HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Natural Resources

RNNR • NUMBER 132 • 1st SESSION • 42nd PARLIAMENT

EVIDENCE

Thursday, April 4, 2019

Chair

Mr. James Maloney

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● (1535)

[*English*]

The Chair (Mr. James Maloney (Etobicoke—Lakeshore, Lib.)): Good afternoon, everybody.

We have no witnesses in person today. We had one cancellation, but we still have three groups of witnesses.

On the screen on our right, we have Brenda Gunn, associate professor, Faculty of Law, University of Manitoba.

On the telephone we have Ciaran O'Faircheallaigh. We thought he was coming from the University of Dublin, but he's not.

You're actually in Australia, right?

Professor Ciaran O'Faircheallaigh (Professor, Griffith University, As an Individual): I am indeed in Brisbane.

The Chair: We also have Gunn-Britt Retter, head of the Arctic and environment unit of the Saami Council, by video conference from Norway. Correct?

Ms. Gunn-Britt Retter (Head, Arctic and Environment Unit, Saami Council): Yes.

The Chair: Thank you, all of you, for joining us.

We have a number of committee members around the table. Our format is that each of you will be given up to 10 minutes to do a presentation, and then after all three of you complete your presentations, we'll open the table to questions.

I may have to cut you off if we're getting short of time or you're getting close to your time or go over it, so I'll apologize in advance.

Why don't we start with Ms. Retter?

Ms. Gunn-Britt Retter: Thank you for inviting me to speak before the committee. It is a great honour. It is also interesting that Canada is the one looking for international best practices for engaging with indigenous peoples. Usually we look to Canada for good practices for engaging with indigenous peoples.

At the outset, it is worth noting the fundamental difference between indigenous peoples in large parts of Canada, I believe in particular in the Canadian north, who have completed land claim agreements. In Sápmi, the Sami, areas, there are few or close to zero, territories where Sami rights are recognized. The exception is the county of Finnmark in Norway, where the Finnmark Act establishes the Finnmark Estate, which is considered to be co-management of the land, as the Sami Parliament and Finnmark County Council each appoints three members to the board. The Finnmark Act transfers the common land, which the national state claims to own, to the Finnmark Estate. The Finnmark Estate, as the land owner, can be engaged in energy projects as well. So far, to my knowledge there has not been any mechanism in place to engage with indigenous peoples in particular in the one established over Windmill Park, beyond the usual standard national procedures, of course, of conducting environmental impact assessments related to local authority and their spatial planning procedures and applying for licence and the hearing process connected to that applied in national law and for involving stakeholders.

No other considerations are carried out related to Sami peoples. Sami interests are considered part of the Finnmark Estate Board, as I said.

Industry and authorities often call for dialogue. The Sami people often claim that dialogue is needed as well. This is also related to energy projects, as is the question. But we also have gained experiences that tell us that entering a dialogue is a risky business, as the Sami people who are impacted by a project go into a dialogue hoping for understanding of their needs for access to land end up coming out of it without a satisfying outcome, while the project leads go ahead claiming that a dialogue has been conducted, the boxed is ticked and they move on. Without recognition of land rights, it is hard to match the industry that simply follows the national legislation. We end up depending entirely on goodwill.

With no recognition of territory, Sami rights to land are also in the hands of goodwill from the authorities and the legislation they develop. In speeches and jubilees, ministers claim the Sami culture is valuable and important, and enriches Norwegian, Finnish, Swedish or Russian culture, but often some interests have to give way to more important national interests. Now that is the green shift to mitigate climate change.

A recent example in Norway is the permission given to the Nussir copper mine in Fâlesnuorri/Kvalsund. In the name of supporting a green shift and the need for copper to, among other things, produce batteries to replace fossil fuel, both reindeer herding lands and the health of the fjord are put at risk by the mine tailings being deposited on the sea floor. Marine experts have pointed to the environmental risk of this, but through a political decision to support the green shift, the mine has deliberately chosen to take that risk.

There are also several examples of huge windmill plants placed on Sami reindeer herding land, representing a fundamental change in land use in the name of reducing CO2 emissions to promote the green shift. This is a very delicate dilemma.

The Sami people are constantly under pressure to give up land use and fishing grounds for the good of the nation states' interest in the name of mitigating climate change and promoting the green shift.

I am sorry I was not able to provide best practices so far. There is, however, one here in my neighbourhood where the windmill project and reindeer herding entity came to an agreement on the placement the windmill park. I am not aware of the degree to which the company informed the reindeer herders of the fact that the project will produce much more energy than the electricity lines—the grid—to have capacity to send out to the market. Now the company is working hard to get a huge new electricity line established to be able to transfer the energy out to the market.

This is why free, prior and informed consent would be very important when engaging with the indigenous peoples. The information part, as in this example, would have been essential to understanding the full picture through the engagement process.

I would also like to add before I conclude that beyond the Sami region I could mention that, as I'm engaged in the Arctic Council work, there are two forthcoming reports prepared through the Arctic Council. One is on the Arctic environmental impact assessment conducted through the Sustainable Development Working Group, and the other is through the Protection of the Arctic Marine Environment, PAME, Working Group, a project called Meaningful Engagement of Indigenous Peoples and Local Communities in Marine Activities. This is an inventory of good practices in the engagement of indigenous peoples, mostly examples from Canada and America actually.

I don't know your deadlines, but these will be published at the beginning of May at the Arctic Council ministerial meeting, so it might be worthwhile for the committee to consider these two reports.

In conclusion, from my perspective, best practice should be to focused on our own consumption patterns to spend and waste less, use energy and resources more efficiently, and reuse resources that are already taken. I would rather do this than occupy more territory for the mitigation efforts.

I hope I kept to the time limit.

Thank you.

● (1540)

The Chair: You did. You had time to spare. We're grateful for that, so thank you.

Professor O'Faircheallaigh, why don't you go next.

Prof. Ciaran O'Faircheallaigh: Thank you.

Just very briefly, good morning from Brisbane and thank you very much for the opportunity to speak to you.

By way of background, my research for the last 25 years has focused on the interrelationship between indigenous people and extractive industries. Over that time I've also worked as a negotiator for aboriginal peoples. I have worked with them to conduct what I refer to as indigenous or aboriginal impact assessments. A number of these have related to large energy projects, particularly to a number of liquefied natural gas projects in the northwest of Western Australia. My experience extends to Canada. I've undertaken fieldwork in Newfoundland and Labrador, in Alberta and in the Northwest Territories.

My comments on international best practice draw on that 25 years of both research and professional engagement.

I want to stress that I am addressing what I consider to be best practice. That, to me, involves two components. It involves the conduct of indigenous or aboriginal impact assessments of major energy projects and, based on those, the negotiation of legally binding agreements between aboriginal peoples, governments and proponents, covering the whole life of energy projects.

The reason for stressing those two points is as follows. Conventional impact assessment has dismally failed indigenous people. That applies in Australia, it applies in Canada, it applies throughout the globe. There are numerous reasons for that. Time means I can't go into them in detail, but I am happy to take follow-up questions.

The major issues are that conventional impact assessment is driven by proponents and the consultants they employ. Their objective is to get approval for projects and, as a result, they tend, for example, to systematically understate problems and issues associated with projects, and to overstate particularly their economic benefits.

Conventional impact assessment tends to deny the validity and knowledge of indigenous knowing, indigenous views of the world. It fails to adopt appropriate methodologies and it tends to be very much project focused. It tends to deal with one project at a time.

The result of that last point is that cumulative impacts tend to be either ignored or very much understated. That, for example, is very evident in the context of oil sands in Alberta.

In response to these fundamental problems, what is happening increasingly is the emergence of indigenous-conducted impact assessment. There are a number of different models that can be applied in developing indigenous-controlled impact assessment. Again, I am happy to elaborate.

Just to mention one, for a proposed liquefied natural gas hub in the northwest of Western Australia, a strategic assessment was conducted by the federal government and the state government in Western Australia. There were a number of terms of reference for the strategic assessment that related to indigenous impacts.

What occurred was that the regional representative aboriginal body, the Kimberley Land Council, and aboriginal traditional owners of the site negotiated with the proponent and the governments that they would simply extract all of the terms of reference that dealt with indigenous issues and would conduct the impact assessment in relation to those terms of reference.

It is extremely instructive to compare the six-volume impact assessment that emerged from that exercise with an impact assessment conducted by the lead proponent, Woodside Energy, in relation to another LNG project in another part of Australia. There is a world of difference. Indigenous impact assessment is much more capable of properly identifying the key issues for indigenous people and, just as importantly, of identifying viable strategies for dealing with those impacts.

The second component of best practice is the negotiation, based on those impact assessments, of legally binding agreements for the whole-of-project life.

● (1545)

One fundamental factor is that the political reality—and this isn't just an issue in relation to indigenous peoples—is that once projects get approval, the attention of government moves elsewhere. Given that many of these projects will last for 20, 30, or 40 years, there is a huge issue of making sure that over time there is a continued focus on dealing with the issues identified in impact assessment and in dealing with changes over time. No project is the same after 10, 20, or 30 years. How do we ensure that there is a continued focus?

One way of doing it is to negotiate agreements that cover the whole of project life and provide the resources to make sure that the focus can be maintained, and to provide management mechanisms and decision-making mechanisms that provide for ongoing input from affected indigenous peoples.

It is essential that those agreements extend through the whole of project life, because as we're becoming increasingly aware, as projects developed in the 1960s and 1970s reach the end of their lives, there are very major issues about closure and rehabilitation of projects and about dealing with project impacts that can in fact extend far beyond the operational life of the mines, the gas fields, and the oil fields concerned.

I would stress that I am talking about international best practice that's emerging, but there are very clear examples of such practice having been realized.

The final point I would stress is that the negotiation of agreements for the life of projects must occur in a context in which indigenous peoples have some real bargaining power. If they lack that bargaining power, then the agreements that result are likely to entrench their disadvantage, their lack of power. It is thus critical to have an appropriate legal framework and international legal instruments such as the United Nations Declaration on the Rights of Indigenous People, with its emphasis on free, prior and informed consent. It's an example of the sort of framework that can provide that real bargaining power.

Thank you.

● (1550)

The Chair: Thank you very much.

Professor Gunn, you are last but not least.

Professor Brenda Gunn (Associate Professor, Faculty of Law, University of Manitoba, As an Individual): [*Witness speaks in Northern Michif* :]

[*English*]

Thank you for the invitation to appear today. I'm really excited that this committee is undertaking this important study, so much so that I was willing to take the afternoon away from my three-month-old daughter. My apologies if I'm perhaps not as put together as I might normally be, but I managed to pull together my presentation while she was napping on my lap over the last couple of weeks. I'm really excited to be here, and I look forward to having some time for questions, so I will try to be as succinct as possible.

For your information, I am a professor in the Faculty of Law here at the University of Manitoba. I've been participating in the international indigenous rights movement for the past 15 years. I am also the co-chair of the rights of indigenous peoples interest group for the American Society of International Law, and a member of the International Law Association's implementing the rights of indigenous peoples committee. I've also provided technical assistance to the UN expert mechanism on the rights of indigenous peoples for their study on best practices for implementing the UN declaration.

Today, I want to focus my remarks on the idea of international best practices, but I want to highlight the international legal standards that should guide Canada's engagement with indigenous peoples. I'll make reference to three main rights, which include the right to self-determination, the right to participate in decision-making and the right to free, prior and informed consent.

While many people cite the UN Declaration on the Rights of Indigenous Peoples in relation to these rights, it's important to know that these rights are grounded in broader human rights treaties that Canada is a party to, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

My presentation here today is going to draw on four main documents, which I provided to the clerk this morning. There are two studies by the UN expert mechanism on the rights of indigenous peoples: the new World Bank environmental and social standards, as well as the “zero draft” of the convention on business and human rights, which is based on the UN Guiding Principles on Business and Human Rights.

To this end, while I would say that I'm providing a presentation on best practices, I actually think it's much more than simply best practices. I'm trying to provide what, in my expert opinion, are the minimum necessary standards that Canada is required to meet to uphold its international human rights obligations.

What I've done is try to compile some of the key areas that I think Canada must uphold, based on these various documents. As a starting point, I think it's quite clear in international law that indigenous peoples must not just be able to participate in decision-making processes that affect their rights, but must also actually control the outcome of such processes. To this end, the participation must be effective. The processes must uphold indigenous peoples' human rights, including the right to self-determination and the right to use, own, develop and control their lands, territories and resources. This is critical, because, in this regard, FPIC safeguards cultural identity. For indigenous peoples, as we know, cultural identity is inextricably linked to their lands, resources and territories.

When we're speaking about FPIC, we have some guidance on what these different standards are. “Prior” means that the process must occur prior to any other decisions being made that allow the proposal to proceed. The process should begin as early as possible in the formulation of a proposal. The international standard is for indigenous peoples' engagement to begin at the conceptualization and design phases. It must also provide the necessary time for indigenous peoples to absorb, understand and analyze the information provided and to undertake their own decision-making processes.

● (1555)

We speak about “informed” consent. International law requires that independent specialists be engaged to assist in the identification of project risks and impacts. Indigenous people should not have to rely solely on the materials put forward by the proponent.

Finally, there is “consent”. I'm sure I'll field more questions on this, so I didn't put too much into the presentation, but I think importantly consent means that indigenous peoples must not be simply required to say yes to a predetermined decision; there has to be the opportunity to engage in a more robust process.

To this end, the process must occur in a climate free from intimidation, coercion, manipulation and harassment. It must promote trust and good faith and not suspicion, accusations, threats, criminalization, violence toward indigenous peoples or the taking of prejudiced views towards them. The process must ensure that indigenous peoples have the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender and representation of other sectors within the community. Indigenous peoples must also be able to determine how and which of their institutions and leaders represent them.

Under international law, indigenous peoples also have the power to determine the course or the actual consultation process. This includes being consulted when devising the process of consultation and having the opportunity to share or use or develop their own protocols in consultation.

Finally, the process must also allow for indigenous peoples to define the methods, the timelines, the locations and evaluation of the consultation process.

One question often raised is when FPIC is required. Generally, it's when a project is likely to have a significant direct impact on indigenous peoples' lives, lands, territories and resources. It's important to note that it's indigenous peoples' perspective on the potential impact that is the standard here. It's not the state's or the proponent's determination of the impact, but indigenous peoples'. Also, this right of FPIC is not limited to lands that Canada recognizes as aboriginal title lands; it includes lands that indigenous peoples have traditionally owned or otherwise occupied and used, including lands, territories and resources that are governed under indigenous peoples' own laws.

It's important during these processes that states engage broadly with all potentially impacted indigenous peoples through their own representative institutions. They must ensure that they are also engaging indigenous women, children, youth and persons with disabilities, bearing in mind that government structures of some indigenous communities may be male-dominated. To this end, consultation should also provide an understanding of the specific impacts on indigenous people. It's not just about having indigenous women, children and youth present, but also specifically turning your mind to how the project may impact indigenous women differently or specifically.

Another area that I think is particularly important in Canada is the importance of ensuring that FPIC processes support consensus building within indigenous peoples' communities and must avoid any process that may cause further division within the community. In relation to processes that might further divide, we want to be aware of any situations of economic duress, such as when communities may be feeling pressure to engage in the process because of economic duress, and trying to ensure that any process, consultation or otherwise is not further dividing the community.

● (1600)

As was already mentioned, these consultation processes should occur throughout the project, ensuring that there is constant communication between the parties. Under international law, it's important to note that these consultation processes where indigenous peoples are engaged in decision-making and provide their free, prior and informed consent should not be confused with public hearings for the environment and regulatory regimes.

Sorry, I think I am running short of time. I want to make one or two more points.

International law does recognize that indigenous peoples may withhold their consent in several circumstances, which include following an assessment and conclusion that the proposal is not in their best interest, where there are deficiencies in the process, or to communicate a legitimate distrust in the consultation process or the initiative.

Some might say that the UN declaration is unclear because different articles provide different wording. However, I think the UN Expert Mechanism on the Rights of Indigenous Peoples has tried to clarify that the terms “consult” and “co-operate” denote a right of indigenous peoples to influence the outcome of the decision-making process, not just to be involved in it. I think the standards and international law are quite clear, and Canada should be taking steps to uphold these obligations.

Finally, to wrap things up, there are some broader objectives that the right to participate in decision-making seeks to achieve that can help us guide these processes. The first is to correct the de jure and de facto exclusion of indigenous peoples from public life, and the second, to revitalize and restore indigenous people's own decision-making processes.

Finally, free, prior and informed consent also has some underlying rationales that should guide our implementation: To restore indigenous people's control over their lands and resources; to restore indigenous people's cultural integrity, pride and self-esteem; and to redress the power imbalance between indigenous peoples and states, with a view to forging new relationships based on rights and mutual respect between the parties.

[*Witness speaks in Northern Michif*:]

The Chair: Thank you all very much.

Professor Gunn, we do appreciate your taking the time away from your newborn to be here with us and to make the effort to prepare. We're very grateful for that.

Mr. Graham, you're going to start us off.

Mr. David de Burgh Graham (Laurentides—Labelle, Lib.): Thank you.

First off, Professor O'Faircheallaigh, I checked and I wanted to thank you for getting up at five o'clock in the morning to talk to us. That's very much appreciated by all of us. I'll come back to you in a second.

Ms. Retter, in your comments you talked about entering a dialogue as being a risky business. That's something that stuck with me from the moment you said it. You talked about the dangers. I want to get into the dangers and the experience you have with that. You talked about a mine that has tailings in the sea floor as a result of the dialogue, if I understood you correctly. If that's the case, did the dialogue process, as described at length by professor Gunn, follow that kind of process of free, prior, and informed consent, or was there a completely different process involved here? Can you help us with that?

Ms. Gunn-Britt Retter: I think the two other presentations answered many of the things I was addressing. What I was trying to convey was the lack of recognition that the process needs to to fulfill free, prior, and informed consent and the lack of recognition that indigenous peoples have less power and that there is a power imbalance. In the Norwegian system, the engagement has been carried out like the ordinary process of hearing and treated like it is with other stakeholders, without this recognition of the different culture, different needs, different world view and imbalance in power relations.

It was carried out according to other stakeholders' interests. Interests were treated, but indigenous people's rights and needs for conducting our culture were not recognized. That's also why we get a different outcome. If we had an impact assessment conducted by indigenous peoples, like the professor was mentioning, or we addressed the free, prior and informed consent as described, I think we would have had a a different result.

● (1605)

Mr. David de Burgh Graham: Your sense is that the process for a free, prior and informed consent would not allow the entry into dialogue to become a risky business.

Ms. Gunn-Britt Retter: Yes, that is our hope, until we try that.

Mr. David de Burgh Graham: Understood. Thank you.

Professor O'Faircheallaigh, you talked about environmental impact assessments and left a loud hint that you'd like to talk about it a bit further. I'd like to give you the opportunity to do that, if you'd like.

Prof. Ciaran O'Faircheallaigh: Sorry, which specific...?

Mr. David de Burgh Graham: On the topic of environmental impact assessments—

Prof. Ciaran O'Faircheallaigh: Yes.

Mr. David de Burgh Graham: —you said you didn't have enough time to say everything you wanted to say on that, so here is some time to say what you wanted to say.

Prof. Ciaran O'Faircheallaigh: I'm sorry, but I'm getting a bad echo on the line now. Anyway, I'll keep going.

I'd like to begin by perhaps following up on your question about dialogue being a risky business.

I think that one issue with conventional impact assessments is exactly that. When indigenous people don't control it, they're in a dilemma because if they engage with it, it can be taken as an indication of their consent. On the other hand, it very rarely is effective in taking into account the issues they have.

I will fill in on a couple of the points. One is the failure to properly acknowledge the importance of indigenous world views, of indigenous understandings of the universe and indigenous expertise. There tends to be a deeply in-built assumption that western science offers the only valid understanding of environmental processes and outcomes. As a result of that, even if use is made of information provided by indigenous people, for example through land-use studies, it tends to be co-opted and presented in a frame that's very much dominated by western assumptions and western values.

Another point I would mention is the failure to use appropriate methodologies for engaging with indigenous people. The very much standard approach in conventional impact assessment is to use meetings in offices, in buildings, to do that in a one-off form so that you come to a meeting, you provide people with information and you ask for their response. For various reasons, that sort of approach is entirely inappropriate. If you look at the way in indigenous-controlled impact assessment is conducted, you see that it tends to have a much broader variety of forms of engagement. It will involve small group meetings, individual meetings. It will involve perhaps separate meetings with men and women. It will involve meetings “on country”, as we say in Australia, in other words, meetings at the places on the land, in the waters, where these impacts are expected to happen, where indigenous people feel much freer and are much better able to express their understandings.

It is iterative. In other words, there will be a succession of exchanges where initial information is provided, people are given time to think about it and come back and ask questions. Further information is provided. You will have this backwards and forwards process over an extended period of time.

I think there are both fundamental and systemic issues in the way indigenous knowledge is treated, and there are a series of very practical issues of what the appropriate ways of engaging with indigenous people are to make sure that they do in fact have a real impact on what is said in environmental impact statements and on the recommendations that emerge from that.

● (1610)

Mr. David de Burgh Graham: Thank you.

I think my time for consultation is already up.

The Chair: Sadly, yes it is, Mr. Graham.

Ms. Stubbs.

Mrs. Shannon Stubbs (Lakeland, CPC): Thank you, Mr. Chair, and thank you to all the witnesses who have made themselves available to participate in this study.

Let me say, as a member of Parliament in Canada who represents a major oil and gas riding, whose future is completely dependent on the successful construction of major energy infrastructure, I thank you as a person who is of indigenous descent myself, being part Ojibway. I thank you as a person who represents oil and gas workers in northeast Alberta and nine indigenous communities, both first nation and Métis, and whose businesses and livelihoods and futures are dependent on oil and gas development and the construction of major energy projects in Canada. I thank you.

I do, however, regret, Mr. Chair, that I want to move my motion that I tabled on Friday, October 19, 2018.

The Chair: Which motion is it?

Mrs. Shannon Stubbs: It's the motion I put on notice on Friday, October 19, 2018.

The Chair: There are others. I've seen a few. I just want to make sure we have the right one in front of us.

Mrs. Shannon Stubbs: Sure, I'll read it:

> That, pursuant to Standing Order 108(2), the Committee request the Minister of Natural Resources appear before the Committee, in the next month, to answer questions related to the Trans Mountain purchase and plans to build the Trans Mountain expansion, and that this meeting be televised.

I trust that the witnesses will understand and probably know that Canada is in a crisis in energy development. It is damaging Canada's reputation as a place that welcomes energy investment, where big projects can be built.

I do hope we'll be able to have you again in the course of this study and certainly invite you to follow up with written submissions, but we as Conservatives are at our wit's end in terms of being able to get our own Minister of Natural of Resources to come to this standing committee to account to Canadians on the outstanding construction of the Trans Mountain expansion—

Mr. Nick Whalen (St. John's East, Lib.): On a point of order, Mr. Chair, we do have the minister coming on the main estimates within the next month. I am wondering if it would be sufficient for Ms. Stubbs to have the opportunity to question the minister on the broad variety of things one can be questioned on with respect to the main estimates, including money allocated to TMX, at that time, and allow the witnesses who have come from abroad and who have made themselves available for this meeting to continue to be questioned. Or we could devote some time at a future meeting to having a second opportunity for the minister to come and speak to us on TMX in addition to the main estimates, if that would be amenable to her.

The Chair: Thank you for that. I was going to suggest the same thing. I'll get back to you in a second, Ms. Stubbs, but we do have witnesses who have joined us from around the world, literally. It's been quite difficult to coordinate this, to get all three of them here. Rather than turning them away....

Mrs. Shannon Stubbs: What date will the minister be here?

The Chair: Allow me to finish, please. We have made the request that the minister come, pursuant to the last motion you tabled, actually. He has agreed to do so. I can't remember the date off the top of my head. It's April 30, I've just been reminded. He will be coming —

Mrs. Shannon Stubbs: The problem is that on February 26—

The Chair: If you would allow me to finish, please—

Mrs. Shannon Stubbs: —all members of the committee did vote to call the minister—

The Chair: Or you can interrupt me. It's entirely up to you.

Mrs. Shannon Stubbs: Or you could keep interrupting me.

The Chair: No, I was actually speaking.

Mrs. Shannon Stubbs: Let me respond to your point.

The Chair: No, I haven't finished yet.

The minister is coming on April 30.

We have three witnesses here—

Mrs. Shannon Stubbs: These Liberals really have problems with letting women speak. I'm the only woman member of this committee.

The Chair: Actually, no, there's another one here. I'd like to acknowledge that.

● (1615)

Mrs. Shannon Stubbs: Yes, there's the permanent member. Sorry.

The Chair: In any event, we have three witnesses here who have graciously given us their time. We have the minister coming. Mr. Whalen has suggested a very reasonable compromise, although that's entirely up to the committee members. We could set aside some time. We are sitting next week. That way we're not putting further witnesses out, and we can discuss this issue then. Since he is coming anyway, we're not losing any time, or you don't lose anything with respect to the nature of your motion, with all respect. That's my suggestion.

Mrs. Shannon Stubbs: Okay. Do you feel comfortable that you've concluded, and do I have your consent to speak?

The Chair: Go ahead. Go ahead.

Mrs. Shannon Stubbs: Okay. Here's my concern.

On February 26, all members of this committee did move to call the minister to appear here on the supplementary estimates, and I thought that we all had an agreement on that, and so far the minister has failed to appear. He's sitting in the House of Commons today, and he's been here multiple times when this committee has sat. It has been nearly five months since he has appeared here. He has not been accountable on the Trans Mountain purchase. He has not been accountable on the allocations in the estimates. Here we are, trying to get through a study, which, I agree, is extremely important but, I think, confounding, certainly to the indigenous communities that I represent, to the 43 indigenous communities who were counting on the completion of the Trans Mountain expansion...while Liberal legislation, dealing with exactly this issue of full-scale regulatory overhaul and consulting with indigenous communities to ensure the meaningful, the proper, the environmentally responsible and sustainable construction of major energy projects can continue. That legislation is sitting in the Senate right now. It never came through this committee. So here we are, trying to get through this study that —

The Chair: May I ask you a question?

What do you propose we do with the witnesses today?

Mrs. Shannon Stubbs: I think you're trying to make it seem like it is urgent to complete. What is urgent is that the minister should have appeared in front of this committee four and a half months ago.

The Chair: Okay.

If you intend to continue, and you have the right to do so, should we be good enough to dismiss the witnesses? We have 45 minutes left in the scheduled meeting, and if you're going to do that, I don't think they need to sit here and listen to it, although they're free to do so.

Mrs. Shannon Stubbs: What I would say is that if you can guarantee and confirm a date and a time when the minister will appear here at the natural resources committee, I absolutely would love to go back to the study. If not, yes, I will continue.

The Chair: The date will be April 30. The time will be 3:30 in the afternoon.

Mrs. Shannon Stubbs: Great.

The Chair: So can we move on?

Mrs. Shannon Stubbs: Yes, let's do that.

Mr. Nick Whalen: We can just leave the motion open but not debate it right now. We'll discuss it next week, because I think Ms. Stubbs might want him twice.

The Chair: That was my understanding as well, yes.

Mr. David de Burgh Graham: We can adjourn debate on the motion now.

Mrs. Shannon Stubbs: Sure.

The Chair: We can set aside some committee business on Tuesday and deal with it then.

We can move on to witnesses.

Is that acceptable to everybody then?

Ms. Georgina Jolibois (Desnethé—Missinippi—Churchill River, NDP): I just want to make some points here. I've had my hand up.

The Chair: I saw that. I wasn't ignoring you.

Do you want to speak to something about the motion?

Ms. Georgina Jolibois: I do want to speak to this piece as well as to the motion because of the importance that all of industry.... Regardless of what province or territory we're in, the indigenous people are impacted and want to have full participation, but due to government regulations and industry's understanding, the indigenous communities always end up losing out. I'm very concerned about that.

I want to thank my colleague to my right here. Talking to the minister is very crucial because, as I'm learning and as I've seen across Canada, industry needs to occur, but indigenous communities are required to be involved.

The Chair: Thank you. You're welcome to come back and join us any time we're meeting.

Ms. Georgina Jolibois: I understand that. I don't appreciate the way you said it because I find that condescending, but it's really significant—

The Chair: What I was saying is that we're going to continue discussing this motion on Tuesday, so I welcome you to come back and participate. That was my point.

Ms. Georgina Jolibois: But again, you're just assuming. I want to make sure that my point is made while we have this opportunity, because we're not going to have these witnesses on Tuesday and I really appreciate the witnesses who are here today with us.

The Chair: All right, thank you.

Are we all in agreement on how we're dealing with this motion then?

Mrs. Shannon Stubbs: We're all in agreement, and we're also in agreement that if that minister does not get here, this will happen every day, every time we meet.

The Chair: I'm not sure we agree on that. That's entirely up to you.

Mrs. Shannon Stubbs: Okay, I'll put you on notice then.

● (1620)

The Chair: Are your questions with respect to the motion? If they're with respect to the motion we're talking about, that's fine. Otherwise I'd like to move on and get to the witnesses.

Mr. T.J. Harvey (Tobique—Mactaquac, Lib.): If the minister does not in fact show up on April 30, you have my full support to table the motion again.

Mrs. Shannon Stubbs: Thank you, Mr. Harvey. We have Albertans in all Canadians.

Mr. Chair, given how important this study is and my gratitude to the witnesses for being here, and the comments of my colleague who doesn't get to participate on a regular basis, if it's okay with you, I would cede my questioning to my NDP colleague to go ahead. Then we'll see if we can get in a follow-up round afterwards.

The Chair: Absolutely. That's entirely up to you.

Ms. Georgina Jolibois: I want to emphasize that I do support the minister's coming here and answering some questions away from the estimates, because when we talk about the budget and the estimates, we rarely get to the kinds of discussions we want to have.

To Ms. Gunn in Manitoba, you speak about indigenous participation and free, prior and informed consent.

I come from Saskatchewan my experience there—and I'm sure it's similar across Canada—is that the federal and provincial governments think "indigenous" means reserves, the Métis locals, or the Métis communities only, but not municipalities where the majority of indigenous people may live.

How can we rectify that? How can we have the discussion to clarify that very point? It's really important that the local residents who live in municipalities look to participate, look to have consent and look for the same information. How can we do that?

Prof. Brenda Gunn: Thanks.

I think you're absolutely right with the concern you've raised. The areas for which these consultations are viewed to be necessary tend to be the reserved lands. In Manitoba we have some recognized trapline territories that can sometimes be engaged, at least by provincial governments.

The "how" is perhaps a difficult question, but I think it must start with the recognition that the right under international law to participate in the decision-making and the right to give one's free, prior and informed consent is not limited to aboriginal title or reserve lands; it's traditional lands, territories and resources. Regardless of Canadian governments' recognition of indigenous people's lands, the right exists there.

One starting point would be simply a recognition that all of Canada is indigenous lands, so that when projects are being contemplated, one must think about whose traditional territories are potentially impacted and start engaging the people in that way.

I think you're right. I don't believe I highlighted it in the presentation, but when indigenous peoples reside in an urban environment they also have a right to engage in the processes. The processes may not just be limited to consultations in community; there may need to be ways set up to address and ensure the participation of indigenous peoples in more urban centres. Those are all quite clearly required under international standards right now.

Ms. Georgina Jolibois: Do we have those discussions occurring across Canada? I'm curious.

Prof. Brenda Gunn: I'm not sure of the extent to which we have them. I think the conversations are perhaps there. Is the legal recognition there that Canada is required to engage in consultation with indigenous people, even when Canadian law has yet to recognize indigenous people's traditional territories? I'm not sure whether it's actually happening. I think you're right to point that out it's not happening effectively.

An example that may speak to this is found in our prairie provinces, where we have the historic treaties and we speak with colleagues who are lawyers in practice. They've told me that different approaches are taken in areas of Canada where there are historic treaties, the numbered treaties, from treaty number 1 through to 11, which Canada still views as indigenous people ceding, surrendering and releasing all rights to the land—indigenous people take a very different perspective on this—compared with the way Canada engages with indigenous people when there is no historic treaty. I think there is a significant difference.

For me, that's some of the problem I was trying to highlight in my presentation—albeit not speaking to it directly—that even if Canada continues to maintain the position that in treaties number 1 through 11 indigenous people ceded, surrendered and released the rights to the land, that is not the perspective of indigenous people. In international law they have a right to engage in processes over their traditional territories, regardless of Canada's interpretation of those treaties.

● (1625)

Ms. Georgina Jolibois: Thank you.

Do I still have time?

The Chair: You have used Ms. Stubbs's time, now you have your own time.

Ms. Georgina Jolibois: I want to go back to a specific question. The UN Committee on the Elimination of Racial Discrimination said in a letter of December 14, 2018, that proceeding with the site C dam "would infringe indigenous peoples' rights protected under the International Convention on the Elimination of All Forms of Racial Discrimination."

How should the governments of Canada and B.C. proceed? That's a really good question and a good discussion to have.

Prof. Brenda Gunn: My apologies. I don't have that report in front of me. I did appear before the Committee on the Elimination of Racial Discrimination when Site C was brought up, so I'm aware of this report.

From my recollection, the report, including the initial report that came out.... Sorry, I don't have dates in front of me. I think it was 2016, Canada's last review before CERD and the concluding observations of the committee. The report you refer to is the follow-up.

I think there are some pretty specific directions from the committee on what needs to happen, so I would suggest that's the starting point. I don't have the document in front of me, nor do I have access to the Internet in the little room that I'm currently in, so I can't pull it up.

I think, perhaps, a starting place for our concerns over Site C is to recognize that we just need to take a pause until some of these issues are considered and resolved. My understanding, as I've done some work with Amnesty International, is that Site C is continuing to move forward despite all these concerns that are being raised. I think, perhaps, a starting point for the conversation is for there to at least be a pause on some of the developments so that the broader issues that have been raised by the human rights committee can be addressed.

Ms. Georgina Jolibois: Am I done?

The Chair: No, you have five minutes.

Ms. Georgina Jolibois: The Trans Mountain pipeline expansion is a very sensitive issue for all Canadians across Canada. It is also shown to have split indigenous nations who want to develop the petroleum resources on their lands and get the product to market, and coastal indigenous nations who oppose the project, saying it threatens their economies that are based on utilizing ocean resources.

How can Canada resolve this? Do you have any ideas to recommend, some suggestions and some solutions for moving forward?

Prof. Brenda Gunn: Thank you for that question, as well. At least I'm assuming these questions are directed at me.

Ms. Georgina Jolibois: Yes.

Prof. Brenda Gunn: If any of my co-panellists would like to jump in, I'm happy to hear international perspectives on these matters.

I'm not sure I have an answer, but I appreciate your highlighting the example, because it hits on one of the most challenging issues, namely, the right of indigenous peoples to participate in decision-making and free, prior and informed consent, which is to ensure that these processes do not create further divides amongst indigenous peoples and do not engage in divide-and-conquer types of tactics. I think projects such as Trans Mountain really exemplify the complicated nature of these conversations when projects are so large, crossing so many territories and engaging so many different people.

One of the questions I often get governments and industry asking is who has the right to say yes? Or whose approval do we have to get when there are so many different people? What happens if not everyone agrees? My answer, which may or may not be the one you're hoping for, honourable member, is that I'm curious to know if the communities who have raised concerns regarding Trans Mountain feel as though they've been heard. And I mean truly heard with regard to the concerns they've raised. Has consideration been given to what the impacts are? Can they be mitigated, and has there been space for real conversation? Or have all of the conversations or consultations occurred in a climate of “this project is going forward. Get on board or get out of the way”?

I fear that on large complicated projects such as Trans Mountain, on which there are people with different perspectives, it becomes easier for Canada and industry to work with indigenous peoples or first nations who are willing to work with them, and to then perhaps ignore or sidestep the concerns raised by other people. I think that's fundamentally a problem.

I don't know enough of the specific concerns that are being raised to say this is the way forward. But I think the right, as contemplated in international law, is about trying to uphold rights and to create space for a real conversation, in which all parties have the opportunity to speak and be heard. I would say that as a starting point for these large projects, we need to make sure all those who are potentially impacted have an opportunity to be heard.

I also think that with projects like Trans Mountain, if I'm correct, there may be a distinction between indigenous communities that are directly impacted by the project, whose traditional territories the pipeline will cross through, and those for whom there may be more indirect impacts. I think that needs to be part of the conversation. I'm not trying to in any way suggest that those who have indirect impacts have lesser rights, but that's just a recognition that there may be different rights at play and so we want to try to get that broader picture.

● (1630)

Ms. Georgina Jolibois: It's important to have the minister here so that we can have further discussions.

The Chair: Mr. Whalen.

Mr. Nick Whalen: Thank you very much, Mr. Chair. I'm happy for this opportunity to bring some of our international guests back into the conversation.

Each of the testimonies we've heard raises issues around the UN Declaration on the Rights of Indigenous Peoples, and you've all emphasized the importance of free, prior and informed consent. Can you advise the committee as to how first Norway and then Australia has acted to ensure that capacity is built among indigenous communities to ensure that consultation is in fact informed? How do you build that technical expertise in Norway and Australia to ensure that people are able to participate in a meaningful way and an informed way in what is often a very technical discussion?

Ms. Gunn-Britt Retter: I have a quick response to the previous question, if I may. I think it's also a question of who has the right to determine future generations' rights to live off the land, just to add to the complication.

Norway has developed, but not Finland and Sweden, a consultation agreement with the Sami Parliament. The Sami Parliament is an elected body of the Sami people. There is one in Norway, another one in Finland and a third in Sweden.

In Norway there is a consultation agreement. An amendment to the act is under discussion now that it should also involve municipalities and provinces, or counties as we call them.

On the question of the technical expertise and capacity, I think the capacity today is what is built in the Sami parliaments, and the employees there have mostly legal backgrounds to do these consultations. But on the technical expertise, which was also raised in one of the previous presentations, we still rely very much on the proponents' reports and findings rather than trusting the indigenous knowledge there.

Of course, in this process with the environmental impact assessments, which Norway, Finland and Sweden conduct, the money is put in by the proponents to carry it out. For example, I don't even know if the Sami have reflected that they could demand to conduct the assessment rather than letting the technical people do it to ensure the holistic and the Sami world view is taken care of. When that has been tried, I don't know of any successful efforts in that regard.

I think we are quite up to date on the legal aspect. We have a lot of legal experts who can take part in this. But when it comes to the more technical part, there is a shortage.

● (1635)

Mr. Nick Whalen: Mr. O'Faircheallaigh.

Prof. Ciaran O'Faircheallaigh: Quickly, there is a precedent with Sami people in Sweden. They have recently conducted their own impact assessment of a proposed copper mine being developed by Falun. I can provide that reference to the committee.

Quickly again, in response to the honourable member's very important questions of only focusing on people on reserve, I think another critical issue about aboriginal control of impact assessment is that aboriginal people decide who is impacted and who should be consulted.

There are cases where I've been involved where—

Mr. Nick Whalen: I'm sorry, Mr. O'Faircheallaigh. As you may have heard previously, I only get seven minutes to ask my questions, and I would like you to answer mine.

Prof. Ciaran O'Faircheallaigh: Okay. Sure.

In terms of capacity and free, prior and informed consent, this is a chicken and egg issue. Where aboriginal people have powerful regional representative organizations, they use their existing capacity to go to proponents and government and negotiate with them about getting the resources to further build that capacity.

For example, in the Kimberley region of northwestern Australia, you have a representative organization called the Kimberley Land Council. It has a powerful political base. It represents all native title groups in the Kimberley, and it is in a position to go to government and proponents and negotiate substantial funding to carry out comprehensive indigenous impact assessments and negotiate agreements.

In parts of Australia, particularly in what we call “settled Australia” in Victoria and New South Wales, you don't have that regional political organization, and, bluntly, you end up with a two-tier system. Aboriginal people in Victoria and New South Wales and South Australia struggle hugely in getting the resources to realize that capacity.

My experience in Canada suggests that you sometimes get the same sort of a two-tier system, possibly for the same sorts of reasons.

Mr. Nick Whalen: Well, let's stay there in Canada, because you said that you've done some work in the oil and gas sector off the east coast. We actually have a process now that's just coming to an end with respect to Equinor and ExxonMobil and consultations for offshore development of the exploratory drilling projects proposed this summer.

Proponent funding was granted to allow the indigenous groups, 41 of them, I believe, that may or may not.... It's quite unknown whether or not their fishing rights in Atlantic salmon would be impacted, but they were all invited to participate. It seems that the ones that were given more funding were the ones that were actually already better able to participate because they were already well funded, and the less well-funded groups were given less money. Do you see this disconnect in Australia—I think you've mentioned it—and how should we try to work around that?

Prof. Ciaran O'Faircheallaigh: Yes. First of all, I should clarify that my work was at Voisey's Bay in Labrador, rather than on the offshore—

Mr. Nick Whalen: Okay. Thank you.

Prof. Ciaran O'Faircheallaigh: —but I think that reinforces the point, because the Innu and the Inuit were able to negotiate one of the strongest impact benefit agreements in Canada mainly because they already had a strong political organization they were able to mobilize. You certainly see that in Australia.

I think the only solution is to have a federally funded facility that provides all groups affected by major projects with funding capacity. It's possible to do that in a way that is consistent with the parliament's accountability requirements and so on. But in the absence of a national fund, these inequities inevitably emerge. To those who already have will come more.

● (1640)

Mr. Nick Whalen: Thank you so much. I have eight more questions, but I only got one in.

The Chair: Mr. Falk, I believe you're next, for five minutes.

Mr. Ted Falk (Provencher, CPC): Thank you to all of our presenters here today for their testimony here at committee.

Ms. Retter, I would like to start with you. In your testimony to committee at the beginning of this meeting, you made a comment. I tried to get it all here; I don't know if I captured it all. You said that sometimes rights have to give way to national interests. Can you further expand on that?

Ms. Gunn-Britt Retter: Yes, thank you. I'll try to be brief.

What I was trying to convey is that while Norway, Finland and Sweden recognize that there are indigenous peoples with rights, they don't have the land title as in other parts of the world.

We are often faced with the challenge, for example, in the face of climate change, which is uppermost today. We say, oh yes, but we need to mitigate climate change and we have to find alternatives to fossil fuel, so that is a global and a national interest, and the Sami issues have to wait now that we have these more important issues to solve. Also, we relay expectations to the Sami people that they have to be part of this joint effort to mitigate climate change, and then use that as an argument to put that dilemma on the indigenous peoples or the Sami people that they have the land that is needed to mitigate this or to change to green energy sources and so on. That is a very unfair burden.

First of all, there are already a lot of windmill parks and mines on Sami land, so it's not that we don't contribute, but there's also a lot of other land that you could use that is closer to where the electricity need is. As a Sami, you feel it's yet another argument to continue to change the land use and put pressure on the Sami culture to carry this burden. I'll put it that way.

Mr. Ted Falk: Thank you.

Ms. Gunn, what is your perspective on national energy projects as far as the rights are concerned of people of first nations or indigenous communities who are directly affected, versus those who are indirectly affected? Should they have the same rights?

Prof. Brenda Gunn: Maybe my best response is not just my perspective, but my legal opinion. I believe international law recognizes that there is an obligation on the state to get the free, prior and informed consent of indigenous peoples, whether it's their traditional territory that will be directly impacted, or whether they may have their rights impacted in other ways.

I'm not sure that international law makes the distinction that you're seeking to make here today. Going back to my earlier comment and my opening presentation, what we should be guided by in these processes is seeking to uphold rights. If we're engaging in processes to restore indigenous peoples' control over their lands and resources and restore their integrity and pride and redress power imbalances between indigenous peoples and states, I think this process where we try to divide indigenous peoples and say, “You're directly impacted, and you're indirectly impacted, so your rights aren't as important”, is not done in good faith. It is not upholding the standards, where the consultation process is actually about upholding rights and promoting new partnership.

● (1645)

Mr. Ted Falk: Would it also be in good faith for someone who doesn't have a direct impact or interest in a project to tender their opposition to a project?

Prof. Brenda Gunn: Well, I don't think it's fair to speak to that in the abstract. From my experience, when people have raised opposition, they've often done so because of concerns for water quality. They may be downstream from a development. Maybe they're indirectly impacted, but they will experience the impacts.

Again, I think the obligation on Canada is to find out what concerns are being raised, how indigenous peoples can be impacted, and what steps are necessary to ensure that all of their human rights are upheld in the process.

The Chair: I'm going to have to stop you there, Mr. Falk.

Mr. Ted Falk: I wasn't done.

The Chair: Well, I have a difference of opinion with you on that one. You will get another shot if you want.

Mr. Hehr, it's your turn.

Hon. Kent Hehr (Calgary Centre, Lib.): I'd like to thank the guests for coming today. This has been a fascinating discussion. Your knowledge is very deep and you bring a lot to the table for us both to understand our duty to consult and to accommodate our indigenous people here on major energy projects. I come from a city called Calgary, the energy capital of Canada. In Canada, we are also treaty 7 people. We share the land with the indigenous people of that region, and build community with them here today.

Nevertheless, I was listening to the discussion about the Sami people and the mitigation of climate change, wherein you found a successful practice implementing a large-scale windmill and a process that worked all right. Was that because there was early engagement on the file? Were people connected very quickly. What led to a successful outcome in that case?

Ms. Gunn-Britt Retter: I'm not sure how early they were engaged, but what was fundamental here was the dialogue, the consultations that went on and that they agreed on that. Yes, they understood the need for the windmill, and they had this dialogue on what part of the land was less important for reindeer herding and still useful for a windmill.

What I understand from that process is that both parties were happy. They adjusted the location of the planned windmill park and they agreed.... I'm not sure if there were any direct benefits involved in that, but at the same time, I raised a concern connected to the free, prior and informed consent part of that project. It's the cumulative effect here, which was also mentioned earlier. After they finished the windmill part, they started to talk about the need for electricity lines. I don't know if that was a part of the kind of understanding that was put on the table when they were negotiating or consulting with the reindeer herders. I'm not sure if there was an understanding that this would lead to other construction on the same land that might have a greater impact than the windmill.

Hon. Kent Hehr: My next question is for Dr. O'Faircheallaigh. Earlier in your testimony, you mentioned that you saw a difference between indigenous environmental impact assessments and “regular” studies in this regard. When these were completed, were the companies and the indigenous people at loggerheads? Was there a mechanism to work out the differences, or was this generally accepted as the best way forward, through dialogue and discourse?

● (1650)

Prof. Ciaran O'Faircheallaigh: In the regulatory process, there doesn't have to be a reconciliation because the indigenous impact assessment goes to the decision-maker—in the case I mentioned, to the federal minister and the Western Australian minister—alongside the conventional impact assessment.

What the decision-makers get is an undiluted perspective on the project and its impacts, and mitigation from an indigenous point of view. I think that is the critical thing. That means, for example, that it is up to the indigenous people to decide who will be affected and whether that's "direct" or "indirect". It's their perspective that goes to the decision-maker and that's key.

However, following on from the impact assessment, there was a negotiation process involving the proponent, the state government and the indigenous parties that resulted in the signing of a series of agreements. Through that negotiation process, you do get a resolution and an agreement on the approach for dealing with the impacts.

I would also note that as a result of the input from the indigenous side, aspects of that are extremely innovative and very important, from the point of view of the national interest, not just the indigenous interest. As I mentioned, one specific example to highlight is that there is a big issue with long-term follow-up. For the life of the project, if it's 40 or 50 years, that agreement provides that there will be an environmental compliance officer present at the site to make sure that all of the agreed environmental protection provisions are put into practice. That's something that goes back to that question about the national interest again.

The Chair: Thank you, Mr. Hehr.

Mr. Falk, I think you mentioned that you weren't finished. I'll give you the floor back.

Mr. Ted Falk: Thank you, Mr. Chair, that's very kind of you. Thank you for your last comments, Mr. O'Faircheallaigh. I think those were fairly insightful.

I'd like to go back to Ms. Gunn again and continue questioning her on some of her perspectives. When I look at some of our previous national projects that we've done as a country, for example our railway system, our rail lines would never get built in today's environment. I'm not saying they were done perfectly and that there couldn't have been more consultation at the time. However, when we look at national energy projects today and the amount of consultations we do and are committed to doing and want to do, what do you see as the best path forward to actually completing these projects?

Prof. Brenda Gunn: I'm not sure I quite understand why we think the railway system wouldn't have been built. I think in some ways it's a really good example. We can see that the negotiation of Treaty No. 3 took a little bit longer, but Treaty No. 3 was negotiated and allowed for the railway system to go through. I actually think we have a great historical example there. The time frame was perhaps not initially what the prime minister at the time had hoped. Treaty No. 3 took four years to reach agreement. It required the Queen's negotiators to come back several times and to sit with the Anishinabe, but it did lead to an agreement.

You're right that we do engage in many consultations at this point. I get the sense there's not always a feeling that the discussions with indigenous peoples are effective, with the aim of upholding rights or an attempt to accommodate indigenous peoples' rights. I appreciate honourable member Hehr's point that it's the duty to consult and accommodate. Often in Canada we do an abbreviated duty to consult, and I think that's part of the problem we have. There's a view, and I think my co-panellist spoke to it as well, that there's a "show up, provide information, maybe get some information back" attitude, but then Canada goes off on its own and makes the decision.

I think what is increasingly being required in international law, including under the new World Bank rules—I know Canada is not a borrower from the World Bank, but I think it shows the international trend—is that it has to be a far more robust process whose intention has to be to provide information and hear the concerns that indigenous peoples may raise. We need to sit down and work together to think of ways to address those concerns in the project.

I think a process that better engages indigenous peoples and that seeks to uphold their rights will actually have greater certainty. We will have projects that are good for the environment and good for indigenous peoples and not just be viewed in a narrow economic view. We will be able to reach those decisions faster and with greater certainty and have the process be done in a much more timely fashion.

I think honourable member Stubbs said that we're in crisis, and I agree. We are in crisis, and it's the failure to full-heartedly engage and uphold indigenous peoples' rights that has led to some of the uncertainty.

● (1655)

Mr. Ted Falk: The Prime Minister has stated that indigenous peoples do not have veto rights. Would you agree with that?

Prof. Brenda Gunn: I think international law has reiterated the same point, but it's important to be clear on what we mean by veto. If we're thinking that Canada goes in, presents a plan to indigenous peoples and tells them, you can say yes but can't say no, so say yes and we're going to walk away, that's not what anyone contemplates. Under international law as I indicated, it shouldn't be a pre-determined decision being put forward to indigenous peoples; it should be about engaging them in the decision-making process.

There are circumstances in which indigenous peoples are allowed to say no. I am very clear that while it's not a veto, we still have a right to say no to projects. I can try to find it in my notes to reiterate, but I believe I said in my opening presentation that indigenous peoples have a right to say no under certain circumstances. Yes, my notes say they "may withhold their consent following an assessment and conclusion that the proposal is not in their best interest"—i.e., that it's not going to uphold their rights or that there are deficiencies in the process or to communicate a legitimate distrust of the consultation process.

Yes, it's not a right to veto, but we do have a right to say no.

The Chair: Thank you.

Mr. Whalen, you have five minutes.

Mr. Nick Whalen: Maybe we could use the example that I referred to before about the indigenous consultation that's happening at the same time as the environmental assessment for offshore Newfoundland and Labrador. There are no direct land rights associated with the exploration area, but there are perhaps indirect or ancillary economic rights associated with their local fisheries.

I wonder if each of you can explain or maybe provide your view of your own national law on when consultation in respect to proposed environmental drilling should begin. Should it begin once a proponent decides to go? Should it begin when the state decides to open an area up for licensing? Should it begin the first time someone is interested in doing some seismic testing in the area?

You've talked about early engagement, but then with respect to indirect rights it's unclear to me when you would suggest the best practice would be for indigenous consultation in that type of scenario, in the scenario we see of offshore oil and gas exploration.

Maybe we'll start this time with Canada, then go to Australia, and then to Norway.

Prof. Brenda Gunn: I was hoping I would go last. I was going to try to pull up—

Mr. Nick Whalen: Okay. We can go the other way.

Prof. Brenda Gunn: Maybe I'll just try to speak really quickly, because I believe our time is almost up.

It should be as early as possible. I know that's not the specific answer you're looking for, but we want to make sure that the engagement is early enough so that indigenous peoples can truly participate in the decision-making and have an impact on the outcome. There's a concern that if we're engaging indigenous peoples too late, it's a *fait accompli*. You want to make sure that the engagement is early enough.

You are right that I have heard criticisms, mostly coming out of Mexico, in fact, that if the engagement is too early, there's no information that can be provided. My only response at that point is that as early as possible, when the first idea comes up, start building that relationship so there is a relationship of mutual trust and respect that can be built upon for consultations about a specific project.

● (1700)

Mr. Nick Whalen: Thank you.

Australia.

Prof. Ciaran O'Faircheallaigh: The question is when consultation starts. In relation to lands that are under claim or for determined native title, consultation starts when somebody applies for an exploration licence. However, there is a thing called the “expedited procedure”, which means that unless the impact of exploration is expected to be very substantial, that's perfunctory.

If someone applies for a development licence, there is then much more extensive consultation.

In terms of best practice, there is an example of strategic assessment that was conducted in western Australia, which went much earlier. That involved looking at a long stretch of coastline, hundreds of kilometres of coastline, and engaging with people all along that coastline about where a liquefied natural gas hub would be placed. That is much preferable. You then had a two-stage process, once the 11 groups had reached consensus.

I think that also goes back to issues about your pipeline.

Once the 11 groups had reached consensus about the best possible place, there was second level of engagement, much more detailed, with the aboriginal people who had rights in that specific area.

Mr. Nick Whalen: Norway, I know you have only one particular group there, so it might not be as complicated as it is for Canada and Australia, but I would love your perspective.

Ms. Gunn-Britt Retter: It's not that complicated. However, in line with the last answer as well, your question lays different levels. When government is planning the area where oil and gas exploration is to take place, it would be natural to engage with the Sami Parliament, the representative body of the Sami people in Norway.

There's no offshore oil and gas in Finland and Sweden.

On the seismic testing and other levels, when you get into the local level, actually starting the project, the people representing those who are in or near that area would be the ones to consult at that level. Throughout the process, there are different processes and different levels of Sami participation.

The Chair: Ms. Jolibois, you have three minutes and then we'll wrap it up.

Ms. Georgina Jolibois: Thank you for this very important discussion from all three organizations. Because of the short time frame, I would like to go back to our witness in Manitoba.

Ms. Gunn, I'm still hung up on this consultation with indigenous populations—first nations, Métis and Inuit—where some provinces look after the Métis, while federally it is the first nations and the Inuit.

How can indigenous communities push for the benefits if they want to get into an agreement with the industry? How can provinces and the federal government help with the process?

Prof. Brenda Gunn: That's a challenging question, and I think this is where energy projects or any natural resource project exists in a context in Canada where there have been a historic pitting of first nations against Métis. I think some of the colonial burden and legacy is what we need to be mindful of when we start engaging in these consultations. We need to be aware of that broader context.

Part of where we're at now, at least with the Supreme Court decision in Daniels, is a recognition that the federal government does have responsibility over Métis people. While the provinces have been engaging with Alberta, for example with the Métis settlements, we do now have clarification, at least from the Supreme Court, that the federal government does have a responsibility to engage with Métis, first nations and Inuit.

I also think the question points to the issue that we're engaging in resource development in Canada in a context where there are several outstanding claims and failure to recognize and uphold treaties. I think that leads to a lot of our tensions and problems, the fact that we're moving forward when we still have other issues that need to be resolved. Related to your question is that the faster Canada moves to resolve outstanding land claims, the easier these consultations may be because we've addressed the fundamental issue. That's where I started my presentation, trying to connect the right to free, prior and informed consent to the broader right to self-determination and the rights over lands, territories and resources.

● (1705)

Ms. Georgina Jolibois: Thank you.

The Chair: Unfortunately, we're out of time, but thank you very much, all three of you, for taking time from your afternoons, or mornings as the case may be, to join us. It was very helpful and we're very grateful. See everybody on Tuesday.

The meeting is adjourned.