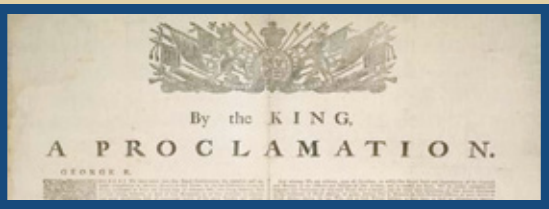
9 Aboriginal Canada and the Natural Resource Economy Series

UNDERSTANDING FPIC

From assertion and assumption on 'free, prior and informed consent' to a new model for Indigenous engagement on resource development

KEN S. COATES AND BLAINE FAVEL

APRIL 2016



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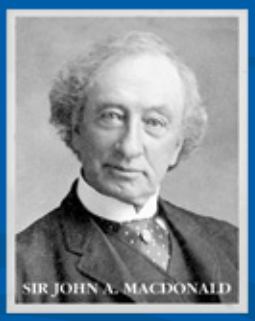

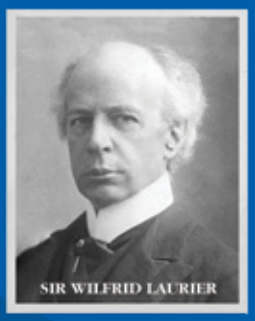

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PREFACE

The year 2013 was the 250th anniversary of the Royal Proclamation of 1763. The Royal Proclamation is widely regarded as having been one of the cardinal steps in the relationship between Aboriginals and non-Aboriginals in British North America – what eventually became Canada.

A quarter of a millennium later it is our judgment that that relationship has often not been carried out in the hopeful and respectful spirit envisaged by the Royal Proclamation. The result has been that the status of many Aboriginal people in Canada remains a stain on the national conscience. But it is also the case that we face a new set of circumstances in Aboriginal/non-Aboriginal relations. Indigenous peoples in Canada have, as a result of decades of political, legal, and constitutional activism, acquired unprecedented power and authority. Nowhere is this truer than in the area of natural resources.

This emerging authority coincides with the rise of the demand for Canadian natural resources, a demand driven by the increasing integration of the developing world with the global economy, including the massive urbanisation of many developing countries. Their demand for natural resources to fuel their rise is creating unprecedented economic opportunities for countries like Canada that enjoy a significant natural resource endowment.

The Aboriginal Canada and the Natural Resource Economy project seeks to attract the attention of policy makers, Aboriginal Canadians, community leaders, opinion leaders, and others to some of the policy challenges that must be overcome if Canadians, Aboriginal and non-Aboriginal alike, are to realise the full value of the potential of the natural resource economy. This project originated in a meeting called by then CEO of the Assembly of First Nations, Richard Jock, with the Macdonald-Laurier Institute. Mr. Jock threw out a challenge to MLI to help the Aboriginal community, as well as other Canadians, to think through how to make the natural resource economy work in the interests of all. We welcome and acknowledge the tremendous support that has been forthcoming from the AFN, other Aboriginal organisations and leaders, charitable foundations, natural resource companies, and others in support of this project.

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EXECUTIVE SUMMARY

The Trudeau government's commitment to implement the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) has generated considerable policy and political debate. What is the intersection between international and domestic law? Is UNDRIP compatible with Canada's laws and policies? What does it mean for Indigenous communities? Does it represent progress or create new uncertainty? These are the types of questions with which policy-makers and Canadians – including Indigenous peoples – are now grappling.

No aspect of the declaration has received more attention than the concept of "free, prior, and informed consent" (FPIC) and its implications for resource development. Some argue that it is tantamount to an Indigenous veto over resource projects. One Indigenous leader in a recent CBC radio interview, for instance, stated plainly that "First Nations have the right to free, informed, and prior consent. That right is guaranteed in law and in effect that is a veto." Others contest that UNDRIP currently has no legal standing in Canada and that in any event, FPIC, by and large, maintains the existing expectations with respect to consultation and accommodation. In the past, FPIC has been embraced by Indigenous peoples, treated with ambivalence by government, and with concern by industry. Some resource firms have seen FPIC as another hurdle for approval of resource development just as real progress was being made in adopting the "duty to consult and accommodate."

Too often assertion and assumption, rather than research and analysis, defined the ongoing debate about "free, prior, and informed consent." This paper seeks to provide dispassionate analysis on the subject for policy-makers, Indigenous leaders, businesses, and Canadians.

Too often assertion and assumption, rather than research and analysis, defined the ongoing debate.

The paper explores the meaning of "free, prior, and informed consent" and how it interacts with current Canadian law and practice. It also sets out recommendations on how the Trudeau government can fulfill its promise to incorporate FPIC into the Canadian system without disrupting the slow yet steady progress that is being made to establish partnerships between Indigenous communities and companies on resource development. There is not a strong case that FPIC currently applies to resource development in Canada, or that it would bestow a veto on resource projects, but the new federal government's embrace of the concept creates a welcome opportunity to further clarify the terms for Indigenous support for resource projects on their traditional lands. It would be a mistake to simply attempt to adopt FPIC as a new standard. The potential for further confusion and disruption in the resource economy is significant.

What is needed is a made-in-Canada implementation plan for FPIC that furthers understanding of the conditions for partnerships with Indigenous communities. There needs to be an Indigenous-driven process to clearly establish the standards for consultation and engagement on resource projects that conforms to existing Canadian laws and practices. This paper considers the roles and responsibilities of Indigenous communities, governments, and natural resource companies, and sets out clear recommendations for each of these parties:

1. The Government of Canada and national Indigenous organizations, including the Assembly of First Nations, Inuit Tapiriit Kanatami, Métis National Council, and the Congress of Aboriginal Peoples, should seek to develop a common declaration that articulates support for the spirit and intent underpinning the *UN Declaration on the Rights of Indigenous Peoples* as it relates to resource development.

2. The Government of Canada and the provinces and the territories – working in full cooperation with Indigenous organizations and peoples – have to define the manner in which they will determine when and how the "national interest" overrides the interests of a specific Indigenous community or group with regard to resource development.
3. The federal government, provinces, territories, and national Indigenous organizations could seek to negotiate a national framework or regional ones that clarify existing case law on Indigenous rights regarding resource development and the role for Indigenous participation.
4. Canada requires a decision-making and conflict resolution system that is culturally sensitive, timely, and fair. The establishment of a non-judicial arbitration body, staffed by commissioners acceptable to all parties and with a mandate to resolve disputes, would go a long way toward providing a transparent mechanism that respects Indigenous cultures and political processes, and spells out the relative rights and responsibilities of Indigenous peoples, governments, and corporations.
5. Indigenous communities could contribute to resolving the uncertainty with respect to UNDRIP, and in turn FPIC, by issuing a declaration that sets out Indigenous requirements and expectations for participation in resource development. Indigenous peoples could, in effect, define what "free, prior, and informed consent" means for them in the form of a framework for resource development and Indigenous approval.

Indigenous peoples could, in effect, define what "free, prior, and informed consent" means for them.

In the end, the discussion over FPIC provides an opportunity to seek a real and sustainable balance in the development of natural resources. Done properly, Canada can create a system that respects Indigenous rights, recognizes the national interests, and reflects the commercial realities faced by companies. The new approach would provide Indigenous communities with an opportunity to protect their rights and needs without undermining the legitimate authority of national, provincial and territorial governments. Until the 21st century, Canadian resource development processes were unbalanced and left Indigenous peoples vulnerable. Responding to the spirit of UNDRIP provides Canada an opportunity to create a fair, reasonable and collectively beneficial approach.

SOMMAIRE

L'engagement du gouvernement Trudeau à mettre en œuvre la *Déclaration sur les droits des peuples autochtones* (DNUDPA) a donné lieu à de vastes débats politiques et à une réflexion profonde sur les politiques. Comment les lois nationales et internationales se recoupent-elles? La déclaration est-elle en accord avec les lois et les politiques canadiennes? Quelles sont ses répercussions sur les collectivités autochtones? Est-elle un pas de plus en avant ou engendre-t-elle de l'incertitude? Il s'agit du genre de questions auxquelles sont maintenant confrontés les décideurs et les Canadiens, notamment les peuples autochtones.

Aucun aspect de la déclaration n'a reçu autant d'attention que la notion et les répercussions du « consentement préalable, donné librement et en connaissance de cause » (CPLCC) sur la mise en valeur des ressources. Selon certains, il revient à accorder un droit de veto aux peuples autochtones sur les projets de ressources. Ainsi, dans une récente entrevue à CBC Radio, un chef autochtone a franchement déclaré que « les Premières Nations ont droit à un consentement préalable, donné librement et en connaissance de cause. Ce droit est garanti par la loi et est effectivement un veto

accordé aux peuples autochtones ». D'autres expliquent que la DNUDPA n'a pas de statut juridique au Canada présentement et qu'en tout état de cause, le CPLCC confirme essentiellement les attentes actuelles en matière de consultation et d'accommodement. Historiquement, le CPLCC a suscité l'enthousiasme des peuples autochtones, a été envisagé avec ambivalence par les gouvernements et a soulevé des préoccupations dans l'industrie. Certaines entreprises de ressources le voient comme un nouvel obstacle à l'approbation des projets de ressources au moment même où elles accomplissent des progrès réels en souscrivant à « l'obligation de consulter et d'accommoder ».

Trop souvent, les affirmations et les suppositions, plutôt que la recherche et l'analyse, caractérisent le débat en cours sur le « consentement préalable, donné librement et en connaissance de cause ». La présente étude vise à présenter une analyse objective de la question aux décideurs, aux chefs autochtones, aux entreprises et aux citoyens canadiens.

L'étude explore la notion de « consentement préalable, donné librement et en connaissance de cause » et la façon dont elle interagit avec les lois et les pratiques canadiennes actuelles. Elle présente également des recommandations sur la manière dont le gouvernement Trudeau peut remplir sa promesse d'intégrer le CPLCC dans le système canadien sans perturber les progrès encore lents, mais constants, accomplis pour construire des partenariats entre les collectivités autochtones et les entreprises pour la mise en valeur des ressources. Il n'y a pas de preuves solides démontrant que le CPLCC s'applique à la mise en valeur des ressources au Canada actuellement ou qu'il suppose un droit de veto sur les projets, mais l'ouverture du nouveau gouvernement fédéral en la matière crée une occasion de clarifier les termes en vertu desquels les Autochtones pourront accorder leur soutien aux projets sur leurs terres traditionnelles. Ce serait une erreur que de simplement chercher à adopter le CPLCC à titre de nouvelle norme. Cela risquerait grandement de créer davantage de confusion et de perturber l'économie des ressources.

Ce dont on a besoin c'est d'un plan de mise en œuvre typiquement « canadien » pour le CPLCC, qui délimite clairement les modalités des partenariats avec les communautés autochtones. Il faut un processus axé sur les Autochtones afin d'établir des normes claires de consultation et de participation dans les projets de ressources, et cela, dans le respect des lois et des pratiques canadiennes courantes. Dans cette étude, les rôles et les responsabilités des collectivités autochtones, des gouvernements et des sociétés de ressources naturelles sont pris en compte pour adresser des recommandations claires à toutes les parties :

La présente étude se veut un plan directeur au service du progrès.

1. Le gouvernement du Canada et les organisations autochtones nationales, dont l'Assemblée des Premières Nations, l'*Inuit Tapiriit Kanatami*, le Ralliement national des Métis et le Congrès des peuples autochtones, devraient tenter d'élaborer en commun une déclaration qui décrit l'esprit et l'intention à la base de la *Déclaration des Nations Unies sur les droits des peuples autochtones* en ce qui a trait à la mise en valeur des ressources.
2. Le gouvernement du Canada ainsi que les provinces et les territoires – travaillant en totale collaboration avec les organisations et les peuples autochtones – devraient définir la manière de déterminer quand et comment les « intérêts nationaux » recoupent les intérêts d'une collectivité ou d'un groupe autochtone particulier en ce qui concerne la mise en valeur des ressources.
3. Le gouvernement fédéral, les provinces, les territoires et les organisations autochtones nationales pourraient chercher à négocier un cadre à l'échelle du pays ou des régions à l'intérieur duquel seraient clarifiées la jurisprudence existante à l'égard des droits autochtones et la participation de ces derniers à la mise en valeur des ressources.

4. Le Canada a besoin d'un processus de prise de décision et de résolution des conflits adapté à la culture, rapide et équitable. La création d'un organe d'arbitrage non judiciaire formé de commissaires acceptés par toutes les parties, et dont le mandat serait de résoudre les différends, permettrait d'offrir un mécanisme transparent pour trancher sur les questions de droit et de responsabilité revenant aux peuples autochtones, aux gouvernements et aux sociétés, et ce, dans le respect des cultures et des processus politiques autochtones.
5. Les collectivités autochtones pourraient apporter leur aide pour résoudre l'incertitude à l'égard de la DNUDPA et du CPLCC en rendant publique une déclaration précisant leurs exigences et leurs attentes en matière de participation autochtone à la mise en valeur des ressources. Les peuples autochtones pourraient en effet définir, de leur point de vue, la notion de « consentement préalable, donné librement et en connaissance de cause » sous la forme d'un cadre d'action pour la mise en valeur des ressources sous réserve de leur assentiment.

Au final, la discussion sur le CPLCC est l'occasion de faire reposer la mise en valeur des ressources naturelles sur un équilibre réel et durable. Le Canada peut créer un système qui, s'il est bien conçu, respectera les droits autochtones, reconnaîtra les intérêts nationaux et tiendra compte des impératifs commerciaux des entreprises. La nouvelle approche fournirait aux collectivités autochtones l'occasion de protéger leurs droits et d'assurer la satisfaction de leurs besoins sans porter atteinte à l'autorité légitime des gouvernements nationaux, provinciaux et territoriaux. Au Canada, jusqu'au 21e siècle, les processus de mise en valeur des ressources ont été asymétriques, fragilisant les peuples autochtones. En répondant à l'esprit de la DNUDPA, le Canada a une occasion d'élaborer une approche équitable, raisonnable et bénéfique pour tous.

INTRODUCTION

The natural resource industry has become contested ground in Canada. Indigenous groups and their supporters have mounted protests against hydroelectric projects, pipelines, and mines, which has given Canadians a growing sense that the resource sector is a political battlefield. At the same time, and garnering much less attention, hundreds of Indigenous communities have signed agreements with mining and forestry companies, finding common ground in search of economic opportunity. Across the country, uncertainty surrounds the roles and responsibilities of governments and companies to engage, consult, and accommodate local communities as part of the resource project approval process. The rhetoric can become heated. Passions can be ignited. Facts can be obscured.

The natural resource industry has become contested ground in Canada.

The Trudeau government's commitment to implement the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP), and in turn its clauses about "free, prior, and informed consent" (FPIC), has the potential to further complicate an already complicated situation and could slow resource development dramatically. But handled properly, the government's recognition of UNDRIP could usher in a new era of cooperation and partnership with Indigenous peoples.

Recent comments in a CBC radio interview by Pamela Palmater, Chair in Indigenous Governance at Ryerson University and well-known commentator on Aboriginal issues, provide some insight into the level of this debate. In the interview she asserts that First Nations communities can effectively exercise a veto over projects:

> We have... a legal right to free and informed and prior consent... First Nations aren't asking for anything. First Nations have the right to free, informed and prior consent. That right is guaranteed in law and in effect that is a veto. First Nations say no on their territory, that means no. And Prime Minister Trudeau said very clearly that no means no when talking to First Nations. His job is to try to find ways in which to go forward with a yes to make sure that... the environment is protected and the economy goes forward, but not one at the expense of the other. (Enright 2016)

Dr. Palmater's observations help illustrate that "free, prior, and informed consent" has become a priority for Indigenous leaders and their communities. But they are also indicative of considerable assumption and misunderstanding. The tendency to equate UNDRIP to Canadian law, and FPIC as tantamount to a veto over resource projects, effectively confuses the issue and risks producing more tension than progress.

Assertion and assumption, rather than debate and analysis, has defined the national conversation about "free, prior, and informed consent." This paper seeks to bring dispassionate policy-oriented analysis to the debate. It explores the meaning of "free, prior, and informed consent," explains how FPIC interacts with current Canadian law and practices, and sets out recommendations on how the Trudeau government can fulfill its promise to incorporate FPIC into the Canadian system without disrupting the existing and still evolving collaborative processes on resource development between Indigenous communities and companies.

This paper argues for a "made-in-Canada" implementation plan for FPIC that furthers understanding of the conditions for partnerships with Indigenous communities. It recommends an Indigenous-driven process to establish the standards for consultation and engagement on resource projects that conforms to existing Canadian laws and practices and meets the goals and values of UNDRIP. We consider the roles and responsibilities of Indigenous communities, governments, and natural resource companies, and set out clear recommendations for each of these parties. The paper's ultimate goal is to inform the federal government as it determines how to fulfill its election commitment to implement UNDRIP, including codifying "free, prior, and informed consent" (Liberal Party 2015), while providing greater clarity for the resource sector.

As the events of the last decade have shown, Canada faces two stark choices.

As the events of the last decade have shown, Canada faces two stark choices about how best to proceed in this vital area. In the first approach, Indigenous peoples could continue to use Canadian legal processes, supplemented by the still unclear legal authority of UNDRIP, to pursue their Aboriginal and treaty rights to gain a greater presence in the resource sector. This approach has worked well, albeit incrementally and at considerable cost, over the past 40 years, producing outcomes for Indigenous peoples that would not otherwise have been gained. In other words, the country could anticipate decades of continuing legal battles with the attending uncertainty for governments and resource companies.

The second approach, the one advocated here, is that the Government of Canada, Indigenous communities, and the resource sector, could take the combination of new government policy, existing Supreme Court judgments, the directives of UNDRIP and FPIC, and the commercial realities of the resource sector, to fashion a new policy and administrative framework for managing relations in the field.

Uncertainty carries enormous risks for all participants, including Indigenous peoples. For 40 years, Canada has limped, unevenly, toward real and sustained partnership with Indigenous peoples over

resource development. Aboriginal Canadians have found support in the legal system and have used the recognition of their rights to make real progress, seen in the hundreds of resource collaborations across the country.

The Trudeau government has indicated a desire to make substantial strides in the sector and to develop new and more collaborative relationships with Indigenous peoples. The potential exists, in an area of pressing national importance, to launch a process of the co-production of policy with Indigenous peoples, one that respects commercial realities and that re-enforces Canada's stature as a country that welcomes respectful, environmentally sound, and economically sustainable resource development.

RESOURCE DEVELOPMENT IN CANADIAN PRACTICE AND LAW

There has been considerable progress in recent years, driven primarily by Indigenous-instigated court decisions and the willingness of resource companies to adjust to new legal and political realities. As late as the 1980s, Aboriginal people in Canada had few recognized legal rights relating to resource development, and only modest recognition of Aboriginal rights in general. Three major Supreme Court decisions – *Taku* and *Haida* in 2004 and the ruling on the *Mikisew Cree* case the following year – established the principle of "duty to consult and accommodate," which required governments (and companies) to inform and negotiate with Indigenous communities before starting development projects, and required appropriate "compensation" for disruptions of land, livelihoods, and community well-being (Newman 2014).

Starting in 2004, resource firms struggled to understand, accept, and implement their new responsibilities.

Starting in 2004, resource firms struggled to understand, accept, and implement their new responsibilities. Part of the problem was that the requirements and expectations were imprecise. Another was that companies were not used to engaging with Indigenous peoples and some were clumsy, ineffectual, and even disrespectful.

Gradually, firms – particularly those with long-term assets and established relations with Indigenous communities – began to adapt. Large companies, such as Cameco and Suncor, took proactive approaches and accommodated the expectations of the First Nations and Métis communities in their fields of operation. They signed substantial collaboration agreements across northern Saskatchewan (in the case of Cameco) and established extensive business and employment relationships, among other engagements, with Indigenous communities near the Alberta oil sands. Others, including some of the junior mining companies, lacked the resources and time to make a substantial change in direction, and continued to press for quick agreements with Indigenous communities.

But it is difficult not to recognize the progress that has occurred. There are now more than 400 impact and benefit agreements between Indigenous communities and the mining sector alone, and many hundreds more in the forestry industry. A new legal capacity specializing in the duty to consult and accommodate requirements has been built. More than 250 Aboriginal Economic Development Corporations have been established and are now making major regional and community investments.

Resource companies are exhibiting an increased commitment to corporate social responsibility in their interactions with Indigenous communities. And on top of that are the employment and investment gains Indigenous peoples have made (Coates and Speer 2015).

Indigenous collaboration with resource firms is considerably more extensive than many Canadians believe. The partnership agreements with New Gold (New Afton Mine, in the BC Interior) resulted in strong participation by the Stk'emlupsemc of the Secwepemc Nation. Similarly, the Nisga'a signed an agreement in 2014 with Avanti Mining to permit the opening of the Kitsault Molybdenum Mine Project in the Northwest corner of the province. On an even larger scale, Vale's extensive agreements and collaborations with the Innu Nation and the Nunatsiavut Government regarding the Voisey's Bay nickel mine include a variety of important Indigenous-directed elements. (Crowley and Coates, 2013; Coates, 2015; Coates, Finnegan Hall and Lindsay, 2015; Newman, 2014).

There are now more than 400 impact and benefit agreements between Indigenous communities and the mining sector alone.

Consultations and agreements have not always worked out smoothly, of course, as the tensions surrounding the Ring of Fire development in northern Ontario attest (Younglai and Marotte 2015). Consider also the continuing struggles of the Attawapiskat First Nation despite its agreements regarding the nearby DeBeers diamond mines, and the ongoing passionate debates about the Northern Gateway and other pipelines. As well, numerous Indigenous communities have been caught in the current energy sector downturn and been harmed economically by the cancellation of projects. Well-negotiated settlements have collapsed in the final stages when the companies determined that the projects had become uneconomical. But it is clear that progress is being made (Crowley and Coates 2014).

There were bumps along the road, but resource firms, Indigenous peoples, and governments generally followed the advice offered by legal scholar Dwight Newman, who argued:

> despite the fact that it is a legal doctrine, the duty to consult needs to be approached in less technical ways. By its nature, the duty to consult as a legal doctrine has to be relatively technical. It is engaged or triggered relatively easily by governments' administrative decisions that have the potential to have adverse effects on Aboriginal or treaty rights. But there are then many complexities on what it might mean in particular circumstances as a minimal legal requirement. In many ways, the history of how the duty to consult has worked suggests that those who attempt to draw upon the spirit of the duty to consult may well attain better outcomes than those who attempt to follow the letter of the law. (Newman 2014)

There were other changes as well. After years of resistance, governments provided additional benefits, including resource revenue sharing in some provinces and territories (and included within modern treaties). There were improvements in general consultations with Indigenous peoples on resource developments and other matters. Driven by Indigenous legal interventions, the country had moved significantly toward more inclusive resource planning, more equitable arrangements for Aboriginal communities, and significantly better relations between Indigenous peoples, resource companies, and government agencies. In this context, the Canadian endorsement of UNDRIP and, as a consequence, free, prior and informed consent, was an intervention into a process that, while far from ideal, had produced significant economic outcomes for Aboriginal people and the country at large.

The new arrangements have empowered Indigenous peoples substantially, but they did not grant a veto over resource development. The courts consistently recognized the right of the governments to govern – to manage affairs in the national interest – and acknowledged that the duty to consult

and accommodate did not grant Indigenous communities the final say. In a series of court cases, the courts ruled, variously, that "The duty does not require than an agreement be reached, nor does it give Aboriginal peoples a veto," (*Behn v. Moulton Contracting Ltd.* 2013); "The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise," (*Beckman vs. Little Salmon/Carmacks First Nation* 2010); and "The consultation process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim" (*Haida Nation v. British Columbia (Minister of Forests)* 2004); and "at some point a government decision will have to be made" (*Tzeachten First Nation v. Canada (Attorney General)* 2008). The substantial influence of Indigenous peoples recognized by the courts did have a ceiling (Canadian Environmental Assessment Agency, undated).

Starting before UNDRIP was passed by the United Nations and well before it was endorsed by Canada in 2010, Canadian governments, Indigenous peoples, and resource companies, prodded and directed by the courts, had created new and more collaborative arrangements for resource development. UNDRIP, therefore, was not entirely a green field of policy, law, and practice, but rather was being laid over top of an existing framework. It is the intersection between current practice and the expectations generated by UNDRIP that has created uncertainty in the Canadian resource sector.

ORIGINS OF THE UNITED NATIONS *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

The Macdonald-Laurier Institute will soon release a broader analysis of UNDRIP as a companion to this paper. That paper will study UNDRIP's origins and evolution, the Harper government's reluctance to endorse the declaration, the potential for implementing its articles and clauses, and what it means for Canada. But it is useful to briefly contextualize the FPIC debate in the broader picture of UNDRIP here.

It would be understandable if Canadians thought that FPIC and UNDRIP were one and the same.

Interpretations of "free, prior, and informed consent" and its implications for Canada have dominated the legal and political debate about UNDRIP. It would be understandable if Canadians thought that FPIC and UNDRIP were one and the same.

UNDRIP is a 46-article resolution that was approved by the United Nations General Assembly in September 2007. It followed a more than 20-year process of developing a set of universal Indigenous rights to be presented to UN member states and ideally, subsequently, reflected in their respective laws, policies, and practices relating to Indigenous peoples.

Producing UNDRIP proved to be a painstaking process involving dozens of nations and most importantly, a large, international set of Indigenous organizations. It was purposefully drafted with the understanding that not all articles applied equally in all countries and

for all Indigenous peoples. Different cultures, economies, and states of development necessarily meant that UNDRIP would translate at the national level in different ways.

Yet one should not diminish the impressive scope and breadth of UNDRIP's general ambition and the potential implications of its specific articles. Working within the context of universal human rights, UNDRIP effectively sets out the individual and collective rights of Indigenous peoples, including their rights to culture, identity, language, employment, health, education, and other issues. It emphasizes self-determination and prohibiting all forms of discrimination against Indigenous peoples.

Canada is one of only four countries – along with Australia, New Zealand, and the United States – that voted against UNDRIP in 2007.

Canada is one of only four countries – along with Australia, New Zealand, and the United States – that voted against UNDRIP in 2007. These countries rooted their initial opposition in concerns about the application of UNDRIP's articles and the document's interaction with national legal, policy, and constitutional arrangements.

Gradually, though, the four countries shifted their positions from opposition to acceptance. Beginning in 2009, the national governments announced their endorsements of UNDRIP with one major caveat – all of them described the declaration as an "aspirational" document with no legal or political implications absent some action to implement or reflect its articles in government policy. The Canadian government's official statement in support of UNDRIP in 2010 is typical. It states:

> The Declaration is an aspirational document which speaks to the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances.
>
> Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada....
>
> In 2007, at the time of the vote during the United Nations General Assembly, and since, Canada placed on record its concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, States and third parties. These concerns are well known and remain. However, we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. We 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. (Indigenous and Northern Affairs Canada 2010)

So, while Canada (and other holdout countries) ultimately accepted UNDRIP and its articles, it was precisely because the government articulated that it had no legal or political implications in and of itself that it was prepared to shift its position.

LEGAL STATUS OF UNDRIP

UNDRIP's legal status is a critical part of the policy debate around its implementation and the execution of the concept of "free, prior, and informed consent." Differing perspectives on its legal standing and interaction with existing Canadian laws and practices are at the heart of much of the confusion reflected in media analysis of FPIC and its implications for Canada.

Many Indigenous communities and Canadian governments have different interpretations with respect to UNDRIP. It is indicative of longstanding differences in legal interpretation on a host of issues, including the numbered treaties of the late 19th and early 20th centuries, the meaning of elements of the *Indian Act,* the implementation of modern treaties, and the application of Supreme Court of Canada decisions.

The preponderance of legal analysis and opinion tilts in favour of the view that UNDRIP has no real legal standing in Canada.

Indigenous peoples and governments in Canada have been locked for decades in debates about interpretative differences and fundamental misunderstandings about the meaning of legal, political, and treaty terms, and processes and commitments. This is the key reason that Canadian courts have become a primary meeting ground for governments and Indigenous peoples.

The preponderance of legal analysis and opinion tilts in favour of the view that UNDRIP has no real legal standing in Canada in and of itself (Nijar 2013; Engle 2011; see also Echo-Hawk 2013; Charters 2006; Charters and Stavenhagen 2009; Henderson 2008; Lightfoot 2010; Mitchell 2014).

Siegfried Weissner has argued:

> Without a doubt, UNDRIP is a milestone of indigenous empowerment. Still, legally speaking, United Nations declarations, like almost any other resolution by the General Assembly, are of a mere hortatory nature: they are characterized as "recommendations" without legally binding character. There have been attempts to ascribe a higher degree of authority to General Assembly resolutions designated as "declarations." In 1962, the Office of Legal Affairs of the United Nations, upon request by the Commission on Human Rights, clarified that "[i]n United Nations practice, a 'declaration' is a formal and solemn instrument… resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected." (Wiessner 2011)

British legal scholar Marco Odello and American Indigenous scholar Duane Champagne are representative of the view that the impact of UNDRIP is dependent upon actions by national and sub-national governments. As Odello (2011) writes:

> international law usually provides a general and abstract set of rules, the fruit of lengthy and complex negotiations and compromises. In addition, it would be a serious lack of pragmatism to forget that individuals and communities, both domestic and foreign, are today under the jurisdiction of states. Therefore, the responsible entities for ensuring their protection are the states' authorities at their different levels, from national to local governments. This protection is given through national legal norms, the system of courts and other mechanisms for the protection of human rights, such as ombudsmen and national human rights commissions. (106)

This prevailing interpretation thus sees UNDRIP is an important expression of comprehensive, long-term objectives and a recognition of widely-held historical experiences of Indigenous peoples around

the world. But without action by national governments to codify UNDRIP in their legal, political, and constitutional arrangements, it is widely viewed as an aspirational rather than binding document. It is not a treaty or UN convention (which would be legally binding) that would be signed or ratified by states. It is instead a statement endorsed by most UN members (Indigenous and Northern Affairs Canada 2015).

This view is not unchallenged. Some Indigenous leaders and activists and even legal scholars have articulated a competing view that UNDRIP does indeed have considerable legal standing. British legal scholar Alexandra Xanthaki (2009), for instance, contests the idea that UN member states viewed UNDRIP's provisions as "mere aspirations." Instead she argues:

> The text is substantially informed by international law, the rights it proclaims are consistent with general international law and the development of international standards on indigenous rights is widely perceived as an international law project. In addition, the *Declaration* can be perceived as agreed interpretation of the various UN human rights treaties concerning indigenous rights.

James Anaya (2010), UN special rapporteur on Indigenous rights, argues a similar view, noting:

> It is one thing to argue that not all of the Declaration's provisions reflect customary international law, which may be a reasonable position. It is quite another thing to sustain that none of them does, a manifestly untenable position.[1]

It is not a treaty or UN convention (which would be legally binding) that would be signed or ratified by states.

An extended discussion of the legal standing of UNDRIP by the International Law Association (ILA) in 2012 produced a legally nuanced but nonetheless strongly worded endorsement of the authority of the declaration.[2]

It is no doubt a complicated legal question and, of course, there are differing views. Yet on balance the prevailing legal view is that UNDRIP and its articles must be codified in domestic law and policy to assume enforceable legal standing. This debate nevertheless continues – and will continue – and undoubtedly will be tested in courts in Canada and internationally.

WHAT IS FREE, PRIOR, AND INFORMED CONSENT?

This ongoing debate about the legal implications of UNDRIP is critical to understanding the concept of "free, prior, and informed consent" and how it might interact with Canadian law and practices.

FPIC appears in several UNDRIP articles but the most widely-cited reference is Article 28 because of its specific connection to resource development. The article states:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied

or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress. (United Nations 2008)

This article has contributed to a highly-charged debate about FPIC's practical meaning for resource development in Canada. The fundamental question – to borrow from Dr. Palmater's radio interview – is: Does it provide Indigenous peoples a veto over resource development? The short answer is no, but that declarative position underestimates the degree to which Indigenous peoples understand the power of UNDRIP and the fundamental importance of community engagement in convincing private companies that their resource projects are viable in a practical sense.

The longer, more productive answer is that UNDRIP and FPIC have implications for Indigenous peoples, industry, and government. It is critical that we think through these different considerations carefully so as to (1) ensure that the implementation of UNDRIP can further the cause of reconciliation and (2) create the conditions for more economic partnerships between Indigenous communities and resource companies. The critical objective must be that the adoption of FPIC does *not* undermine the progress achieved in recent decades to establish real partnerships with lasting economic benefits for Indigenous communities.

Conceptually the FPIC principle appeals to Indigenous communities because it appears to be a logical extension of existing arrangements (typically summarized as "duty to consult and accommodate"). It is seen therefore to build on the important legal victories relating to Aboriginal rights and resource use and to extend Indigenous authority significantly. The concept is also consistent with Indigenous concepts of Indigenous sovereignty and nationhood, and the insistence by First Nations on the nation-to-nation management of major affairs. The latter element – nation to nation relationships – is consistent with repeated statements by the Government of Canada on how it intends to proceed with future relations with Indigenous peoples.

FPIC has generally been a source of concern for the resource sector primarily because it introduces new uncertainty and likely greater complexity to the project approval process. The biggest risk is that it disrupts efforts by resource companies to fulfil their current obligations and the progress that has been made to establish partnerships with affected Indigenous communities. Put differently: FPIC risks changing the rules of the game just as resource companies have grown familiar with and increasingly adept at operating within the current system. The transition, if FPIC is simply adopted as envisioned in UNDRIP, could have significant consequences for the current arrangements.

Canadian governments have largely refrained from engaging these issues and instead allowed court decisions and community-level experimentation between Indigenous groups and resource companies to bring greater clarity to the process. Yet this too is changing. The Alberta government of Premier Rachel Notley has committed to implementing UNDRIP (including the FPIC clauses) and has launched a review and consultation process to determine how to fulfill this promise. Similarly the Trudeau government has committed to implementing the UN declaration and the Liberal Party platform specifically referred to UNDRIP in the context of resource development, a commitment made more politically palatable by the widespread Canadian support for the final report of the Truth and Reconciliation Commission on Indian Residential Schools. The details about how these governments intend to effect these changes are still outstanding but the commitments themselves have been interpreted by Indigenous peoples as representing a major shift in official policy and, by implication, development approval processes.

As for FPIC, the underlying question is simple: how does it affect who decides if and when a resource project can proceed? Governments continue to assert these decisions rest with them, while accepting that the courts have imposed requirements for consultations, a sharing of opportunity, and compensation for the anticipated impacts on Indigenous peoples and communities. Indigenous understanding of traditional land rights and responsibilities, interpretations of historic and modern treaties, and expectations of judicial support for their aspirations, have led Indigenous governments and their peoples to believe that their approval is necessary for projects to proceed. FPIC is thus effectively an affirmation of their pre-existing views.

Companies are less focused on the conceptual arguments and more concerned with the extent to which it adds greater uncertainty, longer project delays, and higher costs associated with additional consultation and approval processes. In this complex and evolving legal and political setting, UNDRIP and the concept of free, prior, and informed consent represents, alternatively, a welcome ratification of claims (for Indigenous peoples), an unwelcome complication (for most governments), and a potentially disruptive element that could derail valuable resource projects (for the private sector).

INDIGENOUS SUPPORT FOR FPIC

It is fair to say that UNDRIP represents both a significant political accomplishment and a source of ongoing disappointment for Canada's Indigenous leaders. Indigenous groups and key representatives were part of the international process dating back to the declaration's origins. Leading figures such as George Manuel (a member of the National Indian Brotherhood, which was a precursor to the Assembly of First Nations) were involved in establishing greater international recognition for Indigenous rights and claims, including overtures to the UN, as far back as the 1960s and 1970s (Coates 2013).

Concurrently, Indigenous people were seeking progress here in Canada to secure recognition, respect, and acknowledgement of their Aboriginal rights. Victories came slowly. The Government of Canada resisted Indigenous claims and only reluctantly agreed to Aboriginal demands and the prompting provided by judicial decisions. With the major exception in Canada of the inclusion of the recognition of "existing Aboriginal and treaty rights" (Section 35 in the *Constitution Act*, *1982*), which represented a significant transition in Indigenous-government and legal relationships, the Government of Canada moved slowly and often in an obstructionist manner with regards to Indigenous demands for greater rights and legal recognition.

It was thus a source of contention that the Harper government initially refused to ratify UNDRIP and then, after endorsing it as an "aspirational" document, failed to make any substantial change to government policy. Indigenous peoples' organizations and human rights groups issued an open letter to all political parties in September 2008, arguing that:

> the Declaration also explicitly recognizes that all provisions are to be balanced with the rights of others and interpreted in accordance with principles of justice, democracy, non-discrimination, good governance and respect for the human rights of all.... Human rights declarations become universally applicable upon their adoption by the UN General Assembly, regardless of how individual states vote. To claim that countries should be exempt from principles and standards they vote against flies in the face of six decades of

> Canadian human rights advocacy at the United Nations and sets a dangerous example for other countries of the world. (Assembly of First Nations et al. 2008)

Filmmaker Elle-Máijá Tailfeathers (2010), writing about the situation in Northern Alberta, urged the Government of Canada to support UNDRIP in general and FPIC in particular:

> One of their largest concerns is the declaration's use of the phrase "free, prior and informed consent." Canada's track record with Indigenous peoples clearly illustrates that informed consent from Indigenous peoples is not one of the country's priorities. On the contrary, many of us would argue that the underlying truth behind Canada's unwillingness to endorse the declaration has more to do with exploitation of land and resources than a concern for human rights. Canada['s] endorsement of the document effectually means airing the country's dirty laundry for all to see.

Shawn Atleo, then-National Chief of the Assembly of First Nations, made the effort to get Canada to endorse and implement UNDRIP one of his highest priorities. For Atleo, as for many Indigenous leaders and community members, control over development was central to the appeal of UNDRIP:

> There will continue to be conflicts until it is recognized that First Nations have the right to prior and informed consent and must be consulted right at the outset of any proposal of development that happens in their territory. (Thompson 2010)

Other Indigenous groups went further. The Confederacy of Nations, for instance, a group known for its assertive stand on Indigenous rights, issued a startling declaration in May 2014:

> Should Canada not withdraw and cease all imposed legislation on First Nations without our free, prior and informed consent, we will strategically and calculatedly begin the economic shutdown of the Canadian economy from coast-to-coast. (O'Neil 2014)

The clamouring for action on FPIC here in Canada was matched by support from the global Indigenous community. A strong statement by the International Working Group on the Rights of Indigenous Peoples outlined the critical place that UNDRIP and FPIC held for Aboriginal people around the world.[3]

As for the legal status of FPIC, there were numerous arguments, in Canada and elsewhere, about its scope and relevance, ranging from the idea that the concept was aspirational and non-binding to the idea that free, prior, and informed consent equaled a veto and was guaranteed by international law. As Dutch legal scholar S.J. Rombouts (2014) comments:

> *free, prior and informed consent* (FPIC) is devised as a tool in international law to give indigenous peoples the power to participate in, and influence the outcome of, such decisions. At first glance, the idea seems sufficiently clear but deeper investigation reveals that this notion is not as straightforward and easily applicable as it looks. Conflicting interpretations and lack of clarity as to its scope and content hamper effective implementation of this relatively new standard.

An important commentary by Cathal Doyle and Jill Cariño (2013) makes a compelling case for moving beyond political rhetoric and focusing on practical outcomes. Their report concludes, in part:

> Collective acknowledgement by the mining industry and States of the legacy of mining in indigenous peoples' territories is fundamental to realigning its relationship with indigenous peoples. This legacy consists of abandoned sites and disastrous human rights and environmental records. In accordance with the responsibilities of States and corporations and the international community processes of reconciliation and avenues of compensation and redress should be established and implemented.

> Improvements in corporate and State practice are absolutely essential. For these to be realized adequate education and training on indigenous rights is necessary for all actors, including indigenous communities, employees and contractors of mining companies, central and local government officials, legal practitioners, and members of the police, army and security forces.[4]

FPIC remains, in Canada and internationally, hotly contested, both in terms of its legal authority and its practical effect. As S.J. Rombouts (2014) comments:

> In international human rights law this problem is recognized and during the last decades a number of legal instruments have been developed to counter the existing power imbalances. Nevertheless, genuine implementation of the developed standards is urgently needed, otherwise the codification of indigenous rights remains merely a reminder of the injustices and human rights violations that indigenous people(s) have faced and continue to face present day. Fortunately but slowly, implementation models and procedures are being developed in the context of different international and regional organizations and on the national level.

FPIC remains, in Canada and internationally, hotly contested.

Free, prior and informed consent is seen as an important tool to realize recognition and application of Indigenous rights. The purpose of FPIC is to give Indigenous communities a stronger voice in the mentioned processes and it is rapidly becoming one of the most important concepts in contemporary international law concerning indigenous peoples. However, it is also one of the most contested and debated ideas in the context of the UNDRIP.

GOVERNMENT AMBIVALENCE ABOUT FPIC

Canada's experience with UNDRIP reflects the ambivalence and contradictory positions described by Rombouts, Doyle, and others. Generally speaking, before quite recently, Canadian governments have not shared Aboriginal enthusiasm for UNDRIP or incorporated the declaration – including the FPIC clauses – into the legal or policy framework related to resource development.

It is a position that has attracted considerable criticism from Indigenous leaders and some legal activists. Consider, for instance, a statement from the Committee on the Elimination of Racial Discrimination (2012), the body which oversees the Convention on the Elimination of All Forms of Racial Discrimination:

> Canada has not fundamentally changed its position and continues to devalue this human rights instrument both domestically and internationally, affecting a wide range of Indigenous peoples' rights. UN treaty bodies are increasingly using the Declaration to interpret Indigenous rights and State obligations in existing human rights treaties. In contrast Canada claims that the Declaration is merely an "aspirational" instrument and does not reflect customary international law. The Special Rapporteur on the rights of indigenous peoples has called this "a manifestly untenable position."

Not everyone agreed. The critical source of disagreement is the binding or non-binding nature of UNDRIP in general and the extent to which it ought to be reflected in Canada's legal, political, and constitutional architecture with respect to Indigenous issues in particular.

With respect to the question about UNDRIP's legal standing, the Harper government was of the view that the declaration had no binding legal ramifications in and of itself. Its only legal standing was the extent to which it became codified in Canadian law or policy. Thomas Isaac, a Vancouver lawyer and sometime representative for resource companies, states this view – particularly with respect to the FPIC clauses – in blunt terms:

> This notion of free prior consent has no legal basis in Canada – none. Zip.... That's not to say that people ought not to seek consent. That's a different question. But is there a basis in law? Not a shred. (O'Neil 2012)

One can argue that this position is partly conceded by the United Nations. It produced an "outcomes document" in 2014 that reinforced international support for UNDRIP and outlined administrative efforts to implement the agreement. The outcomes document had two particular references to resource development issues:

> 17. We commit to establish at the national level, in conjunction with indigenous peoples concerned, fair, independent, impartial, open and transparent processes to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources. Such processes will be culturally appropriate and flexible, and competent to safeguard free, prior and informed consent by indigenous peoples prior to development or use of lands, territories and resources.
>
> 18. We commit to consult and cooperate with indigenous peoples to address the impact or potential impact of major development projects, including extractive industries and to ensure that indigenous peoples participate in the benefits from such projects. The rights of indigenous people regarding development of lands, territories and resources, will be incorporated into law, policies and practice. (General Assembly of the United Nations 2014)

This language – particularly the focus on the "national level" – reinforces the reality that UNDRIP can only be actualized by national governments and must reflect national circumstances and priorities. Yet even then the Canadian government was the only one to refuse to endorse the 2014 "outcomes document." Its opposition rested on the assumption that FPIC interferes with the full and extensive system of consultation, engagement, and decision-making embedded in treaties and the current review processes. The government's statement from September 2014 explains:

> Canada does not interpret FPIC as providing indigenous peoples with a veto. Domestically, Canada consults with Aboriginal communities and organizations on matters that may impact their interests or rights. This is important for good governance, sound policy development and decision-making. Canada has strong consultation processes in place, and our courts have reinforced the need for such processes as a matter of law. Agreeing to paragraph 20 would negate this important aspect of Canadian law and policy.
>
> Canada's position on this issue is well known and has not changed. While the UN Declaration on the Rights of Indigenous Peoples and the Outcome Document for this World Conference are not legally binding and do not reflect customary international law, or change Canadian laws, we regret that our concerns were not taken into account.
>
> As a result, Canada cannot associate itself with the elements contained in this outcome document related to free, prior and informed consent. (Canada 2014)

This position was criticized by Indigenous peoples, a range of legal and constitutional scholars and academics, and some international representatives. UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya (2014), for instance, issued a harsh report on Canadian policy.

Jody Wilson-Raybould, then-BC Regional Chief of the Assembly of First Nations (and as of October 2015, Minister of Justice in the Trudeau government), observes that:

> Dr. Anaya's conclusions and recommendations all speak to the need for strengthening our collective resolve to ensuring reconciliation between Aboriginal Peoples and the Crown, and to translating the promise of section 35 of the Canadian Constitution and the articles set out in UNDRIP into practical benefits on the ground in all our communities. (Alberta Native News 2014)

On the specific issue of FPIC, Anaya contends that:

> The declaration doesn't say Indigenous people have a right to withhold consent. It says states shall consult with indigenous peoples with the objective of achieving their consent. (O'Neil 2013)

The special rapporteur's comment strikes at the heart of the ongoing debate about FPIC.

The special rapporteur's comment strikes at the heart of the ongoing debate about FPIC – including the extent to which it requires substantial changes to the current process of consultation and project approval and represents a "veto" for Indigenous communities.

INDUSTRY CONCERNS ABOUT FPIC

If the Harper government was opposed to FPIC, the resource sector was quietly dismayed about its possible implications for the project approval process. It created uncertainty and, of course, predictability and stability are key parts of any business and investment planning, particularly one where investments are typically calibrated in the hundreds of millions of dollars.

Resource companies had had a generally straight path to project approval for much of the post-Second World War era. The bias in favour of resource development reflected itself in direct and indirect government subsidies (think, for instance, tax preferences for exploration costs) and supporting investments in infrastructure. Conditions began to change in the late 20th century. A greater emphasis on environmental assessment and new expectations with regards to corporate social responsibility placed additional requirements on firms. The series of judicial decisions discussed earlier gave Indigenous communities greater legal standing. The companies adjusted and paid greater attention to Indigenous needs.

The addition of "duty to consult and accommodate" rules complicated project approval processes but made it clear that companies had to recognize their obligations to Indigenous communities. Starting in 2004, companies and Indigenous groups tested the boundaries of the duty to consult and accommodate through negotiations and occasional legal challenges.[5]

Within a decade, the environment had settled down, primarily through the resolution of hundreds of impact and benefit agreements, the creation of units within companies devoted to working with Aboriginal communities, growing Indigenous experience with negotiations, and clearer expectations

about the nature of the agreements (which might include cash, job and training guarantees, preferential contracting, and specific responsibilities for environmental assessment and remediation). Over a comparatively short period of time, resource companies learned how to navigate the increasingly complicated environmental review processes and, with a mixed but generally constructive track record, adapt to the negotiation requirements with Indigenous communities. But receptiveness varied from community to community and project to project. (A caveat that applies equally, it must be noted, to non-Indigenous people, communities and regions.)

Receptiveness varied from community to community and project to project.

As Gavin Dirom, CEO of the Mining Exploration Association of British Columbia, said in 2011:

> It's absolutely the No. 1 issue facing the [mining], exploration and development sector in the province… It's the government's duty to consult, and it's the first nations' obligation to participate [in consultation] and hopefully we'll move projects forward, or have clearer decisions. (Penner 2011)

Efforts by resource companies to better engage, consult, and partner with Indigenous communities have generally been matched by cooperation from Indigenous communities. Consider, for instance, that in the aftermath of the *Tsilhqot'in* decision that expanded consultation requirements, Joe Alphonse, Tribal Chief of the Tsilhqot'in National Government and Roger William, elected Chief of Xeni Gwet'in First Nation write:

> To incorporate consent into the way in which governments operate is a path to avoid countless new court cases, decades of deepening uncertainty and risky investment in British Columbia. For First Nations this is not about separating from Canada, but rather about obtaining recognition as legitimate governments and landowners with a say in what happens in our homes.
>
> Obtaining the consent of First Nations is not as complicated and problematic as many make it out to be. For example, the Tsilhqot'in National Government is introducing its mining policy, which at its core is about how to obtain our government's consent for projects, so developers and First Nations can work together creatively to advance ecologically and culturally acceptable projects.
>
> We hope that now, after this Supreme Court ruling real, genuine and lasting reconciliation will be the order of the day. After a long and unfortunate era of Crown denial, we have an opportunity in this province, to start a new chapter together, one that recognizes the diversity and richness of First Nations in this province and everything we have to contribute to our collective way forward. (Alphonse and William 2014)

The key point, then, is that, notwithstanding imperfections and ongoing areas for improvement, the existing system of consultation and project approvals has become familiar for the resource sector and is producing positive results for companies and Indigenous communities. It is in this context that the debate about FPIC and its legal and policy ramifications produces the risk of uncertainty.

In the resource sector, certainty and clarity are core requirements. A major resource project, such as a mine, costs hundreds of millions dollars. A mega-project, like a pipeline or hydroelectric station, counts construction costs in the billions of dollars. To secure the financing for such undertakings requires the mitigation of risk, and the assurance that the project will proceed in a systematic manner. After all, the other risks inherent in resource development – global market price and demand – cannot be controlled at the company level, even in commodity sectors that have relatively few major corporations. Companies work closely with the national, sub-national, and now Aboriginal governments to secure arrangements that reduce corporate risk exposure to a manageable level.

Resource corporations in Canada have demonstrated a system-wide willingness to work with Aboriginal communities (albeit with differing levels of success). There is growing openness, even, to "free, prior, and informed consent" and to developing more inclusive approaches to resource development. The industry has managed to adapt to the "duty to consult and accommodate" requirements as set out by the Supreme Court and established a substantial track record for economic collaborations. This came at considerable financial cost and some project delays and required substantial adaptations in corporate operations. There were failures, to be sure, particularly in the Ring of Fire initiative in Northern Ontario. It was a learning process – a sometimes painful one – but the results have generally been positive.

Yet the escalating expectations of UNDRIP in general and FPIC in particular represent a new burden and much greater uncertainty. To the extent that "consent" is interpreted as a veto, as it is by some Indigenous groups, and establishes a higher standard of Indigenous approval, the potential for delays and higher costs is heightened.

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A significant report by the Boreal Leadership Council (BLC) – composed of businesses, Indigenous leaders, and environmental groups – released in September 2015, suggested further corporate flexibility on the question of Aboriginal assent to resource projects. The report endorsed the application of "free, prior, and informed consent" to its expectations of members' relationships with Indigenous communities. The corporate members of BLC, which included representatives like Suncor Energy, an oil sands firm, and Tembec, a Quebec–based forestry company, re-stated their commitment to positive and constructive relations with Aboriginal communities; however they stopped short of publicly endorsing FPIC or the BLC statement. As Peter MacConnachie of Suncor states:

> We support the research the Boreal Leadership Council is doing and welcome the opportunity to learn more about what [free, prior, and informed consent] means to aboriginal communities.... What's important to Suncor is that we continue to have strong, mutually beneficial long-term relationships with First Nations. (McCarthy 2015)

FPIC AND RESOURCE DEVELOPMENT IN CANADA

The debate over FPIC reveals an ongoing weakness in the Canadian approach to Indigenous engagement in the resource sector.[6] No one disputes that Indigenous communities have a right to be consulted on development projects in their traditional territories. These communities also have a right to be accommodated and compensated for any disruptions to these lands. Yet, as mentioned above, the precise nature of the rights to consultation and accommodation have not been defined.

At present the primary means of determining the limits of these rights is through negotiated agreements (in effect Indigenous peoples agree that they have been properly consulted and adequately accommodated), through the terms of modern treaties, which define procedures for

Indigenous engagement and accommodation, and through redress to the courts. The latter can be a costly, lengthy, and uncertain process and often has a chilling effect on resource development. The courts have done a great deal to refine and define Aboriginal resource rights. But it is a slow, open-ended, complicated, and imprecise process that is better at defining broad rights than it is at providing metrics for settlements over resource matters. It must be said, however, that Indigenous peoples are completely within their rights to press for legal remedies and they, like all Canadians who seek a precise definition of their rights, should be supported in the use of the court to resolve outstanding legal issues.

Had it not been for the Supreme Court decisions on *Haida* and *Taku*, for instance, it might well have taken a generation or more to develop the principles of consultation and accommodation. That the court did not provide a specific and well-drawn road map for how this legal right and government responsibility should be exercised is part and parcel of a legal process that tends to prefer conceptual decisions (determining, for instance, whether First Nations, Métis, and Inuit should be consulted on resource developments) more than specific remedies (for example, what is a fair agreement for providing consent to a project and what is an appropriate compensation for the impact on territories and lifestyles).

Virtually no one would now argue that consultation and accommodation should not be part of the project approval process.

Resource companies have adapted to this new regime as part of the cost of doing business. Virtually no one would now argue that consultation and accommodation should not be part of the project approval process; many industry observers would agree that the new arrangements have greatly improved relations with Indigenous communities, produced valuable business partners, drawn hundreds of Aboriginal workers into the industry, and created a better and more stable environment for business operations. Each of the consultation and review processes represents a "tax" on development, adding costs and time to the expensive effort to bring Canadian resources to market. Yet it is widely seen as part of the cost of doing business.

The issue is not whether Indigenous people have a major role in project evaluation, but rather the extent and authority assigned to Indigenous governments and communities. To a substantial degree, the power has already shifted toward Indigenous peoples. While there is still considerable debate and many questions remain, real progress is being made on adopting the "duty to consult and accommodate."

By bringing international agreements into the legal-political equation, the concept of "free, prior, and informed consent" has the potential to significantly confuse this process. Some Indigenous people equate FPIC as providing a veto over resource projects even though such an interpretation is not clearly laid out by the UNDRIP drafters (MacKay 2004; Campbell and Oxman 2012). Governments have typically viewed FPIC as yet another ill-defined legal and procedural impediment to official decision-making and evaluative processes, including those set out in modern treaties. Resource companies are worried about an additional level of uncertainty and expectation. All parties will ultimately adapt but it will result in additional costs (including opportunity costs for companies and prospective Indigenous partners), longer negotiations, and legal confusion.

It must be remembered that UNDRIP was never intended to have uniform application across the world. It must be implemented in a way that is consistent with national objectives, legal and constitutional foundations, and stages of development.

Also, UNDRIP did not define the full meaning of "consent," leaving the term open to conflicting interpretations. It is, when practical considerations are linked to legal requirements, rather beside

the point. As Indigenous peoples have shown, sustained and engaged protests, as with the Northern Gateway Pipeline, can slow if not stop a multi-billion-dollar initiative. For companies to proceed with major projects in the current environment, they need to know that they have both the political and legal right to proceed. They do not require unanimous consent, any more than municipal governments require complete community support for urban developments. Rather, there needs to be an appropriate process in place, one that respects Indigenous realities and that provides for substantial returns to affected communities. Consent may not legally bestow a veto; the practical realities of working on Indigenous territories do, however, set a high bar for corporate and government decisions to proceed with large scale resource projects.

Despite the difficulties presented by an embrace of FPIC, current conditions provide an opportunity to reflect the spirit of UNDRIP in Canada's resource development framework. The country urgently needs a clear definition of an appropriate standard for Indigenous engagement and appropriate means of resolving these expectations and rights relating to resource development.

The search for a resolution begins with the realization that Indigenous people will not – and should not – surrender any rights that they currently have without openly negotiated and full and final agreements. Nor should Aboriginal communities walk away from the idea that they deserve, under Canadian law, a more secure and specific role in the country's economic future.

All parties will ultimately adapt but it will result in additional costs.

Secondly, it is vital that the Canadian political and legal system provide clarity as to the authority and rights of Indigenous peoples regarding resource development. Vague declarations and non-specific court decisions define direction and intent but do not provide a great deal of practical assistance to participants in the resource sector.

Thirdly, those Indigenous rights must take into account the need and obligation for national, provincial, and territorial governments to manage the use and careful extraction of natural resources in the general and the Indigenous interest.

Finally, whatever system is put in place (while certain to never get unanimous support from all participants) must be fair, must be seen to be fair, must be faster, and must be more certain. The goal should not be to limit or constrain Indigenous rights but to provide a review and resolution process that uses Indigenous rights as one of the foundations for decision-making (the other being environmental assessment) and not as an irritating addition to an already complicated process.

UNDRIP and the concept of "free, prior, and informed consent" demonstrate the interest of Indigenous peoples around the world in the development of fair and sustainable processes for Indigenous participation in resource approval processes. In that manner, UNDRIP challenges Canada to remain a world leader in accommodating, supporting, and now requiring Indigenous engagement in the sector. The concept of "free, prior, and informed consent," while not clearly stipulated by the drafters and the UN to create an Indigenous veto over development, nonetheless illustrates the continued ambiguity surrounding Indigenous participation in resource development.

The international attention generated by UNDRIP and the concept of free, prior, and informed consent challenges Indigenous peoples, governments, and private sector companies to continue their efforts at innovation and to provide clarity, simplicity, and speedier and more equitable outcomes. Canada should not be constrained by the concept of FPIC, but rather should seek a made-in Canada, Indigenous-centric system of ensuring Indigenous people enter into discussions with resource companies with assurances of fairness and appropriate outcomes.

A MADE-IN-CANADA SOLUTION FOR INDIGENOUS ENGAGEMENT IN RESOURCE DEVELOPMENT

The resource sector is the vanguard of reconciliation with Indigenous peoples in Canada and can do even better in the future. If this process is done properly – and the country is not yet there – the resulting system should also improve opportunities for resource companies, streamline government systems, and thereby ensure that Canada capitalizes on its natural resource potential. To get there requires significant changes to current Canadian policies and processes – based on acceptance by all parties of the legitimacy and strength of Indigenous resource rights, dedication to the spirit of UNDRIP as the international standard for reconciliation, and a sincere commitment to sharing prosperity with Indigenous peoples.

The Trudeau government has said that it intends to implement UNDRIP, including the concept of "free, prior, and informed consent." It has several options going forward. The government could, for example, proceed by way of constitutional amendment, and incorporate UNDRIP directly in the Canadian Constitution. Given the nature of the amending formula in Canada, this approach is improbable and would take a great deal of time.

Alternately, the government could issue a formal statement in support of UNDRIP, short of a legislative initiative, and could require a formal program and legislative review to determine the degree to which current government policy conforms to UNDRIP principles. Such a government-led approach, likely time-consuming and costly, would revise existing systems but would not necessarily produce marked departures in approach and procedure.

The Government of Canada could also pass specific legislation making UNDRIP official policy, a process that would require extensive discussion with Indigenous organizations and leaders and would likely require sweeping changes in structural arrangements and processes. Given the extensive restructuring required in Canadian Indigenous policy, such an approach would delay substantially the resolution of outstanding issues relating to resource development.

There are other ways of proceeding that hold even greater promise for long-term viability. The reality is that FPIC exists substantially in practice, if not fully in law – although it remains to be determined where the precise boundaries of national sovereignty are to be found with regards to resource development. Canada really has two choices going forward:

- To continue to debate, and litigate, the historic and legal nuances of UNDRIP and FPIC, a costly and difficult process that could harm Indigenous and non-Indigenous interests alike, or
- embrace UNDRIP and FPIC, in the spirit of reconciliation and with an eye toward economic and developmental realities, and establish a new, made-in-Canada and made-with-Indigenous-peoples approach that provides this country with a practical, equitable, and manageable path for effective consultation and accommodation and ultimately for resource development. Furthermore, the recommended approach would commit government and industry to the co-production of policy, a strategy that is consist with the Trudeau government's dedication to working with Indigenous organizations and communities to chart a shared future.

The recommendations that follow reflect the second option as the best means for continuing the

progress towards greater economic partnerships between Indigenous communities and resource companies. The goal should be to strengthen the aspects of the Canadian system that are presently working and address areas of weaknesses – particularly the lack of clarity with respect to the roles and responsibilities of Indigenous communities, governments, and the private sector.

The key point is that, while it would be a mistake to fully substitute our current regime of consultation and accommodation with "free, prior, and informed consent," there are improvements that can be undertaken that reflect the spirit of UNDRIP and strengthen Canada's model. Here are five key recommendations to form the basis of made-in-Canada, Indigenous-driven reforms to our system of consultation and accommodation for Indigenous communities.

1. The Government of Canada and national Indigenous organizations, including the Assembly of First Nations, Inuit Tapiriit Kanatami, and the Métis National Council, should seek to develop a common declaration, or public statement, that articulates support for the spirit and intent underpinning the UN *Declaration on the Rights of Indigenous Peoples* as it relates to resource development.

   Such a statement should emphasize the commitment of all participants to the idea of national prosperity sharing and the development of the country's natural resource endowment within a legal and policy framework that respects environmental sustainability and Indigenous engagement and participation.

   Individual chiefs and First Nations could disagree with the process or the statement.

   Reaching such an agreement would face challenges. The Harper government's attempt at education reform is evidence of the limitations of negotiating these types of agreements with disparate organizations that have different mandates, interests, and internal processes. As attempts to negotiate the *First Nations Control of First Nations Education Act* demonstrated, individual chiefs and First Nations could disagree with the process or the statement. The shared resolution will have to provide room for individual communities to stand aside from the general agreement. There are other groups such as the Congress of Aboriginal Peoples and the Native Women's Association of Canada who would invariably insist on participating in the process.

   It does seem time, however, for Indigenous peoples to work toward a more uniform position on these critical issues and for the national conversation to focus on both the effort to improve government-Indigenous and private sector-Indigenous relations, and the need for greater clarity on the aspirations, values, and expectations of Indigenous peoples with respect to resource development. Put more simply, reconciliation requires contributions from all participants.

   Ideally, but separately, resource companies and/or industry associations could make comparable declarations accepting UNDRIP and FPIC as the foundation for their future relationships with Indigenous communities.

2. The Government of Canada and the provinces and the territories – working in full cooperation with Indigenous organizations and peoples – have to define the manner in which they will determine when and how the "national interest" intersects with the interests of a specific Indigenous community or group with regard to resource development.

   The Supreme Court, in the *Tsilhqot'in* decision in 2014, made it clear that the government could claim an overriding interest in a project but that it had to make the criteria used for doing so clear. Doing this on a project-by-project basis would cause significant administrative, legal, and political complications.

Broadly speaking there are scenarios in which it would be quite reasonable for the government to determine a project should proceed in spite of objections from some number of opponents, including Indigenous communities. What happens, for instance, if a mining project obtains the support of five Indigenous communities but fails to secure one? What if 22 out of 25 communities support a specific pipeline project? These might be cases in which the government might exercise its override authority. One could easily conceive of other scenarios where the economic, environmental, or strategic case for proceeding with a project outweighs local Indigenous opposition.

Identifying these parameters for state intervention ahead of time – and without reference to a specific project – would allow for a robust national debate and open and transparent rules for all participants in the development process. Indigenous leaders understand the importance of other compelling interests. If the parameters are developed in a collaborative manner, these negotiations could well lead to the creation of a generally shared understanding of how Indigenous and non-indigenous rights and expectations interact.

3. The federal government, provinces, territories, and national Indigenous organizations could seek to negotiate a national framework or regional ones that capture provincial and territorial circumstances and that clarify existing case law on Indigenous rights regarding resource development and the role for Indigenous participation.

   This work is already underway at the level of individual First Nations. Consider the Simpcw Consultation and Accommodation Framework (central British Columbia), which provides governments and companies with precise outlines of preferred negotiation and resolution processes. Producing similar agreements on a larger scale (perhaps multiple communities within a region) would reflect UNDRIP's spirit of consultation, engagement, and self-determination.

   Obviously Canadians need to be realistic about what progress is possible. A single, national negotiating framework is too ambitious in the current environment. But that does not preclude interested parties – including Indigenous governments, government agencies, and private sector representatives – from establishing local or regional frameworks for consultation and accommodation.

   Broad acceptance of such a framework would reflect the aspirations of UNDRIP, the Indigenous legal rights as defined by the Supreme Court of Canada, and historic treaties and modern agreements. It would provide a clear signal about where in the country conditions are right for collaboration in resource development.

4. Canada requires a decision-making and conflict resolution system that is culturally sensitive, timely, and fair. The establishment of a non-judicial arbitration body, staffed by commissioners acceptable to all parties and with a mandate to resolve disputes, would go a long way toward providing a transparent mechanism that respects Indigenous cultures and political processes, and spells out the relative rights and responsibilities of Indigenous peoples, governments, and corporations.

   Such a process, if the mandate is defined carefully and the system's participants understand and share a commitment to careful and responsive decision-making, would produce faster approvals and better agreements. One such system is the Waitangi Tribunal in New Zealand, which provides for evidence-based and culturally informed decisions involving Maori peoples and Maori rights, focusing largely on historical situations. The Commission has played a significant role in reducing (but not eliminating) legal tensions and conflicts in New Zealand.[7]

   Canada has made a step in this direction with the Specific Claims Tribunal Canada, which has a fairly narrow mandate but which works with a similar goal of providing less expensive and faster resolutions of outstanding Indigenous issues.[8] The current legal system, while costly and

time-consuming, has its strengths – the reality is that Indigenous people in Canada would not have achieved the rights and recognitions of today without more than 50 years of sustained legal pressure. It may well be time, however, to find a better, faster, and more equitable approach that better serves Indigenous and non-Indigenous peoples.

5. Finally, Indigenous communities could issue "Indigenous licences" with respect to UNDRIP and in turn FPIC by issuing a declaration that sets out Indigenous requirements and expectations for participation in resource development. Indigenous peoples could, in effect, define what "free, prior, and informed consent" means for them in the form of a framework for resource development and Indigenous approval. Such a declaration/statement could contain the following elements:
   - A national Indigenous framework that allows for regional and local considerations and priorities;
   - established minimum standards for consultation and accommodation;
   - specific consultation and approval processes that meet community requirements and expectations;
   - any areas – such as cultural and sacred sites or fields of development – that would be non-negotiable in the context of resource development;
   - broad expectations in terms of employment, training, education, resource sharing and equity ownership, and community benefits; and
   - requirements concerning environmental evaluation, monitoring, and remediation.

   The goal here would be for Indigenous peoples to outline their requirements and expectations regarding resource development and to provide a foundation for ongoing and mutually beneficial engagement with the resource sector. If Indigenous groups set their expectations too high, companies would withdraw or slow their work, putting community benefits at risk. If Indigenous governments put standards in place that governments found unacceptable, government investment in community development would likely slow as well. Over time – and one suspects fairly quickly – a new and sustainable equilibrium will emerge. This could result in an Indigenous-led programme of defining the parameters for engagement, consultation, and project approval. If successful, this approach could provide an impressive foundation for long-term collaboration on resource development and management.

Indigenous peoples could, in effect, define what "free, prior, and informed consent" means for them.

This description of "made in Canada", referring to a co-production of a long-term solution rather than a court-imposed or externally directed model (such as FPIC), has been at a high level. It understates the complexity of what a formal agreement might contain. For example, signatories to modern treaties have already concluded complex and impressive strategies for ensuring Indigenous participation in resource development. Equally, First Nations have considerably more authority over development on reserve lands or selected set-aside lands identified through the treaty process than they do over the largest extent of their traditional territories. There are many areas in Canada subject to overlapping claims by First Nations, a situation that will be made more complex through the recent empowerment of Métis and non-status Indians as a result of the Supreme Court's decision in the Harry Daniels case (*Daniels v. Canada*, Supreme Court of Canada, 2016). On lands with proven Aboriginal title, such as those identified through the *Tsilhqot'in* case in British Columbia, the need for Indigenous consent is clearly and explicitly laid out by the Court (with a small remaining caveat for the expression of the national interest in exceptional circumstances).

Any process put in place in Canada will have to, in order to have effect, spell out what is meant by "consent", and outline the means of resolving disputes when Indigenous opposition is met by governmental determination to proceed. The degree to which a more precise definition can be provided and a conflict resolution process determined will influence the effectiveness and credibility of the new system. Such an accord could describe the point at which consultation is required — i.e. perhaps at the start of exploratory activities — and could outline basic principles of resource revenue sharing/prosperity sharing, based on the requirements to accommodate Indigenous needs and preserve the commercial viability of the resource projects. A new process could lift the focus from individual resource projects, which put the onus on single (and often small) resource firms, and permit region-wide discussions that include more firms, more Indigenous groups and greater government engagement.

In other words, the "made in Canada" approach could, using FPIC as inspiration and guide but also relying on Canadian court decisions, existing treaties, and government policies, provide the country with much-needed clarity about the extent and limitations on Indigenous consent, and offer a co-produced framework within which resource firms and Indigenous organizations and communities could operate.

In the past, certainty applied primarily to the ability of governments and businesses to know their planning and operational environment. With the approach advocated here, Indigenous peoples and communities would share equally in the certainty provided, for they would have an assured and specified role, more precise powers and responsibilities, and the valuable assurance that the processes being used to shape resource development in their traditional territories had received broad national endorsement, based on the goals and values expressed in UNDRIP and under the principles of "free, prior and informed consent."

CONCLUSION

There is a tendency to focus on the weaknesses of Canada's regime for consultation and accommodation of Indigenous communities in the process of making judgments on natural resource projects.

Yet this negative perception ignores the progress that has occurred between Indigenous communities and resource companies. Experience has shown that Indigenous communities are not inherently opposed to resource development. They expect to be properly consulted, engaged, and accommodated, and they want to be partners in prosperity. These are reasonable expectations – in fact, they are now legal requirements on governments and resource companies following a series of judicial decisions that have helped to shape the duty to consult and accommodation framework.

The Trudeau government's support for the United Nations *Declaration on the Rights of Indigenous Peoples* in general and the concept of "free, prior, and informed consent" in particular has produced considerable debate about the legal, political, and constitutional implications of implementing the declaration.

The primary focus has been on FPIC and what it means for Canadian law and practices, and how it will affect resource development. This debate has tended to be marked by assertion and assumption rather than dispassionate analysis.

The Trudeau government can deliver on its commitment to implement FPIC not simply by codifying the UN clauses, but rather by adopting made-in-Canada, Indigenous-driven reforms to the current Canadian regimes. Such reforms have potentially substantial implications for Indigenous communities, governments, and the resource sector.

The goal should be to strengthen the aspects of the Canadian system that are presently working and address areas of weaknesses – particularly the lack of clarity with respect to the roles and responsibilities for all three parties.

In the end, all participants in the natural resource field need greater certainty as to decision-making processes and respective responsibilities and authority. In the short term, government statements concerning UNDRIP have added to uncertainty, but this can be resolved. Given that Canada long-ignored Indigenous demands for greater say in development processes, it is hardly surprising that they expect Canada to respond constructively to UNDRIP and the implied commitment to "free, prior and informed consent." The country now faces a fairly simple choice between the current trajectory – political struggles and court challenges – and a more collaborative co-production of a policy approach that could bring about real and sustained improvements in the resource development processes in Canada. Working with Indigenous organizations is the only reasonable path forward.

In the end, the discussion over FPIC provides an opportunity to seek a real and sustainable balance in the development of natural resources. Done properly, Canada can create a system that respects Indigenous rights, recognizes the national interests, and reflects the commercial realities faced by companies. The new approach would provide Indigenous communities with an opportunity to protect their rights and needs without undermining the legitimate authority of national, provincial and territorial governments. Until the 21st century, Canadian resource development processes were unbalanced and left Indigenous peoples vulnerable. Responding to the spirit of UNDRIP provides Canada an opportunity to create a fair, reasonable and collectively beneficial approach.

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ENDNOTES

1 For a North America-wide view on this issue, see Echo-Hawk 2013.

2 The ILA (2012) asserts that:

> The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a whole cannot yet be considered as a statement of existing customary international law. However it includes several key provisions which correspond to existing State obligations under customary international law.
>
> The provisions included in UNDRIP which do not yet correspond to customary international law nevertheless express the aspirations of the world's indigenous peoples, as well as of States, in their move to improve existing standards for the safeguarding of indigenous peoples' human rights. States recognised them in a "declaration" subsumed "within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a non-discriminatory basis" and passed with overwhelming support by the United Nations General Assembly. This genesis leads to an expectation of maximum compliance by States and the other relevant actors. The provisions included in UNDRIP represent the parameters of reference for States to define the scope and content of their existing obligations – pursuant to customary and conventional international law – towards indigenous peoples.
>
> States must comply with the obligation – consistently with customary and applicable conventional international law – to recognise, respect, protect, fulfil and promote the right of indigenous peoples to self-determination, conceived as the right to decide their political status and to determine what their future will be, in compliance with relevant rules of international law and the principles of equity and non-discrimination.

3 The statement declared:

> However, there is a strong evidence that FPIC, if understood as a mere compliance mechanism, may easily mutate into a simple box-ticking exercise, failing to prevent human rights harm from occurring. FPIC must therefore be understood and practiced as just one expression of a rights-based relationships between indigenous peoples, states and businesses, predicated on the full recognition of the whole set of rights laid out in the UNDRIP, with emphasis on the rights to participation, consultation and consent. Furthermore, FPIC must be regarded as a process of sincere long-term trust and relationship building, leading to a real mutual commitment, which may need renewal at various stages of a project and which implies that enterprises take responsibility for the impact of their operations on future generations of the affected indigenous communities. (International Working Group for Indigenous Affairs 2014, 44)

4 For an extended and detailed commentary on FPIC, see Doyle 2014. See also Rombouts 2014.

5 For an interesting overview of free, prior, and informed consent in Canada, see Boreal Leadership Council 2012. The Boreal Leadership Council is a consortium of interested parties including Indigenous peoples, industry, and environmentalists.

6 For a strong argument in favour of Canada using UNDRIP as the basis for a development strategy, see Ornelas 2014.

7 The work of the Waitangi Tribunal can be examined here: http://www.justice.govt.nz/tribunals/waitangi-tribunal. See also Hayward and Wheen, eds. 2004.

8 For further information, see Specific Claims Tribunal Canada 2011.

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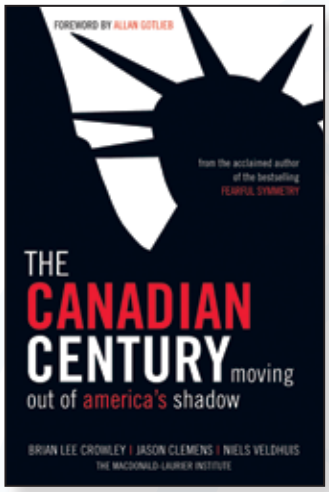

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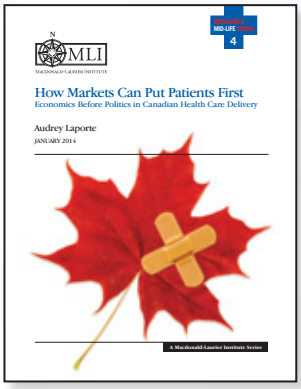

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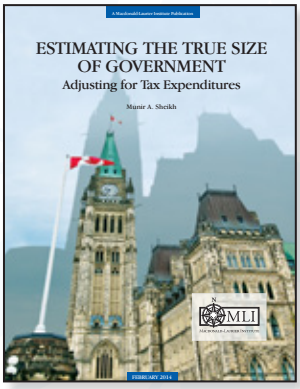

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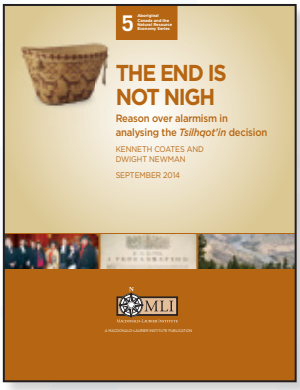

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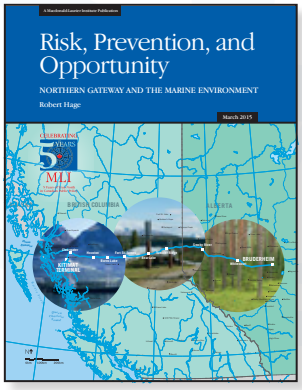

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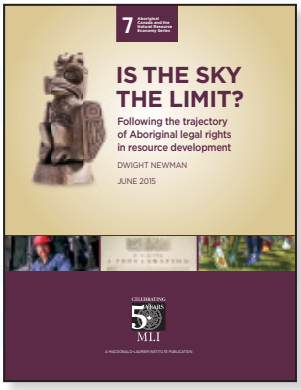

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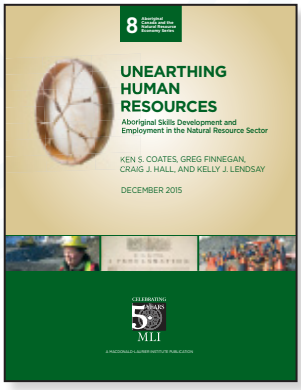

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