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UNDERSTANDING CONSULTATION AND ENGAGEMENT WITH INDIGENOUS PEOPLES IN RESOURCE DEVELOPMENT

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UNDERSTANDING CONSULTATION AND ENGAGEMENT WITH INDIGENOUS PEOPLES IN RESOURCE DEVELOPMENT*†

Brendan Boyd and Sophie Lorefice

SUMMARY

The Federal Court of Appeal overturning approval for the Trans Mountain pipeline expansion in 2018 arguably signaled a new level in the difficult struggle between Canada's resource development and the Crown's duty to consult Indigenous Peoples directly affected by a development project. It may not be the last case where the federal government finds itself unable to adequately meet both of these goals. This is, at least in part, because Indigenous Peoples have a different understanding of consultation compared to industry and government. Indeed, all three groups frame these challenges in their own way. Until they begin to better understand one another, and particularly until government and industry begin to better understand the Indigenous perspective, the courts will continue to be the only avenue for the resolution of differing views.

A review of documents related to resource development and the duty to consult, sampled from all three groups, demonstrates the different worldviews each has on these subjects. One of the most critical issues emerging right now is the "free, prior and informed consent" required by the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada. To business and industry, that looks like a veto that Indigenous Peoples can use to stop any project they do not support. Indigenous groups, however, do not see it as a veto. Since, culturally, they tend towards making decisions by consensus, they are more likely see it as the need for everyone to keep talking until they reach an agreement.

Even when it appears the three groups agree on something, it can be for very different reasons, concealing deeper differences that can emerge later, and unexpectedly.

All three groups, for example, value the importance of getting Indigenous groups involved early on in a project's planning. Businesses would be driven to do so by their economic approach: the earlier Indigenous communities can be involved, the sooner concerns can be addressed, avoiding the risk of challenges further along the project's development. Government sees earlier involvement as a way to meet regulatory and government timelines. However, Indigenous groups see early involvement as an opportunity to take a larger role in the decision-making process. Thus, involving Indigenous groups earlier in the consultation means little if it does not provide an opportunity for increased input.

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Documents from Indigenous groups suggest that controversies over consultation and resource development exist because Indigenous Peoples lack control and input over activities that directly affect them. They tend to perceive consultation as an opportunity for them to assert their sovereignty and jurisdiction and as something directly connected to their history of disempowerment. Until governments and industry better understand that perspective, there will almost certainly be many more court battles to come.

COMPRENDRE LA CONSULTATION ET L'ENGAGEMENT DES PEUPLES AUTOCHTONES DANS LE DÉVELOPPEMENT DES RESSOURCES*†

Brendan Boyd et Sophie Lorefice

RÉSUMÉ

L'annulation en 2018, par la Cour d'appel fédérale, du décret d'expansion du pipeline Trans Mountain a sans doute marqué une nouvelle étape dans le difficile rapport entre l'exploitation des ressources et l'obligation de la Couronne de consulter les peuples autochtones directement touchés par un projet de développement. Ce n'est sûrement pas la dernière fois que le gouvernement fédéral se trouve incapable d'atteindre adéquatement ces deux objectifs. Cet échec s'explique, du moins en partie, par le fait que les peuples autochtones, l'industrie et le gouvernement ont des notions différentes de ce qu'est la consultation. En effet, les trois groupes ont leur propre façon d'aborder cette question. Tant qu'il n'y aura pas de meilleure compréhension mutuelle et, surtout, tant que le gouvernement et l'industrie n'auront pas une meilleure notion du point de vue autochtone, les tribunaux demeureront le seul moyen de résoudre les différends.

L'examen des documents – obtenus auprès de ces trois groupes – qui ont trait au développement des ressources et à l'obligation de consulter montre les visions distinctes de chacun. Un des principaux enjeux actuel concerne le « consentement préalable, donné librement et en connaissance de cause » prévu par la Déclaration des Nations Unies sur les droits des peuples autochtones, laquelle a reçu l'appui du Canada. Les entreprises et l'industrie voient cela comme un veto que les peuples autochtones peuvent utiliser pour arrêter tout projet qu'ils ne soutiennent pas. Les groupes autochtones, cependant, ne le voient pas ainsi. Étant donné qu'ils sont plus enclins culturellement à prendre les décisions par consensus, pour eux il s'agit plutôt d'une invitation à dialoguer jusqu'à ce qu'un accord soit conclu.

Même lorsque que les trois groupes s'entendent sur un point, c'est parfois pour des raisons très diverses, lesquelles cachent des différences plus profondes qui peuvent resurgir plus tard et de manière inattendue.

Les trois groupes, par exemple, sont conscients de l'importance de faire participer les groupes autochtones dès les premières phases de planification d'un projet. Les entreprises sont poussées à le faire selon une approche économique : plus tôt les communautés autochtones sont impliquées, plus tôt on peut aborder les inquiétudes, ce qui permet d'éviter d'éventuels problèmes dans le déroulement du projet. Le gouvernement voit la participation précoce comme un moyen de respecter les

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exigences réglementaires et gouvernementales. Cependant, les groupes autochtones considèrent la participation précoce comme l'occasion de jouer un rôle plus important dans le processus décisionnel. Ainsi, impliquer les groupes autochtones plus tôt dans la consultation ne donne pas grand résultat s'ils n'ont pas l'occasion de participer davantage.

Les documents obtenus auprès des groupes autochtones suggèrent que les controverses au sujet de la consultation ou du développement des ressources ont lieu parce que les peuples autochtones n'ont pas assez d'emprise sur des activités qui les affectent directement. Ils ont tendance à percevoir la consultation comme une occasion pour eux d'affirmer leur souveraineté et leur juridiction; cela est directement lié à leur histoire de dépossession. Tant que les gouvernements et l'industrie ne comprendront pas mieux ce point de vue, il y aura certainement de nombreuses batailles judiciaires à venir.

UNDERSTANDING CONSULTATION AND ENGAGEMENT WITH INDIGENOUS PEOPLES IN RESOURCE DEVELOPMENT

Canadian courts have repeatedly ruled that the Crown has a duty to consult with Indigenous Peoples when approving and shaping resource development projects that are located on their land or could infringe on their rights. But the duty to consult means different things to Indigenous groups, government and industry. Different understandings among stakeholders, and in particular the dissatisfaction among many Indigenous groups with the consultation process, has often led to court challenges of project decisions.

Recently, the Federal Court of Appeal's decision to overturn the federal government's approval of the Trans Mountain pipeline project in 2018 attracted the attention of politicians, media and the public (Tsleil-Waututh Nation v. Canada [Attorney General] 2018 FCA 153). Legal challenges have also occurred over smaller yet still important activities and decisions, where Indigenous communities and organizations have found formal consultation processes and the overall approach to engagement taken by industry and government to be lacking.[1] While these represent a small portion of the total number of cases where the legal duty to consult has been triggered (Newman 2017) they have an outsized impact on the relationships and level of trust between Indigenous Peoples, industry and governments. Finding ways to resolve these conflicts and improve relations can contribute to reconciliation between Indigenous Peoples, non-Indigenous Canadians and the Canadian state and is essential to the future of Canada's natural resource industries.

A common view among many in industry is that project approvals and regulatory decisions should be largely separate from broader public policy issues such as climate change and social inequality (Canadian Energy Pipeline Association 2014; Canadian Association of Petroleum Producers 2017). Policy think tanks and scholars have called for de-politicization of consultation and engagement processes to ensure decisions are made on the basis of objective information and science (Green and Jackson 2015; Hughes 2016; Crowley 2016; DeRochie 2017). Similar ideas have been espoused by media commentators (Staples 2019). But thus far, injecting more information and expertise into decision-making processes has failed to resolve disputes over resource development decisions.

Those who study policy-making have long highlighted that it is not simply a technical exercise, where evidence is weighed as part of the rational process of decision-making (Wildavsky 1989; Majone 1989; Radin, 2013). Evidence produced through expert analysis is not a substitute for politics, but rather, one of several inputs into policy-making (Lindblom and Woodhouse 1993). In the context of Indigenous consultation and engagement, this means that producing more scientific studies or seeking additional expert testimony may improve decision-making, but they are unlikely to resolve the type of disputes that lead to legal challenges. Focusing exclusively on technical information and scientific evidence ignores critical pieces of the puzzle

[1] For examples see the Haida Nation decision, which related to the transfer of a tree-farming licence by government between two private companies (Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 S.C.R. 511); and the K'omoks First Nation decision, which related to the government's issuance of short-term shellfish aquaculture licences on Vancouver Island (K'ómoks First Nation v. Canada (Attorney General), 2012 FC 1160).

surrounding resource development disputes, including differences in culture, values and perspectives. In addition, it potentially marginalizes the traditional knowledge and perspectives of Indigenous Peoples.

In our recent article[2] in Canadian Public Administration (Boyd and Lorefice 2018), we argue that a policy-framing approach (Schon and Rein 1995; Rein and Schon 1996), which examines how different actors frame or define controversial and intractable policy problems, can provide insight into why disputes over consultation and resource development exist. In the article, we apply three elements — sense-making, selecting and storytelling — to identify the frames that are likely to be present in resource development and consultation. We examined 75 publicly available documents on consultation from Indigenous groups (comprising 30 documents), government (24) and industry (21). The documents included policies, statements, guidance documents, best practices, reports and websites. The documents were chosen to ensure representativeness along several dimensions, including: geographic location; level of government; resource sector; and Indigenous Peoples with different treaty relationships, including no treaty.

We find that Indigenous groups tend to frame the process of consultation as a political issue, while government typically frames it as a legal issue, and industry frequently adopts an economic frame. This leads to different understandings among these groups on key aspects of consultation and engagement, even in cases where there appears to be agreement. For example, all groups highlight the importance of engaging Indigenous Peoples early on in the decision-making process. However, Indigenous groups want early engagement to allow for increased participation in decision-making, while government perceives early engagement as a way to meet regulatory-approval timelines, and industry sees it as a way to limit risks and cut costs in the future.

Before delving further into our findings, it is important to exercise caution when generalizing from our findings or venturing broader conclusions about the hundreds of First Nations, Inuit and Métis communities in Canada, as well as the many resource development companies and multiple government bodies. In addition, traditional Indigenous knowledge, including worldviews and cultural protocols, which are frequently shared orally, is not included in our analysis of textual documents. Finally, of course, we do not intend to speak for the Indigenous communities and organizations whose documents are reviewed here, and the final word on their interpretation remains with these communities and organizations.

WHAT IS A POLICY FRAME?

A policy frame is a cluster of intertwined causal and normative beliefs that people and institutions draw on in order to give meaning, sense and normative direction to their thinking and action in policy matters (Schon and Rein 1995). In simpler terms, it is a common understanding of or worldview about a policy problem. In the context of resource development, the groups involved have different interests and values, as well as cultural and linguistic understandings. They will likely frame issues differently, which explains why consultation processes and activities have, in many cases, been ineffective

[2] https://onlinelibrary.wiley.com/doi/10.1111/capa.12301

in reaching mutually acceptable decisions, leading to legal challenges and protests by local communities. Consultation and engagement processes and activities should be frame-reflective, encouraging participants to critically reflect on their own frame and those of others. This can contribute to shared understandings that will increase the chances of mutually agreeable outcomes.

Table 1: Policy frames used by Indigenous groups, government and industry

	Sense-making	Selecting		Storytelling	Frame
Indigenous groups	Connection to broader political context and historical relationships	Consent as consensus	Early engagement for increased involvement in decision-making	Empowerment and autonomy	Political
Government	Managing existing processes	Consent as veto	Early engagement for meeting timelines	Adhering to court/ legal requirements	Legal
Industry	Managing existing relationships	Consent as veto	Early engagement for cost-effectiveness	Creating economic benefits and reducing uncertainty for business	Economic

As noted above, there are three distinct activities associated with framing: sense-making, which involves turning a complex situation into a definable, concrete issue; selecting, which involves decisions about what part of the problem will be emphasized; and storytelling, which involves developing a narrative about what causes an issue and who is to blame (Van Hulst and Yanow 2016) (see Table 1). Our findings uncover several examples within these categories that demonstrate how the groups involved in consultation and engagement frame the issue of resource development differently.

POLICY FRAMES IN RESOURCE DEVELOPMENT DISPUTES

Sense-making refers to how people make sense of or understand an issue. This is the process by which groups turn an uncertain or ambiguous situation into a more concrete and actionable problem. In the documents we reviewed that came from Indigenous groups, consultation and engagement is often portrayed as a problem of disempowerment, creating a need to assert or increase sovereignty and jurisdiction. For example, Hul'qumi'num-member First Nations (HMFN) assert that their consultation policy is: "an expression of the HMFN understanding and exercise of self-determination, inherent jurisdiction and self-government" (HMFN n.d., p. 9). The Assembly of First Nations of Quebec and Labrador (AFNQL) indicates that consultation is: "an excellent opportunity for First Nations to exercise their jurisdiction over, and their social and economic interest in, lands and natural resources" (2005, p. 5).

In contrast, government documents primarily describe consultation as managing and improving existing processes when working with Indigenous Peoples. As one example, the government of Alberta (2014) states that its consultation guidelines "are intended to be consistent with case law and demonstrate a practical approach to meeting the requirements established by the courts." Industry documents typically define consultation as a mechanism for economic development. They focus on the ability to reduce risk and uncertainty in business operations by maintaining and

improving relationships with Indigenous Peoples (Alberta Chamber of Resources 2006; Association of Mineral Exploration [AME] n.d.; Canadian Wind Energy Association; n.d.; Canadian Association of Petroleum Producers 2006).

Selecting refers to which aspects of the problem groups will emphasize and how they categorize them. This dynamic is apparent in the debate over whether the free, prior and informed consent of Indigenous Peoples is required for resource development projects, which has become an issue since Canada endorsed the United Nations Declaration on the Rights of Indigenous Peoples in 2016. Government and industry describe Indigenous Peoples' consent using the metaphor of a veto and argue that Canadian law does not grant them the right to unilaterally stop a project (Alberta 2014; Canada 2011; Mining Association of Manitoba [MAM] 2016; AME n.d.). However, Indigenous groups do not place consent and veto in the same category (FNLC 2013; AFN 2016). The FNLC (2013) argues that many Indigenous communities have a tradition of consensus-based decision-making, where no party has a veto because deliberation continues until all agree. In other words, while Indigenous groups may not be able to completely stop a project on their own, moving ahead without their consent signifies a lack of respect for their traditions, concerns and rights. Thus, government and industry tend to label or categorize consent as a legal requirement or business concern, while Indigenous groups pay attention to the implications it has for autonomy and empowerment in decision-making.

A primary difference between a consensus-based decision-making model and existing consultation approaches is the time required. The documents produced by Indigenous groups suggest that early engagement is about fostering direct involvement in crucial decisions, not just signing off on a project at an earlier date (Hupacasath 2006; AFNQL 2005; Alderville First Nation [AVFN] 2015; Ginoogaming First Nation [GFN] 2014; National Centre for First Nation Governance [NCFNG] 2009). Government documents view early engagement as a way to meet bureaucratic and legal timelines, rather than empowering Indigenous Peoples in decision-making. (Saskatchewan 2013; Newfoundland and Labrador 2013; Canada 2011; British Columbia n.d.). Industry documents focus on the cost-effectiveness of early engagement, noting that it could prevent disputes and issues with a project further down the road, after investments have already been made (AME n.d.; MAM 2016).

Storytelling brings together disparate elements of a policy frame by developing narratives about why problems exists, who is to blame and what should be done about them (Van Hulst and Yanow 2016). The documents of Indigenous groups suggest that controversies over consultation and resource development exist because of the lack of input and control that Indigenous communities have over activities that directly affect them (for examples see Nak'azdli n.d; AVFN 2015; HMFN 2006). The Crown is blamed for failing to establish processes that allow sufficient input and capacity for Indigenous communities, including money, information and expertise, and ensuring they are full participants in decision-making. For example, Indigenous groups' documents often indicate that consultation cannot be achieved through broader public-consultation processes or generic forums that would be used to engage other stakeholders, such as environmental assessments (FNLC 2013; HMFN 2006; GFN 2014; NCFNG 2009; AFNQL 2005). For government, the story of consultation is about meeting the requirements established by the courts. The problem expressed in these documents

is that government must meet legal standards that are unclear and still evolving (British Columbia 2010; Saskatchewan 2011; Canada 2011). The storyline from industry documents focuses on promoting economic development. The primary problem identified in these documents is the need to create certainty and eliminate risks surrounding business operations and investments.

Our findings suggest that Indigenous groups frame consultation and engagement as a political problem, connected to their broader experience of disempowerment and mistreatment by the Canadian state and non-Indigenous society. Government documents frame consultation and engagement as a legal issue where the primary concern is adhering to the requirements and protocols established by the courts. For industry, the issue is framed as an economic matter, driven by the desire to reduce the risk and uncertainty of project development and produce economic benefits.

CONCLUSION

Conflict over consultation emerges because actors frame the issues differently. Understanding these differences is an important first step in creating frame-reflexive consultation and engagement practices. Unless this occurs, the courts will continue to be the only avenue for resolution (Gallagher 2011). In addition, Indigenous groups in Canada may even resort to civil disobedience and protest as a means of asserting their rights and interests. As a result, finding common ground among Indigenous Peoples, governments, and industry on engagement and consultation practices is imperative to the future of resource development and the Canadian economy, and ultimately to the reconciliation of the relationships between Indigenous Peoples and Canada. More work needs to be done to understand how those involved in resource development disputes frame the issue differently and to design frame-reflective consultation and engagement activities that can recognize, accommodate and begin to bridge these differences.

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