Moving forward with the right to free, prior & informed consent

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In this issue of *Northern Public Affairs* we are honoured to share a collection of articles by political leaders, activists, lawyers, practitioners, and scholars who are committed to a future for Canada and Indigenous Peoples based on the principles of reconciliation and respect for self-determination as a basic human right. Their vision calls for Canadians to fully consider the meaning and consequences of reconciliation achieved through the recommendations of the Truth and Reconciliation Commission's Calls to Action, including the full and meaningful implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (the *UN Declaration* or *Declaration*) and the right to free, prior and informed consent (FPIC) in Canadian law, policy, and administration.

FPIC is the right of Indigenous Peoples to say "no" to the imposition of decisions that would further compound the marginalization, impoverishment, and dispossession to which they have been subjected through colonization. FPIC is also the power to say "yes" to mutually beneficial initiatives that can promote healthy and vital Indigenous communities for the benefit of present and future generations.

As stated in an open letter to Prime Minister Trudeau released by the Coalition for the Human Rights of Indigenous Peoples on November 25, 2015:

> FPIC is a necessary corollary of Indigenous Peoples' right of self- determination and the right to own and control their own lands, territories, and resources. It is also a precautionary standard responsive to the widespread, largely unaddressed human rights violations against Indigenous Peoples and the need for rigorous protection against further harm.1

The authors in this issue, some of whom are connected with the Coalition, have spent years moving the debate on free, prior and informed consent forward in domestic and international arenas. In doing so they have developed positions that are sensitive to Indigenous legal traditions, international human rights standards, and domestic law and policy in their efforts to achieve just relations between Indigenous Peoples and settler states. The success of these arguments is perhaps best illustrated by the United Nations General Assembly's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*, an international human rights instrument not yet fully incorporated into Canadian law, policy, and administrative practice.

In light of the importance of this matter, NPA is publishing a digital edition simultaneously with print to be freely available on our updated website. The articles in the digital edition are presented in both HTML and downloadable PDF formats and organized in a way that will be familiar to our readers. We hope you will enjoy and share the digital experience.

Many of the articles in this issue are based on presentations given at the FPIC Forum held in Ottawa on May 19-20, 2015. The articles by Chief Roger William (*Title Is With Me)* and Dalee Sambo Dorough (*Our Whole Lives Have Been About Our Human Rights*) are adapted from remarks made at the opening reception at the beautiful Wabano Centre for Aboriginal Health on Montreal Road. The articles by Lorraine Land *(Who's Afraid of the Big Bad FPIC?)* and Dalee Sambo Dorough *(FPIC in International Context)* were adapted by the authors from presentations given at the panel titled *Legal Foundations of FPIC in International and Domestic Law* held at the University of Ottawa on May 20th.

The work of transforming these oral presentations into written articles was done by the authors themselves, with the assistance of our guest editor, Rachel Singleton-Polster of the Canadian Friends Service Committee (Quakers). Without her exceptional efforts, and the support and collaboration of members of the Coalition for the Human Rights of Indigenous Peoples, this issue would not have been possible. Special thanks are due to Jennifer Preston (CFSC), Paul Joffe (Grand Council of the Crees – Eeyou Istchee), and Ed Bianchi (KAIROS) for their assistance. NPA extends its deep gratitude to all who have helped bring this issue to life.

In this introduction we briefly outline the contours of the argument for the full and meaningful implementation of the right to FPIC in order to set the stage for the articles that follow. We then address the recent history of the issue in Canadian politics and policy, highlighting a way forward that respects Indigenous and Canadian legal traditions and hu-

man rights. Our hope is that this issue of NPA will provide helpful information for Indigenous and non-Indigenous decision makers and the general public as we work together toward reconciliation.

The argument for FPIC

The right to free, prior and informed consent is part of Indigenous Peoples' laws, traditions, and customs. Chief Roger William's article *Title Is With Me* speaks directly to the meaning of consent for the Tsilhqot'in Nation when he explains all that is embodied in ?Esggidam, the Tsilhqot'in word for a person who has jurisdiction, honour, and the power of language in laws and rituals. The Tsilhqot'in Nation has engaged in complex negotiations with different levels of government and the courts in order to protect its land and its rights through co-operation and dialogue, despite a history of conflict with colonial authorities dating back generations. Most recently those efforts yielded the Supreme Court of Canada's decision in *Tsilqot'in*, which affirmed Aboriginal title for the first time and added to the growing tradition of Indigenous consent in Canadian law.

In interviews with *Northern Public Affairs*, Ellen Gabriel, Romeo Saganash, Kenneth Deer, and Will David each described the legal traditions on which their own nations rely to make legitimate decisions in the interest of their people, their land, and the wellbeing of future generations. From this perspective, what is at stake is the recognition or denial of Indigenous systems of governance, and the consequences of that recognition or denial for Indigenous Peoples and Canada. According to Will David, without FPIC, "there really are no Indigenous rights."

In our interview with Romeo Saganash, MP for Abitibi–Baie-James–Nunavik–Eeyou, he spoke to the benefits of recognizing FPIC for Indigenous and non-Indigenous societies. He explained how the Quebec forestry industry has adapted to contemporary Cree governance in a relationship embodying the spirit of FPIC. The lesson he draws is simple: "I've always maintained that recognizing the fundamental rights of Indigenous Peoples in this country is not only good for the environment, it's also good for the economy."

If one strand of the argument to meaningfully implement FPIC is the need to understand and recognize Indigenous legal traditions (and, as Lorraine Land argues, recover and revitalize those traditions that have been suppressed and degraded through colonization), a second strand is the fulsome enactment of international human rights law in Canada. In her article *The Right to Free, Prior and Informed Consent in an International Context*, Dalee Sambo Dorough provides a thorough discussion of the normative standards and international law underpinning the right of Indigenous Peoples to free, prior and informed consent as an integral part of the right to self-determination. Her focus is on FPIC as it is affirmed in the *UN Declaration* as well as other international human rights covenants that Canada has not only endorsed, but ratified.

The third strand of the argument speaks to issues of domestic law, policy, and administration. Since the *Declaration* was adopted by the United Nations General Assembly in 2007, the right to free, prior and informed consent has become the subject of heated debate in Canada. The federal government was strongly opposed to the *Declaration* at the time, citing significant concerns[2] over provisions relating to lands and resources as well as the right to FPIC. It took three years for the Conservative government to begrudgingly endorse the *Declaration,* casting it as an aspirational document "that does not reflect customary international law nor change Canadian laws."[3] Perhaps the most aggressive feature of this campaign, according to a number of our authors, was to cast FPIC as a veto for Indigenous Peoples over development.

The authors in this issue challenge attempts to cast the *UN Declaration*, and specifically the provisions on FPIC, as radical and dangerous. Dalee Sambo Dorough and Lorraine Land each reject the language of veto and argue that FPIC is indeed compatible and consistent with international and domestic law. Sambo Dorough argues that only by recognizing and respecting the human rights of Indigenous Peoples will the days of unilateral state action come to an end. In her view, international human rights standards, including those contained in the *UN Declaration,* provide the direction forward.

Lorraine Land explains how the *UN Declaration* and evolving Canadian law on Indigenous consultation converge "like branches on a tree." Speaking to the experiences of the Saugeen Ojibway Nation and the Athabasca Chipewyan First Nation, she encourages us to look closely at the current legal context for consultation, which she describes as erratic and full of gaps, with "few systemic or regulatory commitments in place to ensure that FPIC principles are the threshold for protecting Indigenous rights." Land then proceeds to describe how FPIC is in fact consistent with existing Canadian law, challenging readers to understand the evolution of FPIC as a story of progress toward a better possible future.

Natan Obed, president of Inuit Tapiriit Kanatami, writes that FPIC is central to a renewed federal approach to policy-making – one that takes seriously the social and economic challenges facing Inuit communities, including high suicide rates, access to justice issues, and gaps in health outcomes. He contrasts two divergent examples of federal policy-mak-

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Camp Osprey

ing to illustrate very different outcomes. In one example, the unilateral imposition of Nutrition North by the former Department of Aboriginal Affairs and Northern Development "marginalized Inuit, exacerbated public distrust of government, and missed an opportunity to craft an effective policy solution to a serious and ongoing challenge." In the other example, Health Canada's First Nations and Inuit Health Branch worked collaboratively with ITK to develop the Inuit Health Approach in a way that reflected the principle of FPIC, putting Inuit in a position to shape the policy agenda.

Dr. Zacharias Kunuk and Lloyd Lipsett address the challenges of implementing FPIC in connection with the Mary River Mine in the Qikiqtani region of Nunavut. A team led by Dr. Kunuk and Norman Cohn of IsumaTV participated in the land claim-mandated environmental and socio-economic review of the project, contributing a human rights impact assessment developed by Lipsett. Based on this experience they offer three lessons to strengthen the implementation of FPIC in connection with non-renewable resource extraction projects in the Arctic. These lessons speak to the important role the corporate sector can play in achieving the objectives of FPIC, and encourage innovative means of supporting community-based processes of decision making using new media technology.

Each of these authors challenges us to closely examine our assumptions about Indigenous Peoples and their role in decision making by listening to the commitments, words, and intentions of those states, Indigenous Peoples organizations, corporations, and civil society groups who have already come together to establish a just framework for reconciliation.

Moving forward with the *UN Declaration* and FPIC

With the release of the Truth and Reconciliation Commission of Canada's (TRC) final report, the *UN Declaration* has become the roadmap for reconciliation across Canada. But if the past is any indication, the process of moving ahead with reconciliation on the basis of the *UN Declaration*, including FPIC, will be anything but straightforward.

At the federal level, the previous government was fearful of the *UN Declaration* and blocked attempts to legislate its full implementation.

In 2008 and 2009, Liberal and NDP MPs introduced private members' bills that would have required the federal government to "take all necessary measures to ensure that the laws of Canada are consistent with the United Nations Declaration on the Rights of Indigenous Peoples." These bills never passed First Reading.

More recently, the last parliament debated and then defeated a motion by NDP MP Romeo Saganash that this same legislation, Bill C-641, move to second reading. Notable during these debates was the assertion by Conservative MP Mark Strahl (Chilliwack – Hope) that Bill C-641 would "provide First Nations with a veto over any sort of legislation or development that concerns them." Conservative MP Ryan Leef (Yukon) warned of the danger of Article 19 of the UN Declaration, a provision that "would give First Nations an effective veto over any legislation that our government or any government at all would bring forward."

Of course, the Conservative position on FPIC was consistent with the Harper government's approach to Indigenous relationships more generally, in tone as well as deed. Under Harper, Indigenous Peoples were often either ignored, discredited, or vilified, and nowhere was this more apparent than in the escalating tensions surrounding environmental protection and pipelines.[4]

During this period the Alberta NDP emerged as a progressive force in the movement to implement the *UN Declaration* by including a commitment in its 2015 election platform to build the *Declaration* into law.[5] As the governing party, however, the NDP has strongly reaffirmed its commitment to pipeline development[6], raising questions[7] about its commitment to implement the *Declaration* and respect the right of Indigenous groups to give or withhold consent to activities that could impact them.

With the election of the Trudeau government last October, expectations grew that the *UN Declaration* would be fully implemented at the federal level. During the election, the Liberal Party ran on a platform of renewed nation-to-nation relations[8] and a commitment to enact the recommendations of the Truth and Reconciliation Commission, "starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*."[9]

Since the election, the Liberal government has not indicated* how it plans to implement the *UN Declaration*. In his mandate letter to Carolyn Bennett, minister of Indigenous and Northern Affairs, the Prime Minister reiterated his priority to implement the *UN Declaration*. He also directed the Minister to review laws, policies, and practices to "ensure the Crown is fully executing its consultation and accommodation obligations in accordance with its constitutional and international human rights obligations."[10]

While Minister Bennett has issued strong statements in support of the TRC's calls to action[11], commentators are asking how the federal government will balance competing expectations for pipelines, environmental protection, and Indigenous rights.[12] So far the Prime Minister seems to think that the

twin objectives of pipeline development and environmental protection can be met simultaneously. And yet, reports questioning whether the Prime Minister may be backing away from an election pledge to respect the Indigenous right to FPIC raise doubts about the distance the government is willing to go to fully meet its commitment.[13]

What steps does the Government intend to take to meet its election pledge to implement the *United Nations Declaration on the Rights of Indigenous Peoples*? What role will Indigenous Peoples play in this process? Have resources been allocated specifically and solely to undertake this process? Will the Minister support the private member's bill, introduced[14] on April 21st, 2016 by Mr. Saganash, to ensure that all necessary measures are taken to ensure that the laws of Canada are consistent with the *UN Declaration*?

What remains is for the government, together with Indigenous Peoples, to define a formal process that will move us forward together. It is only through such a process that we can together ensure that the Articles of the *UN Declaration on the Rights of Indigenous Peoples* concerning the right of Indigenous Peoples to free, prior and informed consent is justly and meaningfully enacted in Canadian law, policy, and practice.◉

**Editor's note: On April 6th, Northern Public Affairs sent 5 questions to Minister Bennett's office about the steps the federal government intends to take to meet its election pledge to implement the* UN Declaration. *This letter was written before NPA received an answer on April 26th.*

Minister Bennett's office wrote the following in response to the question, "How does the Government intend to ensure that Article 19 of the UNDRIP concerning the right of Indigenous Peoples to free, prior, and informed consent is enacted in Canadian law, policy, and administrative practice?":

> *At its core, the concept of Free, Prior, and Informed Consent is about meaningful consultation with Indigenous Peoples on issues of concern to them with a goal of achieving consensus. The Government of Canada believes resource industry proponents, First Nations and government should all strive towards consensus.*
>
> *Canada's constitutional framework recognizes and protects existing and acquired Aboriginal and treaty rights through Section 35 of the Constitution Act, 1982. Furthermore, Canada is legally bound to consult, and accommodate when appropriate, Indigenous groups if contemplated Crown activity may potentially adversely affect those constitutionally protected rights. This legal duty to consult corresponds significantly with elements of the concept of 'free, prior and informed consent' as interpreted as an obligation to 'seek to obtain' consent.*

On May 4, immediately before this issue went to press, the Minister's office provided the following clarification to this response:

> *Canada is deeply committed to renewing the relationship between the Crown and Indigenous peoples, based on recognition of rights, respect, co-operation and partnership. This renewed relationship includes the full adoption and [implementation of] the United Nations Declaration of the Rights of Indigenous Peoples.*
>
> *As [we] move towards the full implementation of UNDRIP, our government will be working in partnership with First Nations, Inuit and the Métis on the best approach.*
>
> *The Government will also be working with stakeholders, including provinces and territories, and Industry, on their role and perspectives on the implementation of the Declaration in Canada.*

Please go to http://www.northernpublicaffairs.ca/index/canada-and-undrip-qa-with-minister-bennetts-office/ to see the minister's complete responses and expert commentary on them.

Endnotes

1 Assembly of First Nations et al., *Joint Open letter: Prime Minister Justin Trudeau - United Nations Declaration on the Rights of Indigenous Peoples & Free, Prior and Informed Consent*, November 25, 2015. A copy of the letter is available at http://www.ubcic.bc.ca/pmtrudeau_undrip_fpic.

2 See, for instance, http://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160

3 Canada, *Canada's Statement in Support of the United Nations Declaration on the Rights of Indigenous Peoples*, November 12, 2010. URL: http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142

4 For example, James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples, wrote, "There appears to be a lack of a consistent framework or policy for the implementation of this duty to consult, which is contributing to an atmosphere of contentiousness and mistrust that is conducive neither to beneficial economic development nor social peace." See United Nations, *Report of the Special Rapporteur on the rights on indigenous peoples, James Anaya, on the situation of indigenous peoples in Canada*. 7 May 2014, A/HRC/27/52/Add.2, p.20. URL: http://unsr.jamesanaya.org/docs/countries/2014-report-canada-a-hrc-27-52-add-2-en-auversion.pdf

5 http://www.albertandp.ca/platform

6 http://www.cbc.ca/news/canada/edmonton/rachel-notley-ndp-conference-1.3528549

7 See, for example: http://www.desmog.ca/2016/04/13/pipelines-indigenous-rights-premier-notley-cant-have-both

8 https://www.liberal.ca/realchange/a-new-nation-to-nation-process/

9 https://www.liberal.ca/realchange/truth-and-reconciliation-2/

10 http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter

11 See, for example, http://www.parl.gc.ca/HouseBusiness/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8151924#Int-8833927

12 http://www.theglobeandmail.com/report-on-business/rob-commentary/eventually-trudeau-will-have-to-disappoint-someone-on-pipelines/article28437986/

13 http://aptn.ca/news/2016/02/04/trudeau-election-pledge-on-first-nation/

14 http://montrealgazette.com/opinion/columnists/opinion-private-bill-is-a-chance-for-canada-and-indigenous-peoples-to-move-forward