

Asserting Indigenous Rights in Canada: A Critical Analysis of the Implementation of the UNDRIP through Regional Assessments

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1. CONTEXT

1.1 Issue

Following the 2016 federal commitment under Justin Trudeau's liberal leadership to fully and effectively implement the UNDRIP, the Government of Canada began to amend various pieces of legislation, including the *Canadian Environmental Assessment Act* of 2012 (CEAA12) (Government of Canada, 2022). The latter was replaced in 2019 with the *Impact Assessment Act* (IAA19), which gives increased recognition and an elevated status to Indigenous-based decision-making in conjunction with the federally legislated process (Gibson et al., 2018). The IAA19 also includes sections that pertain to regional assessments (RAs) which, according to IA experts, aim to provide an opportunity to assert Indigenous rights, and to build Nation-to-Nation relationships between the Government of Canada and Indigenous peoples across the country (Noble, 2017). Nevertheless, the extent of this affirmation under the current legislation remains unclear in the literature. Discontent has also been expressed during and following the completion of the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador, which is the only case study that qualifies as empirical evidence of federal RAs since the enactment of the new process in 2019 (IAAC, 2021; Nunatsiavut Government, 2020a). The apparent gap between federal pledges to implement the UNDRIP and the extent of the assertion of Indigenous rights within federal RAs raises the following question: to what extent are Indigenous rights asserted through regional assessments (RAs) under the *Impact Assessment Act* (IAA19)?

1.2 Objective

This paper seeks to analyze to what extent Indigenous rights, as established under the UNDRIP, have been asserted through RAs under the IAA19. It further aims to address the gap in the literature through an extensive critical review of the most recent legislation pertaining to RAs for the field of IA in Canada, and of the RA case study mentioned above. The first section of the report lays out the theoretical framework, the UNDRIP, and thus the criteria that will be used as a reflection of Indigenous rights to conduct a critical analysis of the legislation and the case study. It is followed by a review of the literature that pertains to RAs in Canada. The following section of the report highlights the methodology used to assess the extent of the assertion of Indigenous rights through RAs. The objective of this report is tackled by first selecting the rights from the UNDRIP that are specifically relevant to the field of IA, based on the commitments of the Government of Canada and the recommendations that were issued by the Expert Panel for the Review of Impact Assessment Processes in 2017 (CEAA, 2017; Doelle & Sinclair, 2019). Second, a thorough reading of the IAA19 took place to highlight the sections that are relevant to this analysis. Third, a critical review of those sections determines the extent to which the selected rights have been implemented within the legislation. Lastly, based on those preliminary results, the report determines whether those rights that were partially or entirely implemented within the IAA19 were also put into practice in the Final Report for the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador.

Table 1: Criteria for Analysis

Rights from the UNDRIP	Key Words
Right to self-determination (Articles 3, 4, and 5)	Self-determination, autonomy, self-government
Right to participate in decision-making and maintain institutions (Articles 18, 19, 34 and 40)	Decision-making, institutions, consultation, cooperation, customs, juridical systems
Right to set own priorities and strategies (Article 23)	Priorities, strategies, right to development, health, economy
Right to make decisions over traditional territory (Articles 26 and 29)	Traditional lands, territories, resources, conservation, protection
Right to free, prior, and informed consent (Article 32)	Free, prior, informed consent, consultation
Right to culture (Articles 8, 11, and 25)	Cultural values, ethnic identity, traditions, spirituality
Right to maintain and protect Indigenous knowledge (Article 31)	Control, protection, traditional knowledge, intellectual property, cultural heritage
Right to financial assistance (Article 39)	Financial, technical assistance

All the rights and their respective articles above are specifically relevant to the analysis, and the expert panel for the Agency highlighted that implementing these principles within the IAA19 not only has key implications for the field of IA, but it also contributes to the broader goal of reconciliation with Indigenous peoples (CEAA, 2017; Noble, 2017).

2. FINDINGS

2.1 Summary of the findings for Sections of the IAA19

Although it remains unexpected for the IAA19 to touch upon each of the eight rights in all five sections that were selected, each of the latter will still be reviewed to establish an accurate portrait of the assertion of Indigenous rights in the legislation. The following table summarizes findings for each section of the IAA19.

Table 2: Summary of the findings for the implementation of the UNDRIP in sections of the IAA19 that entail to regional assessments

Sections of IAA19	
Preamble	
Rights from the UNDRIP	Extent of implementation: Entirely / Partially / Not at all
Right to self-determination (Articles 3, 4, and 5)	Not at all
Right to participate in decision-making and maintain institutions (Articles 18, 19, 34 and 40)	Partially
Right to set own priorities and strategies (Article 23)	Not at all
Right to make decisions over traditional territory (Articles 26 and 29)	Partially
Right to free, prior, and informed consent (Article 32)	Not at all
Right to culture (Articles 8, 11, and 25)	Not at all
Right to maintain and protect Indigenous knowledge (Article 31)	Not at all
Right to financial assistance (Article 39)	Not at all
Participant funding program – Agency’s obligations (Section 75)	
Right to self-determination (Articles 3, 4, and 5)	Not at all
Right to participate in decision-making and maintain institutions (Articles 18, 19, 34 and 40)	Not at all
Right to set own priorities and strategies (Article 23)	Not at all
Right to make decisions over traditional territory (Articles 26 and 29)	Not at all
Right to free, prior, and informed consent (Article 32)	Not at all
Right to culture (Articles 8, 11, and 25)	Not at all
Right to maintain and protect Indigenous knowledge (Article 31)	Not at all
Right to financial assistance (Article 39)	Entirely
Regional assessments – region entirely on federal lands (Section 92)	
Right to self-determination (Articles 3, 4, and 5)	Not at all
Right to participate in decision-making and maintain institutions (Articles 18, 19, 34 and 40)	Not at all
Right to set own priorities and strategies (Article 23)	Not at all
Right to make decisions over traditional territory (Articles 26 and 29)	Not at all
Right to free, prior, and informed consent (Article 32)	Not at all

Right to culture (Articles 8, 11, and 25)	Not at all
Right to maintain and protect Indigenous knowledge (Article 31)	Not at all
Right to financial assistance (Article 39)	Not at all
Regional assessments – other regions (Section 93)	
Right to self-determination (Articles 3, 4, and 5)	Partially
Right to participate in decision-making and maintain institutions (Articles 18, 19, 34 and 40)	Partially
Right to set own priorities and strategies (Article 23)	Not at all
Right to make decisions over traditional territory (Articles 26 and 29)	Partially
Right to free, prior, and informed consent (Article 32)	Not at all
Right to culture (Articles 8, 11, and 25)	Not at all
Right to maintain and protect Indigenous knowledge (Article 31)	Not at all
Right to financial assistance (Article 39)	Not at all
Agency’s obligation to consult (Section 94)	
Right to self-determination (Articles 3, 4, and 5)	Not at all
Right to participate in decision-making and maintain institutions (Articles 18, 19, 34 and 40)	Partially
Right to set own priorities and strategies (Article 23)	Not at all
Right to make decisions over traditional territory (Articles 26 and 29)	Not at all
Right to free, prior, and informed consent (Article 32)	Partially
Right to culture (Articles 8, 11, and 25)	Not at all
Right to maintain and protect Indigenous knowledge (Article 31)	Not at all
Right to financial assistance (Article 39)	Not at all

2.2 Case Study: The Regional Assessment of the Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador

This RA sought to assess the effects of existing and anticipated offshore oil and gas exploratory drilling in the region, which totals 735,000 square kilometers off the eastern shore of Newfoundland and Labrador (IAAC, 2021a; ECELAW, N.A.). The RA process begun on April 15, 2019, and the RA Final Report was published on the Canadian Impact Assessment Registry

(CIAR) on February 29, 2020 (IAAC, 2021a). The figure below maps out the location of the study area, along with other relevant components to the process itself.

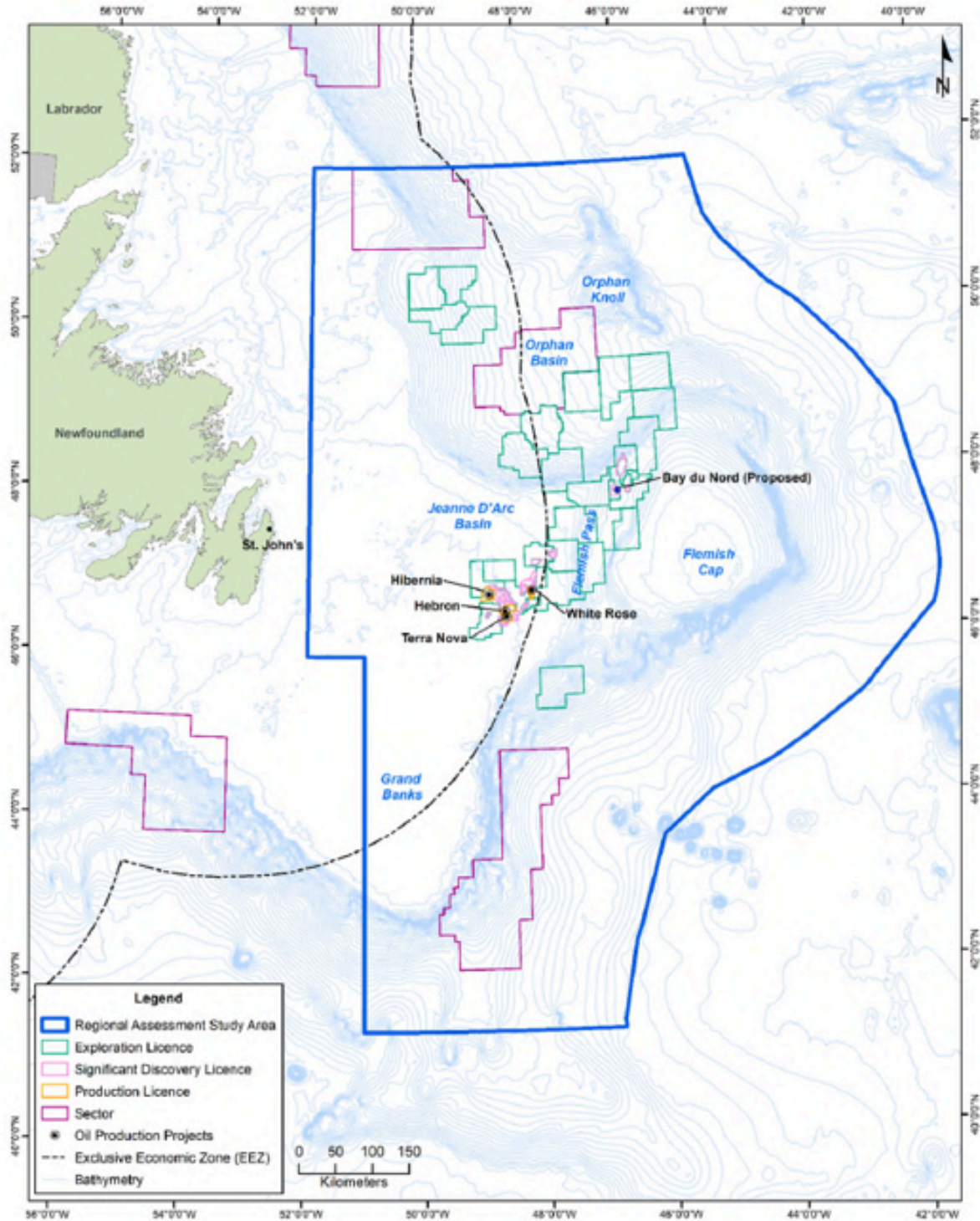


Table 3: Summary of the findings for the enactment of the UNDRIP in the Final Report of the Regional Assessment of Offshore Oil and Gas Exploratory Drilling East of Newfoundland and Labrador

Rights from the UNDRIP	Extent of enactment: Entirely / Partially / Not at all
Right to self-determination (Articles 3, 4, and 5)	Not at all
Right to participate in decision-making and maintain institutions (Articles 18, 19, 34 and 40)	Not at all
Right to set own priorities and strategies (Article 23)	-
Right to make decisions over traditional territory (Articles 26 and 29)	Partially
Right to free, prior, and informed consent (Article 32)	Partially
Right to culture (Articles 8, 11, and 25)	-
Right to maintain and protect Indigenous knowledge (Article 31)	-
Right to financial assistance (Article 39).	Partially

3. DISCUSSION

Note that the full report includes an exhaustive discussion section that touches upon how the legislation, and how the Committee asserted, or failed to do so, each of the rights that were used as criteria for the analysis. Key points from the discussion shall be provided during the presentation.

3.1 Limitations

Some shortcomings have limited the extent of my analysis, such as the lack of empirical evidence that appears as a challenge to provide an exhaustive overview of the situation. Indeed, while other federal RAs are currently in progress, like in the Ring of Fire Area, and in the St. Lawrence River Area, neither of those qualify for analysis prior to their completion. Future research should therefore be conducted on both case studies once they are completed, with

consideration of the more recent decision provided by the Supreme Court of Canada regarding the constitutionality of the IAA19. Moreover, even though the criteria for analysis were previously selected by an Expert Panel, the extent to which they have been asserted is impacted by my personal cultural bias. As a non-Indigenous person of settler descentance living on unceded territories, my personal cultural bias has also contributed to limiting the extent of this critical analysis. Future research on the assertion of Indigenous rights through RAs would benefit from Indigenous peoples' perspectives.

4. CONCLUSION

Although the Government of Canada has committed multiple times to prioritize reconciliation with Indigenous peoples, actions have not followed suit in the field of IA, as the extent of the assertion of Indigenous rights through RAs remains insufficient. Despite the review of the IA process and the Expert Panel that was put in place in 2017 to analyze the previous legislation, federal commitments have not been sufficiently reflected in the IAA19, nor through empirical evidence of federal RAs so far. Indeed, only one out of the eight criteria of analysis, the right to financial assistance, has been entirely implemented within the sections of the IAA19 that pertain to RAs, whereas none of the rights were fully asserted throughout the conduct of the case study.

Notwithstanding, this report has served to shed light on RAs under the IAA19 as a potential means to assert Indigenous rights. Although Indigenous peoples were consulted during the case study, the notion of self-determination, the respect of FPIC, and the consideration of Indigenous knowledge within decision-making were not priorities. Indeed, the insufficient extent to which Indigenous rights were asserted throughout the case study highlights how IA processes maintain a Crown-centric focus. Additionally, the selection of rights from the UNDRIP made by the Expert Panel might have been overly ambitious for the field of IA, and making more specific

recommendations, for instance on fewer rights, might have been more efficient and feasible for the implementation within the IAA19. The Agency, and more broadly the Government of Canada, need to make clearer, more concrete commitments with regards to reconciliation and the assertion of Indigenous rights in the field of IA. For one, this analysis revealed that the implementation of the UNDRIP has partially occurred in the Preamble of the IAA19; however, Indigenous rights should be addressed in all relevant provisions for the IAA19 to uphold the standards of the framework.

The path to reconciliation requires the respect of consent during consultation processes, and the right to FPIC still seems to be a controversial concept. This apparent gap sheds light on the need for the Government of Canada to either challenge or amend the legislation in place, and to increase cohesiveness while conducting RAs. As Bram Noble states, RAs represent a substantial opportunity to implement the UNDRIP within the field of IA, and to further assert Indigenous rights (2017). The discrepancy between the expectations built around RAs as a tool to implement the UNDRIP and the reality of how the case study was conducted brings forward the Government of Canada's responsibility to seize such opportunity.

5. REFERENCES

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