The relationship between First Nations and the Canadian state has been, and continues to be a tumultuous one. Supreme Court decisions that affirm Aboriginal Rights & Title provide some clarity to these relationships, but fall short when compared to international standards. This paper aims to review the background of First Nations sovereignty in the context of resource planning including some global 'best practices' content from the United Nations. Then the paper aims to examine Environmental Assessments by briefly evaluating the effectiveness of this process in incorporating First Nations and therefor fulfilling Crown's duties to consult and accommodate. Lastly the paper provides a description of potential 'best practices' for the Crown, First Nations and industry; this may act as a loose guide for these actors while they engage in new developments under the current framework of consultation and accommodation.

The United Nations declared the Rights of Indigenous Peoples (UNDRIP) in 2007 and despite previous long standing support under the Liberal government, Canada under the Conservative government chose initially to not to sign on to the declaration. Canada did eventually sign on to the declaration, but not without continual unabated criticisms that the declaration was unbalanced (CBC News, 2007). Canada upon endorsing, considered the UNDRIP (2007) to be a "non-legally-binding aspiration document" (AANDC) the Minister of the Department of Indian Affairs and Northern Development claims that the "provisions dealing with lands, territories and resources; [including] free, prior and informed consent when used as a veto" was one of the areas of greatest concern (AANDC). The federal government has made it clear that they believe that the rights in the declaration are already provided in the Canadian Charter of Rights and Freedoms (Neve & Benjamin, 2011).

The UNDRIP discusses the FPIC of indigenous peoples in Article 10, 28, 29 and 32. In Article 10: "no relocation shall take place without the free, prior and informed consent of the

indigenous concerned". Article 28: "indigenous peoples have the right to redress... for the lands, territories, and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent". Article 29 (2): "no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent". Lastly, Article 32 (2):

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (United Nations, 2008).

These articles state very clearly that free, prior, and informed *consent* must be given to the indigenous people when their traditional lands are used for outside development and resource extraction.

The majority of the country has existing treaties with First Nations groups; however, a notable exception is the majority of land in the province of British Columbia where virtually no treaties exist. Gregory et al. stresses that "in 1867, when Canada became a country, British Columbia did not recognize aboriginal rights, and this left any outstanding treaty issues to the federal government" and that the "province asserted ownership (as Crown land) over nearly the entire land base" (2008, p.36). As a consequence, the federal government was left with little means to negotiate treaties (Gregory et al. 2008). In short, the lands were never ceded by First Nations groups to the crown, or to the provincial government. When faced with encroachment and development on traditional territories, First Nations have been forced to institute legal

proceedings against governments and private companies in order to protect their traditional livelihood, the natural ecology of the area, and their sovereignty. When the Canadian Constitution was revised in 1982, Aboriginal and treaty rights were affirmed within Section 35 (Green, 2011). This has given First Nations precedent in their legal proceedings. Section 35 includes a provision that affirmed the Crown's duty to *consult* and *accommodate* the interests of Aboriginal groups, and that this obligation cannot be delegated (Boreal Leadership Council, 2012). Federal policy affirms these obligations based on decisions in the Haida and Taku River cases (2004) and the Mikisew Cree decision (2005). The policy provides guidelines for federal government and confirms that "the Crown has a duty to consult, and were appropriate, accommodate when the Crown contemplates conduct that might be adversely impact potential or established Aboriginal or Treaty rights" (AANDC, 2011, p. 1).

Mining in British Columbia is surprisingly open access; subsurface mineral rights can be claimed exclusively to all lands in BC except for parks and conservation zones. This includes claiming subsurface resources on land claimed as traditional territory by First Nations, privately owned land, and ecologically sensitive areas (Harrison et al. 2010). Mining companies and prospectors with subsurface claims can access land for prospecting and exploration without any consolations with First Nations, and certainly without their free, prior and informed consent. It is only later in the process, when the company begins applying for an Environmental Assessment that the government begins to be truly involved with consulting with First Nations while assessing the environmental impacts of a project. Environmental impacts of development projects like mining may have detrimental impacts for the people that live on the lands as well as potentially damaging environmental habitat for food species that First Nations rely on to maintain traditional life ways (Baker & McLelland, 2003).

For large projects the Canadian Environmental Assessment Act mandates an Environmental Assessment (EA) which is designed to incorporate multiple stakeholders in order to assess a project's potential environmental impacts (Booth & Skeleton, 2011, p.51). Due to their connections with the rural environments, First Nations have often been a stakeholder within the EA process. This allows First Nations to have their voices heard when they are opposing projects within their traditional territory, as well as often fully satisfying the Crown's duty to consult First Nations. Even when First Nations are invited as a stakeholder to major projects and are consulted and sometimes accommodated, this does not equal their free, prior and informed consent. Often the process can be highly problematic. O'Fairchaellaigh asserts that their involvement is often limited due to conflicts with the relationship between First Nations and the crown as well as issues regarding their limited involvement in the design process, limited involvement in operational phase of projects and limited resources that hinder the capacity for First Nations groups to engage with the EA (2007, p.320).

Baker & McLelland describe broader issues with the EA process in relation to First Nations' participation specifically in mining, claiming that the process in general "reflects a poor integration of First Nations people in the decision-making process" (2003, p.599). The authors urge the evolution of the policy and recommend that First Nations be given the choice of methods, adequate funding, and understandable information that would allow them to participate more effectively (2003, p. 601). Booth and Skeleton cite the West Moberly First Nations decision in 2010 against the BC government and First Coal Corporation (2011). It was found by the Supreme Court that the province had failed to consult adequately and failed to accommodate reasonably the concerns of the West Moberly First Nation. Booth and Skeleton reviewed numerous scholarly articles that criticised the EA process in regards to First Nations and

concluded that the "circumstances of West Moberly... are not unique" indicating that there are concerns of this processes effectiveness nationally (2011, p.57). In a development of a mine, the Minister of Environment and the Minister of Energy, Mines and Petroleum Resources ultimately take an EA application and make the decision to issue the certificate (Environmental Assessment Office, 2014). It is up to the Environmental Assessment Office initially to determine if they had accommodated First Nations interests sufficiently, this is obviously open to their personal interpretation and First Nations are forced into litigation such as the case of the West Moberly when they feel they have been not accommodated appropriately.

The British Columbia Environmental Assessment Office (EAO) may delegate the procedural aspects of First Nations consultation to the proponent early on in the EA. This encourages the proponent to do the consultation with First Nations and have them report back to the EAO. Natcher (2001) explains that this is placed upon the Proponent, because the Proponent has the most to gain from the development. The mechanisms used by the proponents may be limited to providing community representatives with a written project summary that provides basic information about the size, infrastructural needs and employment requirements (Natcher, 2001). Occasionally, the First Nations may be visited by a project proponent and rarely "the direct involvement of local representatives on project advisory boards" (Natcher, p.115). Both First Nations and industry have complained about inadequacy of government guidelines in the consultation process (Natcher, 2001).

As consultation often comes down to an industry proponent and a First Nations group or groups, it is crucial to establish best practices for both industry and First Nations. Booth & Skelton have interviewed industry representatives in regards to their view on the EA process. Booth & Skelton found that one proponent recognized that engagement was crucial and claimed

that the "unilateral extraction of benefit is not appropriate" (2010, p. 219). Some proponents stressed that it was crucial to meet frequently and on-site so that a relationship was established, going beyond the requirements of the *BC Environmental Assessment Act* (Booth & Skelton, 2010). Proponents found it frustrating that even though it was best for the long term relationship between the industry and First Nations, it actually was very challenging to convince stakeholders of its value as it does not directly increase tangible (monetary) benefits (Booth & Skelton, 2010). Crucially, Booth & Skelton cite a proponent who was concerned about the entire process who said: "I come to the table as the proponent representative knowing that the First Nations are coming to the table only because the framework provides few other options.... they tacked on First Nations consultation through a process that had no business dealing with the human component" (2010, p. 220). Ultimately, the proponents are cited as sometimes reaching a difficult point in which First Nations cannot be accommodated and the project is out rightly refused, proponents are left with no other option then to submit the assessment anyways. Based on these unique proponent interviews, Booth & Skelton conclude that positive relationships based on greater knowledge of the process for both sides were apparent in the most successful projects.

It is not clear if First Nations will ever obtain the international standard of indigenous sovereignty and free, prior and informed consent in Canada. What can be done under the current system is to attempt to implement best practices for both industry and First Nations in order to try and improve working relationships to obtain the maximum benefit for all stakeholders. Provincially, the methods for best practices for British Columbia may be establishing tribal government to provincial government agreements that outline the consultation before a major project occurs. The first strategy outline in the document 'Guide to Coordinated Authorizations

for Major Mines' is the Strategic Engagement Agreement which may "consolidate engagement between the Province and a First Nations group, and also establish a mutually designed consultation process with the First Nation" (BC, 2013, p.17). The document also describes a Reconciliation Agreement, which may include "commitments to pursue resource revenue sharing, economic development opportunities and socio-cultural initiatives" (p.17) and lastly, Economic and Community Development Agreements, which are revenue sharing based on sharing mining tax revenue. These are all agreements between the province of BC and First Nations in which First Nations are consulted and accommodated firstly. This establishes a framework that helps to avoid the complication that can arise from last minute or unsuitable consultations.

For the mining industry, best practices would be to establish an on the ground working relationship with the First Nations whose territories would be affected by the proposed mining project (Booth & Skelton, 2010). Fitzpatrick et al. in contrasting the Mining Association of Canada's (MAC) policy changes from the Whitehourse Mining Initiative (WMI) to the Towards Sustainable Mining (TSM), notes changes in how First Nations are incorporated (2011, Table 3). Within the WMI, aboriginal leaders are involved mostly in the design, however later when the policy is adapted to clarify the stance on sustainability; the policy is broadened to include aboriginal people generally, both nationally and regionally in the development, implementation and verification of the policy. In order to become a member of MAC, companies must adopt the TSM and thus MAC is helping to set the standard for best practices by encouraging companies to go beyond the bare minimum for consultation within the Environmental Assessment process. Gahr quotes Dan George a member of the Wet'suwet'en Nation as saying "I wish companies would think of First Nations as a business imperative and not a business impediment" (2014,

p.36). First Nations when faced with a position in which they are not privileged to free, prior and informed consent they still may be satisfied to negotiate with industry in order to bring economic and social benefits to their local communities.

Established in 2006, the BC First Nations Energy and Mining Council (FNEMC) works to empower First Nations faced with resource decisions in their traditional territories. A presentation (teaching tool) on Resource Agreements by Gerry Kerr and the BC FNEMC is a current example of the decision making information that some First Nations groups are distributing amongst themselves (2014). This document reflects some of the best scenarios in which a First Nations community can engage with the resource sector. The first component of the document stresses First Nations consent using Impact Benefit Agreements (p.5). FNEMC expresses that engagement must begin prior to the exploratory stage and continue until mine closure (p.6). Compensation for interference with Aboriginal Rights & Title must be provided at Exploration stage and should be for more than simply the direct losses (p.10). Benefits should be provided at the operation stage as a percentage of profits, employment should be preferential to First Nations and First Nations should have preferred access to business opportunities. The FNEMC has determined that costs should be covered by industry and government as these costs would have not occurred without the involvement of these actors in their traditional lands (2014, p.14). This practice allows greater autonomy, consent and control for First Nations faced with mining impacts in their traditional territory. It also encourages more control over decision making in the process and fits well with best practices for industry and the province.

Ideally as a global ‘best practice’ the UNDRIP should be instated in Canada to afford First Nations free, prior, and informed consent in all instances and with all capacities. Without these mechanisms in place First Nations are minimally entitled to consultation and

accommodation by the Crown when it comes to major resource projects. This consultation however is often viewed as lacking by both First Nations and industry proponents, especially when it is carried out through the Environmental Assessment process. In light of these challenges and limitations set by the federal and provincial governments; industry, the province, and First Nations can stand to implement whenever possible the concept of free, prior and informed consent. These actors can strive to go over and above the government policies and legislation in a quest for 'best practice'. Cooperative relationships between First Nations and industry will provide both parties with increased benefits; for First Nations it will provide economic and social stability and for industry, it can provide project longevity and security.

References

Baker, C. D., & McLelland, N. J. (2003). Evaluating the Effectiveness of British Columbia's Environmental Assessment Process for First Nations' Participation in Mining Development. *Environmental Impact Assessment Review (23),* 581-603.

Boreal Leadership Council (2012) *Free, Prior, and Informed Consent in Canada*. Retrieved from www.borealcanada.ca/documents/FPICReport-English-web.pdf

Booth, L. A., & Skelton, W. N. (2010). Industry and Government Perspectives on First Nations' Participation in the British Columbia Environmental Assessment Process. *Environmental Impact Assessment Review, 31,* 216-225.

Booth, L. A., & Skelton, W. N. (2011). Improving First Nations' Participation in Environmental Assessment Processes: Recommendations from the Field. *Impact Assessment and Project Appraisal*, *29(1)*, 49-58.

British Columbia. (2003) *Guide to Coordinated Authorizations for Major Mines: Version 2.0.* Retrieved from http://www.for.gov.bc.ca/ftp/major_projects/external/!publish/web/mining/Mines-Guide.pdf

CBC News. (2007, Sept 13). *Canada Votes 'No' as UN Native Rights Declaration Passes*. Retrieved from http://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160

Environmental Assessment Office. *The Environmental Assessment Process*. Retrieved from http://www.eao.gov.bc.ca/ea_process.html

Fitzpatrick, P., Fonseca, A., & McAllister, L. M. (2011). From the Whitehorse Mining Initiative Sustainable Mining: Lessons Learned. *Journal of Cleaner Production, 19,* 376-384.

Gahr, L, T. (2014) Meeting Midway: The Key to Successful Engagement. *Canadian Mining*

Journal, 135(1), 36-37.

Green, J. (2011) Canada the Bully: Indigenous Human Rights in Canada and the United Nations Declaration on the Rights of Indigenous Peoples. *Prarie Forum, 36,* 9-31.

Gregory, R., Failing, L., & Harstone, M. (2008) Meaningful Resource Consultations with First Peoples: Notes from British Columbia. *Environment: Science and Policy for Sustainable Development, 50(1)*, 36-45.

Harrison, J., Ferguson, K., & Beishuizen, M. (2010, July). *Too Much at Stake: The Need for Mineral Tenure Reform in British Columbia.* Ecojustice Canada. Retrieved from http://site.ebrary.com.proxy.lib.sfu.ca/lib/sfu/docDetail.action?docID=10410928

Minister of the Department of Indian Affairs and Northern Development (AANDC). *Frequently Asked Questions.* Retrieved from http://www.aadnc-aandc.gc.ca/eng/1309374807748/1309374897928

Minister of the Department of Indian Affairs and Northern Development (AANDC). (2011, March). *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. Retrieved PDF Version from http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675

Natcher, C. D. (2001) Land Use Research and the Duty to Consult: A Misrepresentation of the Aboriginal Landscape. *Land Use Policy*, *18,* 113-122.

Neve, A. & Benjamin, C. (2011) Canada and the UN Declaration on the Rights of Indigenous Peoples: Opposition Must Give way to Implementation. *Prairie Forum, 36,* 1-8.

O'Faircheallaigh, C. (2007) Environmental Agreements, EIA Follow-up and Aboriginal Participation in Environmental Management: The Canadian Experience. *Environmental Impact Assessment Review, 27,* 319-342.

United Nations. (2008). *United Nations Declaration on the Rights of Indigenous Peoples.* Retrieved from www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf