

# Canada “Plus” 150: Uncertainties in Reconciling UNDRIP and Natural Resource Development

**Rebeca Macias Gimenez**  
**PhD Candidate**  
**University of Victoria**

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Full implementation of UNDRIP requires integration of Indigenous laws, traditions, ways of knowing into law and policy changes.

How is Canada doing in development projects' decision-making?

**What does it take?**

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## *Article 18*

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves **in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.**

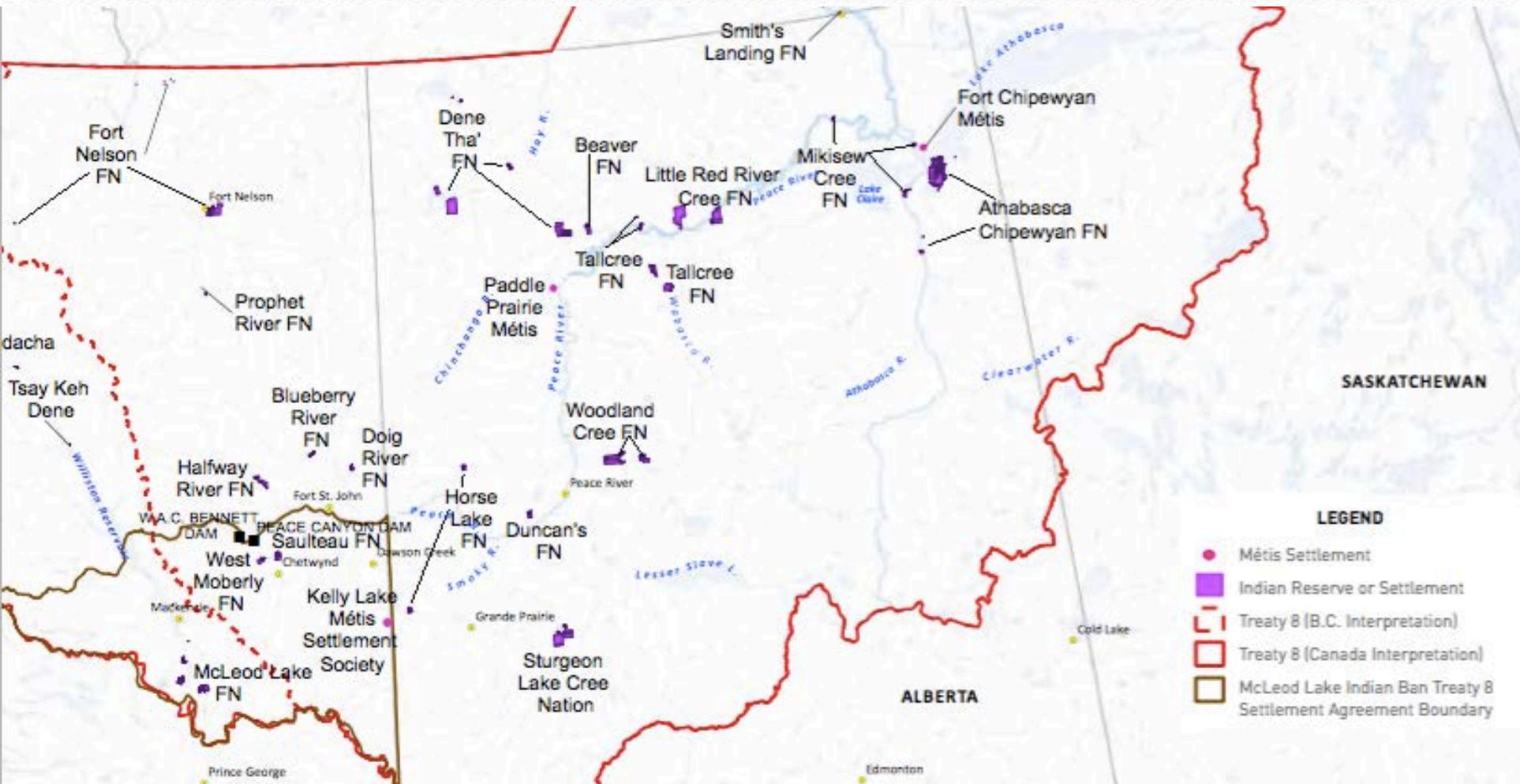
**UNDRIP is the standard!**

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*Inconsistencies in Canadian  
administrative decisions...*

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# Site C hydropower project's EA



Site C Project [BC Hydro website](#)

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Site C Project BC Hydro website

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# Site C hydropower project's EA

Cabinet's decision: significant adverse effects are “justifiable under the circumstances.”

Two issues:

- Too much discretion in defining what significant adverse effect means.
  - Too much discretion in defining what justifiable is.
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# Defining significant adverse effects

- Environmental assessments: notion of social-ecological systems.
  - Criteria to define what “significant” means are not built in collaboration between Indigenous and non-Indigenous jurisdictions.
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# Limiting discretionary power to approve projects

- More rigorous justificatory requirements, consistent with the conclusions of EAs.
  - Increasing accountability and transparency: clearer boundaries for cabinet's discretionary powers, in collaboration with Indigenous jurisdictions.
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*Inconsistencies in Canadian court decisions...*

E.g. Consultation with Indigenous Peoples

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# Prophet River FN v. BC (Environment), 2015 BCSC 1682

- FNs: “Taking up of land was too much, too often” to the point of harming traditional ways of living.
  - Court: “Ministers made no error in issuing the Certificate *without deciding whether the Project was an infringement of the petitioners’ Treaty 8 rights.*”
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# Chippewas of the Thames FN v. Enbridge Pipelines Inc., 2017 SCC 41

- FN: Asserted treaty rights over land.
  - Court: “The duty to consult...rights that flows from the implementation of the specific project at issue; *it is not about resolving broader claims that transcend the scope of the proposed project.*”
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- Strategic assessments: broad approach to physical area, timeframe, and scope of treaty and land rights.
- Indigenous jurisdictions should share decision-making power about projects approval.
- *If consultation is surrounded by these uncertainties, imagine FPIC!*

**Deep (and broad) consultation**

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## UNDRIP

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“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to *obtain their free and informed consent prior to the approval of any project affecting their lands or territories(...)*”

## Canada

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“Early and regular engagement and participation based on recognition of Indigenous rights and interests from the outset, *seeking to achieve free, prior and informed consent* through processes based on mutual respect and dialogue.”

# Free, Prior and Informed Consent

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- Co-designed and co-conducted EA in equal partnerships between the Crown and Indigenous jurisdictions.
- Provisions for strategic environmental assessments for broader analysis (regarding physical area, timeframe, and Aboriginal rights)
- Adoption of Free, Prior, and Informed Consent according to UNDRIP.

## Recommendations for Regulatory Reviews on EA

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rbmacias@uvic.ca

Thank you

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