy-fund>

indigenous project ownership, was permitted to be charged by successful applicants, thereby increasing the amount of revenue generated by the project.

These measures were seen as welcome in a jurisdiction where (i) consent is not recognized until title is established at law; and (ii) the government's obligation to consult with indigenous groups are generally offloaded onto a project proponent. And certainly, in the field of renewable energy, the willingness of communities to engage in project ownership is already heightened as there is some alignment between this form of energy generation and many indigenous groups' values of sustainability, environmental protection, and care for future generations.[34] On their own however, these incentives would likely be insufficient to create an environment conducive to achieving consent. Certainly a sticking point in the proponent/indigenous group negotiations would be how vulnerable communities with poor to non-existent credit histories would be capable of obtaining the funds needed to buy a meaningful share of a proposed project at an interest rate that would allow it to meaningfully share in the economic benefits generated by the project.

A foundational pillar of the FIT Program's indigenous incentives, therefore, is the Aboriginal Loan Guarantee Program ("**ALGP**")[35]. With this program, the province provides a government guarantee to assist credit-challenged indigenous communities to secure the financing they need to purchase an ownership stake in renewable energy and transmission projects in the province. A frequent tool used by the World Bank to support government borrowers[36], a guarantee is a form of security that accompanies a financial transaction where a third party agrees to make loan payments if a borrower cannot. It is attractive to a lender because it minimizes risk – the likelihood of being repaid is assured. This decrease in risk allows a lender to loan money at a lower interest rate, which increases returns to the borrower. To date, the Ontario Financing Authority reports that the ALGP has leveraged $130 million in approved loan guarantees supporting the investments of eight communities, representing over 10,000 indigenous people, in four projects that have invested over $2.8 billion in the province. The 2014 Ontario Budget announced the expansion of the ALGP envelope to a total of $650 million.[37]

---

[34] See, for example, Chris Henderson, *Aboriginal Power: Clean Energy & The Future of Canada's First Peoples* John Denison Publishing 2014, online at:< https://aboriginalpower.ca/index.php?lang=en>

[35] Ontario Financing Authority, *Aboriginal Loan Guarantee Program: Home Page*, Queen's Printer for Ontario, 2014, online at: <http://www.ofina.on.ca/algp/>

[36] See also, the Multilateral Investment Guarantee Agency ("MIGA"), an arm of the World Bank that promotes foreign direct investment by providing political risk insurance and credit enhancement to investors and lenders against losses caused by noncommercial risks online at: <http://www.miga.org/whoweare/index.cfm>. MIGA is a member of the Work Bank Group, and states that its mission is "to promote foreign direct investment into developing countries to help support economic growth, reduce poverty, and improve people's lives."

[37] *Supra* note 35.

Through this regime, in 2010 Toronto based Northland Power Inc. ("**Northland**") approached the six aboriginal communities living on Manitoulin Island, in central Ontario, a group known as the United Chiefs and Councils of Mnidoo Mnising ("**UCCMM**"), to build a 60MW on-shore wind farm.[38] UCCMM has long been an active group in asserting rights to its traditional territory. Local newspapers reported that UCCMM were initially opposed to wind projects within their traditional territory "specifically to voice their displeasure at the lack of progress on other agreements they had with the Ontario Government."[39] On March 28, 2013, UCCMM filed an aboriginal title claim to the waterbeds under Lake Huron and Georgian Bay around Manitoulin Island and title to the islands themselves.[40] This significant step preceded the release of the *T'silhqotin Nation* decision by the Supreme Court. Certainly, this was an environment in which all of the factors contributing to project delay and protracted negotiations about the extent of consultation were potentially present.

However, despite an ongoing aboriginal title claim and historical mistrust of the government, UCCMM and Northland formed a partnership to develop the project jointly, each holding a 50% ownership stake. The Parties took full advantage of the provincial policy tools available to them.[41] They participated in discussions and contributed to the final determination regarding the siting of the wind turbines.[42] Community members were employed by the Project, and a community owned business provided cement to the project. Financial close for the senior construction financing was achieved in October, 2013 and the project entered commercial operation in May of 2014.[43]

What was achieved by this government policy was an interim measure between claim assertion and resolution allowing for the practical implementation of the standard of consent as set out in UNDRIP. Here, the government took responsibility for creating conditions conducive to consent, with the result being a regulatory environment in which proponents and indigenous groups were keen to participate. Certainly alternative models have seen the proponent largely taking this responsibility, however the strength of the *Green Energy Act* and the FIT Program is the government's continuing stake, by way of its policy tools and the ALGP, in the relationship itself, sowing the seeds of reconciliation. What is also

---

[38] Association of Power Producers of Ontario, "Aboriginal power Projects – A progress report", *APPrO Magazine – IPPSO FACTO*, Nov 2011, online at: <http://magazine.appro.org/index.php?option=com_content&task=view&id=1704&Itemid=44>

[39] Tony Kryzanowski, "Island Wind Power: Canada's Manitoulin Island – the largest freshwater island in the world – is now home to a 60-MW wind project that is partly owned by First Nation groups," *enerG Alternative Sources Magazine*, September/October 2014, online at: <http://www.altenerg.com/back_issues/sepoct2014-story3.php>

[40] For a notice detailing the claim, see online at: <http://www.uccmm.ca/not5%ice-from-uccmm.html#.VN26duaUeJs>

[41] *Supra* note 38.

[42] *Supra* note 39

[43] For pictures and video of the Project, see the GE promotional video online at: <https://www.youtube.com/watch?v=46Pb_tU1638>

clear from this example is the active, participatory, nature of consent. Whereas discussions regarding consultation characteristically revert to competing assessments of its adequacy, discussions that prolong rather than avoid conflict, consent is objectively far easier to assess. In turn, in an assessment regarding the mitigation of risk, a demonstration that consent has been achieved is accordingly of much greater value than a determination that consultation has been adequate.

Accordingly, if meaningful consent is the standard sought, the approach to achieving it must not be defined by a take-it or leave-it burden resting on the shoulders of an indigenous group. Such an approach will do nothing to minimize uncertainty, and more likely contribute to the entrenchment of positions and escalation of conflict outlined above. Rather, developers, states seeking to encourage development, and, where involved, the various arms of the Bank and associated lenders governed by its principles, need to have a vested and lasting interest in facilitating consent that is free, prior, and informed, with an urgent focus placed on fostering an environment conducive to it. In doing so, this will require that the individuals uniquely impacted by the proposed development come to the fore, requiring that the benefits of development to such individuals be both justifiable and clearly demonstrable, and leaving behind an outdated state-focused approach to development that is unable to implement the progress made in international and domestic indigenous rights law. This does not mean that consent will always be achieved. But when, from the perspective of the individuals uniquely impacted by the development, such an environment has been cultivated, there will be little uncertainty surrounding the consent that is provided.

CONCLUSION

A worldwide, conservative estimate of the number of indigenous people places the figure at 370 million, which constitutes 5% of the global population, and more importantly, 15% of the world's poor and about one third of the 900 million people classed as extremely poor.[44] While an official definition of "indigenous" depends on self-identification, and as such has not been adopted by any UN-system body, there is broad consensus among international normative actors of their status as a group that is particularly vulnerable if their land and resources are transformed, encroached upon, or significantly degraded. As awareness and acknowledgement of this vulnerability has increased, the progress in domestic and international law has unmistakably moved in the direction of wider recognition and protection of indigenous peoples and their livelihoods.

[44] Rural Poverty Portal, "Statistics and key facts about indigenous peoples", *International Fund for Agricultural Development*, online at: <http://www.ruralpovertyportal.org/topic/statistics/tags/indigenous_peoples>

This paper has sought to provide strategies for how this increased recognition and protection can be put into practice. The reality is that many indigenous groups remain involved in dire struggles to protect their territorial claims to land and their environments. This effort has been aided in some cases by advancements in technology that increase the manner and scale in which rights are asserted; however an increase in assertion has also meant a higher incidence of direct conflict with developers and state suppression. As claims resolution drags on, the likelihood of these incidences increases, mandating an urgent examination of solutions. In the context of Canada's stability, and in comparing the recent positional nature of its federal government with the broader reconciliatory initiatives undertaken by some of its legal and provincial institutions, the country provides a useful case study in which best practices may be developed and shared. While acknowledging that any success will always involve uniquely local ingredients, new, inclusive approaches to development in the Canadian province of Ontario provide a contemporary backdrop for determining the kinds of initiatives that may ultimately prove successful.