



Squaring the Circle

Adopting UNDRIP in Canada

Tom Flanagan

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Executive Summary

The United Nations Declaration of the Rights of Indigenous People (UNDRIP) was approved by the United Nations General Assembly in 2007. Its most controversial feature is a call for “free, prior, and informed consent” (FPIC) by Indigenous peoples before economic development projects can take place on lands they inhabit or to which they may have a claim. Because UNDRIP is neither a convention nor a treaty, it is not legally binding unless it is adopted in legislation. Canada opposed UNDRIP at the United Nations because FPIC and similar sweeping provisions in the document are not consistent with Canadian constitutional law. The government of Stephen Harper adopted it in 2010 with the proviso that it was a statement of aspirations but not legally binding. The same position was taken by the United States, Australia, and New Zealand.

Since 2010, Indigenous advocates have made several attempts to enshrine UNDRIP in legislation, using ambiguous language about its legal impact. Support by the Truth and Reconciliation Commission was particularly important. NDP MP Roméo Saganash presented two private member’s bills that ultimately failed to receive passage in Parliament. The second of these, Bill C-262, was endorsed by the Liberal government but not adopted as a government bill. Thus, it failed in the Senate because a time allocation could not be set and enforced. In the wake of these defeats, Prime Minister Justin Trudeau has promised, in the recent Liberal campaign as well as in the December 2019 speech from the throne, to legislate on UNDRIP, though a draft bill has not yet been tabled.

British Columbia has gone the farthest by passing Bill 41 in November 2019. This legislation again used ambiguous language, saying on the one hand that the government must take all necessary steps “to ensure the laws of British Columbia are consistent with the Declaration,” and on the other hand that “nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia.” Many Indigenous advocates interpreted Bill 41 as having adopted UNDRIP and FPIC and having made the latter the law in British Columbia.

The adoption of Bill 41 led directly to the proliferation of blockades on Canadian National Railway lines. Those traditional Wet’suwet’en chiefs who oppose the presence of the Coastal GasLink pipeline in their territory claimed that Bill 41 gave them a right to veto construction. Their assertions about Bill 41 and FPIC were echoed by other Indigenous advocates as well as the United Nations Commission on the Elimination of Racial Discrimination. When the RCMP took down the barricades put up by supporters of the traditional Wet’suwet’en chiefs, sympathy blockades and demonstrations sprang up across the country.

The Wet'suwet'en episode illustrates the practical difficulties involved in trying to legislate UNDRP and FPIC. Radical Indigenous advocates are not satisfied with ambiguous language; to them, FPIC means an immediate and absolute veto over economic development projects, even though these projects have passed all the tests of current Canadian constitutional law, including extensive consultations with affected First Nations and approval by elected band councils.

Attempting to layer UNDRIP and FPIC over existing constitutional law will produce nothing but chaos. Prime Minister Trudeau will be well advised to observe what has happened in the wake of British Columbia's Bill 41 and walk back his promise to introduce legislation incorporating UNDRIP into Canadian law.

Introduction

Words are wise men's counters, they do but reckon by them: but they are the money of fools.

Thomas Hobbes, *Leviathan* (1651), I, 4.

The *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) was approved at a plenary session of the General Assembly on September 13, 2007 (UN, 2007a). Though it is couched in the language of rights often used in international conventions (Gibson, 2009: 147), UNDRIP is essentially a statement of aspirations for states to accept when they endorse the Declaration. Like all declarations of the UN General Assembly, it is neither a treaty nor a convention and its provisions are not part of international law and cannot be enforced in international tribunals. Canada, the United States, Australia, and New Zealand voted “No”; and eleven other states, including Russia, abstained. A No vote and abstention differ in political optics but both amounted to a refusal to endorse the declaration.

UNDRIP's starting point is the assertion in article 3 that “Indigenous peoples have the right to self-determination,” though that is qualified in article 4 by the further assertion that “in exercising their right to self-determination, they have the right to autonomy or self-government in matters relating to their internal and local affairs.” Even with this restriction, the concept of self-determination raises questions because it is often said to include not only internal but also external autonomy, that is, the right to attain sovereign statehood (Cowan, 2013: 254–269). Many states, particularly African ones (Gover, 2015), were concerned that the original draft might legitimize secessionist movements, so article 46(1) was added late in the drafting process:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

UNDRIP's 46 articles cover a wide range of topics, including education, religious freedom, indigenous languages, intellectual property, discrimination, participation in national politics, and control over lands on which indigenous peoples now reside or have resided in the past. Property rights have emerged as the major issue in the Canadian debate over UNDRIP. Here are some of the more challenging references to property in the Declaration (UN, 2007a):

Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (26.1)

What would this mean in practice, given that Indigenous peoples at one time or other have “used” all of Canada’s land mass?

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. (28.1)

Given that Indigenous leaders often deny the reality of “free, prior and informed consent” in the negotiation of historical treaties, does this mean Canada would now have to make restitution or pay compensation for all Canadian lands acquired by treaty?

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (32.2)

Does “free and informed consent prior to the approval of any project” constitute a veto power for Indigenous peoples over natural-resource or other development projects?

This paper will focus on “free, prior, and informed consent” because it has become a flashpoint for current discussion in Canada, and because its practical implications in this country are enormous. After a brief summary of UNDRIP’s history and of the several attempts to entrench it in Canadian law, I will turn to the political and economic aspects of “free, prior, and informed consent.”

UNDRIP's History

The drafting of UNDRIP was protracted and contentious. It began in 1985 in the UN Working Group on Indigenous Peoples, then was transferred in 1995 to the Working Group on the Draft Declaration. That body could not reach consensus, so when its mandate expired the UNDRIP draft went to the Human Rights Council, where it was approved by a majority but not unanimous vote. Canada, a member of the Human Rights Council at the time, opposed UNDRIP in that forum. Minister of Indian Affairs and Northern Development Jim Prentice said: “It contains provisions that are inconsistent with the Canadian charter. It contains provisions that are inconsistent with the Constitution Act of 1982. It’s quite inconsistent with land-claims policies under which Canada negotiates claims” (CBC, 2006).

From the Human Rights Council, UNDRIP went to the floor of the General Assembly, where Canada continued to oppose it. Ambassador John McNee said that Canada had significant objections to the text

... including provisions on lands and resources; free, prior and informed consent when used as a veto; intellectual property; [and] military issues ... Unfortunately, the provisions in the Declaration on lands and territories were overly broad, unclear and capable of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that had been settled by treaty ... Similarly, some of the provisions dealing with the concept of free, prior and informed consent were unduly restrictive ... Provisions in the Declaration said that States could not act on any legislative or administrative matter that might affect indigenous peoples without obtaining their consent. While Canada had a strong consultative process, reinforced by the Courts as a matter of law, the establishment of complete veto power over legislative action for a particular group would be fundamentally incompatible with Canada’s parliamentary system. (UN, 2007b)

In 2010, the four nations that had voted “No” in 2007—New Zealand, Australia, the United States, and Canada—partially endorsed UNDRIP, while continuing to emphasize that it was an aspirational document that did not create new legal obligations in their countries (Favel and Coates, 2016: 18–19). American President Barack Obama said: “The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force” (US Department of State, 2010: 1). Regarding economic development, he added: In this regard, the United States recognizes the significance of the Declaration’s provisions

on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken” (US Department of State, 2010: 5). The elected leaders of Australia and New Zealand spoke in similar terms.

Speaking for Canada, Prime Minister Harper, while declaring support for UNDRIP, called it “aspirational” and “a non-legally binding document that does not reflect customary international law nor change Canadian laws” (Favel and Coates, 2016: 19). Harper made it clear that the endorsement was a matter of political optics. His government did not want to appear to be opposed to Canadian Indigenous leaders who had supported UNDRIP and in some cases worked on its composition, yet the government continued to have concerns about the wording: “[W]e have ... 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” (Favel and Coates, 2016: 19).

Prime Minister Harper may have thought his verbal sleight of hand would settle the issue, but it proved to be merely scaffolding for further developments. In 2015, the Truth and Reconciliation Commission, which he had appointed, called for a more robust endorsement of UNDRIP:

92. We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

 - i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects. (Truth and Reconciliation Commission, 2015: 10)

The Commission did not use the word “veto,” but it seems to be implied in the wording. If consent must be “free” and “prior,” what is that except a right to say “No,” that is, a power of veto?

During the 2015 election campaign, the Liberals promised to “enact the recommendations of the Truth and Reconciliation Commission, starting with the implementation of the *United Nations Declaration on the Rights of Indigenous People*” (Liberal Party of Canada, 2015: 48). On May 9, 2016, Carolyn Bennett, Minister of Indigenous and Northern Affairs, and Jodie Wilson-Raybould, Minister of Justice, went to the United Nations in New York to announce that Canada was fully endorsing UNDRIP

(Hill, 2016). But was all ambiguity really removed? The Minister of Justice raised new doubts in a speech to the Assembly of First Nations only two months later. She explained that, although she hated the *Indian Act*, it could not simply be repealed without causing chaos:

So as much as I would tomorrow like to cast into the fire of history the *Indian Act* so that the Nations can be reborn in its ashes—this is not a practical option—which is why simplistic approaches, such as adopting the UNDRIP as being Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it.

Accordingly the way the UNDRIP will get implemented in Canada will be through a mixture of legislation, policy and action initiated and taken by Indigenous Nations themselves. Ultimately, the UNDRIP will be articulated through the constitutional framework of section 35. (Wilson-Raybould, 2016: 9, 10; 2020: ch. 4)

It must be assumed that Wilson-Raybould was speaking for the Liberal government, for ministers do not usually freelance on such important subjects. It is difficult to see any difference in substance between the position enunciated here and that taken by the previous Conservative government. Both stressed that UNDRIP is not legally binding, that Canada will work toward implementing it, and that implementation will take place within the limits of the Canadian Constitution and law—not the first time that a new government has ended up adopting its predecessor’s policy, albeit with new political optics.

Federal Bills

Roméo Saganash was an NDP MP from northern Quebec from 2011 through 2019. A Cree lawyer, he had participated for years in the drafting of UNDRIP before running for office. It was natural for him to take further action after the Conservative government's half-hearted acceptance of the Declaration. Accordingly, he submitted private member's bill C-641, which said that the Government of Canada "in consultation and cooperation with Canada's indigenous peoples, must take all measures necessary to ensure that the laws of Canada are consistent with [UNDRIP]." His bill was chosen for debate, but with a Conservative majority in the House it was defeated on second reading, May 6, 2015 (Parliament of Canada, 2014).

Undeterred, Saganash submitted a new private member's bill, C-262, after the 2015 election brought the Liberals to power. Prospects for passage seemed better now because Liberals MPs had spoken and voted in favour of his bill C-641 in the previous Parliament, and the Liberals had a solid majority after the 2015 general election. C-262 went considerably further than its predecessor. It called for UNDRIP to be "affirmed as a universal international human rights instrument with application in Canadian law." It instructed the government to "take all measures necessary to ensure that the laws of Canada are consistent" with UNDRIP, to set up an implementation plan in conjunction with Indigenous peoples, and to report back to Parliament once a year for the next 20 years (Parliament of Canada, 2018).

On July 12, 2016, the Minister of Justice raised doubts about the depth of Liberal commitment to C-262 when she made the speech to the Assembly of First Nations described in the preceding section (Wilson-Raybould, 2016). Two days later, she released a set of 10 principles to govern Canada's relationship with Indigenous peoples. The sixth of these said in summary: "Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights on their lands, territories, and resources" (Canada, Department of Justice, 2017). The reader will note that "aims to secure" is not the same as recognizing an absolute right. The same document also contemplated infringement of rights based on section 35 of the Charter of Rights and Freedoms, which would include the right to be consulted. It is clear that at this time the Minister of Justice, speaking for the government, did not interpret support for UNDRIP as entailing recognition of a First Nation veto over economic development projects on their traditional territories or even on title lands.

On November 21, 2017, however, the Minister amplified her position, saying the Liberal government was now ready to support C-262. Perhaps trying to keep

some consistency with her earlier position, she added: “This step alone, however, will not accomplish the full implementation of UNDRIP. A comprehensive approach, one that our government is committed to, will require other appropriate measures” (Tasker, 2017).

Though the Liberal strategy may have been good politics, it made a mockery of responsible government. For excellent reasons, it is highly unusual for such important legislation to take the form of a private member’s bill. Because it is not government legislation, there is no minister to take responsibility for it and to speak to it in the House of Commons. That means the government does not have to make an official statement of its reasons for supporting the legislation and does not have to present cost estimates. It also deprives the opposition of the opportunity to pose questions to the person who normally would be best prepared to answer them, namely the responsible minister, because in the case of a private member’s bill there is no responsible minister. Also, because of the way time allocation works, private member’s bills move on a different and slower timetable than government bills, making it more difficult to get them passed through the House and Senate before Parliament is dissolved for the next election—and that is what eventually happened to C-262.

With Liberal support now locked in, Bill C-262 came up for second reading on December 5, 2017. Yvonne Jones, Parliamentary Secretary to the Minister of Indigenous and Northern Affairs, said the Liberals would support it. Cathy McLeod, the Opposition critic and main Conservative speaker, questioned using a private member’s bill for such important legislation. She also pointed out the uncertainty surrounding key concepts in UNDRIP, such as free, prior, and informed consent, and asked how they would mesh with established Canadian law on the duty to consult and accommodate. The bill was then supported by a majority of votes and referred to committee. It was reported out without amendments and passed on third reading on May 30, 2018 (Parliament of Canada, 2017), giving it a little over a year to pass the Senate before the federal election scheduled for October 2019.

C-262, however, did not make it through the Senate. Because it was not a government bill, the government representative in the Senate could not impose time allocation. The Conservative caucus, though it did not have a majority of votes in the Senate, talked C-262 to death. Every time it came up for debate, Conservative Senators spoke until adjournment. Liberals condemned the Conservatives for stalling, but the government was the author of its own misfortune. It was helpless to force the bill through because it had tried to pass C-262 on the cheap as a private member’s bill, endorsing the bill but not taking responsibility for it.

At one point Conservative Whip Don Plett made a deal with Senator Murray Sinclair, who, having been Chairman of the Truth and Reconciliation Commission, might be considered the godfather of C-262. The deal was that the Conservatives would stop their filibuster if the other side would call the Ministers of Justice and

of Crown-Indigenous Relations to testify about the bill in committee, but the deal fell apart,¹ the filibuster resumed, and the Senate adjourned for the summer without passing C-262.

The Conservative Senators spent much of their time talking about “free, prior, and informed consent,” arguing that it would amount to a new veto for First Nations over economic development projects legislated on top of the existing jurisprudence of consultation and accommodation. “If it turns out that consent equals a veto or anything approaching a veto for Indigenous people over activities and projects affecting their traditional lands, then we need to know that before we vote on this bill and bring it into law,” said Alberta Senator Scott Tanas (Tasker, 2019). Senator Sinclair at one point denied that UNDRIP would become Canadian law under C-262 (Lum, 2019), but later put it this way: “Free, prior, and informed consent is a very simple concept. And that is, before you affect my land, you need to talk to me, and you need to have my permission ... That doesn’t mean that we’re vetoing it. It doesn’t mean that First Nations people, or Indigenous people outside of Indian reserves, are vetoing anything. Just because they say you can’t run a pipeline across my land doesn’t mean you can’t run it somewhere else” (Brake, 2019).

This ingenious manipulation of words confirms that “free, prior, and informed consent” would amount in practice to a veto, at least for corridor projects such as pipelines. A pipeline has to follow a certain route and end at a certain terminus if it is to be useful. Under Senator Sinclair’s interpretation, one strategically located First Nation could kill an entire pipeline project by withholding consent, even though dozens of other First Nations wanted it to be built.

During the 2019 election campaign, the Liberals said that, if they were re-elected, they would re-introduce something like C-262 as government legislation to make sure it would pass. The Throne Speech delivered December 6, 2019, promised the legislation within 12 months (Bell, 2019). Senators are more reluctant to block a piece of government legislation than a private member’s bill, but that does not guarantee a free ride for new legislation. The Liberals are now faced with managing a minority government. They can surely get enough votes in the Commons from the New Democratic Party (NDP), Bloc Québécois (BQ), and the Green Party to pass a successor to C-262, but it is never clear how long a minority government will last. The government could be defeated for unrelated reasons, causing unpassed bills to die on the order paper. Or Liberal strategists may simply decide that legislating UNDRIP is too controversial for a minority government to undertake. All things considered, it is possible but not certain that legislation regarding UNDRIP will pass in this Parliament, even though the government party promised it during the campaign and in the throne speech.

1. Telephone interview with Don Plett by the author, January 3, 2020.

British Columbia

After the British Columbia provincial election of 2017, the NDP formed a minority government with the support of the Green Party. The two parties negotiated a Supply and Confidence Agreement that included a commitment on UNDRIP: “both caucuses support the adoption of the UN Declaration on the Rights of Indigenous Peoples, the Truth and Reconciliation Commission’s calls to action and the Tsilhqot’in Supreme Court Decision. We will ensure the new government reviews policies, programs and legislation to determine how to bring the principles of the Declaration in action in BC” (New Democrat, BC Government Caucus, 2017: 2).

The first legislative result of this agreement was a reference to UNDRIP in the new *Environmental Assessment Act*, stating that the Environmental Assessment Office would:

- support reconciliation with Indigenous peoples in British Columbia by
 - (A) supporting the implementation of the United Nations Declaration on the Rights of Indigenous Peoples,
 - (B) recognizing the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves,
 - (C) collaborating with Indigenous nations in relation to reviewable projects, consistent with the United Nations Declaration on the Rights of Indigenous Peoples, and
 - (D) acknowledging Indigenous peoples’ rights recognized and affirmed by section 35 of the *Constitution Act*, 1982 in the course of assessments and decision making under this Act.” (Legislative Assembly of British Columbia, 2018: 51, s.2(2)(b)(ii))

The wording was relatively restrained: “supporting the implementation” of UNDRIP and being “consistent with UNDRIP” are not the same as declaring that UNDRIP has been entrenched in legislation.

The government went farther by tabling Bill 41, *The Declaration of the Rights of Indigenous Peoples Act*, with great fanfare on October 24, 2019. Bill 41 committed the government “to affirm the application of the Declaration to the laws of British Columbia; to contribute to the implementation of the Declaration; [and] to support the affirmation of, and develop relationships with, Indigenous governing bodies.” Further, “[i]n consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of

British Columbia are consistent with the Declaration.” There would have to be an action plan to achieve these objectives, with annual progress reports (Legislative Assembly of British Columbia, 2019b: 41, ss. 2–4).

Bill 41 passed third reading on November 26, 2019, with no one voting against. The Liberal Opposition could have talked it out because adjournment was scheduled two days later but decided to let it pass. Through patient questioning in the Committee of the Whole House, Indigenous Affairs critic Mike de Jong had led the responsible Minister, Scott Fraser, to say that Bill 41 did not give legal force and effect to UNDRIP, and that it did not nullify any existing BC laws (Legislative Assembly of British Columbia, 2019a). However, it is not clear how the Minister’s statements mesh with s. 1(4) of the bill: “Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia.”

The Minister also made an important concession regarding the use of Bill 41 and UNDRIP in court cases: “... government’s intention is that the courts may, but they’re not obliged to, use the UN declaration in their role in the courts. Bill 41 does not give legal force and effect, but it does enable government ... to be able to align British Columbia laws to come in to alignment with the UN declaration” (Legislative Assembly of British Columbia, 2019a). What the Minister said is roughly the current state of jurisprudence in Canada; judges may refer to UNDRIP for background in interpreting Canadian law, but it does not overrule or replace existing law.² UNDRIP, like other international declarations, is only binding in Canada to the extent that it has been adopted by the competent legislature. The great question is whether Bill 41 has adopted UNDRIP only as a target for the future or as present law.

Legislation regarding UNDRIP is also under consideration in Ontario. NDP Member Sol Mamakwa, an Oji-Cree from Sioux Lookout, introduced Bill 76, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (Legislative Assembly of Ontario, 2019b). It is by far the most radical bill of this type that has been presented in Canada because it says flatly that “the *United Nations Declaration on the Rights of Indigenous Peoples* set out in Schedule 1 has force of law in Ontario” (Legislative Assembly of Ontario, 2019b: 76, s. 2). The bill was sent to committee after second reading, but as a private member’s bill it is unlikely to pass in anything like its present form. Nevertheless, it reveals what many Indigenous advocates are really driving at.

2. See, for example, *Ross River Dena Council v. Canada*, 2017 YKSC 5, at 110–115.

Discussion

Entrenching the whole of the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) in Canadian law is simply impossible because it is not written with the precision of legislation. It would be like trying to legislate the Sermon on the Mount. Thus, except for Sol Mamakwa's private member's bill, attempts at Canadian legislation have tried to set up a long-term process to revise Canadian law to bring it into accord with UNDRIP. As worded, they would neither legislate UNDRIP as such nor nullify existing Canadian law, though the wording of the BC legislation in this regard is not entirely clear. In any case, repeal or amendment of many Canadian laws would be the logical long-term implication of such bills.

But even if most of UNDRIP cannot be legislated in any ordinary way, the standard of "free, prior, and informed consent" (FPIC) is clear enough to be legislated. On its face, the wording is completely transparent. It gives possessors a veto over the use of their land and resources by others, full stop. The problem with FPIC is not lack of clarity, it is lack of practicality.

First of all, it is different from the "duty to consult and accommodate," which has emerged in Canadian jurisprudence as the standard for dealing with First Nations over economic development projects on lands to which they have title, rights, or a claim of some kind. Canadian courts have repeatedly said that the right to be consulted is not an absolute right to say "No"; in other words, it is not a veto over resource development. The Supreme Court of Canada has also developed a doctrine of infringement for use of Indigenous title lands, so even Indigenous owners do not possess a veto. In this respect, Indigenous people are like all other Canadian landowners, who are subject to expropriation laws in every jurisdiction. Ranchers cannot veto a pipeline running across their land, though they are entitled to appropriate compensation.

Consultation jurisprudence has been developed by the lower courts and confirmed by the Supreme Court of Canada. It is part of the constitution because it is based on s. 35 of the *Constitution Act* of 1982. Provincial or even federal legislation cannot overturn or amend part of the Constitution, so the jurisprudence of consultation would remain in force even if FPIC were legislated. However, legislation can direct the executive government to act in a certain way, to follow standards that go beyond what the courts would impose. Thus FPIC, even if it did not have constitutional status, could become an operational standard within a particular jurisdiction if properly legislated.

But even if it is theoretically possible, legislative adoption of FPIC is a practical catastrophe. There are over 600 First Nations with over 2,000 land reserves. In the parts of Canada where there have been land surrender treaties (chiefly Ontario and

the Prairie Provinces), First Nations still have a variety of hunting and fishing rights on Crown land. In British Columbia, Quebec, and Atlantic Canada, where there have been few if any land-surrender treaties, First Nations maintain usage rights and title claims to ill-defined and overlapping traditional territories. No major natural resource project can proceed today without bumping into an assortment of Indigenous claims. And the Canadian economy has always depended on resource development, from pre-Confederation fish and furs through nineteenth-century agriculture and lumbering to today's oil and gas, hard rock mining, and hydropower.

Under existing jurisprudence, claimants have the right to be consulted and accommodated where possible, but their claims are moderated by knowing that consultation is not a veto power and that the federal government can infringe Aboriginal title. Arming claimants with a veto power under the FPIC doctrine would produce nothing but chaos. The effect would be particularly devastating for corridor projects—roads, railways, pipelines, and powerlines—that bump into the claims of many—sometimes dozens or hundreds—of First Nations. It is almost impossible to get unanimous agreement from so many claimants, which is why expropriation legislation exists in the larger economy.

The effect is illustrated by recent developments in British Columbia, which passed UNDRIP legislation in November 2019. In early January 2020, three major projects came under attack from a UN agency on FPIC grounds: the Site-C hydroelectric project in northeastern British Columbia, the Coastal GasLink pipeline connecting BC gas fields to the projected LNG plant in Kitimat, and the TMX oil-pipeline expansion from Alberta to Vancouver. The BC government has opposed TMX, but the other two projects are supported by both the NDP government and Liberal opposition, and are major pillars of the province's economic plans for the future.

The call to halt work on these projects came from the United Nations Committee on the Elimination of Racial Discrimination, which stated that the proponents had not obtained the “free, prior, and informed consent” of First Nations. Yet BC Hydro's efforts at consultation on the Site-C project had been approved by the courts; and, with the approval of the province, Coastal GasLink had signed agreements with the elected governments of all 20 First Nations along the route. One faction of one of these 20 First Nations—some, but not all, of the hereditary chiefs of the Wet'suwet'en—opposed the pipeline in spite of the agreements and tried to block construction in the face of two court injunctions. They mentioned the FPIC doctrine, but their opposition went far beyond words. Their supporters felled trees across the road, partially cut other trees for mantraps, and stockpiled raw ingredients for making firebombs (Morgan, 2020).

The demand to stop work was echoed by local Indigenous leaders who had participated in developing Bill 41. The Union of British Columbia Indian Chiefs said: “we fully expect B.C. to uphold the new provincial legislation that applies the *United Nations Declaration on the Right of Indigenous Peoples* to B.C. laws. Free, prior and informed

consent of the proper Title and Rights holders impacted must be achieved prior to the approval of any project affecting their land, territories and other resources (Neel, 2020). BC's Commissioner of Human Rights also joined in on Twitter: "I join [the United Nations Committee for the Elimination of Racial Discrimination] in urging Canada to immediately cease the forced eviction of Wet'suwet'en and Secwepemc peoples, to prohibit the use of lethal weapons, and to guarantee no force will be used against them. This is a matter of fundamental human rights" (Canadian Press, 2020a).

These statements nicely illustrate the basic problem: BC politicians are being hoist on their own petard of calculated ambiguity. They have claimed to fully embrace UNDRIP, even though most of them know full well that "free, prior, and informed consent," which is a prominent part of UNDRIP, cannot be implemented in Canada without causing economic devastation. Thus they introduce legislation about working towards implementation of UNDRIP, perhaps thinking that the words they have chosen do not actually change the law in Canada. They may think that their word games satisfy Indigenous pressure groups, but those activists want FPIC in its clear, obvious sense, and they want it now.

When the RCMP enforced a court injunction and took down the barricades, sympathy demonstrations and barricades sprang up across Canada, shutting down the entire network of Canadian National Railway. At the time of writing, the impasse is still unresolved. Premier Horgan supported dismantling the barricades and called for the rule of law to prevail. He also added that the implementation of UNDRIP, like all legislation unless otherwise stated, is forward looking, not retroactive (Canadian Press, 2020b). That argument may work for now but may boomerang in the future. If FPIC does not apply to the Coastal GasLink pipeline because the legislation is not retroactive, that seems to imply that FPIC will in fact apply to future projects, pointing again to the ambiguous wording of Bill 41.

Ironically for British Columbia, which has taken the lead in legislating UNDRIP, "free, prior, and informed consent" now threatens its flagship development project, namely the export of liquefied natural gas. If the Coastal GasLink pipeline cannot go through Wet'suwet'en territory, the huge LNG plant at Kitimat cannot be supplied. Site C is also involved, because the hydroelectricity from that project is supposed to help power the LNG liquefaction process without carbon-dioxide emissions. If the liquefaction process has to be powered by burning natural gas, LNG export will not be nearly as "green" as the NDP had promised. Once again, climate alarmism and a radical version of Indigenous rights are coming together to threaten the development of natural resources. The BC government was happy to play that game when the target was Alberta oil but now finds itself on the defensive as a result of its own legislation.

When it comes to litigation, the courts may uphold the legislation as Minister Fraser explained it in the legislature, with all its careful crafting and qualifications, and find that the right to be consulted, not FPIC, is still the law of the land. But that could

take years of trials and appeals. Canada has already endured 15 years of delay and confusion in which the courts invented and then sorted out the meaning of the duty to consult. The resultant rise in transaction costs caused the Mackenzie Valley gas pipeline to be abandoned, and delayed the Northern Gateway pipeline until the Liberals came to power in 2015 and banned the loading of tankers with bitumen off the northern coast of British Columbia. It delayed TMX for almost four years (Flanagan, 2019: 117–129), although completion of the latter project is looking more likely now that the Federal Court of Appeal has ruled in its favour (*Coldwater Indian Band v. Canada*, 2020 FCA 34).

During this time period, investors have stampeded for the exits, fearing that major projects are becoming impossible in Canada (Globerman and Emes, 2019). After more years of litigation to unpack the meaning of FPIC, there may be little left except bankruptcy for oil companies and continued poverty for the many First Nations that see resource development as their best chance for economic progress. Let Cree business consultant Dale Swampy have the last word: “the discussion on UNDRIP has focused narrowly on the ability of Indigenous peoples to say ‘no’ to economic development. Ensuring equitable participation in, and benefits from, the modern economy—being able to say ‘yes’ to development—is just as important to the well-being of Indigenous peoples” (Swampy, 2019).

References

Bell, Jim (2019). Liberals Promise to Table UNDRIP Law within One Year. *Nunatsiaq News* (December 6). <<https://nunatsiaq.com/stories/article/liberals-promise-to-table-undrip-law-within-one-year>>.

Brake, Justin (2019). “Let Us Rise with More Energy”: Saganash Responds to Senate Death of C-262 as Liberals Promise, Again, to Legislate UNDRIP. *APTN National News* (June 24). <<https://aptnnews.ca/2019/06/24/let-us-rise-with-more-energy-saganash-responds-to-senate-death-of-c-262-as-liberals-promise-again-to-legislate-undrip>>.

Canada, Department of Justice (2017). *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*. July 14. <<https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>>, as of February 18, 2020.

Canada, Federal Court of Appeal (2020). *Coldwater Indian Band v. Canada (Attorney General)*, 2020 FCA 34. <<https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/460815/index.do>>, as of February 18, 2020.

Canadian Press (2020a). B.C. Human Rights Commissioner Asks Canadian Government to Halt Pipeline Project. *Calgary Herald* (January 11). <<https://calgaryherald.com/pmn/news-pmn/canada-news-pmn/b-c-human-rights-commissioner-asks-canadian-government-to-halt-pipeline-project/wcm/99e8435b-81ad-4501-a5c1-3ce917d661b5>>.

Canadian Press (2020b). Horgan Says “Rule of Law Applies”, LNG Pipeline Will Proceed despite Protests. Updated January 13. <<https://www.nationalnewswatch.com/2020/01/13/horgan-says-rule-of-law-applies-lng-pipeline-will-proceed-despite-protests/#.Xh0-UHdFyUm>>.

CBC (2006). Canada Opposes UN Aboriginal Treaty. *CBC News* (June 20). <<https://www.cbc.ca/news/world/canada-opposes-un-aboriginal-treaty-1.572152>>, as of February 18, 2020.

Cowan, Anna (2013). UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia. *Pacific Rim Law & Policy Journal* 22, 2: 247–310. <<http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1233/22PRLPJ247.pdf?sequence=1>>, as of February 18, 2020.

Favel, Blaine, and Coates, Ken S. (2016). *Understanding UNDRIP: Choosing Action on Priorities over Sweeping Claims about the United Nations Declaration on the Rights of Indigenous Peoples*. Macdonald-Laurier Institute. <<https://www.macdonaldlaurier.ca/files/pdf/MLI-10-UNDRIPCoates-Flavel05-16-WebReadyV4.pdf>>, as of February 18, 2020.

Flanagan, Tom (2019). *The Wealth of First Nations*. Fraser institute. <<https://www.fraserinstitute.org/sites/default/files/wealth-of-first-nations-2019.pdf>>, as of February 18, 2020.

Gibson, Gordon (2009). *A New Look at Canadian Indian Policy*. Fraser Institute. <<https://www.fraserinstitute.org/sites/default/files/NewLookCanadianIndianPolicy.pdf>>, as of February 18, 2020.

Globerman, Steven, and Emes, Joel (2019). *Private Sector Capital Expenditures in Canada: An Industry-Level Analysis*. Fraser Institute. <<https://www.fraserinstitute.org/studies/private-sector-capital-expenditures-in-canada-an-industry-level-analysis>>, as of February 18, 2020.

Gover, Kirsty (2015). Settler–State Political Theory, “CANZUS” and the UN Declaration on the Rights of Indigenous Peoples. *European Journal of International Law* 26, 2: 345–373. <<https://doi.org/10.1093/ejil/chv019>>, as of February 18, 2020.

Hill, Brian (2016). Canada Endorses United Nations Declaration on the Rights of Indigenous Peoples. *Global News* (May 9). <<https://globalnews.ca/news/2689538/canada-endorses-united-nations-declaration-on-the-rights-of-indigenous-peoples>>, as of February 18, 2020.

Legislative Assembly of British Columbia (2018). *Bill 51 – 2018: Environmental Assessment Act*. <<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/bills/first-reading/gov51-1>>.

Legislative Assembly of British Columbia (2019a). *Official Report of Debates (Hansard)*. November 20, Afternoon Sitting, Issue No. 293. <<https://www.leg.bc.ca/documents-data/debate-transcripts/41st-parliament/4th-session/20191120pm-Hansard-n293>>, as of February 12, 2020.

Legislative Assembly of British Columbia (2019b). *Bill 41 – 2019: Declaration on the Rights of Indigenous Peoples Act*. <<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>>.

Legislative Assembly of Ontario (2019a). *Bill 76, United Nations Declaration on the Rights of Indigenous Peoples Act, 2019*. <<https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-76>>.

Legislative Assembly of Ontario (2019b). Private Members' Public Business: United Nations Declaration on the Rights of Indigenous Peoples Act, 2019 / Loi de 2019 relative à la Déclaration des Nations Unies sur les droits des peuples autochtones. *Hansard*. March 21, 42nd Parliament, 1st Session. <<https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2019-03-21/hansard#para967>>, as of February 18, 2020.

Liberal Party of Canada (2015). *Real Change: A New Plan for a Strong Middle Class*. <<https://www.liberal.ca/wp-content/uploads/2015/10/New-plan-for-a-strong-middle-class.pdf>>, as of February 18, 2020.

Lum, Zi-Ann (2019). Pushback to UN Indigenous Rights Bill Is “Troubling”: Cree MP. *Huffington Post* (May 29). <https://www.huffingtonpost.ca/entry/romeo-saganash-undrip-bill_ca_5cee807de4b0ae67105a09a4>, as of February 18, 2020.

Morgan, Geoffrey (2020). RCMP Find “Traps” and Fuel-Soaked Rags near B.C. Pipeline Project Road. *Financial Post* (January 20): 2.

Munson, James (2017). Liberals Will Back U.n. Indigenous Rights Bill. *iPolitics* No. 20. <<https://ipolitics.ca/2017/11/20/liberals-will-back-u-n-indigenous-rights-bill>>, as of February 18, 2020.

Neel, Ellen (2020). *Wet’suwet’en Jurisdiction and Governance Must Be Upheld*. British Columbia Union of Indian Chiefs. <https://www.ubcic.bc.ca/wet_suwet_en_jurisdiction_and_governance_must_be_upheld>, as of February 18, 2020.

New Democrat, BC Government Caucus (2017). *Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus*. <http://bcndpcaucus.ca/wp-content/uploads/sites/5/2017/05/BC-Green-BC-NDP-Agreement_vf-May-29th-2017.pdf>, as of February 18, 2020.

Parliament of Canada (2014). *Bill C-641, An Act to Ensure that the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*. House of Commons of Canada, 2nd Session, 41st Parliament, 62-63 Elizabeth II, 2013-2014. <<https://www.parl.ca/DocumentViewer/en/41-2/bill/C-641/first-reading/page-24>>, as of February 18, 2020.

Parliament of Canada (2017). *Bill C-262, An Act to Ensure that the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*. Second Reading. House of Commons of Canada, 1st Session, 42nd Parliament, December 3, 2015–September 11, 2019. LEGISinfo. <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=C262&Language=E&Mode=1&Parl=42&Ses=1&billId=8160636&View=4>>, as of February 18, 2020.

Parliament of Canada (2018). *Bill C-262, An Act to Ensure that the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*. As passed, May 30. House of Commons of Canada, 1st Session, 42nd Parliament, 64-65-66-67 Elizabeth II, 2015-2016-2017-2018. <<https://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>>, as of February 18, 2020.

Swampy, Dale (2019). UNDRIP Says First Nations Can Say No to Development. But We Also Need to Be Able to Say Yes. *Financial Post* (December 10). <<https://business.financialpost.com/opinion/undrip-says-first-nations-can-say-no-to-development-but-we-also-need-to-be-able-to-say-yes>>, as of February 18, 2020.

Tasker, John Paul (2017). Liberal Government Backs Bill that Demands Full Implementation of UN Indigenous Rights Declaration. *CBC News* (Nov. 21). <<https://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037>>, as of February 18, 2020.

Tasker, John Paul (2019). “Reconciliation Should Not Be Partisan”: Ministers Call for End to Tory Stalling on Indigenous Rights Bill. *CBC News* (April 11). <<https://www.cbc.ca/news/politics/tasker-undrip-bill-reconciliation-letter-senate-1.5094152>>, as of February 18, 2020.

Truth and Reconciliation Commission of Canada (2015). *Truth and Reconciliation Commission of Canada: Calls to Action*. <http://nctr.ca/assets/reports/Calls_to_Action_English2.pdf>, as of February 18, 2020.

United Nations [UN] (2007a). *United Nations Declaration on the Rights of Indigenous Peoples*. September 13. <https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>, as of February 18, 2020.

United Nations [UN] (2007b). *General Assembly Adopts Declaration on Rights of Indigenous Peoples; “Major Step Forward” towards Human Rights for All, Says President*. Press Release (September 13). <<https://www.un.org/press/en/2007/ga10612.doc.htm>>, as of February 18, 2020.

US Department of State (2010). *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*. <<https://2009-2017.state.gov/documents/organization/184099.pdf>>, as of February 18, 2020.

Wilson-Raybould, Jody (2016). Notes for an Address to the Assembly of First Nations. Annual General Assembly, Scotiabank Convention Centre, Niagara Falls, ON, July 12, 2016. <https://drive.google.com/file/d/OB_bPXJbq-wgWenpoa2NIRmgwT2NIWkx3enNSWXJELTFSSzc4/view>, as of February 18, 2020.

Wilson-Raybould, Jody (2020). *From Where I Stand: Rebuilding Indigenous Nations for a Stronger Canada*. UBC Press, Purich Books. <<https://www.ubcpress.ca/from-where-i-stand>>, as of February 18, 2020.

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