

## 21. Addressing Barriers to Indigenous Participation in Canada's Economy

### Issue

The lack of clarity or progress regarding the federal government's approaches to many Indigenous issues – including the duty to consult and unresolved land claims – threatens the future socioeconomic well-being of communities across Canada while hindering meaningful discourse on the development of natural resource sector projects.

### Background

#### Consultation

The duty to consult and accommodate Indigenous communities which may be adversely affected by resource development lies with Canadian governments, who are increasingly shifting that responsibility to resource sector businesses seeking to advance projects on or near Indigenous lands.<sup>1</sup> However, the federal government's lack of clarity or direction on the extent of that approach has frequently created considerable challenges for all involved;<sup>2</sup> in some cases, that lack of clarity has led to the stalling or outright halting of projects with potential economic and social benefits for the affected Indigenous communities, and Canada at large. Indeed, addressing the questions surrounding this process would also help to build unity between the Indigenous peoples in Canada and the rest of the country.

The questions left unanswered by the federal government with regards to this approach have grown following its unqualified endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on May 10, 2016. The UNDRIP describes a global set of collective and human rights covering indigenous issues including identity, culture and traditions, though the biggest potential impact for the Canadian resource sector is its focus on free, prior, informed consent regarding resource extraction and other such developments. This move was hailed as a positive one by Indigenous organizations as well as industry groups such as the Mining Association of Canada<sup>3</sup> and the Canadian Association of Petroleum Producers, who view it as an important and much-needed step towards the development of a framework for reconciliation, and "support the implementation of its principles in a manner consistent with the Canadian Constitution and law."<sup>4</sup> However, the lack of details about how the government's commitment will translate into consultative requirements has generated additional questions about its eventual impact on Canadian industry's duty to consult and accommodate.

Though the declaration is not considered legally binding, both the Hon. Carolyn Bennett, Canada's Minister of Indigenous and Northern Affairs, and the Hon. Jody Wilson-Raybould, the Minister of Justice, have indicated the government's intention to build these precepts into federal law.<sup>5</sup> With myriad potential interpretations of these precepts, the Canadian government must ensure that it imminently clarifies how the implementation of UNDRIP will affect this crucial aspect of resource development, and more specifically, what this commitment means for the development of a cohesive approach to consultation and accommodation.

#### Unresolved land claims

Also in need of immediate attention is the government's lack of progress in addressing unresolved land claims. The land claims process is a complex one, involving multiparty negotiations of complicated historical, property, legal, financial, and implementation issues,<sup>6</sup> which are often further complicated by other concerns such as bureaucratic issues and a lack of resources or capacity. As a result, the process is often lengthy: reaching a final agreement can take from 5 to 20 years. Indeed, since the federal government began negotiating modern treaties with Indigenous groups

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<sup>1</sup> Canadian Chamber of Commerce, *Top 10 Barriers to Business Competitiveness 2016*

<sup>2</sup> <http://www.republicofmining.com/2016/01/18/mining-and-indigenous-peoples-our-future-by-pierre-gratton-november-23-2015/>

<sup>3</sup> <http://www.nationalobserver.com/2016/05/10/news/un-declaration-rights-indigenous-peoples-should-not-be-scary-bennett>

<sup>4</sup> Canadian Association of Petroleum Producers: Discussion Paper on Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada | May 10, 2016

<sup>5</sup> <http://globalnews.ca/news/2689538/canada-endorses-united-nations-declaration-on-the-rights-of-indigenous-peoples/>

<sup>6</sup> [https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol\\_2/pdf/E\\_Vol\\_2\\_CH04.pdf](https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_2/pdf/E_Vol_2_CH04.pdf)

and provincial/territorial governments in 1973, 26 comprehensive land claims and three self-government agreements have been signed.<sup>7</sup> Numerous land claims negotiations are currently underway across Canada, with 80 comprehensive land claims under negotiation with the federal government.<sup>8</sup>

This backlog of longstanding legal issues poses significant challenges for the natural resources sector and First Nations communities alike, creating considerable investment and operational uncertainties that inhibit meaningful progress. Resolving these issues is of benefit to all, as they allow for paving the way for effective dialogue on resource development, while also benefiting the communities themselves: the unemployment rate in self-governing communities has historically been 28 per cent lower than non-self-governing communities, and the average family income for beneficiaries of a treaty appears to be double that of non-beneficiaries.<sup>9</sup> Resolution and reconciliation with these communities is crucial, especially at a time where they represent Canada's youngest and fastest-growing population.<sup>10</sup>

The federal government has promised to develop a national strategy to address Indigenous land claims and duties to consult in a "reasonable timeframe,"<sup>11</sup> and this commitment must be acted upon in order to provide both industry and the affected communities with the certainty required to derive appropriate economic and social benefits from resource-related projects. Given that the current liability for comprehensive land claims "that have progressed to a point where quantification is possible" is an estimated \$4.8 billion, this process must also be undertaken with due financial prudence and in a way that respects Canada's fiscal constraints.<sup>12</sup>

## Recommendations

That the federal government:

1. Develop a consistent, coordinated approach to Indigenous consultation and accommodation which clearly identifies Indigenous rights and responsibilities and the duties of the Crown and the role of industry as a stakeholder supporting the process; harmonizes provincial, territorial and federal processes; and reflects relevant factors such as new and existing obligations within established case law;
2. Ensure sufficient resources are dedicated to communicating and implementing this approach across government, industry, and Indigenous communities; and
3. Accelerate the process of resolving land claims in a manner that reflects due financial prudence.

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<sup>7</sup> <https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>

<sup>8</sup> *Public Accounts of Canada 2015, Vol. 1 – Summary Report and Consolidated Financial Statements*; Receiver General for Canada, December 4, 2015

<sup>9</sup> <https://www.aadnc-aandc.gc.ca/eng/1406824128903/1406824211834#key>

<sup>10</sup> <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>

<sup>11</sup> <https://www.liberal.ca/policy-resolutions/61-priority-resolution-aboriginal-issues/>

<sup>12</sup> *Public Accounts of Canada 2015, Vol. 1 – Summary Report and Consolidated Financial Statements*; Receiver General for Canada, December 4, 2015