

The Politics of Consent

Indigenous consent is a right. Will the GreeNDP honour it?

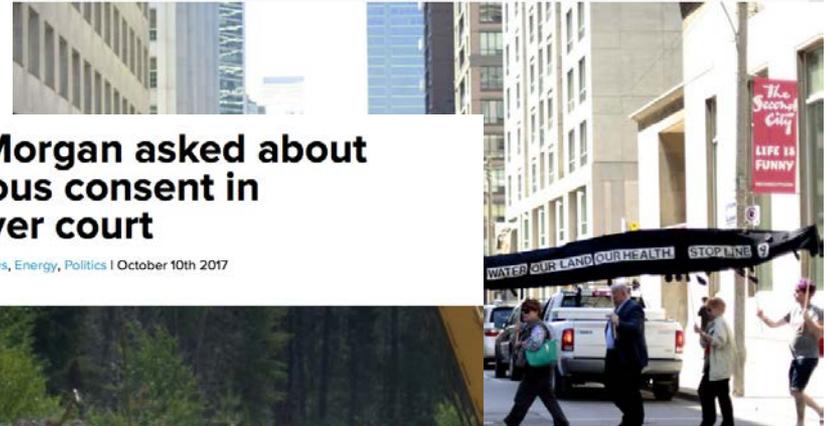
By Jason Tockman in [Opinion](#), [Energy](#), [Politics](#) | June 26th 2017

Opinion
- Commentary

THE STAR

Supreme Court makes it clear. Indigenous peoples can't veto pipelines: Walkom

The government has to consult First Nations over resource projects. But in the end it can still override them.



Deals are not consent on pipeline says First Nations amid split community



LOCAL

by LASIA KRETZEL AND KURTIS DOERING
Posted Apr 16, 2018 5:47 pm PDT Last Updated Apr 17, 2018 at 6:59 am PDT

Kinder Morgan asked about Indigenous consent in Vancouver court

By Dylan Walsman in [News](#), [Energy](#), [Politics](#) | October 10th 2017



A Contested Norm

“While FPIC is everywhere discussed, (...) it is practiced virtually nowhere” (Szablowsky (2010))

“No single internationally agreed definition of FPIC and no one-size fits all mechanism for its implementation” (Fontana and Grugel 2016)

The Trudeau government signs on to give Aboriginals veto rights nobody else has

Harry Sicain and Jim Baillie: If adopted by Parliament, UNDRIP would dismantle our courts' carefully constructed approach to reconciliation



Norm appropriation

- In light of ambiguity actors seek to “make sense” of the norm
 - Unequal – some actors have more resources / authority than others
 - Multiple sites - international, national, local, courts, parliaments, etc.
 - Historically and institutionally contingent
- Many mechanisms / strategies
 - Policy engagement, negotiation, legal challenges, etc.
 - Protest, refusal, etc.
 - Performative politics



Performing FPIC:

- Create own mechanism for expressing consent / lack thereof
 - Process itself can vary
- Why it matters?
 - More than symbolic
 - Performative actions can fill an institutional void
 - Produce meaning – ex. FPIC as capacity to decide (self-determination)
 - Force other actors to take position – engage or ignore and risk conflict



Context: Canada

- Historical legacy
 - Indigenous consent as foundation for legitimacy of Crown sovereignty – treaties
- Duty to consult, accommodate and in some circumstances obtain consent
 - Objective is to “reconcile” Crown sovereignty with Indigenous pre-existing rights/presence
 - Crown still defines process and ultimately decides
 - Nature/scope of duty is circumstantial
 - Creates a lot of uncertainties in practice



Indigenous Appropriation: Squamish

(Skwxwú7mesh Úxwumixw)

- *Squamish Nation Process*: develop own IA for LNG terminal: cumulative impacts on indigenous rights, TK, open-ended community process
- Explicitly link consent and SD: *“The Squamish Process was set in motion to ensure our Aboriginal rights and title interests are protected... We won’t allow outsiders, whether they support the proposal or oppose it, to decide for us. It is our decision to make”*
- Key to success: proponent’s collaboration because of risk (unsettled title)
 - Funding for the process
 - Binding agreement to respect the outcome
- Have said yes, conditional to 20 requirements – all endorsed by proponent
- No unanimity – but legitimacy of process accepted



Indigenous Appropriation: JB Cree (Eeyou Istchee)

- JBNQA: no title but participatory rights through co-management IA boards
- Faced with expansion of mining on their traditional territory – limits of JBNQA
- *Cree Mining Policy*: Cree are “not in principle opposed to mining development on their traditional territory ... but ... no mining development will occur within Eeyou Istchee unless there are agreements with our communities.”
- Different strategy of appropriation : set process / conditions for negotiating IBAs
- Not a binding policy – key is to force other actors to react
- Examples : Eleonore gold mine (yes); Matoush uranium mine (no)



Conclusions

- Performative strategies differ, but same goal : establish substantive and procedural approach to FPIC through practice – common meaning: about authority to decide
- At same time, relational : goal is to communicate consent (or not) to others and have them recognize legitimacy of that decision
- Timing and context are key – political and legal uncertainties create a critical juncture - IP can fill the institutional void

Limits

- 2 examples of “success” ... many failures – why?
- Not accessible to all (resources, expertise)
- Diversity of approaches
- More effective when combined with other appropriation strategies?
- Does not remove concerns over epistemic / idiomatic subjugation

