



From the Niger Delta to the Athabasca: Host community consent in upstream oil operations and the lessons Nigeria's Petroleum Industry Act 2021 holds for Canadian indigenous consultation frameworks

Collins Chukwuonye

Institute of Oil, Gas, Energy, Environment & Sustainable Development, Afe Babalola University, Nigeria

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Abstract

Nigeria's Petroleum Industry Act 2021 (PIA) represents the most significant legislative intervention in Nigeria's oil and gas sector in over five decades. Among its most debated provisions are those establishing Host Community Development Trusts (HCDTs): a statutory mechanism compelling upstream operators to fund and engage with oil-bearing communities as a precondition for the maintenance of operating licences. This article argues that, despite the PIA's well-documented shortcomings, its structural architecture of mandatory community engagement offers a productive comparative lens for examining persistent tensions in Canada's duty-to-consult jurisprudence, particularly as that doctrine confronts the demands of the United Nations Declaration on the Rights of Indigenous Peoples Act 2021 (UNDRIP Act). By juxtaposing the Nigerian experience where decades of voluntary corporate social responsibility regimes failed to prevent conflict and ecological destruction against Canada's constitutionally grounded but procedurally contested consultation framework, this article identifies three critical design challenges shared by both systems: the consent-versus-consultation binary, the structural asymmetry between communities and operators, and the enforcement deficit that undermines good-faith engagement in practice. The article concludes that while Canada's constitutional foundation is normatively superior, the PIA's insistence on pre-project community needs assessments and trust fund structures offers implementation insights that Canadian regulators navigating energy transition could usefully adapt. Conversely, Canada's evolving doctrine of meaningful accommodation provides normative scaffolding that could strengthen future reforms to the PIA.

Keywords: Petroleum Industry Act 2021, duty to consult, host communities, Indigenous rights, UNDRIP, free prior and informed consent, Nigeria, Canada, energy law, comparative law

Introduction

Oil-extracting states occupy a peculiar legal and moral position. They are simultaneously the principal beneficiaries of subsurface wealth and the primary respondents to the communities that bear the environmental, social, and cultural costs of extraction. This tension between national resource sovereignty and local community rights has animated some of the most consequential legal developments in both Nigeria and Canada over the past three decades, yet the two jurisdictions have rarely been placed in sustained comparative dialogue.

Nigeria's Niger Delta presents one of the starkest illustrations of extractive failure in the modern era. Since the discovery of oil at Oloibiri in 1956, communities in the oil-bearing south have experienced chronic underdevelopment, environmental degradation, and political marginalisation despite living atop one of Africa's most valuable hydrocarbon deposits. The 1990 Ogoni Bill of Rights, the execution of Ken Saro-Wiwa and the Ogoni Nine in 1995, and the sustained insurgency that followed all reflect the catastrophic legal vacuum at the community-operator interface. The Movement for the Survival of the Ogoni People (MOSOP) articulated grievances — environmental destruction, political marginalisation, and economic exploitation that were, in essence, claims about consent and benefit-sharing that the prevailing legal framework refused to recognise.

Canada's story is structurally different but thematically resonant. The Supreme Court of Canada's landmark decision in *Haida Nation v British Columbia (Minister of Forests)*

established that the Crown bears a constitutional duty to consult Indigenous peoples whenever it contemplates conduct that may adversely affect asserted or established Aboriginal or treaty rights. That duty, grounded in section 35 of the Constitution Act, 1982^[3] and increasingly informed by Canada's 2021^[8] adoption of UNDRIP into domestic law, has generated a sophisticated body of jurisprudence. Yet, as this article argues, it has not fully resolved the central tension between procedural consultation and substantive consent, a tension that the PIA confronts with its own imperfect but instructive mechanisms.

This article proceeds in five parts. Part II examines the historical and legal antecedents that made Nigeria's community engagement framework a legislative necessity. Part III analyses the PIA's host community provisions in detail, identifying both their structural innovations and their limitations. Part IV surveys Canada's duty-to-consult doctrine, tracing its evolution from *Haida Nation* through the UNDRIP Act and the contentious *Building Canada Act*. Part V conducts the comparative analysis, identifying convergences, divergences, and mutual lessons. Part VI concludes with normative recommendations directed at both jurisdictions.

The Weight of History: Why Nigeria'S Community Engagement Became A Legal Imperative

a. The Colonial and Post-Colonial Settlement

Nigerian oil law inherited from colonial administration a foundational principle: all mineral resources vest absolutely in the federal government. Section 1 of the PIA preserves

this position, declaring that "the property and ownership of petroleum within Nigeria and its territorial waters, continental shelf and exclusive economic zone is vested in the Government of the Federation." This vesting clause, while constitutionally unremarkable by the standards of most resource-extracting states, had profoundly alienating consequences for Niger Delta communities. It stripped communities not only of ownership of subsurface wealth but in the absence of statutory community rights of any cognisable legal interest in the manner and terms of its exploitation.

The regulatory framework that governed upstream operations from the 1969 Petroleum Act through to the pre-PIA era imposed obligations on operators directed almost entirely at the federal and, occasionally, state governments. Community engagement, where it occurred, was discretionary, formalised through Memoranda of Understanding (MOUs) between operators and local communities that were legally unenforceable, inconsistently honoured, and structurally designed to neutralise grievance rather than address it. As Agbarakwe and Bredino have documented, "the discretionary community investment strategies (Memorandum of Understanding) hitherto employed by oil and gas production and exploration companies to ameliorate the squabbles between them and their respective host community" proved institutionally incapable of generating durable peace or equitable development.

b. MOSOP, the Ogoni Nine, and the Collapse of the Voluntary Model

The execution of Ken Saro-Wiwa and eight fellow Ogoni activists on 10 November 1995 crystallised for international audiences the lethal inadequacy of the voluntary community engagement model. MOSOP, which Saro-Wiwa co-founded in 1990, had articulated a rights-based claim that the Ogoni people possessed rights to political autonomy, environmental protection, and a proportionate share of the revenues derived from their land that the Nigerian state and its international oil company partners systematically refused to acknowledge. The state's response, culminating in military crackdowns, gross human rights abuses, and ultimately judicial execution, demonstrated that without enforceable legal rights, community interests would remain permanently subordinate to operator and state interests.

The subsequent intensification of Niger Delta militancy in the early 2000s centred on groups including the Movement for the Emancipation of the Niger Delta (MEND) forced a reckoning that decades of advocacy had not. Oil theft, pipeline sabotage, and the kidnapping of oil workers imposed direct economic costs that made continued non-engagement untenable. Nigeria's 2009 Amnesty Programme, which provided financial payments and vocational training to former militants, represented a grudging acknowledgment that the community-operator relationship required structural repair. The PIA, enacted in 2021 ^[8] after more than twenty years of parliamentary deliberation, was in significant part a legislative response to this accumulated grievance.

Nigeria's Petroleum Industry Act 2021 ^[1]: The Host Community Development Trust

a. Structural Architecture

Chapter 3 of the PIA, comprising sections 234 to 261, establishes the Host Community Development Trust

(HCDT) framework. The HCDT represents a conceptual departure from previous intervention mechanisms in at least three significant respects. First, it is statutory rather than voluntary operators cannot elect whether to engage with it. Second, the trust structure creates a legal personality separate from both the operator and the communities, designed in theory to insulate community funds from political capture. Third, it imposes temporal obligations that attach to the licence itself, linking community engagement to the conditions for continued operation.

Under section 234(3) of the PIA, every upstream operator referred to in the Act as a "settlor" is required to incorporate an HCDT within a defined period of receiving a petroleum licence. The settlor must also conduct a community needs assessment prior to the establishment of the trust, evaluating the social, environmental, and economic conditions of the host communities affected by its operations. This pre-operational assessment requirement is architecturally significant: it creates a procedural obligation that precedes extraction rather than following complaint.

The Act defines "host community" with notable breadth, encompassing not only the immediate community in which petroleum operations occur but also communities proximate to or impacted by those operations. This expanded definition reflects legislative awareness of the diffuse environmental and social impacts of upstream operations, which rarely respect the administrative boundaries of single communities.

b. The 3% Fund and Its Discontents

The financial core of the HCDT regime is the Host Community Development Trust Fund (HCDTF), to which each settlor must contribute annually an amount equivalent to 3% of its actual operating expenditure from the preceding year in respect of upstream petroleum operations affecting the community. This contribution is not discretionary. Non-payment triggers regulatory consequences, including the potential suspension of operating licences under section 316.

The 3% figure has attracted sustained criticism from host communities and civil society organisations alike. The Pan Niger Delta Forum (PANDEF), representing communities across the oil-producing south, had demanded a contribution rate of 10%, arguing that the lower figure was wholly inadequate to address the scale of developmental deficits accumulated over six decades of extraction. The Brookings Institution noted that host communities "remain unhappy" with the 3% provision, characterising it as a political compromise that reflects the relative bargaining power of operators in the legislative process rather than a principled assessment of community need. This criticism is not merely quantitative. It reflects a deeper structural point: that a percentage of operating expenditure, rather than revenue or profit, means that as operators optimise their cost structures through technology and efficiency gains, the absolute value of community contributions may decline even as production volumes and profits increase.

c. Governance, Representation, and Political Capture

The PIA requires HCDT to be governed by a Board of Trustees composed of representatives drawn from specified constituent communities, the host state government, and the operator. The inclusion of state government representatives on the Board has been criticised on the grounds that it replicates, within the trust structure, the same political economy that has historically diverted community benefits

to elite capture. Early scholarly commentary on the HCDT framework observed that "there is a need for the settlor to avoid the temptation of allowing interference in the appointment of persons into the Board of Trustees of the host communities' development trust by politicians and the relevant state governments.

The Act does provide for community representation section 235(2) stipulates that the majority of trustees must be drawn from the constituent communities themselves but the precise method of selecting community representatives is left substantially to subsidiary regulation. This regulatory gap creates a significant accountability risk. Experience with analogous community fund structures in the Niger Delta suggests that where representation mechanisms are under-specified, they are susceptible to manipulation by local political elites who may formally "represent" communities without genuine accountability to them.

The Act further requires that a management committee be established within each host community to oversee the utilisation of trust funds for specific projects. While this creates a second layer of community oversight, it also multiplies the institutional complexity of the framework and potentially increases the transaction costs of project delivery in communities that may lack the administrative capacity to sustain multiple governance bodies simultaneously.

Canada's Duty to Consult: A Constitutional Doctrine in Transition

a. The Haida Doctrine and Its Foundations

The Supreme Court of Canada's unanimous judgment in *Haida Nation* established the foundational architecture of Canada's duty-to-consult doctrine. Writing for the Court, Chief Justice McLachlin held that the honour of the Crown, a principle requiring that the Crown act with integrity in its dealings with Indigenous peoples generates a duty to consult and, where appropriate, accommodate Indigenous interests whenever the Crown contemplates conduct that might adversely affect asserted or established Aboriginal or treaty rights. Crucially, the duty arises not upon proof of rights, but upon the Crown's knowledge of their potential existence. The threshold is deliberately low precisely because Indigenous rights may take years or decades to be formally established through litigation or negotiation, and permitting exploitation to proceed unchecked in the interim would render those rights illusory.

The Court in *Haida Nation* conceptualised the duty as lying on a spectrum, with the depth of required consultation proportionate to the strength of the asserted rights claim and the seriousness of the potential impact. At the lower end of the spectrum, the Crown may discharge the duty through notice and information sharing. At the upper end, where claims are strong and impacts potentially grave, the duty may require deep consultation, genuine accommodation, and the restructuring of proposed conduct. This spectrum analysis has been repeatedly affirmed and refined in subsequent decisions, including *Mikisew Cree First Nation v Canada* and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*.

b. UNDRIP and the Consent Question

The enactment of Canada's United Nations Declaration on the Rights of Indigenous Peoples Act in 2021^[13] introduced a new and contested dimension to the consultation landscape. The UNDRIP Act commits the Government of Canada to taking "all measures necessary to ensure that the

laws of Canada are consistent with the Declaration." This commitment engages Article 32(2) of UNDRIP, which requires states to "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."

The language of "free, prior and informed consent" (FPIC) has fundamentally complicated the existing duty-to-consult framework by raising the question of whether genuine consent, meaning the capacity to say no and have that refusal respected is now a legal requirement, or whether the Canadian framework continues to require only meaningful consultation directed at accommodation. The Office of the United Nations High Commissioner for Human Rights has confirmed that FPIC encompasses the right of Indigenous peoples to withhold consent from projects affecting their lands, in terms that go beyond procedural consultation. Canadian courts have not yet definitively resolved this tension, and the legislative history of the UNDRIP Act itself which expressly states it does not abrogate existing rights but forward-commits to legislative alignment, leaves considerable ambiguity.

c. The Building Canada Act and the Limits of Reconciliation

The most recent stress test of Canada's consultation framework arrived with Bill C-5, the Building Canada Act, enacted in June 2025^[15]. The Act empowers the federal government to expedite the approval of large infrastructure and energy projects deemed to be "in the national interest" through an accelerated one-project, one-review process. Indigenous leaders raised immediate and sustained objections on the grounds that the Act was tabled without meaningful consultation and that its national interest override provisions risked subordinating constitutionally protected Indigenous rights to economic development imperatives, a concern with direct historical resonance in both Canadian and Nigerian contexts.

The federal government's response in establishing an Indigenous Advisory Council within the Major Projects Office and doubling the Indigenous Loan Guarantee Program to \$10 billion to facilitate community equity participation reflects a shift toward economic reconciliation that is thematically convergent with the PIA's benefit-sharing architecture. BC Hydro's competitive procurement rounds, which now require a minimum of 25% First Nations equity participation with incentives up to 51% ownership, similarly represent a structural move beyond consultation toward co-ownership. This evolution tracks, in a more constitutionally robust form, the PIA's intuition that community engagement must be financial and structural rather than merely procedural.

Comparative Analysis: Convergences, Divergences, And Mutual Lessons

a. The Consent-Consultation Binary: A Shared Structural Tension

The most fundamental tension common to both legal systems is the contested boundary between consultation as process and consent as outcome. In Canada, the duty-to-consult doctrine has consistently resisted the characterisation of FPIC as an Indigenous veto, while acknowledging that the depth of required engagement may, in strong-rights cases, approximate consent in practical

effect. The Supreme Court has held that the honour of the Crown "cannot be reduced to a mere process obligation — it must be given real meaning." Yet it has simultaneously affirmed that "the duty to consult does not give Aboriginal groups a veto." The resulting doctrinal position is one of principled ambiguity: the Crown must engage genuinely and accommodate meaningfully, but the ultimate decision remains the Crown's.

Nigeria's PIA reflects a similar structural ambiguity, though expressed through statutory rather than judicial language. The HCDDT framework requires the settlor to conduct a community needs assessment and establish a trust but the Act does not grant affected communities a power of refusal over petroleum operations. Communities may negotiate the terms of engagement through the trust governance structure, but they cannot veto the issuance or renewal of petroleum licences. This is not an oversight. It reflects the same fundamental tension that the Canadian courts have declined to resolve: that resource sovereignty, whether vested in the Nigerian federal government or the Canadian Crown, is treated as ultimately non-negotiable, even as the normative weight of community rights continues to grow.

What distinguishes the two systems is the site of this tension's expression. In Canada, the consent-consultation binary is primarily a juridical question, resolved through litigation in which Indigenous communities bear significant legal costs and temporal disadvantage. In Nigeria, it is primarily a political and regulatory question, resolved through legislative compromise in which community interests are structurally weaker than those of operators and the federation. Neither system has fully resolved the tension; both illuminate the difficulty of reconciling resource imperatives with community rights within existing state structures.

b. Structural Asymmetry and the Problem of Good Faith Engagement

Both systems confront the challenge of requiring good faith engagement between structurally unequal parties. In Canada, the duty to consult is binding on the Crown but is frequently delegated to project proponents (private oil companies), who bear the practical burden of consultation while the Crown retains ultimate responsibility. The Supreme Court's requirement that consultation be "genuine" and directed at "substantially addressing" community concerns is frequently honoured in form rather than in substance, with consultation processes designed primarily to satisfy regulatory requirements rather than to genuinely integrate community interests into project design.

The PIA's HCDDT framework faces an equivalent problem. By designating the upstream operator as the settlor simultaneously the principal beneficiary of petroleum operations and the party obligated to fund community development; the Act creates an obvious conflict of interest. An operator that controls the HCDDT's funding also possesses significant leverage over community governance and project priorities, regardless of the formal independence that the trust structure is designed to ensure. Where community needs assessments are conducted by operators without independent verification, they are susceptible to under-reporting of community needs and over-reporting of existing operator contributions.

The emerging Canadian practice of equity participation offers one structural response to this asymmetry. Where communities hold equity stakes in projects as distinct from

receiving benefit payments or consultation fees, their interests become structurally aligned with project success rather than merely procedurally accommodated. The Alberta Court of Appeal's decision in *Benga Mining Ltd v Alberta Energy Regulator* illustrated how Indigenous support for a proposed project, grounded in benefit-sharing arrangements, can itself be legally material to regulatory approval. This point has not been sufficiently integrated into Nigerian reform discourse: the PIA's trust mechanism remains primarily a benefit delivery vehicle rather than a structure for aligning community interests with operational outcomes.

c. Enforcement Deficits: The Implementation Gap

Both systems suffer from an enforcement deficit that threatens to render their most progressive provisions formally aspirational. In Nigeria, the PIA's regulatory architecture vests enforcement authority in the Nigeria Upstream Petroleum Regulatory Commission (NUPRC), which is empowered to suspend operating licences for non-compliance with HCDDT obligations. However, the Commission's institutional independence is structurally uncertain in a political economy in which the federal government is simultaneously a significant shareholder in many upstream operations through the Nigerian National Petroleum Company Limited (NNPC Ltd.). The risk is not hypothetical: decades of environmental regulation in Nigeria have demonstrated that statutory enforcement provisions directed at the petroleum industry are frequently subject to regulatory forbearance in practice.

In Canada, the enforcement landscape is different but the deficit is real. The Crown's constitutional obligation to consult is judicially enforced but communities may seek declaratory relief, injunctions, and damages for failures of consultation and the remedial process is slow, expensive, and available primarily to communities with sufficient legal capacity and resources to sustain protracted litigation. The practical result is that consultation obligations are more reliably honoured in relation to well-resourced First Nations with established treaty rights and legal infrastructure, and less reliably honoured in relation to smaller or more remote communities whose rights may be equally compelling but whose enforcement capacity is limited. This asymmetry of enforcement reproduces, within the consultation framework itself, the structural inequality it is designed to address.

d. Mutual Lessons

The comparison yields several lessons that flow in both directions. From Nigeria's PIA to the Canadian framework, three insights emerge. First, the PIA's mandatory pre-project community needs assessment requiring operators to evaluate community conditions prior to commencing operations, provides a structural model for front-loading community engagement that Canadian project approval processes could more systematically incorporate. Current Canadian practice often initiates consultation after the broad parameters of a project have been established, limiting community influence to marginal adjustments rather than foundational design. Second, the PIA's statutory trust mechanism, despite its limitations, offers a precedent for converting consultation outcomes into binding financial obligations. Canadian duty-to-consult jurisprudence has generated accommodation requirements that are frequently satisfied through one-off financial payments or project modifications. A trust-based architecture where ongoing community development is a condition of licence maintenance rather than a one-time

accommodation aligns community interests with the full duration of extraction activity and is better suited to addressing the long-term developmental deficits created by upstream operations.

Third, the PIA's explicit recognition that consultation must serve developmental outcomes not merely procedural compliance anticipates the UNDRIP Act's forward commitment to laws that are consistent with Indigenous peoples' rights to development on their own terms. The Nigerian experience suggests that developmental aspirations embedded in legislation without adequate funding, independent enforcement, and genuine community governance will remain largely unrealised a lesson that Canadian policymakers drafting UNDRIP-aligned legislation should take seriously.

From Canada to Nigeria, the lessons are equally instructive. Canada's constitutionally grounded consultation framework, even in its imperfect form, demonstrates that community rights can be made justiciable without rendering resource development inoperable. The duty-to-consult doctrine has not, as its early critics feared, created a de facto Indigenous veto over all resource projects; it has instead created a system of procedural accountability that, while expensive and slow, generates genuine legal consequences for rights violations. Nigeria's PIA, by contrast, creates enforcement obligations that are essentially regulatory in character and therefore vulnerable to the political economy of the regulator-regulated relationship.

Conclusion

This article has argued that Nigeria's PIA and Canada's duty-to-consult framework, despite their different legal foundations and political contexts, are grappling with the same structural challenges: the consent-consultation binary, structural asymmetry between communities and operators, and the enforcement deficit that renders progressive legal provisions aspirational in practice. Neither system has fully resolved these challenges. Both have generated institutional innovations that, in cross-jurisdictional dialogue, offer genuine insights for reform.

The comparative exercise is not merely academic. As Canada navigates the demands of the UNDRIP Act and the energy transition simultaneously seeking to accelerate renewable energy development while honouring Indigenous rights to free, prior, and informed consent the lessons of Nigeria's statutory community engagement framework offer a sobering caution: that legislative good intentions, absent adequate funding, independent governance, and justiciable enforcement, do not reliably translate into community benefit. Nigeria's six decades of extractive failure, punctuated by the tragedy of the Ogoni Nine and the systematic underdevelopment of the Niger Delta, demonstrate what happens when community rights are treated as political questions rather than legal ones.

Conversely, as Nigeria considers future amendments to the PIA and as other African oil-producing states contemplate community engagement legislation of their own Canada's jurisprudence demonstrates that statutory frameworks are most robust when they create justiciable rights rather than merely regulatory obligations; when community participation is structured to align interests rather than merely accommodate grievances; and when the duty to engage is understood as a continuing obligation throughout the lifecycle of extraction, not a pre-project formality.

The Niger Delta and the Athabasca are separated by thousands of miles and profoundly different constitutional

traditions. But the communities that live in both regions communities whose lands contain resources of national and global significance, and who have historically borne the costs while others captured the benefits are asking fundamentally similar questions about rights, consent, and dignity. How law answers those questions will define the legitimacy of resource governance in both jurisdictions for generations to come.

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