INDIGENOUS RIGHTS

Founding nations seek real energy stakes

Engagement with indigenous communities affected by energy projects must go beyond the legal minimum, writes *Maria Kielmas*.

'We want to stand on our own feet,' stresses Karen Ogen-Toews, CEO of British Colombia-based advocacy group First Nations LNG Alliance and a former elected Chief of the Wet'suwet'en First Nation in Burns Lake, British Columbia, Canada. Ogen-Toews is articulating the growing support for energy and resource project developments in the territories of Canada's traditional indigenous communities – First Nations (Indians), Inuit and Métis – that are increasingly at odds with the opposition to such projects from environmentalist groups.

The FNLNG Alliance needs revenues from energy projects to fund basic amenities such as housing, schools and sewers, Ogen-Toews says, but is facing a huge backlash from a highly organised opposition. This comes at a time when Canada is having to redirect oil and gas exports from the US market – its traditional customer that is increasing its own exports – to Asian markets. The result is that oil and gas export projects within British Columbia are mired in almost daily demonstrations.

Fights about the energy sector's future coincide with the Canadian federal government's proposals to make fundamental changes to its relationship with indigenous communities, and a process of alignment with the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This stipulates the right of free, prior and informed consent (FPIC) that enables indigenous communities to withhold consent to any project that affects them. The declaration was opposed initially by Canada, the US, Australia and New Zealand – but these four countries have since changed policy and now support it. Canada's proposed changes will enable indigenous peoples to re-assume more controls over their governance, land resources and cultures. Since the 2007 UNDRIP declaration, similar exercises have been undertaken to a lesser degree by many governments worldwide.

Construction of the Westridge marine terminal, part of Kinder Morgan Canada's controversial oil pipeline expansion in British Columbia. A number of advocacy groups have demonstrated against the project, despite the company following all rules about consultation with First Nations

Photo: Kinder Morgan Canada

Strategic treaties

The British Crown pursued strategic treaties with First Nations and other indigenous peoples in Canada throughout the 18th century. French colonial interests ended after the 1756–1763 Seven Years War, leaving Britain as the dominant colonial power in North America. Several of these treaties were recognised by Canada's 1867 Constitution Act, followed by further treaties throughout the 19th century, stipulating access to resources. Indigenous rights were further reaffirmed by the 1982 Constitution Act, while the 1974 Federal Indian Oil and Gas Act and 1995 Federal Indian Oil and Gas Regulations governed energy developments. Provincial governments such as Alberta have developed their own hydrocarbon regulations since the 1940s.

The result is a lack of uniform law and different treaties with different provisions throughout Canada. Approximately 80% of Canada's population lives close to the US border, in provinces with different acts and regulations. To the north, territories under federal jurisdiction are subject to different acts and negotiated agreements.

Canada is populated by more than 500 separate indigenous communities that have different views on oil and gas development. Around 189 First Nations groups belong to the Indian Resource Council, an organisation that supports increased oil and gas exploration. 'When a law is clear, uniform and predictable – such as with the Federal Indian Oil & Gas Act – and oil and gas exploration requires both the consent of the Band (First Nation) and the federal government, there tends to be less controversy and less litigation,' says Allan Ingelson, Associate Professor in the Faculty of Law, University of Calgary. 'But when you have multiple indigenous groups in the same area with multiple perspectives, and when there are no treaties in place, you have more uncertainty and more litigation.'

Pipelines and ownership

The Kinder Morgan Transmountain Pipeline Expansion in British Columbia – Canada's only oil export pipeline to the West Coast – has become a major environmentalist protest target. In answer to questions by email, the operator rejected claims that the project will damage indigenous rights and titles. Over the past six years, Kinder Morgan has engaged with more than 133 indigenous communities and has nearly 100 agreements including letters or Memorandums of Understanding,

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capacity funding agreements and cultural assessments. More than 45 communities have participated in traditional land use and traditional marine use studies, the company states.

Alberta's Frog Lake First Nation has pioneered negotiation of ownership stakes in producing oil fields, pipelines and storage. It has negotiated project finance to the value of millions of dollars as the Canadian financial sector recognises a growing customer base. However, equity stakes in LNG projects are not possible yet, says Ogen-Toews, as the costs of this are too high. So far, no operating consortium has offered to carry the indigenous group through major project development stages so that eventually the community could receive income and/or royalties once a project reaches payback.

The Liberal government led by Prime Minister Justin Trudeau proposed Bill C-69 as draft legislation in February this year, to replace the National Energy Board (NEB) with a modern national energy regulator, to build trust with indigenous peoples and to include offshore renewable wind energy projects. The new Canadian Energy Regulator will assume many of the NEB's prior duties, with increased indigenous representation, and will incorporate traditional indigenous knowledge into the energy project review process. This is a positive move, says Ingelson.

Australia's constitutional debate

Australia's situation is almost the opposite. 'A big difference between Canada and Australia is that there have been no treaties in Australia,' says John Southalan, Adjunct Associate Professor at the Perth-based University of Western Australia Law School. 'There were no fundamental documents setting relations or expectations between colonists and the original people.'

The 1993 Native Title Act stipulates indigenous land access rights and use. It is a group, not an individual right, and the affected community must form an Aboriginal Corporation that holds the title. The courts have the final say over any dispute with a third party and titles are invalid if all strict procedures in the Act are not followed. But many operators realise that times are changing. 'One thing that is starting to become more obvious is that businesses need to go above what the domestic law requires,' continues Southalan.

In contrast to mining industries, the Australian energy sector has little engagement with indigenous issues as most major developments are located offshore. A Woodside-operated consortium abandoned plans to build onshore facilities for the North West Gas project at James Price Point near Broom, Western Australia, because of rising costs. A native title claim by the Goolarabooloo people that opposed the project – although the community was divided on the issue – was found by the courts to be false. Eventually, only the Karratha gas plant on the Burrup Peninsula, with five LNG processing trains, was constructed after a 2016 agreement with five traditional indigenous communities. The agreement extinguished some native titles for 99 years and reverted them to the state, provided land management funding of A$450,000 ($346,000) annually over five years, and an A$2.5mn ($1.9mn) lump sum for infrastructure funding.

The Australian public debate has now shifted to a constitutional reform. In May 2017 representatives of indigenous peoples issued the 'Uluru Statement from the Heart', calling for an entity representing them to be enshrined in a new constitution and a process of working towards treaties to be established. Discussions about a treaty of agreement with indigenous communities, or 'Makarrata', have been underway since 1977. Proposals have included compensation for indigenous Australians for the loss of traditional lands and conditions governing mining and exploration of natural resources. The latest debate is dividing public opinion.

'Often, when Australia has seen changes to existing law and rights to acknowledge and accommodate indigenous interests, this has resulted in political and legal challenges and the insistence on the *status quo*,' says Southalan. State governments and land-dependent businesses have considerable investments – financially and politically – in the existing system, he adds. Nevertheless, there is a realisation among some farmers, miners and governments that engagement and agreement with indigenous cultural land owners is essential to shared use of land.

Mexico's land reform legacy

Consultation between energy investors and indigenous communities has become essential in Mexico. In 2017, a total of 24 energy projects in the country had problems with social conflicts, including renewable as well as fossil fuel developments. It wasn't until 2014 that legal guidelines were introduced for consultation with indigenous communities, says Juan Fernando Ibáñez Montaño, Managing Partner at Mexico City law firm Ibáñez Parkman. Following constitutional reform in 2013 that removed the state's monopoly in energy production, the 2014 Hydrocarbons Law and Law of the Electrical Industry established the requirements for social impact evaluation and public consultations with communities. Energy investors have to evaluate the environmental and social impact of their projects, while the Energy Secretariat's Social Impact Evaluation Team conducts consultations with the communities. 'Although indigenous consultation is a government obligation, we always advise companies to help the government,' says Ibáñez.

The rights of local communities to be consulted on any development that may have a significant impact on their lives or environment were upheld by a Supreme Court ruling 2016. This recognised the rights of indigenous peoples enshrined in international treaties signed by Mexico, such as the International Labour Office Convention 169. There are between 54 and 68 different indigenous communities in Mexico, mostly in the south-east of the country. Traditional group tenure of land, the *comunidades agrarias* system, was abolished by the Spanish Crown but was restored formally in the 1917 Mexican constitution following the revolution 10 years earlier.

However, under 1990s land reform laws, individuals are allowed to sell their own plots. Non-indigenous villages hold land in this communal manner and can complicate social impact assessments for energy projects, observes Ibáñez. The best solution in Mexico, he thinks, would be for the main political parties in the national congress to co-operate and draft a specific law for consultation with indigenous communities.

Despite the complications of evolving legislation on indigenous rights in many countries, corporate energy investors may find that the local community will soon be their most important business partner. ●