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BARRISTERS AND SOLICITORS

Artwork by Robert Solomon

(Re) Envisioning Consent: **The Canadian Legal Context for FPIC**

Presentation at the FPIC Symposium

Ottawa, May 20, 2015

Lorraine Y Land, OKT LLP

Introduction

- Two Stories of Aboriginal Consent:
The Saugeen Ojibway and Athabasca Chipewyan
- The Federal Position on FPIC
- Canadian Law on Aboriginal “consent”
- Moving from the Fear of an Aboriginal “Veto” to Humanizing and Implementing FPIC



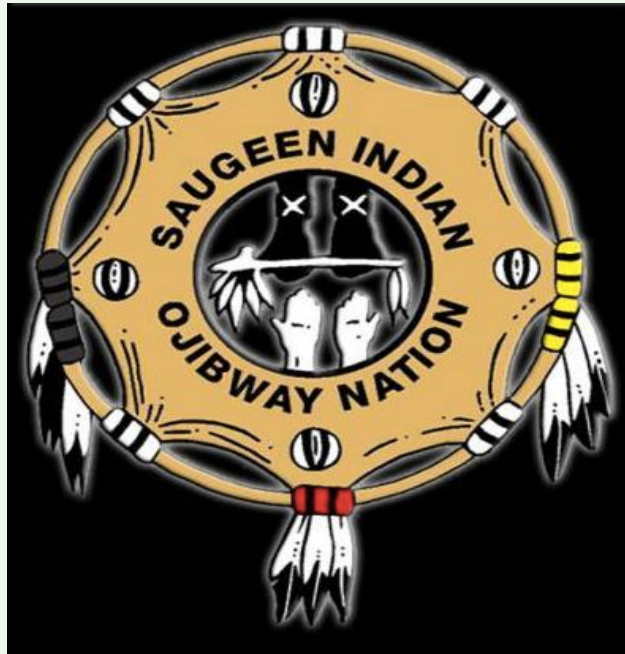
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Two Stories of the Pursuit for FPIC

**Saugeen Ojibway
Nation**



**Athabasca Chipewyan
First Nation**



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Saugeen Ojibway Nation and the Bruce Nuclear Facility



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SON and Bruce Nuclear: Achieving FPIC Guarantees

OPG Commitment: No Deep Geological
Repository under Lake Huron
unless SON **consents**

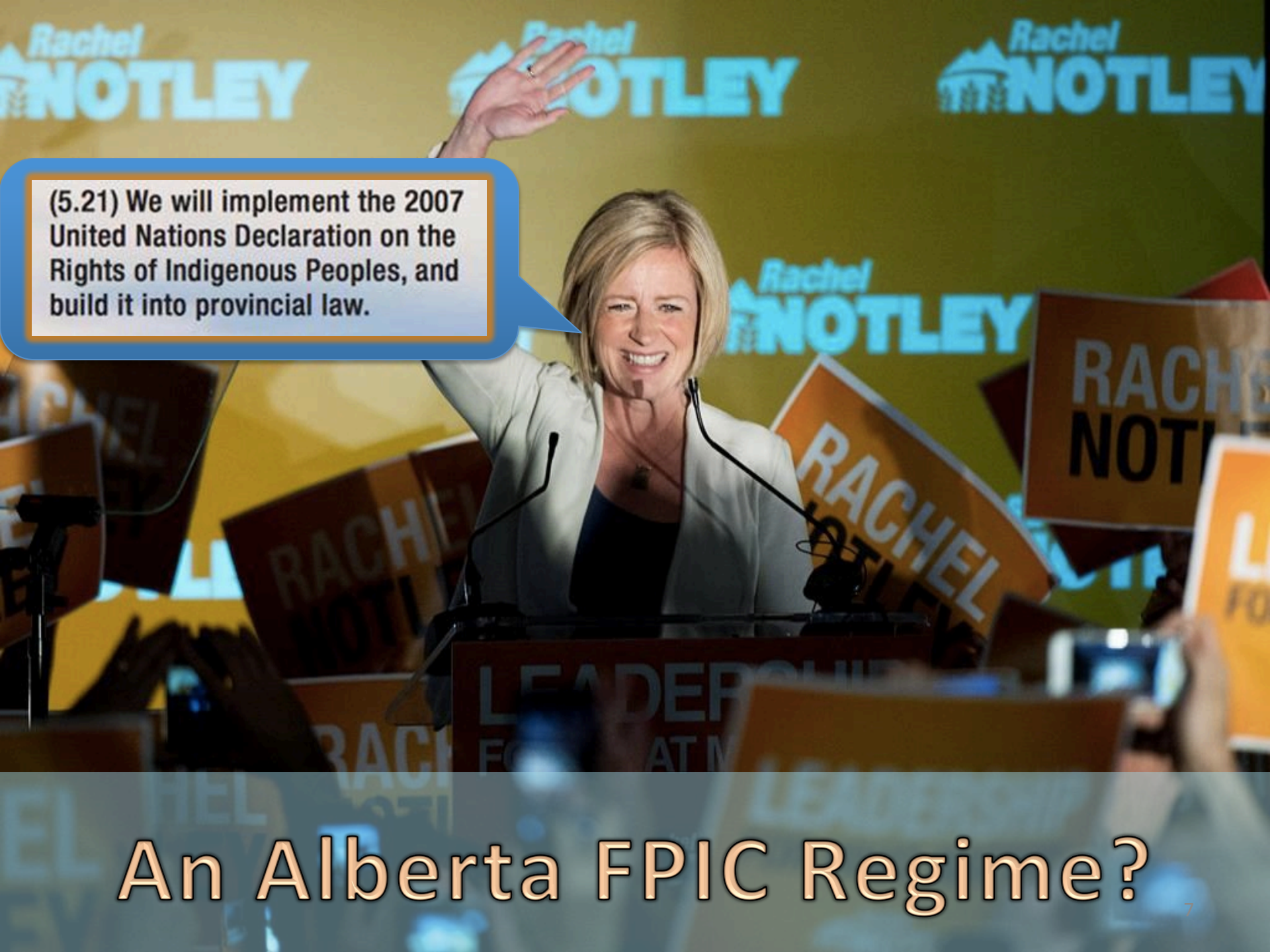
Athabasca Chipewyan FN and the Oil Sands



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A photograph of Rachel Notley, leader of the Alberta New Democratic Party, speaking at a podium. She is smiling and waving her right hand. The podium has a sign that says "LEADER". Behind her are several campaign signs that say "RACHEL NOTLEY". The background is a green wall with the "Rachel NOTLEY" logo repeated. A blue speech bubble is overlaid on the left side of the image.

(5.21) We will implement the 2007 United Nations Declaration on the Rights of Indigenous Peoples, and build it into provincial law.

An Alberta FPIC Regime?

FPIC Themes

- Current “Aboriginal consultation” regimes leave big gaps in indigenous rights protection
- FPIC is already being achieved, but in a checkerboard and erratic fashion
- Domestic pressure for FPIC is being influenced by international pressures
- Complex issues lie at the heart of the Crown-Aboriginal relationship and thus FPIC
- We may soon have first FPIC legislation (Alberta)



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The Canadian Legal Landscape on FPIC



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Canada's Position on FPIC

- Opposes UNDRIP in 2007
- Endorses UNDRIP in 2010 with caveats
- “FPIC is ‘aspirational’”
- “UNDRIP is not legally binding”

Most Recent: 2014 WCIP & Bill C-641

- 2014: Canada at WCIP: “FPIC ... can be interpreted as providing a **veto** ... and **cannot be reconciled with Canadian law**”
- May 2015: Defeat of Romeo Saganash’s Bill C-641 (*“An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples”*)



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**BUT IS FPIC INCOMPATIBLE WITH
CANADIAN LAW?**

The Deep Roots of the Concept of Indigenous “Consent”



**Royal Proclamation
of 1763:
The acquisition of
Indian lands must
happen by
“consent”**



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Aboriginal “Consent” in Modern Supreme Court Cases



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Calder



Calder - 1973

Delgamuukw

Haida

Tsilhqot'in



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Calder

- Established the principle that Aboriginal title could still exist (though Supreme Court split on whether Nisga'a still retained it)
- Details correspondence in 1850s and 1860s outlining the expectation of Aboriginal groups that they must consent to the sale or taking of their lands



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Delgamuukw



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Delgamuukw



“Some cases may even require the full consent of an Aboriginal nation...”

Haida



Tsilhqot'in

Haida - 2004

Delgamuukw

Calder



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Haida



Haida

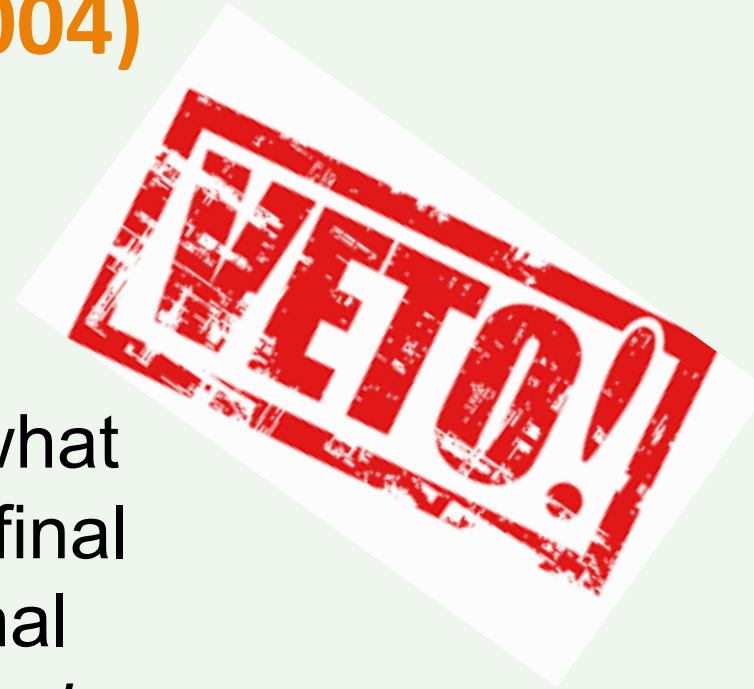
The image shows three Haida women in traditional regalia performing a dance. They are wearing black dresses with red and white accents. Each woman is holding a red wooden rattle. They are standing in front of a large, multi-story stone building with a gabled roof and several windows. A Canadian flag is visible on the left side of the building. The scene is outdoors on a grassy area under a clear blue sky.

The duty to consult can vary from a minimum 'duty to discuss' to the requirement for full **consent** of the Aboriginal nation on serious issues

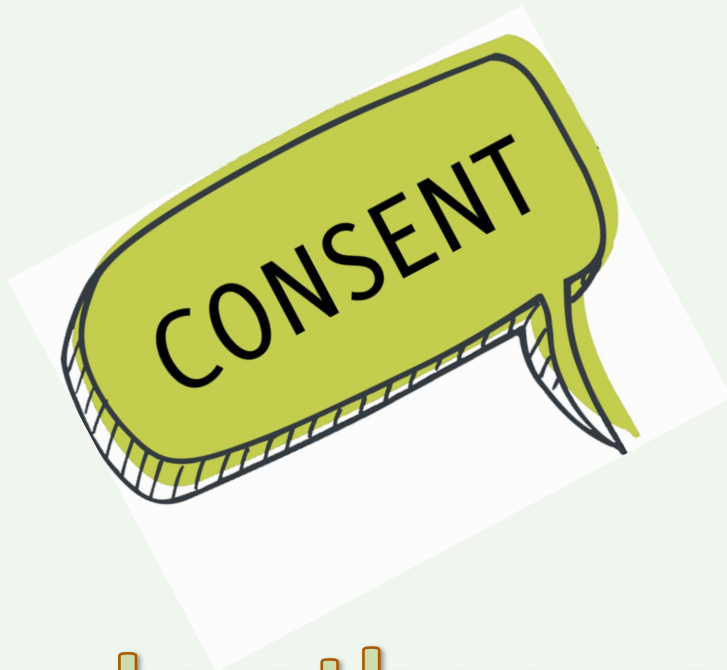
Where Does the Idea of “Veto” Come From?

Haida (SCC 2004)

- “...there is **no duty to agree**...” [para. 42]
- “This process does not give Aboriginal groups a **veto** over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights....” [para.48]



Haida: Veto versus consent



“The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case.

Rather, what is required is a process of balancing interests, of give and take” [para 48]

In other words, **consent** is still required in some situations



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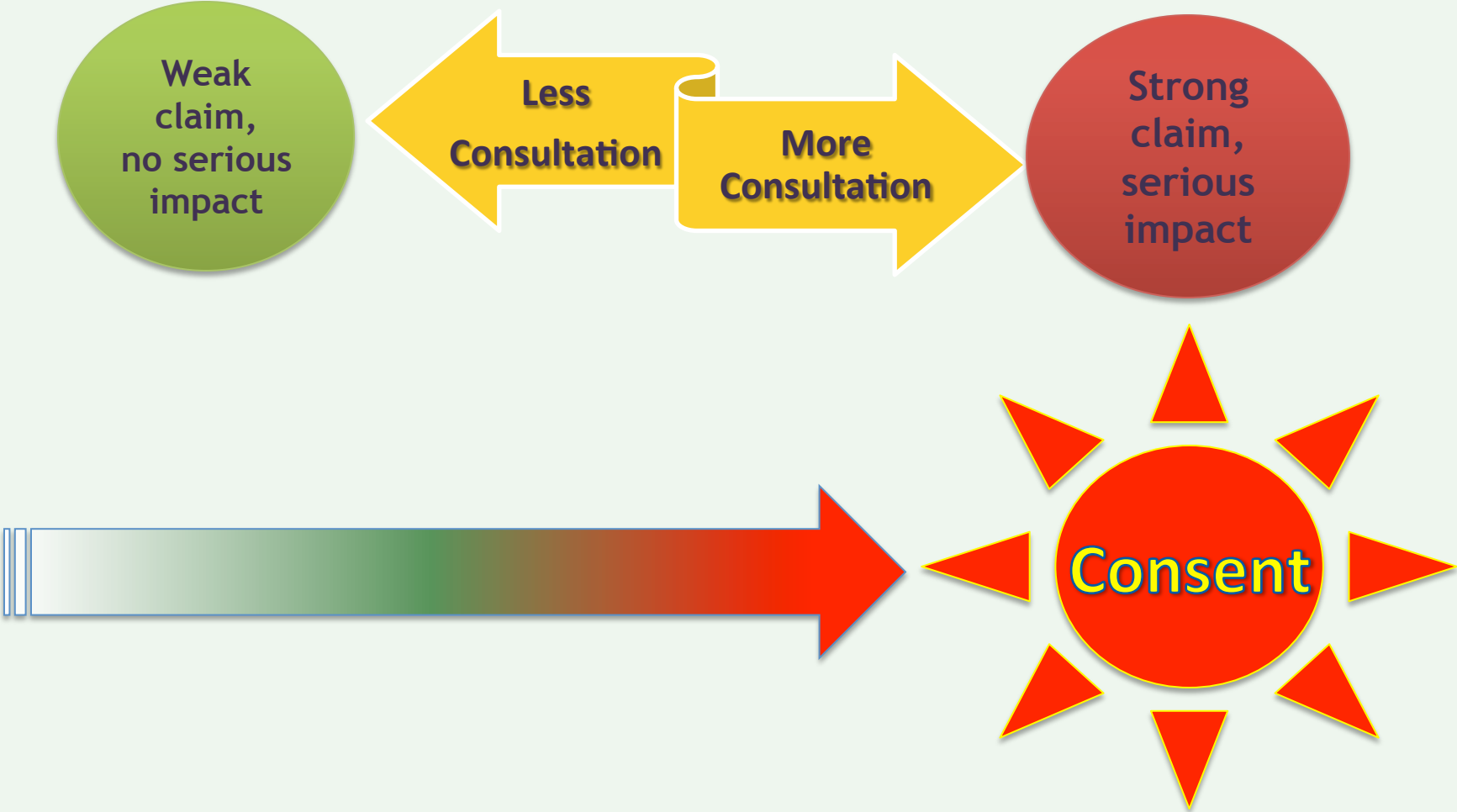
Haida's Spectrum Analysis

The degree of consultation will depend on:

- (1) how strong the Aboriginal right is, which is being claimed, and
- (2) how much potential harm could be caused to that Aboriginal right.

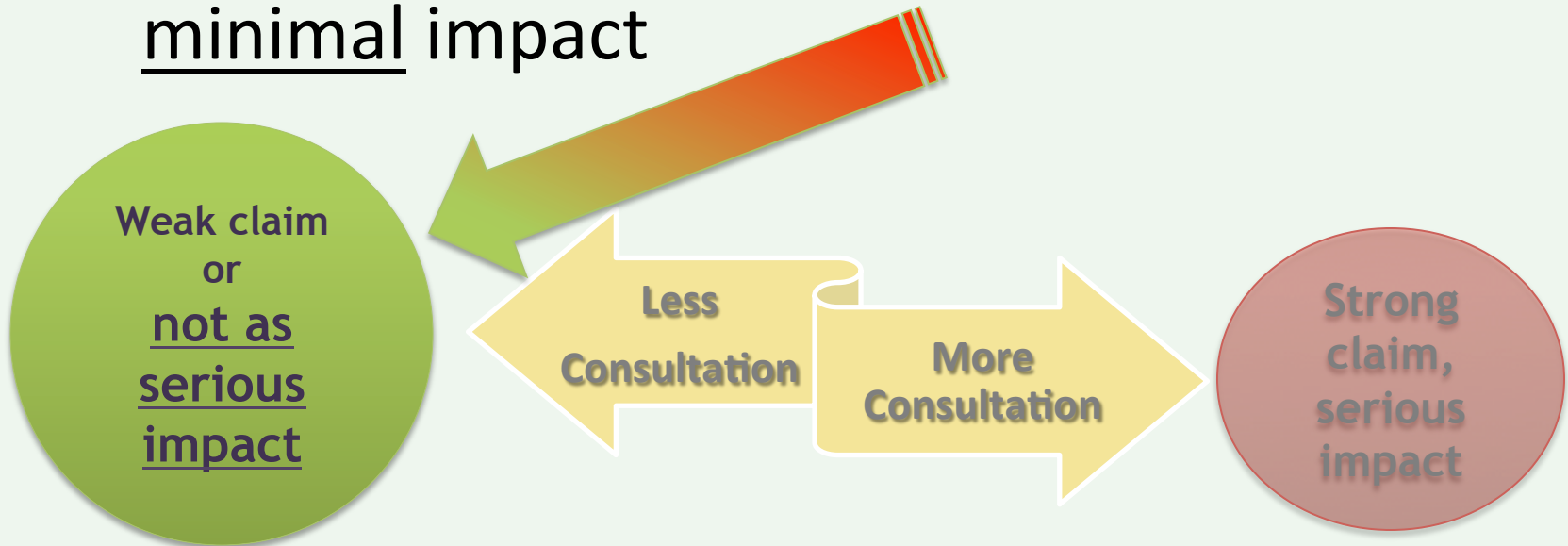


Strong Claims & Impacts = CONSENT



Mikisew

- “Had the consultation process gone ahead, it would not have given the Mikisew a **veto** over the alignment of the road”
- Context: treaty right, no consultation, but minimal impact



Tsilhqot'in



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Tsilhqot'in

*Tsilhqot'in Nation v. British
Columbia, 2014 SCC 44*



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Tsilhqot'in – Facts

- Interior of BC
- Semi-nomadic
- Today: 6 Bands
- 1983: BC granted commercial logging license
- Claim for AT of 4,380 km²



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Tsilhqot'in - Key Findings



- Tsilhqot'in retained Aboriginal title to 1700 km²
- Supreme Court rejects “Postage Stamp” approach
- Court expands on notion of “consent”
- New legal test for “justified infringement”

Consent or Justified Infringement is Required

Para 76: “The **right to control the land** conferred by Aboriginal title means that governments and others seeking to use the land must obtain the **consent** of the Aboriginal title holders. If the Aboriginal group **does not consent** to the use, the government’s only recourse is to establish that the proposed incursion on the land is **justified** under s. 35.”



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Justified Infringement – A New Test

The Crown has to show:

1. that it consulted and accommodated the Aboriginal community **procedurally**
2. that it is imposing its decision based on a “**compelling and substantial objective**”, &
3. that it is imposing its decision in a way consistent with its **fiduciary** obligations

The old
DTC
analysis

New
additional
legal
tests



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Justified Infringement – Mirroring the Charter S. 1 Test

The Supreme Court incorporates elements similar to justification for infringing Charter rights:



Rational connection is needed between the proposed decision / conduct and the right (the decision cannot deprive future generations of the Aboriginal right)



Proportionality (Crown can go no further than necessary; benefits to Crown cannot outweigh adverse effects to FN)



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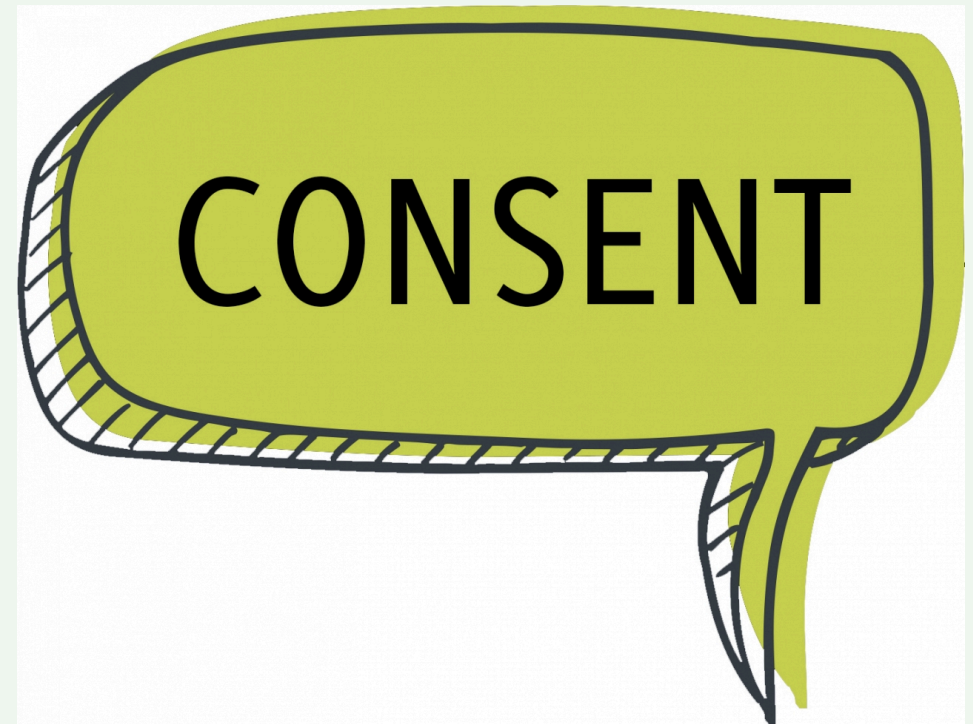
**Tsilhqot'in
helps reframe
the
debate
about
veto v consent**



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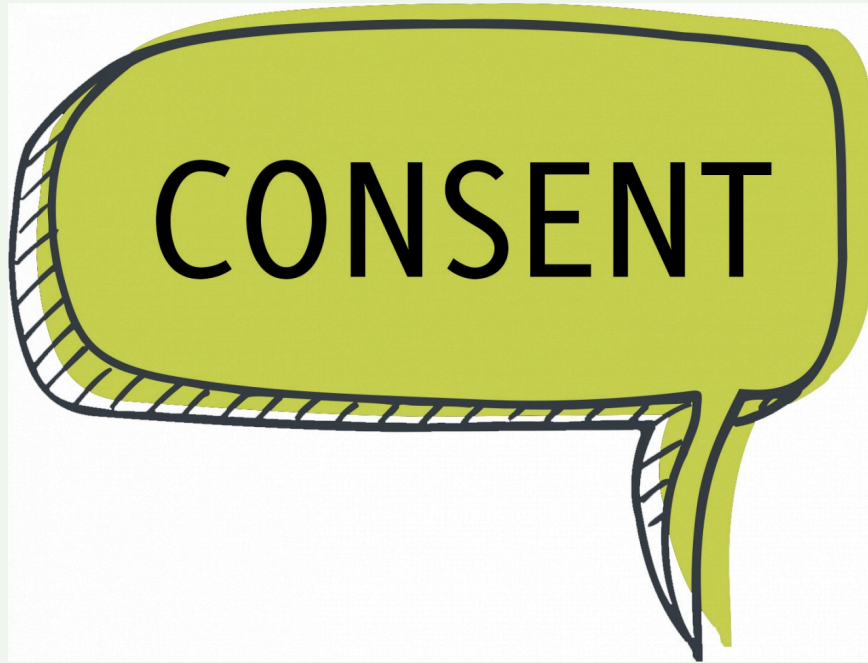
Consent Discussion

The Court explores the concept of “Aboriginal consent” in more detail than previous decisions (and confirms it is a requirement in some cases)



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Consent Discussion



Focuses on the Aboriginal perspective: The compelling and substantial objective of the government “must be considered from the Aboriginal perspective as well as from the perspective of the broader public” (at para 81).



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Consent Discussion

- The SCC does not formally endorse “FPIC”
- However, the SCC emphasizes **consent as the starting point**:
 - SCC starts with “consent” discussion (need for consent or justified infringement before Crown approvals) (para. 76)
 - SCC goes on to emphasize the importance of consent repeatedly (paras 88, 90, 92, 97 and 124)
 - This emphasis on consent stands in contrast to the approach of earlier SCC decisions (notably *Delgamuukw*)



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IS FPIC INCOMPATIBLE WITH CANADIAN LAW?

Enforceability of International Human Rights Law

- “Customary law applies directly as part of Canadian domestic law, unless there is a specific law in Canada that states otherwise” (*R. v. Hape*)
- The ‘presumption of conformity’ requires courts to interpret federal statutes (where possible and in the absence of an express contrary intent) to be in compliance with Canada’s international obligations (*Ordon Estate v Grail*)



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Enforceability of International Human Rights Law: *CHRC v Canada* (2012)

- Parliament will be presumed to act in compliance with its international obligations
- Where there is more than one possible interpretation of a provision in domestic legislation, courts will seek to avoid an interpretation that puts Canada in breach of its international obligations
- Parliament will be presumed to respect the values and principles enshrined in international law, both customary and conventional



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Veto: the Language of Fear

- **FEAR: False Evidence Appearing Real**
- **The False Evidence:**
 - That all development proposals are reasonable
 - That all Aboriginal groups are anti-development
 - That Aboriginal groups are or will be unreasonable in making decisions
 - That other Canadians will suffer a 'loss' if Aboriginal groups gain



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Refuting the F.E.A.R.



Articulate and expose the fears

Show the alternatives

- Humanize the context (to respond to the federal government 'demonizing' Aboriginal groups)
- Support robust institutions of indigenous governance
- Tell the stories of FPIC in action



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**FPIC is a growing branch on the
tree of Canadian Law**



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Thank You

Lorraine Land

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