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Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples

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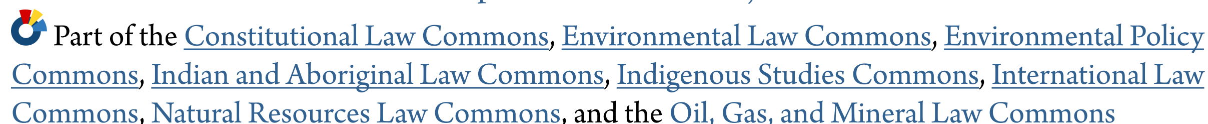
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Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples

Abstract

Canadian Prime Minister Justin Trudeau has repeatedly promised to meet the Indian Residential School Truth and Reconciliation Commission's recommendation to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a framework for reconciliation. This commitment is significant as Canada's position on UNDRIP has been highly contested. In particular, the compatibility of UNDRIP's Free, Prior, and Informed Consent (FPIC) standard with Canadian law has been repeatedly called into question. This work evaluates the possibility and importance of implementing FPIC in Canada. It begins with an overview of FPIC internationally and of FPIC in relation to Canadian law. It then suggests potential policy measures to implement two key articles of UNDRIP containing FPIC requirements. To meet Article 32's FPIC requirement for project approvals for development on their territory, this work draws upon Assembly of First Nations recommendations in suggesting amendments to environmental assessment processes. To implement Article 19's FPIC requirement for legislative and administrative measures affecting Indigenous Peoples, it suggests revisiting the Royal Commission on Aboriginal People's recommendation for a House of First Peoples (or Aboriginal Parliament) and informs this suggestion with reflection on the Sámi peoples' experience with the Sámi Parliament in Norway.

Keywords

Aboriginal Law, Duty to Consult, Free Prior and Informed Consent, Environmental Assessment, Indigenous Rights, United Nations Declaration on the Rights of Indigenous Peoples.

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FREE, PRIOR, AND INFORMED CONSENT AND RECONCILIATION IN CANADA

Sasha Boutilier*

INTRODUCTION

In the summer of 2015, the Indian Residential Schools Truth and Reconciliation Commission (TRC) released 94 recommendations. Perhaps the most prominent of these was the call for Canada to implement the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[1] The TRC made clear that UNDRIP should be adopted by both the federal and provincial governments as a "framework for reconciliation."[2] This recommendation was surprising, given that Canada's position on UNDRIP has been contested over the past 10 years: in 2007, Canada was one of only four countries to vote against UNDRIP in the General Assembly, and when it did finally approve UNDRIP, it explicitly stated that UNDRIP was solely aspirational. In this context, the promise of recently elected Prime Minister Justin Trudeau to implement UNDRIP is notable and significant.[3] In his mandate letter to Indigenous and Northern Affairs Minister Carolyn Bennett, Trudeau directed her to begin the process of reconciliation "starting with the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*."[4] Support for UNDRIP has also been expressed at a provincial level, albeit less explicitly: in July 2015, Canada's Premiers declared their intention to enact the TRC's 94 recommendations.[5] In July 2016, Justice Minister Judy Wilson-Raybould announced the Canadian government would seek to meaningfully implement the Declaration rather than simply adopting it as a whole directly into Canadian law.[6]

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[1] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 [*UNDRIP*].

[2] Truth and Reconciliation Commission of Canada, *Calls to Action*, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at para 43 [*TRC*].

[3] Joanna Smith, "Canada will implement UN Declaration on Rights of Indigenous Peoples, Carolyn Bennett says", *The Toronto Star* (12 November 2015), online: <www.thestar.com>.

[4] Canada, Office of the Prime Minister, "Minister of Indigenous and Northern Affairs Mandate Letter", by Justin Trudeau, (Ottawa: Office of the Prime Minister, 13 November 2015) online: <http://pm.gc.ca>.

[5] Sue Bailey, "Premiers commit to commission recommendations after meeting with native leaders", *CBC News* (15 July 2015) online: <www.cbc.ca/news>.

[6] James Munson, "Ottawa won't adopt UNDRIP directly into Canadian law: Wilson-Raybould", (12 July 2016), *iPolitics* (blog), online: <http://ipolitics.ca>.

The UNDRIP's scope is far-reaching and its potential impact is transformative. Particularly controversial in Canada has been the standard of "Free, Prior, and Informed Consent" (FPIC) contained in UNDRIP. This paper focuses specifically on the implications of implementing FPIC in Canada. In Section I, it provides an overview of FPIC in international law and examines several international examples of state-implemented FPIC requirements. In Section II, it considers the state of Canadian law in relation to FPIC and the compatibility of FPIC with Canadian constitutional law regarding Aboriginal law and the duty to consult. In Section III, it considers how Canada could implement FPIC on major Indigenous political issues in Canada. This section is divided into two parts: (1) project approvals requiring FPIC under Article 32 of UNDRIP, such as for Northern Gateway or Energy East; and (2) legislative or administrative measures requiring FPIC under Article 19 of UNDRIP, such as the *Indian Act* reform. All told, legislative measures to implement UNDRIP's FPIC standard could and should be taken in Canada. Further, constitutional amendments entrenching FPIC and creating a House of First Peoples would best serve to protect Indigenous rights and mark a true sign of progress towards reconciliation.

I. INTERNATIONAL PROPOSALS TO IMPLEMENT ARTICLES 19 AND 32 OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

FPIC in International Law and Policy

FPIC is inseparable from Indigenous peoples' right to self-determination and also intersects with international human rights jurisprudence on property, cultural, and non-discrimination rights.[7] Former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya compellingly describes self-determination as "a universe of human rights precepts concerned broadly with peoples…and grounded in the idea that all are equally entitled to control their own destinies."[8] FPIC is fundamental to what Anaya describes as the "ongoing" aspect of self-determination: that "the governing institutional order…be one under which people may live and develop freely on a continuous basis."[9] As Tara Ward notes, many Indigenous advocates see UNDRIP as an important way to "ensur[e] that Indigenous peoples meaningfully participate in decisions directly impacting their lands, territories, and resources."[10]

The standard of FPIC set in UNDRIP strengthens the earlier standard of the International Labour Organization's (ILO) *Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention 169).[11] ILO Convention No. 169 obligates signatory states to consult Indigenous peoples on matters affecting them "with the objective of achieving

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[7] Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 NW J Intl Human Rights 54 at 56 [*Ward*].
[8] James Anaya, *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 1996) at 81.
[9] *Ibid*.
[10] *Ward*, *supra* note 7 at 56.
[11] *International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries,* 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991) [*ILO Convention No. 169*].

agreement or consent to the proposed measures."[12] Thus, FPIC requires securing consent, while ILO Convention No. 169 merely requires attempting to do so. However, as a treaty, ILO Convention No. 169 is legally binding upon states that ratify it, while UNDRIP is not. Further, there are relatively strong ILO reporting and monitoring mechanisms concerning implementation of treaties.[13]

The FPIC standard is contained in six articles of UNDRIP (10, 11, 19, 28, 29, 32).[14] Of these, Articles 19 and 32 will be thoroughly discussed.[15] Article 19 obliges states to consult in good faith with Indigenous peoples "through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[16] Article 32 requires states to obtain the "free and informed consent prior to the approval of any project affecting their lands or territories and other resources" from Indigenous peoples concerned.[17] While the FPIC requirement in other clauses of UNDRIP is undoubtedly significant (e.g., particularly in the context of land claims agreements, restitution, protection of traditional knowledge, and relocation), such clauses are beyond the scope of this paper and will not be canvassed here.

While what consent encompasses seems fairly clear, the phrase "free, prior, and informed" merits some elaboration. "Free" implies consent must be obtained without any form of coercion, intimidation, manipulation, or application of force by government or non-governmental parties seeking consent.[18] "Prior" implies that Indigenous peoples must be engaged early in the planning process, be given sufficient time to adequately consider proposed measures, and continue to be engaged through the process.[19] "Informed" implies that Indigenous peoples must have an adequate understanding of the full range of issues and potential impacts of any decision.[20] UN Special Rapporteur James Anaya confirms this interpretation in his guidance note on consultation with Indigenous peoples.[21]

It should be noted that FPIC is subject to the same limitations as the rest of UNDRIP, particularly those found within Article 46. Article 46(1) guarantees UNDRIP should not be interpreted 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."[22]

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[12] See *ILO*, *Ibid* art 6(2).
[13] *Ward*, *supra* note 7 at 59–61.
[14] *UNDRIP*, *supra* note 1 at Appendix A.
[15] See *UNDRIP*, *Ibid*, arts 10-11, 28–29.
[16] See *ibid*, art 19.
[17] See *ibid*, art 32.
[18] Boreal Leadership Council, *Understanding Successful Approaches to Free Prior and Informed Consent in Canada*, Part I: Recent Development and Effective Roles for Government, Industry, and Indigenous Communities", by Ginger Gibson MacDonald and Gaby Zezulka (Ottawa: Boreal Leadership Council, September 2015) at 8.
[19] *Ibid*.
[20] *Ibid*.
[21] James Anaya, *Report to the Human Rights Council*, A/HRC/12/34, (14 July 2009), para 50–53 [*Anaya*].
N.B. Anaya bases his interpretation in this report upon past ILO and IACHR rulings on consultation standards.
[22] *UNDRIP*, *supra* note 1 at art 46(1).

Article 46(2) allows limitations on rights in UNDRIP, provided such limitations are "non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[23] Finally, Article 46(3) prescribes UNDRIP rights "shall be interpreted in accordance with principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith."[24] As Paul Joffe notes, Article 46 provides an important interpretive framework for UNDRIP that is often ignored.[25]

FPIC in International Jurisprudence and State Policy

The FPIC standard has been addressed both in international courts, such as the Inter-American court of Human Rights (IACHR), and domestic courts, such as that of Belize. The IACHR has affirmed the right to and importance of FPIC in *Saramaka v Suriname* [2007], *Awas Tingni v Nicaragua* [2001], and *Mary and Carrie Dann v The United States*.[26] The African Commission on Human and Peoples' Rights also upheld the FPIC requirement in *Kenya v Endorois* [2009].[27] The Supreme Court of Belize referenced UNDRIP's FPIC standard in its October 2007 ruling in *Maya Villages of Santa Cruz and Conejo v The Attorney General of Belize and the Department of Environment and Natural Resources*.[28] The Constitutional Court of Columbia likewise ruled that the state must obtain FPIC for large scale investment or development plans in 2009.[29]

State and sub-state governments have also introduced legislation requiring FPIC in several countries. The 1997 Philippines Indigenous Peoples Rights Act requires FPIC. The Aboriginal Land Rights Act (Northern Territory) Act, 1976 established a system of Aboriginal freehold in Australia that requires consent of Aboriginal peoples where third parties seek an "estate or interest" in the land.[30] Other examples of international legislation approaching FPIC include Greenland's Home Rule Act, and Venezuala's *Ley Organica de Pueblos y comunidades Indigenas Gaceta Official de la Republica Bolivariana de Venezuela*.[31]

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[23] See *UNDRIP*, *Ibid*, art 46(2).
[24] See *UNDRIP*, *Ibid*, art 46(3).
[25] Paul Joffe, "Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?" in Jackie Hartley, Paul Joffe, and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich, 2010) 70 at 78, 80, 82 [*Hartley, Joffe & Preston*].
[26] Jeremie Gilbert and Cathal Doyle, "A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent", Stephen Allen and Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011) 289 at 309 [*Gilbert & Doyle*].
[27] *Ibid* at 309.
[28] *Ibid* at 310.
[29] *Ibid* at 311; see: *Alvaro Bailarin y otros, contra los Ministerios del Interior y de Justicia; de Ambiente, Vivienda y Desarrollo Territorial; de Defensa; de Proteccion Socia; y de Minas y Energia*
[30] Mark Rumler, "Free, prior and informed consent: a review of free, prior and informed consent in Australia", online: (2011) Oxfam Australia at 8. <http://business-humanrights.org/sites/default/files/media/oaus-fpicinaustralia-report-1211.pdf> [*Rumler*]; *Gilbert & Doyle*, *supra* note 26 at 310–11.
[31] *Gilbert & Doyle*, *supra* note 26 at 311.

II. FPIC IN CURRENT CANADIAN LAW

The legitimacy of Canada's past opposition to UNDRIP has been hotly contested. While Prime Minister Steven Harper's government characterized their opposition as being backed by strong concerns of UNDRIP's compatibility with Canadian constitutional law,[32] numerous academics and Indigenous leaders argue the opposition was largely ideological.[33] Joffe, for instance, thoroughly contradicts the Canadian government's claims that UNDRIP is incompatible with Canadian constitutional law and finds the opposition is "based on an ideological bias, rather than backed by a legitimate, legal rationale."[34] In this section, focus is narrowed on FPIC's compatibility with Canadian constitutional law, particularly concerning strength of the duty to consult, limitations of rights, and whether FPIC constitutes a veto. Although FPIC is fundamentally compatible with Canadian constitutional law, the standard it establishes exceeds the current Canadian standard and, thus, a legislative or constitutional amendment would be required to implement FPIC's standards in Canada. The constitutionally mandated minimal standards of treatment for Aboriginal peoples should not and do not preclude the legislative or constitutional addition of stronger standards, which is discussed in Section III.

The Duty to Consult and Accommodate

The duty to consult and accommodate is the closest thing to FPIC in Canadian constitutional law. The duty to consult and accommodate was established by a trio of Supreme Court of Canada (SCC) cases between 2004 and 2005: *Haida Nation v British Columbia (Minister of Forests)*,[35] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*,[36] and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*.[37] *Haida Nation* establishes that prior to taking actions that would affect existing, or potentially existent, Aboriginal and treaty rights, the Crown is obliged to consult and, if necessary, accommodate Aboriginal concerns.[38] Thus, the duty to consult is triggered by substantively the same measures as the FPIC standard (i.e., measures affecting Aboriginal peoples and their rights). In its rulings

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[32] See the following legal memo concerning the relationship of Canadian law to UNDRIP Canada: "The Law of Canada in Relation to UNDRIP", nd online: <https://ceaa-acee.gc.ca/050/documents/p63928/92200E.pdf>.
[33] See for instance this May 2008 open letter calling for Canada to implement UNDRIP penned by 75 Canadian academics and legal scholars: "Open Letter Canada Needs to Implement this New Human Rights Instrument", in *Hartley, Joffe & Preston*, *supra* note 25 at 205.
[34] *Hartley, Joffe & Preston*, *supra* note 25 at 71.
[35] 2004 SCC 73 [*Haida*].
[36] 2004 SCC 74 [*Taku River*].
[37] 2005 SCC 69 [*Mikisew Cree*]; see also Patrick Monahan & Byron Shaw, *Constitutional Law* (Toronto: Irwin Law, 2013) at 508–510 [*Monahan & Shaw*]; Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich, 2014) at 9.
[38] *Monahan & Shaw*, *supra* note 37 at 508.

on the duty to consult, the SCC seems to have incorporated some parts of "free, prior, and informed," although federal legislation in this area is still lacking, as discussed in Section III.[39]

The duty to consult differs in two key ways from the FPIC standard: first, in the strength of the duty; and second, in the limitations placed on the right to consultation/consent. While FPIC presents a single universal "standard," the duty to consult and accommodate, per the SCC in *Haida*, implies a "spectrum of obligations" dependent upon the strength of the Aboriginal interest affected.[40] Depending on the affected interest's strength, the duty to consult and accommodate could range from the low end of merely informing the Aboriginal peoples affected and hearing their concerns, to the high end, which could involve securing the consent of the affected Aboriginal peoples.[41] The consent that will be in some cases required was first articulated in in 1997 in *Delgamuukw v British Columbia*,[42] and was confirmed again by the SCC in 2014 in *Tsilhqot'in Nation v British Columbia*.[43] In *Tsilhqot'in*, the SCC further articulated that in cases "where Aboriginal title had been established," "Governments and others seeking to use the land must obtain the consent of the Aboriginal title holders."[44] Thus, in cases where title has been established, Canadian constitutional law prescribes consent, and in cases where title or other rights are yet to be unproven, the level of obliged duty will fall along a spectrum.

The second key way in which Canadian constitutional law on the right to consultation, accommodation, and consent differs from FPIC is in terms of limitations on the right at issue. *Tsilhqot'in* reaffirmed the test for justification of infringement upon Aboriginal rights established in *R v Sparrow*[45]: the test for infringement requires the government to show "(1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group."[46] *Tsilhqot'in* introduced further criteria drawn from the *Oakes* test for justification of limitations of rights under section 1 of the *Canadian Charter of Rights and Freedoms*[47] (the reasonable limits clause): (1) that there be "rational connection" between the incursion and the government's goal; (2) that the incursion must take the least invasive means to achieve its objective ("minimal impairment"); and (3) that there be "proportionality of impact" (that the public benefits expected from the incursion outweigh any adverse effects on Aboriginal interests).[48]

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[39] Issues exist particularly surrounding the *Canadian Environmental Assessment Act,* SC 2012, c 19, s 52.
[40] *Haida*, *supra* note 35 at paras 43–44.
[41] *Ibid*.
[42] [1997] 3 SCR 1010 at para 168 [*Delgamuukw*].
[43] 2014 SCC 44 at para 76 [*Tsilhqot'in*].
[44] *Ibid*.
[45] [1990] 1 SCR 1075 at para 77 [*Sparrow*].
[46] *Ibid*.
[47] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Can*ada Act* 1982 (UK), 1982, c 11. See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.
[48] *Tsilhqot'in*, *supra* note 43 at paras 87, 125.

UNDRIP, by contrast, gives no clear test for the limitations of rights. Article 46(2) comes the closest to doing so, but this article seems to prescribe strict guidelines for any limitations on rights rather than setting a standard of justification for infringement on rights.[49] Article 46(2) specifically requires limitations to be (1) in accordance with international human rights obligations; (2) non-discriminatory; and (3) "necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of other and for meeting the just and most compelling requirements of a democratic society."[50] A detailed analysis of whether the *Sparrow-Tsilhqot'in* test meets these requirements is beyond the scope of this paper and could be the focus of future scholarship.[51] However, from preliminary analysis, the *Sparrow-Tsilqoth'in* test would seem to come close to meeting these requirements—particularly in the context of Article 46(3), which calls for UNDRIP to "be interpreted in accordance with the principles of justice, democracy…good governance, and good faith."[52]

Discussion of limitation or infringement on the right to consent leads into a discussion over the controversy in Canada concerning whether FPIC constitutes a veto. Under Prime Minister Harper, portraying FPIC as necessarily implying a veto played strongly into Conservative rhetoric that UNDRIP was incompatible with Canadian constitutional law, since the SCC has held the duty to consult does not give a "veto."[53] This view was resoundingly opposed in an open letter from over 100 scholars and legal experts as well as by a coalition of Aboriginal organizations including the AFN, Native Women's Association of Canada, and several provincial Aboriginal organizations.[54]

During the 2015 federal election campaign, AFN National Chief Perry Bellegarde powerfully stated his opposition to characterizing FPIC as a veto:

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[49] Article 46(2) in full states: "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."
[50] *UNDRIP*, *supra* note 1 at art 46(2).
[51] One brief note: I would suggest that Article 46(2)'s requirement that the purpose be strictly necessary to secure the rights and freedoms of others could be problematic in relation to the Sparrow-Tsilhqot'in test. However, addition of the requirement that the objective of the legislation be aimed towards securing rights and freedoms of other to the compelling and substantial objective stage of the Sparrow-Tsilhqot'in test would seem to fulfill this standard.
[52] *UNDRIP*, *supra* note 1 at art 46(3).
[53] *Rumler*, *supra* note 30 at 2. See also: Doug Beazley, "Rights of Indigenous peoples: How far will Ottawa go?", *Canadian Bar Association National Magazine* (December 2015) online: <http://www.nationalmagazine.ca>.
[54] See Native Women's Association of Canada, "Canada uses World Conference to continue indefensible attack on UN Declaration on the Rights of Indigenous Peoples", (24 September 2014), online: <www.nwac.ca>.

> The term veto is not used in the UN Declaration. Veto implies an absolute right or power to reject a law or development that concerns Indigenous peoples, regardless of the facts and law in any given situation.[55]

Ward notes that many Indigenous advocates view it as a means to "ensur[e] that Indigenous peoples meaningfully participate in decisions directly impacting their lands, territories, and resources," rather than as a veto.[56]

This view is powerfully confirmed by a report by UNSR James Anaya concerning the duty to consult. Anaya specifically states the Declaration's FPIC standard "should not be regarded as according Indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations with Indigenous peoples."[57] Similarly, Anaya suggests UNDRIP's differing language from ILO Convention No. 169 should be interpreted as follows:

> [S]uggest[ing] a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.[58]

This understanding would seem to be compatible with the direction the duty to consult is evolving in Canadian law, as discussed above.

Additionally, the presence of Article 46 in UNDRIP should be emphasized again, and it bears noting that Article 46 would seem to impose a slightly higher standard than the *Tsilqoth'in-Oakes* test.[59] In a very limited number of cases FPIC might amount to a veto, but these would only be cases in which good faith negotiations fail to reach a reconciliation of interests and where no justification meets the specifications of Article 46.

Prime Minister Trudeau and Minister Bennett seem equally hesitant to view FPIC as a veto.[60] The AFN, the Native Women's Association of Canada (NWAC), and the federal government seem to be operating on such an understanding as well. Given widespread acceptance of this understanding of FPIC from political circles, UN human rights bodies, and much of the academic community, FPIC should not be considered a veto and, thus, FPIC is compatible with Canadian constitutional law.

FPIC and Treaties

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[55] Gloria Galloway, "Trudeau's promises to aboriginal peoples feared to be unachievable", *The Globe and Mail* (22 October 2015), online: <www.theglobeandmail.com>.
[56] *Ward*, *supra* note 7 at 6.
[57] *Anaya*, *supra* note 21 at 16.
[58] *Ibid*.
[59] *Sparrow*, S*upra* note 45.
[60] "Canada will implement UN Declaration on Rights of Indigenous Peoples: Bennett", *Metro News* (13 November 2015), online: <www.metronews.ca>.

The existence of treaties in Canada, and particularly on-going issues concerning the interpretation of treaties, significantly complicates the questions of which territory FPIC applies to and to whom the duty to consult is owed. However, a focus on its impact on Indigenous communities as a standard for consent being required rather than contested for interpretation of historical treaties may be helpful. Indeed, as Anaya notes, the idea that consultation is only required on lands recognized as Indigenous lands under domestic law is

> misplaced, since commensurate with the right to self-determination and democratic principles, and because of the typically vulnerable conditions of indigenous peoples, the duty to consult with them arises whenever their particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement.[61]

As such, Anaya seems to suggest a more appropriate focus for the state would be the impact upon Indigenous peoples, regardless of particular contested interpretations of treaties. This would seem to suggest that a commitment to implementing UNDRIP would lead the government to work with the Indigenous groups to address concerns and secure consent rather than relying on contested treaty language concerning extinguishment of rights and title to avoid consultation.

Such an argument should not, however, be interpreted as undermining Indigenous peoples' treaty rights, whether they arise from historic treaties or modern treaties. Indeed, Article 37 of UNDRIP affirms the significance of treaties and other agreements with states, as does the preamble.[62] However, in the absence of a clear message from UNDRIP concerning specifics of treaty interpretation, Anaya's suggestion of focusing on the potential impact of projects on Indigenous communities seems appropriate and in keeping with evolving Canadian jurisprudence on the duty to consult.

III. FPIC AND CURRENT ISSUES IN CANADA

Regarding the implementation of the duty to consult, it is helpful to distinguish between project approvals covered by Article 32 of UNDRIP and administrative or legislative measures under Article 19. For specific resource projects, consultation is now typically carried out through the Environmental Assessment (EA) process.[63] However, for major legislative measures affecting Indigenous peoples this remains unclear. Indeed, national and provincial legislative issues raise profound difficulties in terms of how consent is given. Obtaining consent from every one of the six hundred and thirty-four recognized band councils would seem impossible and impractical. In lieu of these approaches, the Assembly of First Nations (AFN) and other national Aboriginal organizations would seem to be the next best approach. However, the legitimacy of these groups is highly disputed. Thus, at the end of this section, the idea of an Aboriginal parliament (or "House of First Peoples") that was raised by the Royal Commission on Aboriginal

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[61] *Anaya*, *supra* note 21, 15.
[62] *UNDRIP*, *supra* note 1 at art 37(1).
[63] See generally: Jeffrey Thomson, *The Duty to Consult and Environmental Assessments: A Study of Mining Cases from Across Canada* (MES Thesis, University of Waterloo Faculty of Environmental Studies, 2015) [unpublished].

Peoples is revisited, and lessons from the experience of Sámi Parliaments in Scandinavia are discussed.

Article 32: FPIC for Project Approvals

Several major natural resource development projects currently underway in Canada illustrate the potential impact of FPIC. The Northern Gateway Pipeline, which will be discussed in further detail below, faced litigation from seven First Nations bands seeking an injunction against its approval, which the Federal Court of Appeal granted in June 2016.[64] Energy East faces strong opposition from affected Mohawk peoples as well as from the Assembly of First Nations of Quebec and Labrador.[65] Petronas Northwest's multi-billion dollar liquefied natural gas plant also faces opposition from Lax Kw'alaams First Nation, which rejected a one-billion dollar impact benefit agreement last year.[66] Lax Kw'alaams also filed a lawsuit in December seeking an injunction against Petronas' proposed project which will likely cut to the core of what a "substantial and pressing public purpose" entails under the *Sparrow-Tsilhqot'in* test.[67]

Several states have enacted legislation that requires FPIC (see section I),[68] and one possible approach to implement the FPIC standard for EA related projects would be through legislation. Section 91(24) of the *Constitution Act*, *1867* grants the federal government legislative authority over Aboriginal peoples and could likely be used to justify such legislation against possible provincial challenges. Amendments to the *Canadian Environmental Assessment Act* (CEEA) and comparable provincial legislation could specify that projects require FPIC from Indigenous peoples affected. A 2011 AFN submission concerning the CEEA to the House of Commons Standing Committee on the Environment and Sustainable Development on the CEEA may provide some guidance in this regard.

The AFN submission explicitly states: "the term 'free, prior and informed consent' should be referenced in the language of the Act, and the Act should further specify the circumstances under which free, prior and informed consent of First Nations must be secured."[69]

[64] Jason Proctor, "Northern Gateway pipeline approval overturned", *CBC News* (30 June 2016), online: <http://cbc.ca/news>.

[65] Philip Authier, "Mohawks threaten to block Energy East pipeline, saying project is threat to way of life", *National Post* (14 March 2016), online: <http://news.nationalpost.com>.

[66] "Lax Kw'alaams Band reject $1B LNG deal: Experts say the project could still go ahead without the First Nation's consent", *CBC News* (31 May 2015), online: <www.cbc.ca/news>.

[67] "Another aboriginal-title lawsuit might help fill a yawning gap", Editorial, *The Globe and Mail* (24 September 2015), online: <www.theglobeandmail.com>.

[68] *Gilbert & Doyle*, *supra* note 26 at 310. Legislation affirming Indigenous land rights has been passed in Australia, the Philippines, Venezuela, and Greenland for example.

[69] Assembly of First Nations, "Submission to the House of Commons Standing Committee on the Environment and Sustainable Development: Canadian Environmental Assessment Act Seven-Year Review", (28 November 2011) at 13, online: <www.afn.ca> [AFN, "Submission to the House of Commons"].

In terms of the specifics of what requiring FPIC in the Act would require, several other recommendations of the AFN submission are also of note, particularly surrounding the "prior" and "informed" elements of FPIC. The submission further suggests amendment of the CEEA to (1) require engagement of Aboriginal peoples earlier in the Environmental Assessment process by requiring consultation of First Nations on scoping decisions, parameter setting for assessment, and methodologies for assessing environmental impact, and (2) require development of plain language summaries during the scoping process that respond directly to concerns of Aboriginal peoples on a nation-to-nation basis.[70]

The AFN submission further suggests "requiring" use of Aboriginal traditional knowledge where available, rather than just allowing it as is currently the case in the CEEA.[71] As Carmen argues, "informed" includes the right inclusion of knowledge of traditional elders and traditional knowledge holders in decision-making.[72] The AFN submission notes that the FPIC standard "means that the bridge between traditional knowledge and western scientific knowledge needs to be substantially strengthened, if not reconstructed."[73]

The ongoing litigation against the Northern Gateway Pipeline (NGP) illustrates the value of these proposals. Indeed, the present issues lead some First Nations to not participate in the EA process at all; Chief Terry Teegee, of the Carrier Sekani Tribal Council, stated: "There was no consultation. We didn't participate in the Joint Review Panel process because it didn't address the issues that we wanted, in terms of the cumulative impacts of the project as well as our title and rights."[74] Seven First Nations bands seeking an injunction against NGP note being consulted too late, flawed environmental impact assessment methods, and not being given adequate resources for traditional use/knowledge studies as key to their opposition. Particularly, they take issue with the Environmental Assessment, which considered NGP's effects on all affected Aboriginal peoples "on balance" (i.e., on average) rather than the unique effects upon each First Nation's unique rights."[75] In these concerns we can see a clear violation of a principle advocated for by UNSR Anaya—that the "consultation procedure itself should be the product of consensus."[76]

Ultimately, however, such legislative measures are prone to reversal or dilution subject to political changes much more easily than any constitutional amendment to entrench FPIC.

[70] *Ibid* at 5.
[71] *Ibid* at 5–6.
[72] Andrea Carmen, "The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress", in *Hartley, Joffe & Preston*, *supra* note 25, 120 at 124–125.
[73] AFN, "Submission to the House of Commons", *supra* note 67 at 6.
[74] Laura Kane, "First Nations' challenges of Northern Gateway pipeline to be heard in court", *The Globe and Mail* (30 September 2015), online: <www.theglobeandmail.com>.
[75] *Gitxaala Nation v R*, [2015] FCA 73 (Factum of the Appellant Haisla Nation) at para 26; Sasha Boutilier, "Uncertain by Definition: Current Legal and Policy Issues Pertaining to Implementation of the Duty to Consult", (2016) 1:1 *Intra Vires Undergraduate LJ* 12 at 14–15.
[76] *Anaya*, *supra* note 21 at 18.

Following the 1993 landmark *Mabo v Queensland*[77] ruling in Australia, several legislative responses, such as the *Native Title Act*, *1993*, were taken by the Labor Party under Prime Minister Paul Keating, which controlled the Australian parliament. However, several of these changes were rolled back or diluted under Prime Minister John Howard's more conservative government.[78] The other option in this situation would be to pursue a constitutional amendment stating that FPIC is required. Canada would be the first state to voluntarily amend its constitution to require such, as opposed to having this requirement imposed by the judiciary, as has been the case in Belize and Columbia (see section I). [79]

Article 19: FPIC for Administrative and Legislative Measures

While FPIC on project-specific measures of the type typically addressed through the Environmental Assessment Processes[80] could be accomplished by amendments to environmental assessment legislation—as has already been proposed by the AFN—the task posed by Article 19 of ensuring FPIC for "legislative or administrative measures" affecting Indigenous peoples remains daunting. Only a cursory look at legislative measures affecting Indigenous peoples under the Harper administration illustrates the need for national procedures for consultation and for FPIC. Legislative measures such as the CEEA, omnibus bills, the *Safe Drinking Water for First Nations Act*,[81] the *First Nations Financial Transparency Act*,[82] and the *First Nations Control of First Nations Education Act*[83] provoked not only pronounced backlash from Aboriginal peoples due to a lack of meaningful consultation but also concerns as to the

[77] [1992] HCA 23.
[78] Chris Gibson, "Cartographies of the Colonial Capitalist State: A Geopolitics of Indigenous Self-Determination in Australia", (1999) 31:1 *Antipode* 45 at 54, 64, 72.
[79] While the 2008 Ecuadorian constitution requires "free prior informed consultation" with the goal of obtaining consent, it does not in fact require consent and it is unclear what the Constitution provides in cases where consent is not given. See: *Constitution of the Republic of Ecuador* (published in the Official Register, 20 October, 2008), art 57(7), online: <http://pdba.georgetown.edu>. See also: Memorandum from Shearman & Sterling LLP to Land Issues Working Group, Customary Land Tenure Chart (5 November 2013) at 13, online: <http://www.laolandissues.org/wp-content/uploads/2014/05/Customary-Land-Tenure-%E2%80%93-Examples-of-Laws-from-Various-Countries.-Shearman-Sterling-LLP-2012.pdf>. See also: David Cordero Heredia, "The prior consultation right in the construction of the Plurinational State of Ecuador," (New York: Cornell University, 13 May 2014) at 56, online: <http://repositorio.educacionsuperior.gob.ec/handle/28000/1307>.
[80] It merits note that in *Hupacasath v Canada (Minister of Foreign Affairs)*, 2013 FC 900, [2014] 1 CNLR 106, in which Hupacasath First Nation sought an injunction against the Canada-China Foreign Investment Promotion and Protection Agreement. the Federal Court ruled the duty to consult could extend to any measures (including international treaties) with non-speculative, appreciable effect on Aboriginal peoples. However, in practice, Aboriginal claimants have only been successful in establishing a duty to consult on project-specific measures. This point was upheld by the Federal Court of Appeal in 2015 [*Hupacasath*].
[81] SC 2013, c 21.
[82] SC 2013, c 7.
[83] Bill CC-33, *An Act to establish a framework to enable First Nations control of elementary and secondary education and to provide for related funding and to make related amendments to the Indian Act and consequential amendments to other Acts*, Second Session 41st Parliament, House of Commons, First Reading April 10, 2014.

legitimacy of National Aboriginal Organizations (NAOs), particularly the AFN. Both these concerns were profoundly manifest in the rise of the Idle No More movement in 2012.[84]

Examination of the TRC recommendations reveals that the federal parliament will be expected to introduce other significant legislation, including an Aboriginal Languages Act,[85] Aboriginal child-welfare legislation,[86] an act establishing a National Council for Reconciliation,[87] and Aboriginal education legislation.[88] Further, the TRC calls for significant and potentially controversial amendments to *The Criminal Code of Canada*.[89] While the TRC recommendations are conspicuously silent on *Indian Act* reform—likely due to its extraordinarily contentious history—it is an issue that looms constantly in the backdrop of Indigenous–state relations in Canada.[90]

A topic such as *Indian Act* reform illustrates the challenges of securing FPIC, absent a clear process for national legislative decisions. There are currently six hundred and thirty-four recognized First Nations governments or band councils in Canada. The prospect of securing consent from each is daunting to the point of being impossible. For example, many band councils opposed amendments to the *Indian Act* focused on gender equality. More recently, negotiations with the Harper government over the *First Nations Control of Education Act* proved politically disastrous for AFN National Chief Shawn Atleo, leading to his resignation.[91] As recently as March 2016, pronounced conflict emerged regarding the exclusion of NWAC, the Council of Aboriginal Peoples, and provincial Aboriginal organizations from climate change consultations in British Columbia.[92] While it is problematic to emphasize internal conflicts in Indigenous politics—the right to disagree is fundamental to political life—there do seem to be very real concerns regarding representation and legitimacy in NAOs, which could prove troubling if these organizations are to take on a central role in strengthened national FPIC processes.

As is made clear from the preceding, the potential scope of this clause is alarmingly broad if not viewed in the context of Article 46. Reading Article 19 in the context of the principles of good governance, good faith, and democracy—as Article 46(3) of UNDRIP requires—would suggest a more narrow interpretation of which measures triggering the FPIC

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[84] Wab Kinew, "Idle No More Is Not Just An Indian Thing", in The Kino-nda-mini Collective, eds, *The Winter We Danced: Voices from the Past, the Future, and the Idle No More Movement* (Winnipeg: ARP, 2014) 95 at 97; Jeff Denis, "Why Idle No More Is Gaining Strength, And Why All Canadians Should Care", in The Kino-nda-mini Collective, *Hupacasath*, *Supra* note 80, 217 at 218.
[85] *TRC*, *supra* note 2 at Call to Action 14.
[86] *Ibid* at 1.
[87] *Ibid* at 6.
[88] *Ibid* at 2.
[89] *Criminal Code*, RSC 1985, c C-46, s 319.
[90] Douglas Sanderson, "Overlapping Consensus, Legislative Reform and the Indian Act", in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: UTP, 2016).
[91] "Shawn Atleo resigns as AFN national chief", *CBC News* (2 May 2014), online: <www.cbc.ca>.
[92] Elizabeth McSheffrey, "Indigenous leaders shocked by exclusion from climate change meeting", *National Observer* (7 March 2016), online: <www.nationalobserver.com>.

requirement in Article 19 should be favoured. A Native Council of Canada (NCC) proposal for what requires consultation provides perhaps a more suitable definition: "directly affect areas of exclusive Aboriginal jurisdiction...or where there is a substantial impact of a particular law on Aboriginal peoples."[93] This approach would be consistent with current Canadian law concerning the duty to consult, which requires consultation where effects are appreciable and non-speculative.[94]

Revisiting the House of First Peoples

While a number of previous commissions have sought to address Aboriginal representation in Canadian political institutions, these approaches would not seem to fulfill the FPIC standard. For example, the Charlottetown Accord's proposal for Aboriginal constituencies in both the House and the Senate would certainly increase Aboriginal representation in Canadian institutions but would not satisfy FPIC's suggestion for national legislation, since a handful of reserved seats does not and cannot translate to widespread consent to legislation. RCAP's recommendation to establish a House of First Peoples, by contrast, could conceivably fulfill the FPIC standard for national legislative matters, provided an appropriate institutional mandate and authority is present.

The Royal Commission on Aboriginal Peoples' (RCAP) landmark 1996 report recommended the passage of an Aboriginal Parliament Act that would create a body representing Aboriginal peoples within the federal government and advise Parliament on issues affecting Aboriginal peoples.[95] As RCAP notes, this idea was first proposed by the Native Council of Canada (now the Congress of Aboriginal Peoples) during negotiations on the Charlottetown Accord.[96] The NCC proposed that either the House of First Peoples "have the power to veto certain legislation put before it, or that passing such legislation require a double majority of the House of Commons and the House of First Peoples."[97]

As Melissa Williams notes, in considering this proposal, RCAP looked to the Sámi Parliaments in Norway, Finland, and Sweden.[98] It is helpful to examine the challenges and developments over the past twenty years regarding the Sámi Parliament (Sámediggi) model when considering the possibility of a House of First Peoples in Canada. Among the Nordic

[93] Native Council of Canada [Congress of Aboriginal Peoples], "House of the First Peoples", paper tabled in Working Group II of the Continuing Committee on the Constitution, 31 March–2 April 1992, Canadian Intergovernmental Conference Secretariat document 840-614/015 (As cited in RCAP, "Volume 2, Chapter 3, Appendix 3B," at 411.

[94] *Hupacasath*, *supra* note 80 at para 3; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 46; *R v Douglas*, 2007 BCCA 265 at para 44.

[95] Canada, Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996) [*RCAP*].

[96] Canada, Royal Commission on Aboriginal Peoples, *Restructuring and Relationships*, vol 2 (Ottawa: Canada Communication Group, 1996) at 411 [RCAP, *Restructuring and Relationships*].

[97] See *RCAP*, *Ibid*.

[98] Melissa Williams, "Sharing the River: Aboriginal Representation in Canadian Political Institutions" in David Laycoch, ed, *Representation and Democratic Theory* (Vancouver: UBC Press, 2004) 93 at 100 [*Williams*].

countries, the Sámediggi in Norway is widely recognized as having more influence than other groups and should thus be the focus of a comparative analysis.[99] The Norwegian Sámi Rights Commission, established in 1980, issued its report in 1985 which called for the creation of a Sámi Parliament.[100] The *Sámi Act* of 1987 created this legislative body, and the first elections were held in 1989.[101] Thirty-nine representatives are elected from seven multi-member Sámi constituencies.[102]

In 2005, Norway strengthened consultation procedures for the Sámediggi. A 2009 ILO progress report notes with satisfaction the development of these procedures in 2005 for relations between the Sámediggi and Norwegian National Parliament ("Storting") and states they are in the spirit of ILO consultation standards.[103] Eva Josefsen et al. note that Norway's passage of ILO Convention No. 169 was a strong motivator for the development of its consultation standards.[104] Norway's Sámediggi is viewed as fulfilling its obligations under ILO Convention No. 169.[105] Thus, it would seem merely a matter of changing the free, prior, and informed consultation protocol to a FPIC protocol in order to meet the UNDRIP standard in Norway.

However, three concerns have emerged regarding the Sámi Parliament that are of particular relevance to Canada. The Sámediggi has been criticized for failing to (1) provide real self-determination; (2) reflect Sámi political traditions, and (3) adequately address Sámi women's issues. Many Sámi people and scholars criticize the Sámi Parliament as not really providing meaningful self-determination, which is viewed as coming from the local or community level.[106] Further, the Parliament merits criticism because it was developed in less than full consultation with the Sámi people and fails to reflect Sámi political traditions in its institutional arrangement.[107] Additionally, as Kuokkanen notes, many Sámi women are critical of the Sámi Parliaments as "male political arenas where women's voices and views were not adequately heard" even when women formed a majority in the Sámi Parliament.[108] In the context of the historical and continuing tensions between NWAC and the AFN in Canada, these concerns

[99] Eva Josefsen, Ulf Mörkenstam & Jo Saglie, "Different Institutions within Similar States: The Norwegian and Swedish Sámediggis" (2015) 14:1 *Ethnopolitics* 32 at 32–33 [*Josefsen*].
[100] Peter Niemczak, "Aboriginal Political Representation: A Review of Several Jurisdictions", Library of Parliament, Parliamentary Information and Research Service (27 October 2008) at 3–4.
[101] *Ibid* at 4.
[102] Josefsen, *supra* note 99 at 40–41.
[103] International Labour Organization, "Observation (CEACR) Indigenous and Tribal Peoples Convention, 1989 (mo. 169) – Norway," 2009, online:
<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2306517>
[104] *Josefsen*, *supra* note 99 at 39, 45.
[105] *Ibid*.
[106] Rauna Kuokkanen, "Self-determination and Indigenous Women – 'Whose Voice Is It We Hear in the Sámi Parliament?" (2011) 18:1 *Intl J Minority & Group Rights* 39 at 45 [*Kuokkanen*]; *Josefsen*, *supra* note 99 at 41.
[107] *Ibid* at 52–53.
[108] *Ibid* at 53.

seem highly relevant to necessitate a strong role for the NWAC and other Aboriginal women's organizations in any consideration of an Aboriginal parliament.[109]

The prospect of an Aboriginal Parliament in Canada is further complicated by the diversity of the Indigenous peoples within Canada. While the Sámi represent the only Indigenous people in Norway, Aboriginal peoples in Canada encompass First Nations, Métis, and Inuit per the *Constitution Act*, *1982*, not to mention the great diversity within these peoples (especially within the First Nations faction).[110] Measures affecting one group may not affect the others. For example, *Indian Act* reform will not affect the Inuit. Other measures may affect Métis and First Nations, but not Inuit or other combinations of this sort. It is beyond the scope of this paper to provide a full analysis of the technical issues involved in addressing this challenge; indeed, such issues should be discussed in fully collaborative consultation with Aboriginal peoples. However, it should be briefly noted that a division of seats in the House of First Peoples based roughly on population would seem most appropriate. Further, one potential option would be a committee (or perhaps caucus) structure with each faction's representatives on one respective committee (i.e., First Nations, Inuit, and Métis). Majority approval would thus be required from the specific committee (First Nations, Inuit, or Métis) if it did not affect all Aboriginal peoples. For example, while *Indian Act* reform would affect First Nations, it would not affect Inuit and Metis and would thus be referred to the First Nations committee. Other legislation affecting all Aboriginal peoples—CEEA reform for example—would be considered by the Parliament as a whole.[111]

In consultations on how to implement UNDRIP (which are hopefully upcoming in Canada) this proposal certainly merits revisiting, and Indigenous voices should be foremost in its consideration, particularly in the context of the lukewarm reception it received following RCAP. Article 19 of UNDRIP is clear that Indigenous peoples must be consulted through "their own representative institutions" in seeking FPIC.[112] Thus, if this procedure were to truly fulfill the mandate of Article 19, it would be necessary for Indigenous peoples to truly consider the "House of First Peoples" *their* institution. It bears noting that NAOs—the very organizations that would ideally be consulted and that would lead work on the proposal—would quite likely be hesitant about the proposal, as it would largely supplant their own purpose.

As Kuokkanen notes, the Sámi Parliaments "cannot be considered self-determining or self-governing institutions."[113] However, this is not a flaw in the Sámi Parliament itself so much as the institutional structure surrounding it, particularly the lack of meaningful local Indigenous

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[109] Joanne Barker, "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada" (2008) 60:2 *American Q* 259.
[110] See for instance: James Frideres, "Aboriginal Identity in the Canadian Context" (2008) 28:2 *Can J Native Studies* 313 at 324.
[111] The Native Council of Canada proposal deferred judgement on which representation scheme was most appropriate. This is clearly a matter properly negotiated and decided by the Aboriginal peoples affected.
[112] *UNDRIP*, *supra* note 1 at art 19.
[113] *Kuokkanen*, *supra* note 106 at 39; Rauna Kuokkanen, "Achievements of Indigenous Self-Determination", The Case of the Sámi Parliaments in Finland and Norway", in JM Beier, ed, *Indigenous Diplomacies* (Palgrave, New York, 2009) 97.

governance in Norway. This challenge illustrates the importance of appropriately conceptualizing an Aboriginal parliament in Canada. RCAP states the following:

> [T]he creation of an Aboriginal parliament would not be a substitute for self-government by Aboriginal nations. Rather it is an additional institution for enhancing the representation of Aboriginal peoples within Canadian federalism.[114]

Pushing RCAP's conceptualization further, the House of First Peoples in Canada could be described as, ideally, an institution that would seek to support self-determination at a local level, rather than being an institution of self-determination in and of itself.

CONCLUSION

Williams compellingly presents recognition of Aboriginal and non-Aboriginal peoples in Canada's "shared fate" as an alternative conception of citizenship to traditional understandings grounded in shared identity. Recognition of this shared fate—the fact that, as Chief Justice Lamer famously put it in *Delgamuukw*, "we are all here to stay"[115]—allows preservation of different identities while placing the focus on just relations.[116] FPIC provides a sound framework for these just relations, which are fundamental to the achievement of Indigenous peoples' right to self-determination. As discussed earlier, legislative measures to implement UNDRIP's FPIC standard could and should be taken, particularly amendments to the CEEA. In the long-term, however, constitutional amendments entrenching FPIC and creating a House of First Peoples would best serve to protect Indigenous rights and mark a true sign of progress towards reconciliation.

[114] *RCAP*, *supra* note 95 at 363.
[115] *Delgamuukw*, *supra* note 42 at para 186.
[116] *Williams*, *supra* note 98 at 104–105.

APPENDIX 1: FPIC IN UNDRIP

Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 28 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 11 equal in quality, size and legal status or of monetary compensation or other appropriate redress

Article 29 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 32 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. 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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

APPENDIX 2: RCAP RECOMMENDATIONS ON ABORIGINAL PARLIAMENT AND THE HOUSE OF FIRST PEOPLES

Recommendations

The Commission recommends that:

2.3.51

The federal government, following extensive consultations with Aboriginal peoples, establish an Aboriginal parliament whose main function is to provide advice to the House of Commons and the Senate on legislation and constitutional matters relating to Aboriginal peoples.

2.3.52

The Aboriginal parliament be developed in the following manner:

(a) the federal government, in partnership with representatives of national Aboriginal peoples' organizations, first establish a consultation process to develop an Aboriginal parliament; major decisions respecting the design, structure and functions of the Aboriginal parliament would rest with the Aboriginal peoples' representatives; and

(b) following agreement among the parties, legislation be introduced in the Parliament of Canada before the next federal election, pursuant to section 91(24) of the Constitution Act, 1867, to create an Aboriginal parliament.

2.3.53

(a) Aboriginal parliamentarians be elected by their nations or peoples; and

(b) elections for the Aboriginal parliament take place at the same time as federal government elections to encourage Aboriginal people to participate and to add legitimacy to the process

2.3.54

The enumeration of Aboriginal voters take place during the general enumeration for the next federal election.

APPENDIX 3: NATIVE COUNCIL OF CANADA PROPOSALS FOR HOUSE OF FIRST PEOPLES' ELECTORAL SYSTEM

Excerpted from: RCAP, Volume 2: Restructuring the Relationship, Chapter 3, p.411-412. *http://caid.ca/RRCAP2.3.B.pdf*

A number of options were proposed for selection of representatives to the House of the First Peoples:

1. by electoral districts representing all Aboriginal peoples within that district;

2. by electoral districts representing each Aboriginal people (that is, separate representation for First Nations, Inuit and Métis people);

3. through appointment by Aboriginal organizations or Aboriginal governments;

4. through indirect elections in which Aboriginal associations or Aboriginal governments represent each Aboriginal people; or

5. through indirect elections in which an electoral college mechanism is established composed of delegates of each Aboriginal people.

As the proposal noted, the method of selection would have to reflect Aboriginal principles of democracy within their own institutional framework. In many instances representatives would be elected directly, but in a number of nations indirect representation might reflect more accurately traditional Aboriginal ways, in which consensus decision making is favoured over the more adversarial approach of non-Aboriginal Canadian politics.