BRIEFING NOTE

To: UN Working Group on the issue of human rights and transnational corporations and other business enterprises

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Re: Recommendations for Aligning Canadian Business Practices with International Human Rights Standards

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1. INDIGENOUS RIGHTS TO CONSULTATION IN CANADA

In 1982, Canada amended its constitution to recognize and affirm Aboriginal and Treaty rights of indigenous people in Canada.[1] Canadian courts have interpreted this to mean that the federal and provincial governments of Canada (the "Crown") have a duty to consult with – and accommodate – indigenous people when they consider an act that may impact constitutionally-protected indigenous rights.[2]

The duty to consult and accommodate is based in part on pre-constitutional laws which required the Crown to uphold "honourable" conduct during the process of colonization.[3] The requirement that the Crown act honourably has been enforced by Canadian courts since 1997,[4] and has only existed as a requirement for prospective decision-making since 2004.[5] It is generally triggered by decisions allowing businesses to develop indigenous lands.

The goal of the duty to consult and accommodate is to help repair and grow the relationship between the Canadian state and indigenous peoples. However, the duty to consult and accommodate has significant operational flaws that has led to disappointment for many indigenous peoples. Specifically,

- Consultation is often underfunded or unfunded, rendering it of limited value;[6]
- Large-scale projects built before consultation was carried out often have serious ongoing impacts, but consultation is often considered no longer available because the impacts have already occurred;[7]
- The right of an indigenous group to meaningfully withhold consent is limited;[8]
- Consultation is often treated as an procedural box to be ticked, rather than a site for ongoing engagement through a Nation-to-Nation relationship;
- Crown officials who engage in consultation tend to focus on the impact on a particular site, rather than indigenous peoples' jurisdiction over their entire territory;

- Crown officials require evidence of site-specific uses before taking indigenous input seriously, jeopardizing indigenous intellectual property rights to traditional knowledge;[9]
- Crown agencies frequently fail to clearly delineate which ministries or government officials are responsible for consultation, leading to bureaucratic confusion;[10]
- Crown agencies sometimes informally contact indigenous peoples without indicating that they are "consulting," limiting their opportunity to exercise constitutional rights;
- The Crown sometimes delegates consultation to officials or businesses who lack the authority to influence the outcome of the process;
- Consultation is not uniformly applied to legislative processes;[11]
- The duty to consult and accommodate applies to Crown decisions, but there is no binding protocol to guide corporate activity that effects indigenous lands and peoples.

2. INCORPORATING UNDRIP INTO CANADIAN LAW

To address the problems in Canada's indigenous rights framework and to meaningfully implement the United Nations "Protect, Respect and Remedy" Framework in Canada, there must be a clear expectation that businesses will act in compliance with the principle of Free, Prior and Informed Consent ("FPIC") as articulated in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP").

UNDRIP lays out the substantive rights that indigenous peoples have identified as the *minimum standard* necessary to maintain their "dignity, survival and well-being" within States.[12] UNDRIP anchors indigenous rights with the fundamental principle that indigenous peoples have the right to self-determination[13] and the right to be free and equal with other peoples.[14] FPIC calls for governments to seek the consent of indigenous peoples when an act – including business development and resource extraction – is contemplated that may affect indigenous rights.

In 2016, Canada announced that it was a full supporter of UNDRIP.[15] However, in subsequent statements Canada explained that UNDRIP will be implemented "in accordance with the existing constitution."[16] This qualifying language is highly problematic. It suggests that Canadian law is already 'consistent' with UNDRIP and therefore 'good enough,'[17] or that UNDRIP will be limited by what is feasible or already 'legal' in Canada.[18]

Although FPIC is now the standard that must be met in order to provide the legal, moral, and social support for business projects to go ahead, there are few systemic or regulatory commitments in place in Canada to uphold FPIC,[19] and provincial governments have not committed to using FPIC to inform their policies. As a result, indigenous consultation does happen in Canada, but it is often in a checkerboard and erratic fashion that does not reflect FPIC principles.[20] This creates uncertainty for businesses who aim to engage with indigenous people and diminishes the protections for indigenous rights in Canada.

One foundation for applying FPIC in Canada has emerged out of recommendations for environmental regulatory reform made by a four-person Expert Panel (the "Panel"), established to review Canada's environmental assessment processes.[21] The clearest messages conveyed to the Panel by participants with respect to FPIC was that the Government of Canada needs to engage in a dialogue about FPIC with indigenous peoples across the country.[22] The Panel also found that:

> When it comes to a consideration of FPIC, the main elements are clearly stated in the words themselves – free, prior and informed**.** FPIC is not in conflict with the duty to consult and accommodate; to the contrary, it should strengthen and supplement consultation and accommodation. **To reflect FPIC, all Indigenous Peoples who are impacted by a project have the right to provide or withhold consent.**[23]

The Panel recommended that indigenous peoples be included in decision-making at all stages of environmental impact assessments, in accordance with their own laws and customs.[24] This recommendation should inform all business decisions that may affect indigenous rights.

3. GOOD PRACTICES: GRAND BEND WIND PROJECT

Each indigenous community has its own vision for how its rights should be exercised, and whether – and on what conditions – it will consent to development. The following is a case study of for First Nations which gave consent on terms benefitting all parties through an equity partnership agreement in a renewable energy project. This case study illustrates that a relationship-fostering approach to consultation, consent, and economic development can lead to positive outcomes for both businesses and the indigenous peoples who host them.

In 2009, the province of Ontario introduced the *Green Energy Act*[25], legislation designed to phase out coal production and rapidly introduce a renewable energy (wind, solar, biomass, hydro) economy to the province. Fixed price contracts for large renewable projects (greater than 500kW) were issued to eligible proponents by way of a Feed-in-Tariff Program to develop certainty regarding the return on investment. Policies proactively incentivizing indigenous ownership were implemented to minimize project interference. Rather than mandating consent, the province of Ontario set out to implement policies that would facilitate it from indigenous groups by way of their meaningful participation in these projects.

The province created an Aboriginal Renewable Energy Fund to allow First Nations to explore potential partnerships related to proposed projects in their territories, engage in prefeasibility studies, and engage in partnership negotiations with a view to reaching agreement.[26] Priority points were awarded to project applicants seeking to develop a project with an indigenous partner, thereby increasing the likelihood of a successful application. In addition, an increased electricity purchase price called an 'Aboriginal Price Adder', indexed to proportionate indigenous project ownership, was permitted to be charged by successful applicants, thereby increasing the amount of revenue generated by the project.

On their own, these incentives would likely have been insufficient to create an environment conducive to achieving consent. A sticking point in the proponent/indigenous group negotiations would be how vulnerable communities with poor to non-existent credit histories

would be capable of obtaining the funds needed to buy a meaningful share of a proposed project at a low enough interest to allow for a meaningful return.

A foundational pillar of the FIT Program's indigenous incentives, therefore, was the inclusion of an Aboriginal Loan Guarantee Program.[27] With this program, the province provides a government guarantee to assist credit-challenged indigenous groups to secure the financing they need to purchase an ownership stake in renewable energy and transmission projects in the province.[28]

Through this regime, in 2012, Toronto based renewable energy company Northland Power Inc. ("NPI") approached two indigenous governments located at the north and south ends of the St. Clair river (northeast of Detroit, MI, located on the Canadian side of the Canada/U.S. border), Walpole Island First Nation and Aamjiwnaang First Nation ("WIFN" and "AFN" respectively) to build a 100MW on-shore wind farm.[29] WIFN has long been active in asserting its rights to its traditional territory, and WIFN and AFN had no recent history in collaborating in any projects. Significant mistrust of wind projects and a strong anti-wind lobby in the surrounding counties contributed to a challenging environment to see these projects approved.[30]

However, despite an ongoing aboriginal title claim at one of the communities and significant mistrust of policies encouraging investment risk, loans, and indebtedness designed by the provincial government, WIFN and AFN formed a partnership with NPI to develop the project jointly, each holding a 50% ownership stake. The parties took full advantage of the provincial policy tools available to them.[31] Financial close for the senior construction financing was achieved in March of 2015, and the project entered commercial operation in May of 2016.[32]

In this case study, the government took responsibility for creating conditions conducive to consent: a regulatory environment in which proponents and indigenous groups were keen to participate. Certainly alternative models have seen the proponent largely taking this responsibility, however the strength of the *Green Energy Act* and the FIT Program is the government's continuing stake, by way of its policy tools and the ALGP, in the relationship itself. What is also clear from this example is the active and participatory nature of consent.

Whereas discussions regarding consultation characteristically revert to competing assessments of its adequacy, prolonging rather than avoiding conflict, consent is far easier to assess. In turn, in an assessment regarding the mitigation of risk, a demonstration that consent has been achieved is accordingly of much greater value than a determination that consultation has been adequate.

4. RECOMMENDATIONS

The UN Working Group on the issue of human rights and transnational corporations and other business enterprises could support indigenous peoples in Canada who are asserting their rights and interests within the framework of the *Guiding Principles on Business and Human Rights* through the following:

1. Stating clearly that compliance with the *Guiding Principles on Business and Human Rights* means that businesses will comply with the principle of FPIC when they contemplate acts that may affect indigenous rights, whether or not host states require it.

2. Call for Canada to reaffirm its commitment to the *International Convention on Civil and Political Rights*; *the International Covenant on Civil and Political Rights; the Indigenous and Tribal Peoples Convention, 1989 (No. 169)* of the International Labour Organization (ILO); UNDRIP; *the UN Guiding Principles on Business and Human Rights*; and its own Treaties with indigenous peoples.

3. Call for Canada to review its legislation in order to make FPIC binding upon businesses developing projects on traditional territories of indigenous groups.

4. Call for Canada's political recognition that FPIC includes a right for indigenous people to withhold consent.

5. Remind Canadian governments and companies that international laws also recognize indigenous peoples' right to substantively participate in decision-making.

6. Call for Canadian companies to subscribe and comply with international human rights standards, and for Canadian governments and lenders to require it as a mandatory condition of corporate operations.

7. Call for Canada to establish a Nation-to-Nation forum with equal representation from Canadian and indigenous governments to make decisions about consultation and consent.

8. Call on Canada to provide for stable and adequate funding for legal and technical assistance, to ensure full and independent participation by indigenous peoples to the decision-making process.

9. Call on Canada to implement FPIC in it environmental assessment processes.

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ENDNOTES

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[1] *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11, s 35.
[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 35.
[3] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103, 2010 SCC 53 at para 42, citing the recognition of this "Honour of the Crown" in the pre-constitutional *Royal Proclamation* (1763), R.S.C. 1985, App. II, No. 1. The Honour of the Crown likely owes part of its origin to Imperial law. See: Brian Slattery, "Aboriginal Rights and the Honour of the Crown." (2005) 29 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 433.
[4] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para 168.
[5] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511.
[6] Kaitlin Ritchie, "Issues associated with the implementation of the duty to consult and accommodate aboriginal peoples: threatening the goals of reconciliation and meaningful consultation" (2013) 46:2 UBC Law Rev 397.
[7] See eg *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 (in which a provincial court decided that a dam which flooded reserve lands prior to 1982 did not trigger any engagement).
[8] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 48. Compare with *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256 at para 76, 90-92 (where title has been proven, seeking consent is a necessary step in justifying a rights infringement).
[9] Policy manuals for various government agencies note that information provided by First Nations may be subject to federal or provincial access-to-information legislation. See eg: Indigenous and Northern Affairs Canada, *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), online: http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675#chp1_2.
[10] For example, the Province of Alberta's Aboriginal Consultation Office is responsible for directing consultation, but the Ministry of Indigenous Affairs, of which it is a part, has no authority over natural resource decisions. See: *The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015* (which, along with its predecessor, establishes the Aboriginal Consultation Office within the Ministry of Indigenous Affairs, as a matter of policy). Compare: *Designation and Transfer of Responsibility Regulation*, Alta Reg 80/2012, s 6, 10, enacted pursuant to the Government Organization Act, RSA 2000, c G-10 (transferring limited jurisdiction to that Ministry). In general, the Supreme Court of Canada has noted that the ability of government bureaucracy to split its jurisdiction so as to "avoid" consultation must be avoided. See: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650, 2010 SCC at para 62.
[11] This issue will soon be before the Supreme Court. See: *Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311, leave to appeal granted*: Chief Steve Courtoreille on behalf of himself and the members of the Mikisew Cree First Nation v. Governor General in Council, et a*l., 2017 CanLII 29943 (SCC).
[12] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Preamble.
[13] *Ibid*, Article 3.
[14] *Ibid*, Article 2.
[15] Mandate Letter for the new Minister of Indigenous and Northern Affairs (renamed from Aboriginal and Northern Development), available at http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter.
[16] Lorraine Land, "TRC@1: Pop goes the weasel words? Translating UNDRIP into action", *OKT Blog*, May 12, 2016, online: < http://oktlaw.com/trc1-pop-goes-weasel-words-translating-undrip-action/>.
[17] *Ibid*.
[18] *Ibid*.
[19] Lorraine Land, "Who's Afraid of the Big, Bad FPIC? The Evolving Integration of the United Nations Declaration on the Rights of Indigenous Peoples into Canadian Law and Policy", *Northern Public Affairs*, Volume 4 – Issue 2, May, 2017, online: < http://www.northernpublicaffairs.ca/index/magazine/volume-4-issue-2/whos-afraid-of-the-big-bad-fpic-the-evolving-integration-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-into-canadian-law-and-policy/>.
[20]*Ibid*.
[21] The Terms of Reference established for the Panel was to engage broadly with Canadians, indigenous peoples, provinces and territories, and key stakeholders to develop recommendations to the Minister of Environment and Climate Change on how to improve federal environmental assessment processes.

[22] Building Common Ground: A New Vision for Impact Assessment in Canada, Expert Panel Report, "2.3.1 Reflecting UNDRIP principles in impact assessment", available online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html#_Toc019>.

[23] *Ibid* (emphasis added).

[24] *Ibid*.

[25] *Green Energy Act, 2009,* SO 2009, c12, Sch. A.

[26] For more information on the current iteration of the Aboriginal Renewable Energy Fund, see online at: <http://www.aboriginalenergy.ca/aboriginal-renewable-energy-fund>.

[27] Ontario Financing Authority, *Aboriginal Loan Guarantee Program: Home Page,* Queen's Printer for Ontario 2014, online: <http:www.ofina.on.ca/algp>.

[28] As of 2014, the Ontario Financing Authority ("**OFA**") reported that the ALGP had leveraged $130 million in approved loan guarantees supporting the investments of eight communities, representing over 10,000 indigenous people, in four projects that have invested over $2.8 billion in the province. The ALGP envelope currently totals $650 million. *Ibid*.

[29] Information site for the Grand Bend Wind Farm located online: <http://grandbend.northlandpower.ca/>.

[30] See for example: <http://ontario-wind-resistance.org/2014/06/28/grand-bend-wind-project-approved-another-40-massive-turbines-along-huron-coast/>. A third indigenous community, initially interested in participating alongside WIFN and AFN, ultimately declined to participate as a result of these external pressures, but despite their reservations did obstruct WIFN and AFN from proceeding with the Project.

[31] See press briefing of Northland Power, online: <http://grandbend.northlandpower.ca/site/northland_power___grand_bend_wind_farm/assets/pdf/npi_gbwf_10.3x11.42_pr01_apr5_v2.pdf>.

[32] For a 360 degree video of the Grand Bend Wind Farm, see online at: <https://www.youtube.com/watch?v=-z0vApaVTes>.

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