

The National Interest Can't Be Vetoed

The Editorial Board

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Justice Minister Sean Fraser committed the cardinal sin of politics last month – letting slip an awkward truth.

Mr. Fraser was asked whether the Liberal government believes that Indigenous groups now have a veto over industrial development because of Ottawa's 2021 adoption of the United Nations Declaration on the Rights of Indigenous Peoples ([UNDRIP](#)), which states the need for free, prior and informed consent.

"The commentary has suggested to date that it's not necessarily a blanket veto power, but of course we're in new territory here," he told reporters, going on to add that, "in most circumstances, I think it demands a very deep level of engagement and understanding of the rights that may be impacted, and to the extent those rights can be accommodated we should make every effort to."

To judge by the speed of the resulting apology – the very next day – Mr. Fraser committed a sizeable political blunder. But there is one hitch: His statement was an accurate summary of the state of Canadian law on Indigenous rights.

Mr. Fraser's sin was not to misstate Ottawa's legal obligations but rather to momentarily pierce the veil of ambiguity that the Liberal government has draped over looming negotiations with Indigenous groups.

Prime Minister Mark Carney has talked about the [need to obtain consent from Indigenous groups](#) (as well as the provinces) as part of the effort to [fast-track major industrial projects](#). That is a political commitment, not a legal obligation.

Canadian courts have been crystal clear on the point. Governments must consult with Aboriginal peoples and, in some cases, accommodate their interests. But that duty does not presuppose any particular outcome or that any agreement is reached. It does require good faith, on the part of both the Crown and Indigenous groups. And there is a spectrum for consultation and accommodation, depending on the degree of infringement and the strength of a claim to title.

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That was the state of law before the Trudeau Liberals adopted UNDRIP four years ago. Since then, both supporters and critics of UNDRIP have asserted that the standard of free, prior and informed consent equates to a veto.

Canadian jurisprudence – and the wording of the declaration itself – says otherwise. The UN declaration, at its heart, lays out a framework for governments to obtain the free, prior and informed consent of Indigenous groups for any activity on their traditional territories. That might sound like a veto; in everyday life, true consent necessarily means the ability to withhold consent.

But UNDRIP also contemplates “fair and equitable compensation” in situations where such consent has not been obtained. Translation: there is no veto, although proceeding unilaterally could prove costly to a government.

The declaration also states that its provisions cannot be interpreted in a way that would “impair, totally or in part, the territorial integrity or political unity” of a signatory country.

One of the few Canadian court decisions dealing with UNDRIP’s impact repeatedly makes clear that there is no veto right conferred on Indigenous peoples. In February, the Federal Court issued a [ruling](#) that found that the Canadian Nuclear Safety Commission had failed to properly consult with two Indigenous groups, in part because it did not incorporate UNDRIP into its efforts. The court required the commission to restart its consultation and accommodation process. But at the same time, the ruling underscored that UNDRIP did not create a veto in law.

Indeed, it could not be otherwise. If Indigenous groups truly did hold a veto as a matter of law, they – not Ottawa, on behalf of all Canadians – would exercise sovereignty over large parts of Canada. That would, to borrow UNDRIP’s words, rather impair the territorial integrity of this country.

There are legal realities, and then there are political realities. One of those political realities is that the Liberals want to focus on how nation-building projects can build prosperity in Indigenous communities, rather than spawn court cases. Another reality is that businesses contemplating investments in the billions of dollars will need certainty. So it is understandable that the Carney government wants to focus on obtaining the consent of Indigenous communities.

But the Liberals should make clear that what Mr. Fraser said was, in fact, simply a statement of reality. Should negotiations fail, the national interest remains paramount.