

The role of UNDRIP in Canada's federal EA process

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The Government of Canada has fully supported the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), with the goal of renewing its relationship with Indigenous people in Canada and moving towards reconciliation¹. In Canada, there also exists a constitutional duty to consult and, where appropriate, accommodate Indigenous groups whenever the Crown contemplates decisions that may adversely impact their rights. The rights articulated in UNDRIP are largely consistent with this constitutional protection, and as a starting point, position Canada well in meeting many of the principles contained within the Declaration. However there continue to be opportunities within the legal and policy frameworks where UNDRIP can be further embraced, in particular through the continual improvement of environmental assessment processes. Drawing from a combination of observation and practitioner experience, but not academic literature, this paper identifies opportunities and challenges with implementing UNDRIP specifically with respect to the consideration of Indigenous knowledge in environmental assessment, and how this knowledge supports decisions regarding major resource projects.

Related to Canada's commitments towards UNDRIP, a review of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) is underway. The authors of this paper acknowledge legislative and policy changes are being considered by a panel of independent reviewers that may result in improvements to how Indigenous peoples' voices can be better factored into the environmental assessment process. The focus of this paper is to highlight aspects of the existing federal environmental assessment process under the CEAA 2012, and their relationship with UNDRIP.

Context

In Canada, consultation is integrated in the environmental assessments of proposed major resource projects with the goal that Indigenous groups are adequately consulted and accommodated when the Crown makes a decision that may adversely impact their rights, such as a decision on the acceptability of the proposed project and subsequent regulatory permitting. For more than a decade, the integration of Indigenous consultation has been a policy objective of the federal environmental assessment process. This model is also used to fulfill several objectives as it relates to UNDRIP.

Throughout the environmental assessment process, opportunities are available for Indigenous groups to participate, provide their views on potential environmental effects of the proposed projects, choose whether to share their Indigenous knowledge that can inform both a decision regarding the significance of adverse environmental effects, and an assessment of the severity of impacts to rights. CEAA 2012 has sections that address how projects can affect Indigenous people's relationship with their landscapes and resources. The information collected and analyzed for the purposes of CEAA 2012 can go a long way

¹ <http://eareview-examenec.ca/panels-terms-of-reference/>

towards informing the federal government's duty to consult about potential impacts from a project on Aboriginal rights.

The federal Aboriginal Consultation and Accommodation Guidelines provide direction to federal government officials when assessing the legal requirements for Aboriginal consultation and accommodation. How the federal government works with Indigenous groups within the environmental assessment process, and how consultation is integrated in an environmental assessment, is however somewhat flexible and adaptive on a project-by-project basis. As the Government of Canada develops policies around the implementation of UNDRIP, and reviews federal environmental assessment processes, both opportunities and challenges associated with integrating UNDRIP into aspects of the federal environmental assessment process will emerge.

Indigenous Knowledge

Indigenous knowledge occupies an important role in environmental assessment. It can provide important baseline information, and help inform the assessment of environmental effects and the development of potential mitigation measures. Overall the integration of traditional knowledge can result in a more informed decision making process. However, consultation practitioners struggle with how to work within our existing framework to create a more respectful and inclusive process that allows for the better incorporation and realization of the potential power of this knowledge.

The biggest challenge that practitioners face relates to the lack of confidence that Indigenous groups have in the current federal environmental assessment regime. Indigenous groups are often concerned that the information they provide will not be appropriately respected, understood, incorporated and protected. As such, this situation creates further challenges associated with receiving and incorporating Indigenous knowledge, and resolving conflicts when Indigenous and western knowledge systems diverge – all within legislated timelines.

Existing tools can be built upon to include strengthened provisions for independent review panels, and possibly other entities, to better safeguard Indigenous knowledge. Indigenous groups, federal and provincial governments, and proponents can work in partnership through the environmental assessment process with agreed upon goals such as: increasing mutual understanding of issues, trying to resolve conflicts, improving an understanding of how projects could interact with their traditional landscapes and resources, and potentially impact their rights. Further, via enforceable conditions, the Minister of Environment and Climate Change Canada can issue a decision statement that requires proponents to undertake activities that would ensure the involvement of Indigenous groups in monitoring initiatives post environmental assessment. This can be seen as a more appropriate use of and respect for Indigenous knowledge, provide for the longer term involvement of Indigenous groups in decision-making with respect to their landscapes and resources, and better uphold the principles of UNDRIP.

Critiques

Some of the main criticisms heard from Indigenous people that relate to the limitations of environmental assessment and its application in a UNDRIP context include (but are not limited to):

- Indigenous governance structures, laws and customs can be eroded through the federal environmental assessment process;
- environmental assessments are often done through a Western science lens that does not adequately make room for, and sometimes devalues, Indigenous knowledge and worldviews;
- cultural, spiritual, and other intangible impacts are not acknowledged or appropriately addressed through the current process, which can result in inaccurate assessments;
- information pertaining to environmental effects is contained in siloes, and there is little ability to reflect a holistic understanding of rights and land uses as they relate to ecosystems and affected landscapes;
- decisions appear to be made without adequately considering future generations, including cumulative effects which are not adequately addressed in the current process; and
- tight timelines and inadequate funding restrict the ability of Indigenous people to participate meaningfully in the environmental assessment and decision making process.

Moving forward

Participation of Indigenous groups has greatly improved the quality and rigor of federal environmental assessments in Canada; it is anticipated that in the future, environmental assessment will continue to evolve and improve. It is understood that any options for further embracing UNDRIP in the environmental assessment process will require meaningful and substantive discussions with Indigenous groups about how the federal government can adjust its policy framework and associated processes regarding consultation.

From a practitioner's perspective, areas where further consideration can be given to better integrating UNDRIP in the operationalization of federal environmental assessment processes, and potentially address some of the criticism, might include:

- developing better tools that integrate Indigenous knowledge into environmental assessment processes, including the identification of potential environmental effects, establishing baseline data, assessment of environmental effects and associated mitigation measures;
- exploring the application of provisions within modern treaties or self-government and First Nations Land Management agreements that relate to environmental assessment,
- developing tripartite collaboration agreements between Indigenous groups, proponents and government, to improve partnerships in undertaking environmental assessments;
- developing policy in partnership with Indigenous groups on matters of concern within the environmental assessment process; and
- improving mechanisms for inter-governmental collaborations between federal, provincial, and/or territorial governments to address issues that implicate multiple jurisdictions and require collaborative decisions on accommodation.