Indigenous Involvement in the North American Energy Transition

Key Trends and Requirements

Robyn Barabash, Austin J. Pierce, and Sarah Powell

While the state of the North American energy transition continues to evolve, electricity demand is expected to surge by 2050, with renewables leading the power generation mix. On top of navigating the once-in-a-generation pressure to achieve significant greenhouse gas emissions reductions and transition to greener energy sources, other environmental, social, and governance (ESG) factors also have risen in importance for developer and regulator decision-making. One such factor is the increasing consideration of Indigenous rights.

Notwithstanding the differences in approach to Indigenous rights from the United States, Canada's rapidly evolving regulatory landscape for the development of energy transition projects—and transformational shift in the role of Indigenous communities in electrification efforts—may provide some helpful takeaways and strategies for project development and capital deployment to help manage these evolving expectations and potential risks over a project's lifetime.

Comparative Legal Landscapes

Historically, both Canada and the United States have developed laws that explicitly considered "Indigenous" peoples vis-à-vis the "settler" population, rooted in the concept of the federal government as a "fiduciary" of Indigenous peoples. However, how this fiduciary—or in the United States, "trust"—relationship has been applied over time has varied substantially, oftentimes due to tensions in balancing these duties against other state interests and deep-seated colonial attitudes, including reliance on the doctrine of discovery to support the European assertion of sovereignty over North America.

In 2007, Canada and the United States were among the four countries that voted against the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), citing concerns over potential conflicts with recognized legal rights. Of particular concern was the principle of "free, prior and informed consent" (FPIC). While the scope of FPIC requirements is still a subject of debate, the fundamental assertion is that Indigenous peoples should be involved in decision-making that may affect their lands, resources, or traditions. Both nations subsequently revised their positions, and Canada recently passed legislation requiring federal laws to be consistent with UNDRIP. United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14 (Can.). While the United States has not followed suit with such a wide-reaching policy, the U.S. federal government has recently shown a willingness to interpret law and policy in a manner more favorable to Indigenous rights.

Even before UNDRIP, Indigenous rights were entrenched in the Canadian Constitution Act, 1982 (Can.) and have been the subject of decades of jurisprudence, which has defined the content and meaning of the Canadian government's legal duty to consult Indigenous communities. To trigger this duty, there must be (1) actual or constructive knowledge by the federal, provincial, and/or territorial government (the Crown) of an existing or asserted Indigenous right; (2) contemplated Crown conduct (such as the issuance of a permit or leasing of Crown land); and (3) the potential for such conduct to adversely affect an Indigenous right. The scope of the duty and level of engagement required vary depending on the strength of the claim and nature of the potential impacts. Consultation may also lead to a duty to accommodate, of which the primary goal is to avoid, eliminate, or minimize, and if not possible, to compensate for the potential adverse impacts. While private developers do not generally have an independent duty to consult with Indigenous peoples, significant procedural aspects of this duty are often delegated to developers, including the environmental impact assessment processes applicable to energy transition projects.

It has yet to be seen if (and how) incorporating UNDRIP into Canadian law enhances the Crown's duty. That said, from

Published in *Natural Resources & Environment* Volume 37, Number 3, Winter 2023.

a project development perspective, regardless of whether UNDRIP ultimately results in any changes to the duty, at a minimum consultation will bear more scrutiny. Developers should be prepared to be active and thoughtful participants in any Crown-led consultation, and to offer opportunities for "meaningful engagement" with Indigenous communities.

Project development has the most immediate nexus with Indigenous rights because of a project's impacts on the environment and relevant communities.

As in Canada, consultation in the United States is a government obligation. However, it is not based in the text of the U.S. Constitution. Instead, much of the fundamental relationship between the U.S. government and federally recognized Indian tribes is rooted in the "general trust relationship between the U.S. and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (citing *United States v. Mason*, 412 U.S. 391, 398 (1973); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). While limited statutory consultation mandates exist, this "trust relationship" does not include an explicit duty to consult; it was historically viewed as merely applying an "exacting fiduciary standard" to actions taken by the federal government to fulfill its obligations to Indian tribes. However, from the 1970s, a series of policy trends underscored an interpretation of this relationship that focused on promoting self-determination, self-governance, and the "special government-to-government relationship" between Indian tribes and the United States as a primary means to uphold the trust obligation.

This included the devolution to tribes of certain regulatory activities previously managed by federal agencies. However, it also resulted in the gradual establishment of consultation obligations for agencies regarding actions that would impact tribes but that were outside a tribe's jurisdiction. This duty is expressed in certain statutes and implementing regulations, but the broader duty for federal agencies to consult with tribes on regulatory policies that have tribal implications is based in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000). As the effectuation of such consultation obligations has been the subject of disagreement between tribes and federal agencies, in January 2021, President Biden issued a Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, calling for agencies to develop detailed plans to carry out the order.

Some of these plans have raised questions regarding the role of UNDRIP. The U.S. announcement of support for UNDRIP in 2010 had several qualifications—including on the interpretation of key terms in the declaration, such as FPIC. As such, the degree to which UNDRIP will be integrated into U.S. federal agency practices is currently unclear. However, various groups—such as the National Congress of American Indians—continue to advocate for the incorporation of UNDRIP more wholly into U.S. law and policy, which may impact expectations for compliance with more widely accepted obligations toward U.S. Indigenous communities.

Beyond law specific to Indigenous peoples and their rights, there also has been an increase in the strategic use of other legal regimes, such as broader environmental policy or traditional mining law, to achieve outcomes that Indigenous communities have not been able to achieve through the consultation process. Paired with the increasing possibility of tribe as regulator, as discussed below, this underscores the importance of support from key Indigenous communities beyond technical compliance with legal obligations.

Project Development Risks and Opportunities

Project development has the most immediate nexus with Indigenous rights because of a project's impacts on the environment and relevant communities. No project type (including energy transition projects) is immune from Indigenous rights considerations, regardless of potential emissions reductions and other environmental benefits. For example, until recently, several First Nations in British Columbia (B.C.) opposed the 1,100 MW Site C Clean Energy Project, which is estimated to produce about 5,100 GWh of hydroelectricity annually for over 100 years. Similarly, in the United States, there has been opposition to offshore wind projects on both coasts due to concerns about their impacts on certain tribes' cultural practices and ability to interface with nature. Various Indigenous communities have also opposed projects using other means of electricity generation, from solar to geothermal, as well as other components of the energy sector value chain, including the extraction of critical minerals necessary for certain components of energy transition projects. *See, e.g.*, *Fallon Paiute-Shoshone Tribe v. U.S. Dep't of Interior*, No. 3:21-cv-00512-RCJ-WGC, 2022 WL 137069 (D.C. Nev. Jan. 14, 2022); Maddie Stone, *Native Opposition to Nevada Lithium Mine Grows*, Grist (Oct. 28, 2021).

Fulfilling regulatory requirements, including consultation, is the immediate preoccupation for project developers when considering Indigenous rights. In both Canada and the United States, the focus has been on conducting "meaningful" consultation, though what that requires is subject to multiple and evolving interpretations. While consultation may seek to achieve some level of support (or FPIC), projects can and have moved forward despite strong objections from Indigenous communities. However, notwithstanding the receipt of legal approval, such concerns can result in protests, legal challenges, and other project risks, which may ultimately lead to added costs and delays.

In addition to advancing broader economic reconciliation efforts, involvement of Indigenous communities in energy transition projects beyond consultation can have a number of important practical benefits for reducing risks associated with

perceived failures to respect Indigenous rights. Indigenous support has been an important risk management tool for projects subject to government decisions that trigger the duty to consult. As noted above, scope and sufficiency of consultation are often contentious for both U.S. and Canadian projects, and consideration of Indigenous rights impacts is incorporated into several pieces of Canadian legislation, including environmental regimes applicable to energy transition projects.

As a result, there has been an increase in projects with Indigenous partners, particularly in Canada. Since 2010, thousands of renewable energy projects have been developed with Indigenous involvement, including over 200 medium and large-scale generation projects (primarily in B.C., Ontario, and Québec) that involve some type of partnership between Indigenous communities and developers. There have also been several such projects in the United States involving both generation (such as the Confederated Tribes of Warm Springs' co-ownership of the Pelton Round Butte Hydroelectric Project, or PRBHP) and transmission (like the Morongo Nation's co-ownership of transmission lines connecting solar, wind, and battery resources to the grid).

Privately negotiated project agreements—commonly called impact benefit agreements—also can be used to secure Indigenous support where commercial partnership may not be feasible or desirable. These agreements primarily provide for the sharing of project benefits and may offer opportunities for a community to work alongside a developer to complete environmental studies, fulfill procurement needs, and help secure support from other relevant groups.

Regardless of form, such benefit-sharing arrangements are expected to grow in importance to the energy transition over time. The increased recognition of Indigenous rights, combined with evolving stakeholder expectations, has meant that Indigenous communities are receiving a greater say in projects that may impact their rights or territories. For example, in addition to fulfilling the Crown's duty to consult, provincial regulators can have specific engagement obligations for developers built into their approval regimes and often encourage developers to work with Indigenous groups as much as possible. As a result, demonstrating a willingness to engage, consider, and accommodate Indigenous concerns (such as by changing project elements or adding mitigation measures) is important for developers seeking Canadian regulatory approvals. In B.C., environmental assessment legislation was amended to require Indigenous consent for a project where a treaty or other negotiated agreement requires such consent, with the Tahltan Nation recently signing the first of its kind. *See* Off. of Premier of B.C., *Tahltan Central Government, B.C. Make History Under Declaration Act* (June 6, 2022). While "consent," like "meaningful consultation," may be subject to competing interpretations, it is generally seen as a higher bar to clear.

There is also an increasing possibility for Indigenous communities to serve a regulatory role for projects located within their traditional territories. Beyond any regulations applicable within Indigenous communities' reservations, there is increased interest in the United States for tribal "comanagement" of public lands. *See, e.g.*, Inter-Governmental Cooperative Agreement for the Cooperative Management of the Federal Lands and Resources of the Bears Ears National Monument (June 18, 2022). The concept of "tribe as a regulator" is also gaining traction in Canada. For example, Henvey Inlet Wind, one of Canada's largest wind projects, is 50% owned by Henvey Inlet First Nation (HIFN), located entirely on HIFN's reserve land and governed by an environmental assessment and permitting regime developed specifically for that project by HIFN. Continued UNDRIP harmonization and reconciliation efforts in Canada may result in Indigenous-led regulatory regimes becoming more common. Beyond co-management, such projects can also provide developers with access to otherwise inaccessible solar, wind, and other resources physically located on Indigenous lands.

Privately negotiated project agreements—commonly called impact benefit agreements—also can be used to secure Indigenous support where commercial partnership may not be feasible or desirable.

Lastly, full-fledged partnerships with Indigenous communities also may create certain strategic benefits that project developers should consider in crafting future project proposals. First, such partnerships in the United States may result in more favorable regulatory or judicial review standards. For example, the U.S. Ninth Circuit Court of Appeals has found tribal co-ownership of PRBHP to preclude a suit under the Clean Water Act on tribal sovereign immunity grounds. *Deschutes River Alliance v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1163 (9th Cir. 2021). Indigenous partnerships also may unlock additional capital or procurement opportunities, as discussed below.

Access to Capital

Capital sources are another important venue where Indigenous rights may be examined. While there are many instances in which financing may come from the same jurisdiction where a project is located, the nature of increasing sustainable finance mandates and heightened ESG pressures means that energy transition projects may be receiving funds from other jurisdictions (including flows between the United States and Canada).

How project developers manage Indigenous rights matters can represent both a reputational and repayment risk for financial institutions. Consequently, many financial institutions have internal policies—or policies aligned with recognized

international frameworks or standards, such as the Equator Principles or International Finance Corporation (IFC) Performance Standard 7, Indigenous Peoples (IFC7)—that establish baseline expectations regarding engagement with Indigenous peoples that may be affected by a project. Released in 2020 following calls for change, Equator Principles 4 (EP4), which is based on the IFC Performance Standards, strengthened FPIC requirements for Indigenous consultation. EP4 makes clear that even projects in developed countries like Canada and the United States require an "informed consultation and participation" process and are equally subject to domestic laws and IFC7 (even where IFC7 may be more stringent) and must be benchmarked against IFC7's FPIC requirements. *See* EP4, Principle 5: Stakeholder Engagement (2020). However, EP4 recognizes that there is no universally accepted definition of FPIC and asserts that FPIC does not require unanimity or confer a veto. EP4 also contemplates justified deviations from FPIC requirements where it is unclear whether FPIC has been achieved, but good faith, IFC7-compliant negotiations have been documented.

Beyond direct access to physical on-reserve resources, as noted above, some projects may receive direct or indirect financial benefits for Indigenous involvement.

In light of the increased focus of ESG generally, and on Indigenous rights specifically in international guidance like EP4, project developers also need to be prepared to address any policies a financial institution (public or private) may have regarding Indigenous rights, on top of jurisdiction-specific legal considerations. For example, Vanguard expects companies to have effective risk oversight strategies in place to identify material social risks, which includes risks with respect to Indigenous rights and cultural heritage. Further, Moody's has found that failure to sufficiently address Indigenous rights concerns in Canada can hamper project execution and be a credit negative for pertinent corporations. Irrespective of project location, incorporating Indigenous rights into ESG-related diligence in the project finance context has become fairly commonplace. Lenders may even seek comfort in the form of a legal opinion on Indigenous rights matters, in certain cases.

Notwithstanding a growing body of case law offering guidance on consultation in various contexts, some uncertainty as to the level and sufficiency of consultation remains. Although Canadian and U.S. actors generally understand when their respective duties are triggered, as the United States does not have equally structured or substantial guidance for assessing the sufficiency of consultation, U.S. entities financing Canadian-based projects should be prepared for a more formalistic government consultation process. Conversely, Canadian entities, such as pension funds, financing U.S.-based projects may need to perform additional due diligence around Indigenous rights risks to meet any internal obligations to consider such risks that may typically be informed by Crown actions and decisions.

If a Canadian quasi-public entity is involved, stakeholders must also consider whether simply the act of funding will trigger the duty. For example, in *Nova Scotia (Aboriginal Affairs) v. Pictou Landing First Nation*, 2019 NSCA 75 (Can.), provincial funding constituted Crown conduct with a potential for adverse impact on Pictou Landing First Nation since it increased the likelihood that a pulp mill would continue to discharge contaminants into the First Nation's traditional territory. Statutory obligations to consider Indigenous rights impacts may also be triggered for projects outside of Canada if certain federal authorities or pension funds are providing funding.

Beyond direct access to physical on-reserve resources, as noted above, some projects may receive direct or indirect financial benefits for Indigenous involvement. Certain Canadian power procurements may assess projects against criteria that explicitly assign value to Indigenous ownership. For example, the latest draft Long-Term Request for Proposals issued by the Ontario Independent Electricity System Operator awards points in its rating criteria to projects with Indigenous equity interests of 10% or more (with more points being awarded for greater equity holdings). Similarly, for projects seeking Crown funding under government grant programs like the federal Smart Renewables and Electrification Pathways Program, a portion of the funds are earmarked for projects with meaningful (ranging from 25% where total project costs are up to $100 million to 10% where total project costs exceed $300 million) or majority Indigenous ownership, which may qualify for greater government support. *See* Gov't of Can., Continuous Intake Applicant Guide—Smart Renewables and Electrification Pathways Program (SREPs) (2022).

Social License

The considerations above speak to a combination of legal obligations and risk management considerations for stakeholders pursuing energy transition projects that may interface with Indigenous communities. However, both are informed by the broader undercurrent of societal expectations.

While not a new concept, the term "social license" is commonly used when exploring the ramifications of ESG factors on an entity's or project's ongoing acceptance or approval by numerous stakeholders. Accordingly, a project's social license will likely be at stake if an Indigenous community perceives that consultation or involvement has been inadequate. Failure to maintain such social license can be just as damaging for a project as failure to obtain or maintain a regulatory license. Among other things, such concerns have the potential to result in reputational harm, operational costs and delays, or litigation (whether rooted in the legal regimes of Indigenous rights

or otherwise) that can substantially impact project prospects. A project's social licence, or lack thereof, is also likely to impact a private or public lender's appetite to support the project.

Further, social license is not bound by the formalities or procedures of a legal regime. Requirements to maintain social license instead parallel changes in societal expectations and can change swiftly and dramatically, meaning that such license can be lost at any time, even once a project is operating. Managing this risk requires consistent attention to societal and market trends in order to develop appropriate and timely responses.

This is not simply to avoid subsequent litigation or operational issues. Expectations embedded in the concept of "social license" often shape future obligatory and risk management considerations that project companies need to address, as changes in social expectations can often drive similar changes in law and policy. Canada's UNDRIP journey is a prime example. Sentiments did not change overnight; it took over a decade from the time Canada first endorsed UNDRIP until its commitment to ensure consistency of federal laws with UNDRIP manifested in legislation. That interim period also saw the release of several reports from the Truth and Reconciliation Commission that, among other things, called on the Canadian government and businesses to adopt UNDRIP as the reconciliation framework. Within the development community, significant learning and capacity building were required to equip developers with the tools to consider Indigenous rights in a more rigorous manner. Similarly, the proliferation of ESG-related policies and expanded ESG risk management functions of financial institutions highlight such evolution in the financial sector. Projects whose involvement of Indigenous communities outpaces regulatory development in this area may also be better positioned to adapt to future legal changes and thus be more attractive to potential lenders and investors.

Key Takeaways

ESG is a multifaceted concept. ESG increasingly demands that companies (regardless of their role in the energy transition) consider a range of environmental and social factors in their decisions, including Indigenous rights impacts. There are times when these factors can come into tension, and excelling at one factor, like climate-change and emissions reductions, will not absolve an entity from the consideration of others. Given the land and watershed interface of various energy transition projects, stakeholders need to be cognizant of any Indigenous communities that may be impacted, as well as the evolving market and regulator expectations regarding Indigenous rights.

Such expectations can affect virtually every stage of a project's life, from permitting, to financing, to construction and operation. While this inevitably involves elements of compliance and risk management, there are increasing strategic opportunities and willingness for project developers and Indigenous communities to work together.

It increasingly demands that companies (regardless of their role in the energy transition) consider a range of environmental and social factors in their decisions, including Indigenous rights impacts.

This is driven, at least in part, by changes in the approach of policy makers, including the greater recognition of UNDRIP by both the United States and Canada, though to different degrees. As Canada's incorporation of UNDRIP into federal law is still in its early stages, refinements are inevitable and changes uncertain. However, beyond implications for projects in Canada, this journey may also presage potential strategies or expectations for U.S.-based projects. While particular outcomes cannot yet be determined with certainty, all stakeholders should understand the potential Indigenous rights implications of their projects and factor them into their strategies.

Ms. Powell is a partner and Ms. Barabash is an associate at Davies Ward Phillips & Vineberg LLP in Toronto, Canada. Mr. Pierce is an associate at Latham & Watkins LLP in Houston, Texas. They may be reached at spowell@dwpv.com, rbarabash@dwpv.com, and austin.pierce@lw.com, respectively.