

Free, prior and informed consent: Reflections from IsumaTV's engagement with the Mary River Project

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The following paper presents a series of reflections about the implementation of free, prior and informed consent (“FPIC”) in the context of natural resource extraction in the Arctic. In particular, this paper summarizes the experience gained from the activities of an Inuit media organization (IsumaTV/Nunavut Independent Television Network) to promote informed consultation in relation to the development of the Mary River Mine in Nunavut, Canada.

Background

The Mary River Mine is an open pit iron mine on North Baffin Island on Inuit owned lands in the Qikiqtaaluk Region of Nunavut in the Canadian Arctic. The company developing the mine is Baffinland Iron Mine Corporation (BIMC), which is a joint-venture between ArcelorMittal (Luxembourg) and Iron Ore Holdings Ltd. (USA). The initial project proposal was approved by the Minister of Aboriginal Affairs and Northern Development in 2012 after an extensive environmental and socio-economic review and consultation process overseen by the Nunavut Impact Review Board (NIRB).¹ As will be discussed below, the initial project proposal has been subsequently

changed in response to lower iron ore prices and the current economic challenges to the mining industry.

IsumaTV is a collaborative Inuit media organization that has created an online platform for sharing Inuit and Indigenous films.² In 2012, IsumaTV launched a Digital Indigenous Democracy (DID) project at a time that Inuit in the Qikiqtani Region of Nunavut had the opportunity to take part in an official review process for the proposed Mary River Mine. DID uses the Internet, community radio, local television and social media to empower Inuit traditional knowledge and to create new tools and networks to help voice individual and collective views.

Given the importance of the proposed mine to local Inuit communities, the DID project supported a multimedia Human Rights Impact Assessment (HRIA) to examine the positive and negative impacts of the proposed mine in accordance to international human rights standards. This was an innovative project because of how the HRIA used DID’s multimedia tools to facilitate engagement with potentially-affected stakeholders. The HRIA was then submitted as the basis for a formal intervention in the public hearings conducted by the NIRB, by Dr. Zacharias

Kunuk, co-director of IsumaTV, with Lloyd Lipsett, a human rights lawyer consulting for IsumaTV.

These activities by IsumaTV are the logical extension of the organization's mission to preserve and promote Inuit and Indigenous Peoples' *culture and language*. However, the framing of these activities in terms of Indigenous Peoples' *rights* became pertinent and possible because of two important developments of international human rights standards.

The UN Declaration on the Rights of Indigenous Peoples

As a distinctive legal concept and international standard, FPIC finds its main expression in the *United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration or Declaration)*. The *UN Declaration* was adopted by the UN General Assembly in 2007 after more than 30 years of debate and negotiation within the UN system.

Canada initially voted against the *Declaration*, citing concerns about FPIC being used as a veto (amongst other concerns). However, Canada later endorsed the *Declaration* through a Statement of Support issued in November 2010, stating: “[w]e are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.”³

While the *UN Declaration* is mainly focused on the relationship between Indigenous Peoples and governments, its provisions increasingly inform the human rights efforts of extractive industry companies and associations. Indeed, several important global mining companies now have policies that make explicit commitments to work towards FPIC in their operations.⁴

The UN Guiding Principles on Business and Human Rights

In 2011, the UN Human Rights Council unanimously adopted the UN Guiding Principles on Business and Human Rights (UN Guiding Principles), marking a global consensus that companies are expected to respect human rights.⁵ For a company, respecting human rights implies having a human rights policy, an ongoing process to prevent adverse impacts on human rights, and an effective operational-level grievance mechanism.

Canada has supported the development of the UN Guiding Principles and, since 2014, has included them as one of the standards expected of Canadian extractive companies in Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad.⁶

Furthermore, many leading mining companies and industry associations have begun to develop detailed human rights policies and procedures. One

of these companies is Baffinland's parent company, ArcelorMittal.

Taken together, these two developments—of the *UN Declaration* and the UN Guiding Principles—provided the necessary foundation of international standards for IsumaTV to promote FPIC through a multimedia HRIA in the context of the development of a mine.

HRIA and Intervention in NIRB Public Hearings

As mentioned above, IsumaTV conducted a Human Rights Impact Assessment (HRIA) of the Mary River Project⁷ and used this as a basis for a formal intervention in the public hearings being conducted by the Nunavut Impact Review Board (NIRB).⁸

The Inuit-language multimedia HRIA included 22 call-in radio shows and 59 videos focusing on a range of potential human rights impacts that could be caused by the Mary River Mine once it entered into production, including workers' rights and human rights concerns related to the environment. At the time of the public hearings (when the mine had not yet been approved), these issues were mainly prospective. Such prospective assessment of potential human rights impacts is often valuable from a risk mitigation perspective. Furthermore, it is easier to build a constructive dialogue about human rights between companies, communities, and governments when looking forward at potential impacts rather than later when there may be specific allegations of human rights violations related to an operation.

Nonetheless, FPIC was a live issue for the HRIA given that it focuses on various aspects of the consultative process that leads to the approval of a mine or other development project on Indigenous Peoples' lands. In this regard, the key findings of the HRIA were summarized as follows:

Ongoing consultation with Inuit and other stakeholders is a critical component of respecting human rights. The concept of Free, Prior and Informed Consent (FPIC) has not been formally recognized in Canadian law or in the corporate policies of Baffinland and its parent companies. However, there is a strong legal framework for consultation with Inuit in Nunavut. Inuit rights have largely been protected to date as a result of the requirements of the Canadian Constitution and the Nunavut Lands Claim Agreement. A key aspect has been the impact review process by the Nunavut Impact Review Board that provided a process for informed discussion and community input. The requirement for Baffinland to negotiate an Inuit Impact Benefit Agreement with the Qikiqtani Inuit Association also provides a

process for Inuit to provide their consent about how the mine will be developed.⁹

After a review of the roles and actions of different actors in terms of consultation with Inuit in relation to the development of the mine, the HRIA concluded that:

Consultation processes are by their nature complex and imperfect. Their success requires the sustained efforts of many parties over a long period of time. They can always be improved. ... Consultation and consent should not be viewed as a “one-time event,” but rather as a continuous process of building and maintaining trust and the social license to operate. The opportunities and successes of consultation through the NIRB review process and Baffinland’s community engagement should be viewed as the foundation for ongoing consultation over the lifespan of the mine.¹⁰

A number of specific recommendations about improving FPIC as an ongoing process were made in the HRIA and in the formal intervention in the NIRB public hearings. The IsumaTV team was therefore pleased when the NIRB Final Hearing Report recommended a number of terms and conditions that support ongoing consultation with Inuit and other stakeholders for the development of the mine. These terms and conditions were accepted by the Minister for Aboriginal Affairs and Northern Development and became part of the project certificate for the Mary River Mine.

Reconsideration Process

The importance of understanding FPIC as an ongoing process was made clear to the IsumaTV team when BIMC announced changes to the Mary River Mine very soon after the initial project had been approved. These changes involved a change to the shipping route and a reduction of the volume of ore that would be produced during an “Early Revenue Phase” for the mine.

These changes were driven by economic realities as iron ore prices fell and the company was no longer in a position to finance its initial plan of constructing a railway and deep-water port in Steensby Inlet. However, they also had the effect of changing which community would experience the majority of impacts when the mine began operating. Initially, members of the community of Igloodik felt that they would be most affected by the shipping route through Steensby Inlet, whereas afterwards it was the community of Pond Inlet that felt that they would experience the impacts related to shipping through Milne Inlet. This is a poignant example of

how operational changes can dramatically alter the projected impacts of an operation, as well as who are the most directly affected stakeholders.

In this context, and to its credit, the NIRB required that there be a formal Reconsideration Process for the Early Revenue Phase, including additional public hearings. The IsumaTV team participated in these hearings and made further recommendations about the importance of ongoing mechanisms for informing and consulting with Inuit as the Mary River Mine continues to develop and plans change.

At the same time, the IsumaTV team also started to grapple with the issue of “consultation fatigue” as some community members appeared to be disinterested in participating in further discussions and public hearings about the Mary River Mine. Furthermore, for an organization like IsumaTV, it is difficult to obtain open-ended project funding that would permit ongoing interventions in subsequent rounds of public hearings.

These are important practical issues for the implementation of FPIC as an ongoing process. Subsequent to the Reconsideration Process for the Early Revenue Phase, additional proposed changes to the Mary River Project have been presented by BIMC. At the time of writing, there is correspondence between the various parties to the project about whether further public hearings should be required.

Community-based Monitoring and Dialogue

In the midst of these project changes and discussions about the need for further public hearings, IsumaTV has had the opportunity to contribute to the ongoing implementation of FPIC through an innovative initiative that was financed by the Ilagiiqtunut Fund.¹¹ This initiative had three main components: (1) installation of an IsumaTV Integrated Media System in Inuit Communities; (2) broadcast of “inform and consult community radio shows” about the Mary River Mine; and (3) consolidating and transmitting community feedback to the QIA and other project monitoring bodies.

While this initiative is still being wrapped up, the IsumaTV team has some preliminary observations that are relevant to broader discussions about implementation of FPIC in the context of mining in the Arctic:

- The “inform and consult community radio shows” demonstrate the ongoing importance of good information and consultation with communities for the successful development of the Mary River Mine. There are significant misperceptions and misinformation circulating in the communities about what actually is happening at

Mary River, as well as about the details of proposed changes to the operations that have been proposed to the NIRB. Greater coordination is needed between all actors to help provide more accessible information in Inuktitut on an ongoing basis and to help avoid fragmentation of efforts to inform and consult with communities.

- This phase of community monitoring focused on the Ilagiiktunut Fund's priority themes related to workers, families, and communities. Although environmental issues were not the main focus of the project, the recent climate change summit (COP21) reinforced the importance of climate change for resource development in the Arctic. In particular, the issue of climate change has been linked explicitly to human rights and Indigenous Peoples' rights, which once again strengthens the importance of good information and ongoing consultation for Inuit communities about the environmental aspects of the Mary River Mine.

Lessons Learned

Based on the experience of the IsumaTV team in conducting the above-noted activities in relation to the Mary River Mine, the following three lessons are offered to strengthen the implementation of FPIC in relation to extractive industry projects in the Arctic.

Lesson #1: The importance of strong frameworks and institutions for the protection of Indigenous Peoples' rights

There is a strong legal framework for consultation with Indigenous Peoples in Canada, particularly in the context of modern land claims agreements. For example, in Nunavut, Inuit rights are protected by the Canadian Constitution and the Nunavut Lands Claim Agreement. Two noteworthy features of the NLCA are: (1) the requirement for a rigorous environmental and social impact review process of extractive industry projects by the Nunavut Impact Review Board, which includes processes for informing and consulting with affected communities; and (2) the requirement for an Inuit Impact Benefit Agreement (IIBA) to be negotiated between a project proponent and the relevant Designated Inuit Organization, which provides a framework for obtaining and documenting "consent" for a project.

Given the importance of these mechanisms for implementing Indigenous Peoples' rights, it is critical for the Canadian government to continue supporting the integrity and independence of impact review processes for extractive industry projects. While it is important to ensure the efficiency of such processes, there are concerns that efforts to "streamline" the review of future projects may provide insufficient time to inform and consult with Indigenous Peoples.

Furthermore, if the negotiation of impact benefit agreements represents good practice for developing partnerships between the extractive industry and Indigenous Peoples, it is important to foster greater transparency about the negotiation and content of these agreements. Greater transparency can help ensure that these agreements are truly indicative of the consent of Indigenous communities, as well as address concerns about good governance of the financial flows from the extractive industry.

Lesson #2: The importance of more explicit attention to human rights due diligence

The Government of Canada has recently signalled that the UN Guiding Principles on Business and Human Rights are one of the international standards that Canadian extractive companies should adhere to when operating abroad.¹² Mining companies operating in Canada should also implement the UN Guiding Principles since the "responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure."¹³

While many human rights issues can be addressed through traditional environmental and social management processes, the UN Guiding Principles on Business and Human Rights provide additional and explicit attention to human rights. In particular, more explicit human rights due diligence by extractive industry companies should encourage greater understanding of and attention to Indigenous Peoples' rights and concerns. Furthermore, as more extractive industry companies develop their human rights policies and practices, there may be more opportunities to undertake HRIAs as collaborative undertakings between companies and affected communities.

Lesson #3: The importance of developing new media tools for ongoing consultation

As discussed throughout this paper, ongoing consultation is fundamental to obtaining and maintaining consent for extractive industry projects and for respecting the full range of Indigenous Peoples' rights. As media professionals, IsumaTV promotes the transformative potential of 21st century multimedia tools to provide new channels for information, dialogue and engagement. In particular, tools that emphasize audio and visual communications have the potential to be more respectful of Indigenous Peoples' languages and oral traditions. Informing and consulting Inuit in their first language of *oral* Inuktitut should be conducted audio-visually if it hopes to meet modern human rights standards. 21st century new media – online video, radio, and Internet TV – now offer Indigenous Peoples a practical, econom-



Photo courtesy of IsumaTV

Hunting on the sea ice in Foxe Basin, summer 2012

ical toolkit to carry this out at the community level.

However, there are considerable barriers to access (cost and bandwidth) in many of the remote regions of Canada, where Indigenous Peoples are affected by extractive industry projects. This is certainly the case in Nunavut, where access to the Internet lags far behind the rest of the country. Therefore, government, industry and other stakeholders should redouble efforts to provide improved access to Internet and other technologies that facilitate communication in oral languages as a key component of an overall framework for effective engagement between Indigenous Peoples and extractive industries. Full documentation of the multimedia HRIA is online at www.isuma.tv/DID/HumanRights. ●

Dr. Zacharias Kunuk is co-founder of Kingullit Productions, award-winning filmmaker, and member of the Order of Canada. Together with Norman Cohn, Kunuk is co-project leader of Digital Indigenous Democracy. Lloyd Lipsett is an international human rights lawyer and a leading practitioner in the field of human rights impact assessments. He led the HRIA of the Mary River Mine for the Digital Indigenous Democracy project.

Endnotes

1 The initial project proposal included the construction of a 150 km railway over the permafrost and an all-season deep water port at Steensby Inlet. The initial mine life was projected at over 30 years, and significant benefits were predicted in terms of jobs (800 to 2,700 during construction and 950 during operations) and economic benefits (estimated at \$2 to 5 billion over the lifespan of the mine).

2 www.isuma.tv
 3 <http://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>
 4 Oxfam is tracking the uptake of FPIC by mining, oil and gas companies in its “Community Consent Index.” In a 2015 report, Oxfam states that the number of companies that have formal commitments to FPIC has tripled since 2012. See: <https://www.oxfam.org/en/research/community-consent-index-2015>
 5 See: www.ohchr.org/Documents/.../GuidingPrinciplesBusinessHR_EN.pdf
 6 <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strategie.aspx?lang=eng>
 7 The HRIA was conducted by Lloyd Lipsett, a human rights lawyer with extensive experience in conducting HRIAs for communities, companies and multilateral agencies. The HRIA of the Mary River Project was conducted in 2012-2013 and information about the methodology, findings and conclusions can be found at: <http://www.isuma.tv/DID/HumanRights>.
 8 The formal interventions in the NIRB public hearings in Iqaluit, Igloolik and Pond Inlet were presented by Dr. Zacharias Kunuk and Lloyd Lipsett in July 2012. The materials for the formal intervention can be found at: <http://www.isuma.tv/en/DID/MyFathersLand>. Furthermore, a documentary film called “My Father’s Land” was co-directed by Dr. Kunuk and Norman Cohn and can be viewed here: <http://www.isuma.tv/myfathersland/film>.
 9 See section Five of the HRIA at <http://www.isuma.tv/DID/HumanRights/KeyFinding5/full-finding>
 10 Ibid.
 11 This fund was created pursuant to the Inuit Impact Benefit Agreement between BIMC and the QIA and therefore represents a funding stream that is related to the mine’s operation.
 12 See: *Canada’s Enhanced Corporate Social Responsibility Strategy to Strengthen Canada’s Extractive Sector Abroad*, supra note 5.
 13 UN Guiding Principle 14.