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The Politics of Process: B.C.'s Mineral Claims Regime and the Threat of an FPIC Freeze

by Minh Do

FEDERAL AND PROVINCIAL GOVERNMENTS' legal obligation to consult and accommodate Indigenous nations has been confirmed by the Supreme Court of Canada for over 20 years. The duty to consult is triggered when a government's action may affect Indigenous Nations' rights. An action that could severely impair Indigenous Nations' exercise of their rights entails accommodation measures to mitigate negative effects. Additionally, British Columbia in 2019 passed legislation committing the government to align its laws with the *United Nations' Declaration on the Rights of Indigenous Peoples* (UNDRIP). UNDRIP affirms Indigenous Nations' right to self-determination, including the right to free, prior and informed consent (FPIC) to make decisions that affect Indigenous lands. Prior to 2023, British Columbia's mineral claims regime violated both the imperative to consult Indigenous Nations and the principles of UNDRIP. In the previous system, individuals or companies with a Free Miner Certificate could pay a nominal fee to register a mineral or placer claim through B.C's Mineral Titles Online. These claims confer a priority right to subsurface minerals and the exclusive ability to pursue further permits to conduct significant exploration work. First Nations had no role in the claims registration process and were only consulted during the later permitting stage. This "free entry" system would have likely remained in place if not for litigation that challenged its constitutionality.

Gitxaała vs. British Columbia (2023)

The Gitxaała Nation and Ehattesaht First Nation first successfully challenged the "free entry" system in 2023, with the British Columbia Supreme Court confirming that it violated the duty to consult. The B.C. government was ordered to reform the regime to implement consultation processes, which was rolled out in March 2025. However, it took an appeal to produce an additional ruling from the B.C. Court of Appeal in 2025 that confirmed the previous mineral claims regime was also inconsistent with FPIC, as incorporated by the B.C. government's legislation. This judicial acknowledgement that the Mineral Tenure Act is inconsistent with Indigenous nations' rights under UNDRIP must thus be addressed in subsequent consultative forums and reforms, which could be subject to future litigation. The B.C. Court of Appeal's decision is being appealed by the B.C. government on the grounds that it is creating "confusion" over the legal status of UNDRIP in Canada (Depner 2026).

It is worth pausing here to further examine the B.C. government's position. The B.C. government accepted the need for reforms aimed at incorporating Indigenous consultation to meet both their duty to consult under Canadian common law and the standards of UNDRIP as affirmed in B.C. legislation. However, the B.C. government is challenging the position that inconsistencies between the Mineral Tenure Act and other B.C. laws and UNDRIP are justiciable. The B.C. government is arguing against judicial forms of accountability over how UNDRIP is implemented.

The rejection of judicial intervention over UNDRIP implementation would mean that only the duty to consult creates a justiciable standard of honourable state conduct towards Indigenous Nations, leaving UNDRIP and legislation affirming it to be treated as an aspirational framework.

A similar challenge by the Canadian Nuclear Laboratories is being made to the Federal Court of Appeal after the

Federal Court in early 2025 ruled that UNDRIP serves as an interpretative lens that changes the standards of Indigenous consultation.

Legitimacy Deficits

Excluding the judiciary as a venue to challenge the state's implementation of UNDRIP is the latest demonstration of the state's preference for controlling processes of decision-making, particularly over land and waters. The evolution of the duty to consult is illustrative of what happens when the judiciary permits the state to use existing decision-making processes that simply integrate additional steps to include Indigenous consultation. In *Process as Power,* I analyze how the duty to consult's obligations as outlined in Canadian common law permits Canadian governments to consult Indigenous Nations without adapting to Indigenous standards of good governance. The judiciary did not compel Canadian governments to restructure the process of decision-making, only that Indigenous Nations must be formally included in pre-existing models with the final decision-making power residing with a minister.

The consequences of perfunctory consultation are enduring legitimacy deficits throughout state decision-making, contributing to continuing Indigenous-state conflict and litigation.

Such legitimacy deficits arose when B.C.'s mineral claims regime was reformed to conform to the duty to consult standard. In a six-month review of those reforms, a majority of First Nations survey responses revealed that they perceived the decision-making process to lack transparency and produce only weak a ccommodation measures. Despite formally meeting the duty to consult, these consultative processes overburden Indigenous communities to review numerous applications because no additional supports are provided (Ministry of Mining and Critical Minerals 2025, 16); they do not clearly demonstrate how Indigenous feedback was considered and were even perceived to ignore First Nations (Ibid, 17); and they produce unresponsive accommodation measures (Ibid, 18). These results are striking because they closely mirror issues present in other decision-making processes related to reviewing industrial activities. *Process as Power* includes an examination of B.C.'s Environmental Assessment process and the same state-driven unilateralism permeates that forum as well. I trace how these deficiencies are tied to the ways in which the duty to consult case law over time permitted state-led decision-making designs while narrowly defining what Indigenous Nations can raise in consultative forums.

Implementing UNDRIP?

UNDRIP fundamentally departs from the duty to consult standard because it presents an Indigenous-driven framework through FPIC that respects Indigenous self-determination. The fact that governments like B.C., Canada, and the Northwest Territories have passed UNDRIP-affirming legislation showed promising signs that reconciliation politics was backed by some action. But UNDRIP's implementation was always going to be the real test of these governments' commitments. In the context of the B.C. Environmental Assessment process, I find that reforms starting in 2018 have made some progress to improve the capacity of Indigenous Nations to review applications and to consistently respect the rights-holding status of Indigenous Nations. Other developments are more concerning, like how decision-making power continues to reside with a minister who is not bound by any party, including a new dispute resolution facilitator. Crucially, in this particular policy area, ongoing nation-to-nation negotiations are being pursued to advance additional reforms to uphold UNDRIP (Environmental Assessment Office 2025).

Combatting the state's asymmetrical hold over decision-making in matters that affect Indigenous Nations would be completely undermined if governments could unilaterally decide how to implement UNDRIP. The Eby government's attempted volte-face to suspend parts of their UNDRIP-affirming legislation in response to the mining litigation is not only a political betrayal to the Indigenous Nations in that province working to advance UNDRIP but also conflicts with the direction established in recent appellate decisions. Canadian appellate courts have explained that legislative commitments, like those aimed at implementing UNDRIP, engage the Crown's honour, which compels these governments to act upon their declarations. The Crown being bound to fulfill legislative promises related to the goal of reconciliation has been affirmed in other Indigenous rights contexts like the *C-92 Reference* decision (2024) concerning Indigenous child welfare. As explained in *Gitxaała v. British Columbia* (2025), the B.C. government's legislative "affirmation … amounts to a binding Crown promise, namely, that the Crown will act as though the existing legal rights, obligations, principles, minimum standards and goals expressed in UNDRIP in specific relation to Indigenous peoples apply to British Columbia laws, including the common law" (at para. 161).

Thus, the appeal of the *Gitxaała v. British Columbia* decision shows that legal uncertainty stems more from the state's intransigence to maintain its decision-making processes than UNDRIP's status in Canadian law.

Unfortunately, the lack of cooperation on UNDRIP's implementation may also produce a chilling effect that prevents the passage of UNDRIP-affirming legislation in other jurisdictions.

The conflict over process rights is just beginning and will continue to entwine both legal and political developments.

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References

British Columbia Environmental Assessment Office. (2025, September). *Review of the 2018 Environmental Assessment Act* [Backgrounder]. Government of British Columbia. https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/act-review/eao_act_review_backgrounder.pdf

British Columbia Ministry of Mining and Critical Minerals. (2025, December). *Mineral Claims Consultation Framework—6 month review*. Government of British Columbia. https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/act-review/mineral_claims_consultation_framework__6_month_review.pdf

Depner, W. (2026, February 7). B.C. seeks to challenge landmark court ruling over mineral rights and DRIPA. *CBC News*. https://www.cbc.ca/news/canada/british-columbia/eby-dripa-gitxaala-ruling-challenge-mineral-rights-9.7078151

Gitxaała v. British Columbia (Chief Gold Commissioner), 2025 BCCA 430.