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Free, Prior and Informed Consent in Canada:

Towards a New Relationship with Indigenous Peoples

Free, prior and informed consent is a principle that has been developed to describe important procedural and substantive aspects of the active engagement with and participation in decision making by Indigenous people with respect to projects and other activities affecting their ancestral land or their Indigenous rights. As a country, Canada is on a continued journey to redress the injustices of the past, to address the social and economic imbalance of the present, and most importantly, to set a path for the future.

In this new era of reconciliation, free, prior and informed consent is identified as an important issue for Indigenous peoples, for governments, for project proponents, for employers, and for the investment community—indeed for all Canadians. TD has sponsored this work with the hope that it will inform and support constructive dialogue on this important topic.

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PART I

INTRODUCTION

1. We have been asked to prepare a discussion paper analyzing the application in Canada of the principles of free, prior and informed consent for Indigenous peoples in respect of government measures that may affect them, and how this may comport with the similar domestic duty to consult, and if appropriate, accommodate Aboriginal peoples' interests.[1] This paper first reviews the principles of free, prior and informed consent under the 2007 United Nations Declaration on the Rights of Indigenous Peoples as well as Canada's evolving position on those principles and what weight they may carry. Second, we review Canadian law on the duty to consult and, if appropriate, accommodate Indigenous rights and interests. Third, from this review of the applicable domestic and international law, we suggest an approach to meeting the letter and spirit of these standards in practice. This approach is grounded in the need to facilitate reconciliation among Canada's governments, Indigenous peoples and the rest of Canadian society. We suggest:

(a) building a relationship with Indigenous peoples founded on mutual respect and trust, focused on furthering each other's long-term interests, and not simply concluding a transaction for short-term gain;

(b) approaching the relationship through a model of partnership;[2]

[1] This paper was authored by a team led by The Hon. Frank Iacobucci and including John Terry, Valerie Helbronner, Michael Fortier, and Ryan Lax. The views expressed in this paper are those of the authors based on their years of practice and are not to be taken as the views of any clients or other members of Torys LLP.

(c) providing Indigenous peoples with a meaningful opportunity to participate in both procedural and substantive dimensions; and

(d) involving governments to help align parties incentives, and otherwise facilitate appropriate consultation processes.

2. The Declaration sets out a statement from the international community on the manner in which international human rights law should apply to Indigenous people. Among other things, the Declaration addresses circumstances in which states must consult Indigenous[3] peoples when their rights or interests are potentially affected by a proposed measure, with the aim of obtaining their free, prior and informed consent, and circumstances in which states must refrain from action if that consent cannot be obtained. As part of Canada's constitutional protection of Aboriginal and treaty rights, Canadian courts have enunciated a duty to consult and, if appropriate, accommodate Aboriginal peoples when their rights, claimed or established, are potentially affected by a government action. Courts have adjudicated a significant volume of cases alleging deficiencies in consultation.

3. These international and domestic legal principles share a common purpose: to protect Indigenous peoples' underlying rights, to remedy the significant historical disadvantage and disenfranchisement Indigenous peoples have faced, and to provide the foundations for a more dignified ongoing relationship that reconciles Indigenous peoples' self-government and other rights with non-Indigenous people and governments of Canada. Both sets of principles are intended to provide a foundation for more responsible development activity in which Indigenous people are able to participate and from which they may benefit. While the purpose of this paper is not to review the history of Canada's relationship with Indigenous peoples, it is important to begin any discussion of Indigenous rights from this perspective.[4]

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[2] By "partnership" in this context we do not necessarily mean a legal partnership. Rather, we intend to emphasize the importance of understanding Indigenous consultation and, if appropriate, accommodation as a process in which two or more groups come together in the aim of mutual benefit in a manner that accommodates each other's interests.

[3] For the purpose of this paper we have used the term "Indigenous" when speaking about Indigenous peoples generally, and "Aboriginal" (referring to First Nations, Inuit and Métis peoples in Canada) when speaking directly about section 35 of the *Constitution Act, 1982* or Canadian jurisprudence.

[4] This history is discussed in greater depth in other publications. See for example: The Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg, MB: The Truth and Reconciliation Commission of Canada, 2015) ("Truth and Reconciliation Commission"); The Hon. Frank Iacobucci, "The Indian Residential School Legacy of Canada: A Tragic Past, A Hopeful Future" (The 2015 Larkin-Stuart Lecture delivered at the George Ignatieff Theatre, Trinity College, 3 November 2015) [publication forthcoming].

Canada's historical relationship with Indigenous peoples

4. Canada's history begins from one fundamental truth: when Europeans arrived in North America, they encountered Indigenous peoples who had lived here for many generations, since "time immemorial."[5] Those peoples established distinct cultures, societies, economies, forms of government and ways of life that pre-dated the arrival of Europeans and have continued, at least in some of these respects, after contact.

5. The British Crown often, but not always, entered into treaties with Indigenous peoples to define their mutual rights and obligations in what would become Canada, on a nation-to-nation basis. However, treaties were at times signed in the aftermath of violent confrontation or under forms of coercive pressure, and even when concluded, treaties were not always honoured in full or have been subject to linguistic misunderstanding. Though the French also settled in the lands that would become Canada, they did not formalize their relationship with Indigenous peoples through treaty.

6. For too long after Confederation, Indigenous peoples were treated as wards of the state, not citizens. They had no rights to vote, own property or move freely on and off reserves. Indigenous peoples were subject to an insufficient welfare system and were provided vastly inadequate education, health care, employment opportunities, potable water, sanitation, and other services. Many of these conditions continue in some places today.

7. From before Confederation, Canada operated a system of Indian Residential Schools, which forcibly removed Indigenous children from their families and communities in the aim of assimilating them into Canadian society. Families and communities were torn apart. Children were subject to abuse. At least 3,200 deaths were recorded, though burial records are scant and the actual total is likely higher. These schools have been variously described as "one of the gravest injustices in Canadian history,"[6] "the most disgraceful, harmful, racist experiment ever conducted in our history,"[7] and "cultural genocide."[8] The final such school closed in 1996. Their emergence as a public issue is discussed below.

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[5] See e.g. *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 at para. 2 ("Calder").

[6] Mayo Moran & Kent Roach, "Introduction: The Residential Schools Litigation and Settlement" (2014) 64:4 U.T.L.J. 479 at 480.

[7] Liberal Justice Minister Irwin Cotler, cited in George Jonas, "Residential schools were a savage solution to a lingering problem" *National Post* (16 January 2013), online: National Post <http://news.nationalpost.com/full-comment/george-jonas-residential-schools-were-a-savage-solution-to-a-lingering-problem>.

[8] Truth and Reconciliation Commission, *supra* note 4 at 1; The Right Honourable Beverley McLachlin, P.C., "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance" (Global Centre for Pluralism Annual Pluralism Lecture 2015, delivered at the Aga Khan Museum, 28 May 2015), online: Global Centre for Pluralism, <http://www.pluralism.ca/images/PDF_docs/APL2015/APL2015_BeverleyMcLachlin_Lecture.pdf>.

The modern imperative of reconciliation

8. More recently, there has been growing recognition by Canadian governments and citizens of the need to heal, improve, and repair the relationship with Indigenous peoples. A first significant step was taken in 1982, when the Constitution was amended to protect existing Aboriginal and treaty rights. Constitutionalization has given greater weight to enforcement of Aboriginal rights.

9. In the early 1990s, the Indian Residential Schools emerged as a public issue as survivors began to tell their stories. Through the 1990s and early-2000s, approximately 15,000 survivors commenced individual civil suits against the federal government and churches who ran residential schools; 23 class actions were launched. In the face of this, in May 2005, the federal government initiated a sea change in its policy toward survivors. It announced a comprehensive approach to resolving this legacy, including providing financial compensation for every survivor and settlement of legal claims.

10. As part of the settlement, the government established a Truth and Reconciliation Commission to educate Canadians on what happened, obtain records, assemble archives, and provide all concerned with an opportunity to tell their stories. In December 2015, the Commission released its final report, a multi-volume statement of its activities and methodology, the history of residential schools, their legacy and the issues and challenges that lie ahead.[9]

11. As part of this report, the Commission included 94 "Calls to Action" to reorient the relationship between Indigenous peoples and Canada.[10] Their unambiguous purpose is reconciliation. It is worthwhile to emphasize the Commission's definition of reconciliation:

> The Commission defines reconciliation as an ongoing process of establishing and maintaining respectful relationships. A critical part of this process involves repairing damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change. Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions. It is important that all Canadians understand how traditional First Nations, Inuit and Métis approaches to resolving conflict, repairing harm, and restoring relationships can inform the reconciliation process.[11]

12. The process of reconciliation is still beginning in earnest in Canada. There is much ground that all levels of government in Canada, Indigenous peoples and the rest of Canadian society have to cover. We approach the topic of this paper—the application of the international principles of free, prior and informed consent in Canada—in light of this history and through the lens of reconciliation. While this topic asks for legal analysis, it cannot be divorced from this history or broader social context.

13. The international principles of free, prior and informed consent have been incorporated into various corporate codes of conduct, and the Truth and Reconciliation Commission recommended the implementation of the Declaration by all Canadian governments and the private sector.[12] But the precise manner in which the principles of free, prior and informed consent apply in Canada is in its embryonic stages of development. It has spurred a lively debate regarding their scope, reach and implications for Canadian law and policy. The Canadian business community and Indigenous peoples alike would benefit from further direction from all levels of government. This paper does not advocate for a particular position, but contributes an approach in light of the purpose of reconciliation, discussed in Part IV below.

[9] Truth and Reconciliation Commission, *supra* note 4.

[10] *Ibid.* at 319-39.

[11] *Ibid.* at 16-17.

[12] *Ibid.* at 319-39; "The Equator Principles (June 2013)" *Equator Principles,* online: Equator Principles <http://www.equator-principles.com/resources/equator_principles_III.pdf> ("Equator Principles (June 2013)"); "The Ten Principles of the U.N. Global Compact" *United Nations Global Compact,* online: United Nations Global Compact <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

PART II

THE PRINCIPLES OF FREE, PRIOR AND INFORMED CONSENT

History and development of the principles of free, prior and informed consent

14. The concept of free, prior and informed consent was first articulated in the *Indigenous and Tribal Peoples Convention, 1989* (the ILO Convention) negotiated under the auspices of the International Labour Organization.[13] Article 16 of the ILO Convention guarantees to Indigenous peoples the right not to be removed from their lands unless necessary, and with their free and informed consent. If consent cannot be obtained, the ILO Convention requires that Indigenous peoples should not be removed without a public consultation process. It further establishes a right to return to the lands when possible, and if not possible, to be provided with full compensation.[14] Article 15 also confirms Indigenous peoples' right to the natural resources on their lands. However, to date, the ILO Convention has been ratified by only 22 countries, not including Canada.[15]

15. The human rights bodies of the Organization of American States (the OAS) have developed a complementary set of rights jurisprudence over the last fifteen years. The Inter-American Commission on Human Rights and Court of Human Rights[16] has

recognized Indigenous peoples' rights to land, natural resources found on traditional territories, and ultimately to free, prior and informed consent with regard to large-scale development projects impacting their survival.[17] These rights are grounded in the rights to protection of property, culture and due process contained in the American Declaration on the Rights and Duties of Man (the American Declaration) and the American Convention on Human Rights (the American Convention).[18] While Canada has been a member of the OAS since 1990, it has not ratified, and therefore is not bound by, the American Convention. The American Declaration is not binding on OAS member states, but has been relied on by OAS human rights bodies as an interpretative aid in assessing the conduct of member states.

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[13] *Indigenous and Tribal Peoples Convention, 1989* (No. 169) (27 June 1989), Geneva, 76th ILC session (entered into force 5 September 1991); A prior ILO Convention, No. 107, contained a much weaker antecedent to the FPIC right (Article 12) easily subordinated to government interests, economic development and national laws. *Indigenous and Tribal Populations Convention, 1957* (No. 107) (26 June 1957), Geneva, 40th ILC session (entered into force 2 June 1959).

[14] *Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (27 June 1989), Geneva, 76th 1LC session (entered into force 5 September 1991) at art. 16.

[15] "Ratifications of C169 *Indigenous and Tribal Peoples Convention, 1989 (No. 169)" International Labour Organization* (27 June 1989), Geneva, 76th ILC session (entered into force 5 September 1991), online: International Labour Organization <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>; Most other settler countries and former colonies similarly refrained from ratifying the Convention, including Canada, the U.S., Australia and New Zealand.

[16] The Inter-American Commission on Human Rights addresses human rights conditions in the 35 member states of the OAS, including Canada. It observes and reports on human rights conditions through site visits, holds thematic hearings on specific areas of concern, and requests the adoption of precautionary or remedial members to protect individuals at risk. Individuals may submit complaints for the Commission to investigate. By contrast, the Inter-American Court of Human Rights hears specific cases of violations of human rights brought by individuals or groups in one of the 20 countries that has accepted its jurisdiction, which Canada has not done. "Inter-American Human Rights System," *International Justice Resource Center,* online: International Justice Resource Center, <http://www.ijrcenter.org/regional/inter-american-system/>.

[17] Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 Nw. J. Int'l Hum. Rts. 54 at 61 ("Ward"); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 79; *Mary and Carrie Dann v. United States* (2002), Inter-Am. Comm'n H.R., Case 11.140, Report No. 75/02, OEA/Ser.L/V/II.118, doc. 5 Rev, para. 1; *Maya Communities of the Toledo District v. Belize* (2004), Inter-Am. Comm'n H.R., Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 doc. 5, Rev. 1 at para 194; *Saramaka People v. Suriname* (2007), Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 174 at paras. 131, 136; *Kichwa People of Sarayaku v. Ecuador* (2002), Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 245.

[18] Ward, *supra* note 17 at 61; Alex Page, "Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System" (2004) 4:2 Sustainable Development Law and Policy at 16; OAS, Conference of American States, Ninth International, *American Declaration on the Rights and Duties of Man,* OEA/Ser.L./V.II.23, doc. 21, rev. 6 (1948) at arts. 13, 23, 26; OAS, Inter-American Specialized Conference on Human Rights, *American Convention on Human Rights,* 1144 U.N.T.S. 123 (1969) at arts. 21, 26.

The United Nations Declaration on the Rights of Indigenous Peoples

16. The United Nations General Assembly adopted the U.N. Declaration on the Rights of Indigenous Peoples in 2007. The Declaration was negotiated over 25 years by states, Indigenous groups, human rights organizations, and others.[19] 143 member states voted in favour of its adoption, while Australia, Canada, New Zealand, and the United States were the only four votes against. However, each country subsequently endorsed the Declaration in some form.[20]

The principles of free, prior and informed consent

17. The Declaration contains several provisions incorporating the language of "free, prior and informed consent." The most general is Article 19, which obliges states to "consult and cooperate in good faith with indigenous peoples… in order to obtain their free, prior and informed consent before adopting and implementing" measures that may affect them.[21]

18. Other provisions of the Declaration set out more specific obligations requiring degrees of "free, prior and informed consent" in specific contexts:

(a) Article 32 obliges states to "consult and cooperate in good faith with indigenous peoples… 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 resource exploitation.[22]

(b) Article 28 establishes a right to redress for indigenous peoples for lands, territories and resources that they have traditionally owned, occupied or used, "which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."[23]

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[19] United Nations Declaration on the Rights of Indigenous Peoples, GA. Res. 61/295, UN GAOR, 61st Sess., Annex, UN Doc. A/RES/61/295 (2007) ("*United Nations Declaration on the Rights of Indigenous Peoples* (2007)"); *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* General Assembly 64th Sess., UN Doc. A/64/338 (2009) at para. 40 ("*Report of the Special Rapporteur* (2009)").

[20] *Report of the Special Rapporteur* (2009), *supra* note 19 at para. 41. In general terms, these countries initially opposed the Declaration because of concerns regarding the scope of some of the rights it contains and how those rights may interact with domestic legal systems, including the principles of free, prior and informed consent, and the degree to which the Declaration provides rights to lands now owned by others. Canada's initial concerns are discussed in greater detail below.

[21] *United Nations Declaration on the Rights of Indigenous Peoples* (2007), *supra* note 19 at Article 19 [emphasis added].

[22] *Ibid.* at Article 32(2) [emphasis added].

[23] *Ibid.* at Article 28(1) [emphasis added].

(c) Article 29 requires states to take effective measures to avoid storage or disposal of hazardous materials "in the lands or territories of indigenous peoples without their free, prior and informed consent."[24]

(d) Article 10 protects Indigenous peoples from being "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."[25]

19. The recitals and more general provisions in the Declaration provide interpretive context. The recitals state the United Nations' concern "that indigenous peoples have suffered from historic injustices as a result of… their colonization and dispossession of their lands, territories and their resources," and the intention that the rights in the Declaration will "enhance harmonious and cooperative relationships between the State and indigenous peoples."[26] Article 1 states that Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms.[27] Articles 3 and 4 state that Indigenous peoples have the right to self-determination, including to freely determine their political status and freely pursue their economic, social and cultural development, and to autonomy or self-government regarding internal or local affairs.[28] Article 43 emphasizes that the rights contained in the Declaration constitute "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[29]

20. The Declaration also recognizes that state practice differs, that the situation of Indigenous peoples varies across regions and countries, and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration in applying the rights it sets out.[30] Of special significance, article 46(2) makes clear that the Declaration's provisions are not absolute, but "subject only to such limitations as are determined by law and in accordance with international human rights obligations" on the condition that they are "non-discriminatory," "necessary solely for the purpose of securing due recognition

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[24] *Ibid.* at Article 29(2) [emphasis added].

[25] *Ibid.* at Article 10 [emphasis added].

[26] *Ibid.* at recitals pp. 2-4.

[27] *Ibid.* at Article 1.

[28] *Ibid.* at Article 3-4.

[29] *Ibid.* at Article 43.

[30] *Ibid.* at recitals p. 4.

and respect for the rights and freedoms of others" and for "meeting the just and most compelling requirements of a democratic society."[31]

What is required by the principles of free, prior and informed consent?

21. The United Nations Special Rapporteur on the Rights of Indigenous Peoples is an expert in the field of indigenous rights appointed by the U.N. Human Rights Council to examine obstacles to protecting rights of Indigenous peoples, to review alleged violations of Indigenous rights, and to make recommendations on appropriate measures to prevent and remedy violations.[32] In carrying out this mandate, the Special Rapporteur submits to the U.N. Human Rights Council both general reports on the conduct of his or her activities and specific reports in respect of individual countries. The resolutions appointing the Special Rapporteur specifically direct that the Declaration form part of the normative foundation of his or her mandate.[33] The first Special Rapporteur was S. James Anaya, an American indigenous and human rights law scholar, who served until 2014.[34]

22. **Consultation with the objective of consent:** The Special Rapporteur has consistently emphasized the importance of good faith dialogue and meaningful consultation in the aim of achieving consent as the primary objective of the principles of free, prior and informed consent. The purpose is to "reverse historical patterns of imposed decisions and conditions of life that have threatened the survival of indigenous peoples."[35] In this way, the "principles of consultation and consent" have the objective of "avoiding the imposition of the will of one party over the other," and "striving for mutual understanding and consensual decision-making."[36]

23. In this context, the Special Rapporteur has emphasized that the obligation to carry out consultations with Indigenous peoples in "good faith… in order to obtain

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[31] *Ibid.* at Article 46(2).

[32] *Ibid.* at Article 28.

[33] *Human rights and indigenous peoples: mandate of the Special Rapporteur on the rights of indigenous peoples,* HRC Res. 15/14, 15th Sess., UN Doc. A/HRC/15/60.

[34] In June 2014, Victoria Tauli-Corpuz, a Philippine indigenous rights scholar and activist, and former chair of the United Nations Permanent Forum on Indigenous Issues, was appointed to replace him. As her appointment is still recent, there are few reports that she has produced. Thus far Ms. Tauli-Corpuz has focused more on gender and Indigenous rights, an important topic but further from the subject of this paper. For that reason, most of the Special Rapporteur's reports discussed in this paper focus on Mr. Anaya's work.

[35] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* HRC, 12th Sess., UN Doc. A/HRC/12/34 (2009) at paras. 46, 49 ("Report of the Special Rapporteur, HRC (2009)").

[36] *Ibid.* at para. 49.

their free, prior and informed consent" should not be regarded as a "veto power" that Indigenous peoples hold over decisions that may affect them. Instead, the Declaration establishes "consent as the objective of consultations with indigenous peoples," not a free-standing right in all circumstances.[37] While a veto enables arbitrary or uninformed decisions and inhibits meaningful consultation, consultation in the aim of achieving consent emphasizes meaningful and informed dialogue and accommodation.

24. The importance of achieving free, prior and informed consent varies depending on the circumstance. The character of a consultation procedure is shaped by "the nature of the [Indigenous] right or interest at stake" and "the anticipated impact of the proposed measure."[38] The Special Rapporteur has stated that a significant impact on Indigenous peoples' lives or territories "establishes a strong presumption that the proposed measure should not go forward without… consent."[39] Circumstances where consent may be necessary are discussed at paragraphs 30 to 32, below.

25. **The Special Rapporteur has stated that most consultation processes require certain key elements in order to be considered free, informed and in good faith.** First, in designing a consultation process, attention must be paid to the implications of power imbalances that may exist between Indigenous groups and the corporations or governments engaging in consultation, and if necessary deliberate steps should be taken to address them.[40] This may include providing resources, support or independent legal advice to Indigenous groups. The consultation procedure itself should be the product of consensus.[41]

26. Second, Indigenous groups affected must have full access to information regarding the project, including technical studies, financial plans, environmental assessments, and other relevant documents that the context demands. Indigenous groups may also be involved in the conduct of those studies.[42]

27. Third, consultations should take place before the government authorizes or a company undertakes or commits to undertake any activity related to the project

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[37] *Ibid.* at para. 46.

[38] *Ibid.* at paras. 46, 47.

[39] *Ibid.* at para. 47.

[40] *Report of the Special Rapporteur on the rights of indigenous people,* HRC, 24th Sess., UN Doc. A/HRC/24/41 (2013) at para. 63 (*"Report of the Special Rapporteur, HRC* (2013)").

[41] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at para. 47.

[42] *Report of the Special Rapporteur, HRC* (2013), *supra* note 40 at paras. 65-66.

within Indigenous territory or other lands subject to Indigenous rights.[43] In practice, consultation may have to take place at multiple stages of a project, from its initial proposal, through exploration, development, and operation, to its closure.[44] Indigenous groups should be consulted from the earliest stages to build trust and cooperation. Starting the consultation process at later stages often engenders distrust, making agreement or consent more difficult to achieve.[45]

28. Fourth, Indigenous peoples should be consulted through their own representative institutions, leadership and decision-making structures.[46] This gives recognition to Indigenous peoples' own choices and forms of self-government, thereby according the consultation process greater legitimacy. The process of determining whom to consult may not be straightforward in every context, as it can be the case that multiple individuals or institutions claim to represent a group.

29. In circumstances in which consent cannot be obtained, the Special Rapporteur recommends that the state not move forward with the project without satisfying two conditions: first, the state must demonstrate that the rights of affected Indigenous peoples will be adequately protected; and second, that the impacts of the project will be mitigated to the extent possible.[47] Protection and mitigation may in part involve compensating Indigenous peoples for rights that are lost.[48] If these two conditions cannot be adequately satisfied, the state must justify the infringement by balancing the rights at issue with the need to respect other human rights and the public interest in "meeting the just and most compelling requirements of a democratic society."[49] The Special Rapporteur has expressed doubt that a purely commercial project would satisfy this criterion.[50] While the question of what constitutes a purely commercial venture has not been explored in depth, the concept likely relates to the degree to which Indigenous peoples benefit from the project, if at all. It is important to note that, in the domestic Canadian context, as discussed at paragraphs 61 to 65,

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[43] *Ibid.* at para. 67.

[44] *Ibid.* at para. 67.

[45] *Ibid.* at para. 68.

[46] *Ibid.* at paras. 70-71.

[47] *Report of the Special Rapporteur on the rights of indigenous people,* GA. 66th Sess., UN Doc. A/66/288 (2011) at para. 86 *("Report of the Special Rapporteur* (2011)*").*

[48] *Ibid.* at para. 98.

[49] *United Nations Declaration on the Rights of Indigenous Peoples* (2007), *supra* note 19 at art. 46.

[50] *Report of the Special Rapporteur, HRC* (2013), *supra* note 40 at para. 35.

the degree to which this analysis applies may differ as between proven Aboriginal title and rights on the one hand, and unproven rights or interests on the other.

30. **Consultation where the impact of a project is extreme and there is no consent:** The Declaration recognizes two situations of extreme impact on Indigenous peoples requiring their free, prior and informed consent. Articles 10 and 29 prohibit the storage or disposal of hazardous materials on Indigenous lands, and the relocation of Indigenous peoples, without their free, prior and informed consent.[51] This mandatory language stands in contrast to the more general obligation to "consult… in order to obtain" free, prior and informed consent found in Article 19 and elsewhere. In these circumstances it is appropriate to think of consent as a requirement or prerequisite to proceeding with a project, rather than the end goal of the consultation process.[52]

31. There is some suggestion from the Special Rapporteur that consent may be similarly required in other circumstances of extreme impact on Indigenous peoples analogous to the two examples entrenched in the Declaration. For example, the Special Rapporteur references with approval the Inter-American Court of Human Rights case involving the Saramaka people of Suriname, in which the Court held that, for a large-scale project that may severely impact the survival of an Indigenous group (in this case, logging and mining), the state has the duty to obtain free, prior and informed consent.[53]

32. However, the precise scope of the principles of free, prior and informed consent, and the issue of whether, and in what circumstances, Indigenous peoples' consent may be required is still in its embryonic stages of development and subject to future interpretation and development by governments and international bodies.

When does the obligation arise?

33. As the Declaration is still relatively new, there is not a well-developed body of reports or examples as to when these consultation and consent obligations arise. However, the Special Rapporteur has provided some guidance. He has stated that the duty to consult with the aim of achieving consent arises whenever a state decision may affect Indigenous peoples in ways not felt by others in society. This occurs when interests and rights particular to Indigenous peoples are implicated.[54] The

[51] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at para. 47; *Report of the Special Rapporteur* (2011), *supra* note 47 at paras. 83-84.

[52] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at para. 47; *Report of the Special Rapporteur on the rights* (2011), *supra* note 47 at paras. 83-84.

[53] *Saramaka People v. Suriname* (2007), Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 172, at para. 134; *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at para. 47.

Special Rapporteur provides the example that land or resource use regimes may apply broadly, but affect Indigenous rights and interests in unique ways.[55]

34. The Special Rapporteur has also stated that the duty to consult "arises whenever [Indigenous peoples'] particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement."[56] The duty would arise "in respect of resources owned by the State pertaining to the lands that the peoples concerned occupy or otherwise use, whether or not they hold ownership title to those lands."[57]

What is the impact of this obligation?

35. Because the Declaration is a United Nations resolution rather than a treaty, its provisions, including those respecting the principle of free, prior and informed consent, are not binding as a matter of international or Canadian law.[58]

36. However, the Declaration is widely viewed as representing international consensus regarding the minimum set of rights to be accorded to Indigenous peoples.[59] Its provisions are built upon decades of work in the field, reflected in other human rights instruments and jurisprudence, and "decades of advocacy and struggle by Indigenous peoples themselves."[60] As already noted, the Declaration has been widely adopted by U.N. member states.[61]

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[54] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at para. 43; *Report of the Special Rapporteur* (2011), *supra* note 47 at paras. 81-83.

[55] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at para. 43; *Report of the Special Rapporteur* (2011), *supra* note 47 at paras. 83-84.

[56] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at para. 44.

[57] *Ibid.*

[58] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at paras. 38-40; *Report of the Special Rapporteur* (2011), *supra* note 47 at para. 68; *Report of the Special Rapporteur on the rights of indigenous people,* GA. 68th Sess., UN Doc. A/68/317 (2013) at para. 61; see also *Snuneymuxw First Nation v. School District No. 68,* 2014 BCSC 1173; *CAW-Canada, Local 444 v. Great Blue Heron Gaming Co.,* 2007 ONCA 814; *Hupacasath First Nation v. Canada (Foreign Affairs),* 2013 FC 900; James Anaya, Symposium on Patrick Macklem's *The Sovereignty of Human Rights* (19 April 2016); Patrick Macklem, *The Sovereignty of Human Rights* (New York: Oxford University Press, 2015) at 135.

[59] *Report of the Special Rapporteur on the rights of indigenous people,* GA. 68th Sess., UN Doc. A/68/317 (2013) at para. 63.

[60] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at paras. 38-40; *Report of the Special Rapporteur* (2009), *supra* note 19 at paras. 40-41; *Report of the Special Rapporteur* (2011), *supra* note 47 at paras. 67, 69.

[61] *Report of the Special Rapporteur* (2011), *supra* note 47 at paras. 35, 67.

37. Further, since its enactment, the obligations of free, prior and informed consent contained in the Declaration have been incorporated into other instruments relating to private sector conduct. The United Nations Global Compact, the world's largest corporate sustainability initiative, includes the Declaration by reference among its principles.[62] The International Finance Corporation (IFC), the arm of the World Bank Group that offers investment, advisory and asset management services to encourage private sector economic development in developing countries, mandates compliance with the obligations of free, prior and informed consent in its Performance Standard 7: Indigenous Peoples. Any private sector client seeking to make an investment with the support of the IFC must therefore comply with these principles through the life of the project.[63] Similarly, the obligation of free, prior and informed consent has been incorporated into the Equator Principles, a financial industry benchmark for determining, assessing, and managing environmental and social risks in projects, through their alignment with the IFC Performance Standards.[64] An overwhelming majority of major financial institutions in Canada have adopted these principles, and annually report on their compliance with them.[65] The Equator Principles incorporate IFC Performance Standard 7 by reference.[66]

Positions of the Government of Canada and the Truth and Reconciliation Commission

38. When the Declaration was adopted by the United Nations General Assembly in 2007, Canada, along with Australia, New Zealand and the United States, voted against it. Canada expressed concern that wording in the Declaration respecting Indigenous peoples' rights to the lands, territories and resources they traditionally owned, occupied or otherwise used, as well as the obligation of free, prior and informed consent, would conflict with domestic law.[67] Specifically, Canada expressed concern that these provisions in the Declaration would conflict with existing guarantees under section 35 of the *Constitution Act, 1982,* or that these and other provisions

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[62] "Indigenous Peoples" *United Nations Global Compact,* online: United Nations Global Compact <https://www.unglobalcompact.org/what-is-gc/our-work/social/indigenous-people>.

[63] "Performance Standard 7: Indigenous Peoples" *International Finance Corporation* (1 January 2012), online: IFC <http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES>.

[64] Equator Principles (June 2013), *supra* note 12.

[65] "Equator Principles Association Members & Reporting," Equator Principles (June 2013), *supra* note 12.

[66] Equator Principles (June 2013), *supra* note 12 at p. 21.

[67] CBC News, "Canada votes 'no' as UN native rights declaration passes" *CBC News* (13 September 2007), online: CBC News <http://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160>

might call into question the finality of Canada's existing Aboriginal treaties and land claims agreements.[68]

39. Canada changed its position in 2010 and endorsed the Declaration, but qualified its endorsement by stating its view of the Declaration as a "non-legally binding aspirational document."[69] Canadian courts have held that the Declaration is not legally binding in Canada.[70] However, the new federal government has committed to the full implementation of the Declaration.[71] On May 9, 2016, Canada announced that it is formally removing its "permanent objector" status and confirmed plans to fully adopt and implement it.[72]

40. These changes are, in part, in response to the Final Report of the Truth and Reconciliation Commission of Canada, an independent Commission established by the federal government as part of the Indian Residential Schools settlement.[73] The Commission recommended the full implementation of the Declaration. The Commission's Calls to Action 43 and 44 call on federal, provincial, and territorial governments to fully adopt and implement the Declaration as the framework for broader reconciliation with Indigenous peoples, and to develop a national action plan and other concrete measures for that implementation.[74]

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[68] *Ibid.;* CBC News, "Canada endorses indigenous rights declaration" *CBC News* (12 November 2010), online: <http://www.cbc.ca/news/canada/canada-endorses-indigenous-rights-declaration-1.964779>.

[69] "Canada endorses indigenous rights declaration" *CBC News* (12 November 2010), *Ibid.;* Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples" (9 May 2016), online: Government of Canada <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

[70] *Snuneymuxw First Nation v. Board of Education – School District #68,* 2014 BCSC 1173; *Mississaugas of Scugog Island First Nation v. National Automobile, Aerospace, Transportation and General Workers Union of Canada,* 2007 ONCA 814; *Hupacasath First Nation v. Canada (Foreign Affairs),* 2013 FC 900.

[71] Liberal Party of Canada, "133. Priority: Respecting Aboriginal Rights" (2016), online: Liberal Party of Canada <https://www.liberal.ca/policy-resolutions/133-priority-respecting-Aboriginal-rights/>; Prime Minister of Canada Justin Trudeau, "Statement by Prime Minister on Release of the Final Report of the Truth and Reconciliation Commission" (15 December 2015), online: Prime Minister of Canada Justin Trudeau <http://pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission>.

[72] CBC News, "Canada removing objector status to UN Declaration on the Rights of Indigenous Peoples" *CBC News* (8 May 2016), online: CBC News: <http://www.cbc.ca/news/Aboriginal/canada-position-un-declaration-indigenous-peoples-1.3572777>; Indigenous and Northern Affairs Canada, News Release, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: Government of Canada <http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.mnthndVl=&crtr.mnthStrtVl=&crtr.page=1&nid=1063339&crtr.yrndVl=&crtr.kw=indigenous&crtr.yrStrtVl=&crtr.dyStrtVl=&crtr.dyndVl=>.

[73] Though the Truth and Reconciliation Commission was formed by the federal government, it operated independently of government, does not bind any government, and directed many of its Calls to Action towards government.

[74] Truth and Reconciliation Commission, *supra* note 4 at 191 (Calls to Action 43 and 44). The role of government in facilitating consultation processes is discussed at paragraphs 104 to 111 below.

41. In its Call to Action 92, the Commission called upon the corporate sector in Canada to adopt the Declaration as a reconciliation framework and apply its principles, norms and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.[75] The Commission stated that, while the duty to consult and accommodate is placed on the Crown, and therefore binds the federal and provincial and territorial governments, in practice, procedural elements of this duty may be delegated to "industry proponents seeking a particular development." It also noted that the business risk associated with the legal uncertainty surrounding the duty to consult has often motivated industry proponents to negotiate mechanisms to ensure that Indigenous peoples benefit directly from development in their territories.[76] The Commission stated that economic reconciliation involves working in partnership with Indigenous peoples so that their traditional lands and resources are developed in culturally respectful ways that give full recognition to their rights.[77] In the Commission's view, the only way to do this is by establishing constructive, mutually beneficial relationships.

42. While the federal government has now committed to the full implementation of the Declaration, it is not evident what precise changes to Canadian law may be required, if any.[78] This is a live issue currently being considered by governments across the country. On April 4, 2016, Romeo Saganash, the member of parliament from Abitibi-Baie-James-Nunavik-Eeyou, presented a private member's bill to the House of Commons to establish a collaborative process for the full implementation of the Declaration.[79] In announcing Canada's plan to implement the Declaration, Minister of Indigenous and Northern Affairs Carolyn Bennett stated, "Adopting and implementing the Declaration means that we will be breathing life into Section 35 of Canada's Constitution, which provides a full box of rights for Indigenous peoples."[80]

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[75] Truth and Reconciliation Commission, *supra* note 4 at 306 (Call to Action 92).

[76] *Ibid.* at 302 n 273; *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 53 ("Haida").

[77] Truth and Reconciliation Commission, *supra* note 4 at 305.

[78] As part of her apology to Indigenous Peoples in response to the Final Report of the Truth and Reconciliation Commission of Canada, on May 30, 2016, Ontario Premier Kathleen Wynne announced a series of initiatives to foster reconciliation with Indigenous peoples in Ontario, and a commitment to "work closely with Canada's federal government, whose commitments to reconciliation are encouraging and vital to our success." Office of the Premier, "Ontario's Commitment to Reconciliation with Indigenous Peoples" (30 May 2016), online: Government of Ontario <https://news.ontario.ca/opo/en/2016/05/ontarios-commitment-to-reconciliation-with-indigenous-peoples.html>.

[79] 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,* 1st Sess., 42nd Parl., 2016.

[80] Indigenous and Northern Affairs Canada, News Release, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: Government of Canada <http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.mnthndVl=&crtr.mnthStrtVl=&crtr.page=1&nid=1063339&crtr.yrndVl=&crtr.kw=indigenous&crtr.yrStrtVl=&crtr.dyStrtVl=&crtr.dyndVl=>.

43. It is notable that the Special Rapporteur's 2014 report on "The situation of indigenous peoples in Canada" commended Canada for its "well-developed legal framework" and several "policy initiatives that in many respects are protective of indigenous peoples' rights."[81] The key areas of concern highlighted by the Special Rapporteur are those well-known to Canadians and in large part acknowledged by Canada: the well-being gap between Indigenous and non-Indigenous people; persistently unresolved claims to treaty and Aboriginal rights; the vulnerability of Indigenous women and girls to abuse; and distrust between Indigenous peoples and the provincial and federal governments.[82] He also commented on ways to improve the consultation process, emphasizing in particular the need to ensure that the consultation process begins at earlier stages of project development.[83]

44. Notably, the Special Rapporteur did not focus significant attention on any differences in scope that may exist between guarantees under Canadian law and the provisions of the Declaration. However, he expressed the view that, as a general rule, resource extraction projects should not proceed without both adequate consultation and the free, prior and informed consent of the Indigenous peoples concerned.[84]

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[81] *Report of the Special Rapporteur on the rights of indigenous people,* HRC, 27th Sess., UN Doc. A/HRC/27/52/Add.2 (2014) at para. 6 (*"Report of the Special Rapporteur, HRC* (2014)").

[82] *Ibid.* at 1.

[83] *Ibid.* at paras. 58-77, 98.

[84] *Ibid.* at para. 98.

PART III

ABORIGINAL RIGHTS IN CANADA

45. Roughly in parallel with the evolution of the obligation of free, prior and informed consent at the international level, Canada's courts have developed a robust set of constitutional principles respecting Aboriginal rights, including the duty to consult and accommodate. From the Supreme Court's 1973 cornerstone Aboriginal rights decision in *R v. Calder,* through the adoption of section 35 of the *Constitution Act, 1982* giving constitutional protection to Aboriginal and treaty rights, to the cases following the Supreme Court's 2004 articulation of the modern duty to consult, and if appropriate, accommodate in *Haida Nation v. British Columbia,* Canadian courts have developed a significant body of jurisprudence regarding Indigenous consultation.

Sources of Aboriginal title and other Aboriginal rights under Canadian law

46. Aboriginal title and other rights arise from one of two sources: treaties with the Crown, or historical practice.

47. From 1701, the British Crown entered into treaties with Indigenous peoples to encourage peaceful relations between Indigenous peoples and European settlers in the lands that would become Canada.[85] The Royal Proclamation, 1763 acknowledged the prior entitlements of Indigenous peoples in North America, which "required the Crown to treat with them and obtain their consent before their lands

could be occupied."[86] Accordingly, the Royal Proclamation, 1763 forbade settlement unless the Crown had first established treaties with the Indigenous peoples in the area.[87] In 1996, the Royal Commission on Aboriginal Peoples emphasized this point: "Indian land could be purchased for settlement or development… lands could be surrendered only on a nation-to-nation basis, from the Indian nation to the British Crown, in a public process in which the assembled Indian population would be required to consent to the transaction."[88]

48. These treaties, and their modern equivalent land claims agreements, often but not always surrendered Aboriginal title to lands in exchange for certain rights over the surrendered lands and the creation of reserves.[89]

49. However, many treaties did not comprehensively address the division of rights between Aboriginal peoples and the Crown, and the scope and interpretation of others is debated. Much of modern-day British Columbia, Newfoundland, Nunavut, Quebec and Yukon was never subject to Aboriginal treaty.[90] The "peace and friendship" treaties of the Maritimes "did not involve First Nations surrendering rights to… lands and resources."[91] In 1973, the Supreme Court, in recognition that long before Europeans settled in North America, Indigenous peoples occupied the land in organized, distinctive societies with their own social and political structures, held that those pre-existing Indigenous laws and interests were not automatically extinguished by the Crown's assertion of sovereignty, but were absorbed into the

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[85] Indigenous and Northern Affairs Canada, "Treaties with Aboriginal people in Canada" (15 September 2010), online: Government of Canada <http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>.

[86] Right Honourable Beverly McLachlin, P.C., Chief Justice of Canada, "Aboriginal peoples and Reconciliation," (2003) 9 Canterbury L. Rev. 240 ("McLachlin, Aboriginal peoples". See also *Calder, supra* note 5; *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at para. 110-112 (*"Van der Peet"*); *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 200 (*"Delgamuukw"*).

[87] McLachlin, Aboriginal peoples, *supra* note 86; See also *Calder, supra* note 5; *Van der Peet, supra* note 86 at para. 110-112; *Delgamuukw, supra* note 86 at para. 200. See also *Canadian Charter of Rights and Freedoms,* s. *25(2), Part I of the Constitution Act, 1982,* being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. The Truth and Reconciliation Commission's Call to Action 45 calls upon the Government of Canada to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown building on the nation-to-nation relationship set out in the Royal Proclamation of 1763. See Truth and Reconciliation Commission, *supra* note 4 at 199-200.

[88] *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back,* vol. 1 (Ottawa: Canada Communications Group, 1996) at 209-210.

[89] Jack Woodward, Q.C., *Native Law,* looseleaf (Toronto: Thomson Reuters, 2016) at para. 5:210.

[90] Indigenous and Northern Affairs Canada, "Maps of Treaty-Making in Canada," online: Government of Canada <http://www.aadnc-aandc.gc.ca/eng/1100100032297/1100100032309>

[91] Indigenous and Northern Affairs Canada, "Peace and Friendship Treaties," online: Government of Canada <https://www.aadnc-aandc.gc.ca/eng/1100100028589/1100100028591>.

common law as rights.[92] Those rights could only be extinguished by explicit acts of the Crown displacing Aboriginal rights or interests. Unless extinguished, these Aboriginal rights survived colonization and continue to operate.

50. Aboriginal rights that survived until 1982 without being extinguished are now protected under section 35 of the *Constitution Act, 1982,* which "recognized and affirmed" "existing Aboriginal and treaty rights."[93] These rights are held by First Nations, Inuit and Métis peoples, and cannot be extinguished.[94]

51. Whereas courts were previously reluctant to recognize Aboriginal and treaty rights, constitutionalization has given greater weight to their recognition and enforcement. The obligation on governments in Canada to consult and, if appropriate, accommodate the rights and interests of Indigenous peoples has developed through the jurisprudence interpreting section 35 since its enactment. As described below, this obligation differs somewhat in respect of rights that have been claimed but have not yet been proven or settled, and rights that have already been proven or established by treaty.

Aboriginal title and other rights claimed but not yet proven

52. When the government has real or constructive knowledge of the potential existence of an Aboriginal right or title claim, and contemplates conduct that might adversely affect it, a duty to consult the affected Indigenous people and potentially accommodate its interests arises.[95] This duty is held by the Crown, and therefore falls on all levels of government in Canada. The level of government implicated in any Aboriginal consultation process will depend on the context in which the need for consultation arises and the jurisdictional authority that level of government exercises.

53. The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably to achieve "the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."[96]

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[92] *Calder, supra* note 5.

[93] *Constitution Act, 1982,* s. 35, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. s. 35.

[94] *R v. Sparrow,* [1990] 1 S.C.R. 1075 (*"Sparrow"*).

[95] *Haida, supra note 76 at para. 35.*

[96] *Van der Peet, supra* note 86 at para. 31; *Delgamuukw, supra* note 86 at para. 186; *Haida, supra* note 76 at para. 17.

54. **The honour of the Crown gives rise to different obligations depending on the circumstances.** Where Aboriginal rights or title have been asserted, but have not been defined or proven, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty and define the rights guaranteed by section 35 of the *Constitution Act, 1982*.[97] If a treaty has not been concluded, the Crown must act honourably in the process of defining Aboriginal rights and in reconciling them with other rights and interests. This implies a duty to consult and, if appropriate, accommodate the interests of Indigenous peoples where they have asserted rights which have not yet been resolved.[98]

55. **The content of the duty to consult also varies depending on the circumstances.** The content of the duty to consult can range from a minimum duty to discuss important decisions where the potential infringement of rights is less serious or relatively minor, through exchanges that are "significantly deeper than mere consultation… required in most cases," to "full consent of [the] Aboriginal nation… on very serious issues."[99] In all cases, the Crown must act with good faith in the aim of substantially addressing the Indigenous people's concerns.[100]

56. The degree of consultation required is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title claim, and to the seriousness of the potentially adverse effect on the right or title claimed.[101] Where the claim to title is weak, the right limited, or the potential infringement is minor, the only duty on the Crown may be to give notice, disclose information and discuss any issues raised in response.[102] At the other end of the spectrum lie situations where a strong case for the claim is put forward, the right and potential infringement is significant to the Indigenous community, and the risk of non-compensable damage is high. In these cases, greater consultation aimed at finding a satisfactory solution is required.[103] Consultation in this circumstance may require the opportunity to make submissions, formal participation in the decision-making process from early stages

[97] *Sparrow, supra* note 94 at 1105-1106; *Haida, supra* note 76 at para. 20.

[98] *Haida, supra* note 76 at paras. 20, 25.

[99] *Ibid.* at para. 24.

[100] *Ibid.* at paras. 41-42.

[101] *Ibid.* at para. 39.

[102] *Ibid.* at para. 42.

[103] *Ibid.* at para. 44.

of the project, and provision of written reasons to show that Indigenous concerns were considered and what impact they had.[104] The government may also wish to adopt mediation regimes involving impartial decision-makers in contexts involving complex or sensitive issues.[105]

57. **When the duty to accommodate Aboriginal interests arises.** Where a strong case exists for the Aboriginal title or right claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing Indigenous concerns may require that steps be taken to avoid irreparable harm or to minimize the effects of infringement until the underlying claim to Aboriginal rights is finally resolved.[106] However, this is not a veto for Indigenous peoples, which may only be appropriate in certain cases of established rights.[107]

Aboriginal title and other rights once proven

58. Aboriginal title and other rights, once established by the courts or treaty, provide the highest degree of control over land. An Aboriginal group's consent will generally be required unless certain conditions are met, as discussed below.

59. **Aboriginal title confers the right to exclusive use and occupation of the land, to reap the benefits flowing from the land, and the right to proactively manage the land.[108]** The use of Aboriginal title lands is not confined to traditional purposes. However, as a collective right held by the group for present and future generations, the land cannot be put to uses that are incompatible with the collective and ongoing nature of the right. The land cannot be alienated, developed or misused in a way that would substantially deprive future generations of its benefits.[109]

60. The right to control the land conferred by Aboriginal title means that governments

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[104] *Ibid.*

[105] *Ibid.*

[106] *Ibid.* at paras. 46-47.

[107] *Ibid.* at para. 48.

[108] *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at paras. 2, 67, 73 (*"Tsilhqot'in Nation"*); *Delgamuukw, supra* note 86 at para. 117.

[109] *Tsilhqot'in Nation, supra* note 108 at paras. 67, 73, 74; 1. Certain treaties give the Crown the right to "take up" additional land. However, there is a point at which taking up additional land would infringe other rights guaranteed by the treaty, because it may not leave enough land untaken to meaningfully exercise other Aboriginal treaty rights; see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69.

and others seeking to use the land must obtain the consent of the Aboriginal title holders.[110]

61. **If the Aboriginal people does not consent to the proposed land use, the government maintains a residual right to infringe the Aboriginal title.** Such an infringement is only permitted if justified under section 35 of the *Constitution Act, 1982* on the basis that it is necessary for the broader public good.[111] This is a stringent test, not easily met.

62. If the Crown chooses to proceed with a measure absent the relevant Aboriginal people's consent, the government must demonstrate three elements. First, the Crown must have discharged the same duty to consult and accommodate as applies in respect of unproven rights, described above. However, the required level of consultation and, if appropriate, accommodation in respect of a proposed project is greatest where title has been established.[112]

63. Second, the government's actions must also be backed by a compelling and substantial objective, considered from the Aboriginal perspective as well as from the perspective of the broader public.[113] Courts have been hesitant to limit the range of objectives that can justify infringement in the abstract. While few cases have addressed the issue, the Supreme Court has indicated that a broad range of projects, including commercial ventures and infrastructure developments, could satisfy this factor if the public interest is significant enough.[114]

64. Third, the government must show that the proposed infringement is consistent with the Crown's fiduciary duty toward Aboriginal peoples. The Crown's underlying right in the land is held for the benefit of the Aboriginal group. When the government seeks to exercise this underlying right in a manner that infringes Aboriginal rights, the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. An infringement cannot be justified if it: (a) would substantially deprive future generations of the benefit of the land; (b) would disproportionately infringe the right in a manner that is not rationally connected to the achieve the objective; (c) would cause the right to be infringed more than necessary to achieve the objective sought (minimal impairment); or (d)

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[110] *Tsilhqot'in Nation, supra* note 108 at para. 76.

[111] *Ibid.* at paras. 76-77.

[112] *Ibid.* at para. 79.

[113] *Ibid.* at para. 81.

[114] *Ibid.* at para. 83.

the benefits of the infringement would be outweighed by its adverse effects.[115]

65. While this issue has not been explored to the same degree in the context of other established Aboriginal rights, an argument has been raised that the same reasoning in respect of established Aboriginal title may apply to other established Aboriginal rights, depending on the degree to which the rights at issue may be affected.[116] If this argument is correct, once Aboriginal rights have been established, the Crown may need to seek the consent of the rights-holding Aboriginal group with respect to uses of land that would substantially impair those rights, or, if consent is not obtained, justify the infringement using the same or a similar infringement analysis to that set out above.[117]

Consultation and accommodation policies of governments in Canada vary considerably

66. The federal government, all ten provinces, and the Northwest Territories have established Aboriginal consultation policies to implement the Crown's duty to consult and accommodate. The Yukon and Nunavut, while providing less formal guidance, have not established formal policies. Altogether, these policies vary considerably. Some polices are accompanied by general or industry-specific implementation guidelines.[118] British Columbia and Nova Scotia have developed guidance on the role of the business sector in the consultation process.[119] Several explicitly address the treatment of Aboriginal title.[120] Finally, some policies provide for funding for Indigenous peoples to participate in the consultation process, either from the

[115] *Ibid.* at para. 87.

[116] Jack Woodward, Q.C., *Native Law,* looseleaf (Toronto: Thomson Reuters, 2016) at para. 5:2360.

[117] *Ibid.*

[118] Government of Manitoba, "Procedures for Crown Consultation with Aboriginal Communities on Mineral Exploration – Mineral Resources Division, Manitoba Science, Technology, Energy and Mines," online: Government of Manitoba <http://www.manitoba.ca/iem/mines/procedures/pdfs/procedures_mineralexploration.pdf>; Government of Manitoba, "Procedures for Crown Consultation with Aboriginal Communities on Mine Development Projects – Manitoba, Mineral Resources Division, Manitoba Science, Technology, Energy and Mines," online: Government of Manitoba <http://www.manitoba.ca/iem/mines/procedures/pdfs/procedures_minedevelopment.pdf>; Government of Saskatchewan, "First Nations and Métis Consultation Policy Framework" (June 2010), online: Government of Saskatchewan <https://www.saskatchewan.ca/~/media/files/government%20relations/first%20nations/consultation%20policy%20framework.pdf> ("Saskatchewan, Consultation Policy").

[119] British Columbia Environmental Assessment Office, "Guide to Involving Proponents When Consulting First Nations" (December 2013), online: Government of British Columbia <http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/proponents_guide_fn_consultation_environmental_assessment_process_dec2013.pdf>; Nova Scotia Office of Aboriginal Affairs, "Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia" (November 2012), online: <https://www.novascotia.ca/nse/ea/docs/ea-proponents-guide-to-mikmaq-consultation.pdf>.

government or the private sector.[121] These policies demonstrate the type of context-specific variation in approaches to fulfilling consultation obligations that could also apply to the application of the principle of free, prior and informed consent.

67. **Degree of Specificity:** The consultation policies and guidelines of Canada, Alberta, British Columbia, Saskatchewan, Manitoba, and Nova Scotia offer the most detailed and practical guidance about how to fulfill the Crown's duty to consult. Canada's guidelines include a "step-by-step, chronological" approach outlining detailed relevant considerations to consultation at each stage.[122] Saskatchewan and Alberta's materials provide consultation matrixes with sample consultation measures, and anticipated timelines for Aboriginal and government responses.[123] British Columbia outlines operating guidelines for each stage of the consultation and accommodation process.[124] In contrast, the policies of Ontario, Quebec, New Brunswick, Prince Edward Island, Newfoundland, and the Northwest Territories provide broad policy goals and general factors to be considered, but do not provide as much concrete guidance.

68. Some provincial policies, such as those of British Columbia, Alberta, Manitoba, and Ontario, also provide sector- or industry-specific guidelines with consultation guidance tailored to particular contexts.[125]

69. The policies also differ with respect to the level of detail they provide in describing how to implement the duty to accommodate. Only some policies offer specific examples of types of accommodation.[126]

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[120] See e.g. Government of Nova Scotia, "Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia" (April 2015), online: Government of Nova Scotia <http://novascotia.ca/abor/docs/April%202015_GNS%20Mi'kmaq%20Consultation%20Policy%20and%20Guidelines%20FINAL.pdf> ("Nova Scotia, Consultation Policy").

[121] Bill 22, *Aboriginal Consultation Levy Act,* 1st Sess., 28th Leg., Alberta, 2013 (assented to May 23, 2013), online: Legislative Assembly of Alberta <http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_28/session_1/20120523_bill-022.pdf>.

[122] Indigenous and Northern Affairs Canada, "Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011" (March 2011), online: Government of Canada <http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>.

[123] Alberta Indigenous Relations, "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management" (28 July 2014), online: Government of Alberta <http://indigenous.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf.pdf>; Saskatchewan, Consultation Policy, *supra* note 118.

[124] Province of British Columbia, "Updated Procedures for Meeting Legal Obligations When Consulting First Nations: Interim" (7 May 2010), online: Province of British Columbia <http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/legal_obligations_when_consulting_with_first_nations.pdf> ("British Columbia, Updated Procedures").

[125] See e.g. British Columbia, Updated Procedures, *supra* note 124.

[126] *Ibid.*

70. Prince Edward Island and Nova Scotia have each entered into consultation agreements with the Mi'kmaq and the federal government outlining a preferred, but not exclusive, consultation protocol.[127] Certain modern treaties with Aboriginal peoples also provide guidance on consultation processes.[128]

71. **Treatment of Aboriginal title.** Some guidance documents explicitly discuss unique considerations in respect of Aboriginal rights or title claims.[129] Others seem to approach this topic implicitly. This may reflect the treaty status of a province's lands. For example, Saskatchewan's policy excludes Aboriginal title, stating, "The Government does not accept assertions by First Nations or Métis that Aboriginal title continues to exist with respect to either lands or resources in Saskatchewan. Accordingly, decisions claimed to adversely affect Aboriginal title are not subject to this policy."[130]

72. **Funding for Aboriginal participation in the process.** Some governments' policies require that the cost of consultation for Indigenous peoples be borne by project proponents. For example, the Newfoundland and Labrador policy requires proponents to bear the full cost of consultation. Alberta's *Aboriginal Consultation Levy Act* requires proponents to pay to the provincial government levies to be used for grants to Indigenous peoples to participate in the consultation process.[131] Other provinces like Manitoba and Ontario have made commitments to funding Indigenous participation themselves.[132] Others are silent on this issue.

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[127] Indigenous and Northern Affairs Canada, "Mi'kmaq - Prince Edward Island - Canada Consultation Agreement" (2012), online: Government of Canada <https://www.aadnc-aandc.gc.ca/eng/1344522721221/1344522886022>.

[128] See e.g. James Bay and Northern Quebec Agreement (1975); Little Salmon/Carmacks First Nation Final Agreement (1997); Nisga'a Final Agreement (1999); Tsawwassen First Nation Final Agreement (2009); Maa-nulth Final Agreement (2009).

[129] See e.g. British Columbia, Updated Procedures, *supra* note 124; Indigenous and Northern Affairs Canada, "Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult – March 2011" (March 2011), online: Government of Canada <http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>; Nova Scotia, Consultation Policy, *supra* note 120; Ministry of Northern Development and Mines Ontario, "Consultation and Arrangements with Aboriginal Communities at Early Exploration" (September 2012), online: Government of Ontario <http://www.mndm.gov.on.ca/en/mines-and-minerals/mining-act-policies-and-standards>; Interministerial Support Group on Aboriginal Consultation, "Interim Guide for Consulting the Aboriginal Communities" (2008), online: Gouvernement du Québec <https://www.autochtones.gouv.qc.ca/publications_documentation/publications/guide_inter_2008_en.pdf>; Aboriginal Affairs Secretariat, "Government of New Brunswick Duty to Consult Policy" (November 2011), online: Province of New Brunswick <http://www2.gnb.ca/content/gnb/en/departments/Aboriginal_affairs/duty_to_consult.html>; Government of Prince Edward Island, "Provincial Policy on Consultation with the Mi'kmaq" (3 March 2014), online: <http://www.gov.pe.ca/photos/sites/aboriginalaffairs/file/Provincial%20Policy%20on%20Consultation%20with%20the%20Mikmaq%20-%20Revised%20March%203,%202014.pdf>.

[130] Saskatchewan, Consultation Policy, *supra* note 118.

[131] Bill 22, *Aboriginal Consultation Levy Act,* 1st Sess., 28th Leg., Alberta, 2013 (assented to May 23, 2013), online: Legislative Assembly of Alberta <http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_28/session_1/20120523_bill-022.pdf>.

[132] Ministry of Northern Development and Mines for Ontario, "Aboriginal Participation Fund" (15 April 2016), online: Government of Ontario <http://www.mndm.gov.on.ca/en/mines-and-minerals/Aboriginal-participation-fund>; Government of Manitoba, News Release, "Consultation Participation Fund Announced for Aboriginal Communities" (25 January 2010), online: Government of Manitoba <http://news.gov.mb.ca/news/index.html?item=7654>.

PART IV

TOWARDS A NEW RELATIONSHIP TO FACILITATE RECONCILIATION

73. The commonalities and differences between the principles of free, prior and informed consent in the Declaration and the duty to consult and accommodate in Canadian law have been the subject of much analysis and discussion. Both are procedural obligations that facilitate a process aimed at reconciling Aboriginal rights and interests with the wider societies of which they form a part. Both provide guidance for an engagement process to be conducted prior to government action that may affect Aboriginal rights. Both establish that the nature and extent of this process depends on the context at hand.

74. On balance, the two are similar in scope and effect and are fundamental bases for Indigenous involvement in projects. We would like to turn in the balance of this paper to specific examples and principles which we feel can help guide the way forward in practice. In this part of the paper, we will talk more about partnerships, engagement, participation, and address substantive issues with and impacts of the project, with less focus on consultation and accommodation. The latter nomenclature is rooted in the Canadian jurisprudence; while we certainly believe that parties must comply with the jurisprudence, we suggest that an approach that is focused on relationships and parties' underlying interests from the outset—rather than positions

or strict legal rights—provides the foundation for meaningful engagement and sets the stage for a successful outcome for all involved.

75. We recommend an approach to meeting the letter and spirit of domestic and international standards by focusing on the following elements.

(a) **Relationship:** The focus must be on building a long-term relationship between the government, project proponents[133] and Indigenous peoples, grounded in mutual respect and trust, and not on merely completing a check-list.

(b) **Model of partnership:** The model of partnership, in which multiple groups come together for mutual benefit and to accommodate each other's interests, should govern the project.

(c) **Procedural and substantive participation:** Indigenous peoples should have the opportunity to meaningfully participate in all aspects of the project. This participation has both procedural and substantive dimensions.

(d) **Involvement of government to align incentives and facilitate:** Governments by necessity are involved in the consultation process, as the duty is ultimately theirs. Governments should also help align project proponents' and Indigenous peoples' incentives so that they can more easily find common ground.

76. We describe each of these elements in more detail below.

Building a relationship requires an interests-based approach

77. Engagement with Indigenous peoples on a particular project should be approached from the perspective of relationship-building—as between the Indigenous peoples concerned, the relevant governments, and the project proponent.

78. This relationship must be founded on mutual respect and trust, the importance of which cannot be overstated. Mutual respect and trust cannot simply be proclaimed. They must be built on positive, ongoing and mutual conduct and action through meaningful engagement. Where established, this foundation allows a deeper appreciation of all parties' interests in the context of a discussion that will likely address sensitive issues. The government and project proponent must understand that, in some way, all Indigenous consultations are related to Canada's historical treatment of Indigenous peoples and are part of the ongoing process of reconciliation. Acceptance and respect of this basic tenet will allow for the building of a dialogue and relationship that can lead to a successful outcome for all parties.

[133] We note that many project proponents are either First Nations or are partnerships involving First Nations or Indigenous entities.

79. A good faith engagement process in most circumstances requires parties to meaningfully understand each other's interests over the short, medium and long term. Any engagement process should begin by focusing on the parties' interests, rather than an analysis of what rights are strictly held at law and the degree engagement that is required as a result. While the law forms the backdrop to the process and may inform the nature of the ultimate process adopted and the outcomes sought, it is generally counter-productive for parties to approach consultation seeking to do no more than the minimum that is required. Likewise, an inflexible "positional" or "hard bargaining" attitude to engagement, without regard to underlying interests and their relative significance, is unlikely to assist any party. A good faith attempt to genuinely understand and, to the extent possible, address each other's interests, will better facilitate a relationship aimed at a positive outcome.

80. While domestic and international consultation obligations apply to Canadian governments, the project proponent also has a significant role. In practice, consultations in respect of specific projects are carried out in whole or in part by private sector project proponents. An approach to consultation focused on an interests-based relationship best enables parties to take the long-term view necessary to facilitate reconciliation between Indigenous peoples and the Crown.

The model of partnership

81. In designing an approach to achieve an interests-based relationship, it may be beneficial for project proponents and Indigenous peoples to approach each other with the relationship of a partnership in mind.

82. This does not necessarily mean partnership in the legal sense, but it does mean a relationship that includes the elements of good faith, transparency, collaboration, and recognition of each other's capacities and constraints. Such a partnership should be understood as a process in which two or more groups come together with the aim of mutual benefit in a manner that addresses each party's unique set of interests. A partnership mindset encourages all parties to consider Indigenous peoples not as the "recipients" of consultation but as partners in the design, operation and success of the project.

83. A partnership mindset encourages all parties to consider each other's interests in a more fundamental manner and with a longer-term view, building a relationship that respects the underlying Indigenous rights, interests and dignity involved.

Meaningful participation

84. Flowing from the mindset of partnership, what does a good faith and meaningful engagement process look like in practice? There is no cookie-cutter model to follow; any engagement process is context-specific. Both Canadian and international law clearly indicate that this in part depends on the nature of the Aboriginal rights

at issue and the potential harm that the proposed project activity would cause. In practice, it also depends on the history, capacity, challenges, issues and opportunities of the particular Indigenous peoples that are involved.

85. With this context-specific reality always front of mind, a mindset of partnership enables us to set out certain guidelines or best practices.

Procedural participation

86. In our experience, four principles should guide any relationship among government, project proponents and Indigenous peoples in relation to a project: (a) there must be engagement regarding the procedure to be followed; (b) there must be engagement from an early stage (where possible) and on an ongoing basis; (c) Indigenous peoples must be provided with sufficient information for a meaningful process; and (d) resources (both financial and human) will be required to facilitate the process.

87. At the outset of the project, representatives of all Indigenous peoples that may be affected should be contacted through their own representative institutions, and should be engaged in a dialogue regarding the proposed project and the type of engagement process they view as warranted. This can be a difficult and complex process, as there may not be a single set of representatives or institutions to address. Ideally, the procedure itself would be the product of consensus.[134] Though it may be difficult, finding consensus on the procedure is likely to engender a climate of confidence and mutual respect, both in the process itself and in the Indigenous people's ongoing relationship with the project proponent and the Crown.

88. In many cases, especially those with significant potential impact on Indigenous rights, it will be important to build a relationship with affected Indigenous peoples from an early stage of the project. They should be involved in the project's conception and design and concrete mechanisms should be in place for input from Indigenous traditional knowledge, oral history, and ways of life and experience.

89. Because circumstances often change, events arise, projects evolve and project timelines usually unfold over a number of years, the process will likely need to continue throughout subsequent stages of the project's design, regulatory approvals, construction, operation and decommissioning, as needed. All parties should be willing on an ongoing basis to meaningfully address issues as they arise or become known.

90. Indigenous peoples must be provided with information about all aspects of

[134] *Report of the Special Rapporteur, HRC* (2009), *supra* note 35 at para. 51.

the project that may affect them. This may include the preparation and review of environmental and social impact studies, as well as an assessment of how the project might affect the rights and interests of the Indigenous peoples concerned.[135] Without sufficient information it will not be possible to have an informed process, and that process will likely suffer a deficit of legitimacy.

91. However, in any project there is a tension between completeness of information and constraints on what can be known. It must be recognized that more information can always be obtained, and more studies can be done. The question to be asked is what information is necessary for Indigenous peoples to meaningfully engage in the process on an informed basis, bearing in mind their rights and interests.

92. It is also important to emphasize that engagement is a two-way process, involving mutual interaction and exchanges of information between project proponents and Indigenous peoples. Inasmuch as project proponents must share all relevant information, they must also listen to Indigenous peoples with a mind that is open to accommodating their interests and concerns. An engagement process will be most effective where Indigenous peoples demonstrate significant commitment to sharing their views as well.

93. The project proponent should be mindful that, though some Indigenous peoples in Canada are well-resourced, most are among the most marginalized segments of the Canadian population. This marginalization is a result of precisely the same historical disadvantages and disentitlements underlying the imperative of facilitating reconciliation between Indigenous peoples and the Crown. These same groups cannot always be expected to have the resources necessary to engage in a consultation process as an equal to the project proponent or the Crown.

94. In this context, meaningful engagement may require the provision of financial, technical, legal or other resources (including translation into local Indigenous language(s)). While primary responsibility for addressing this asymmetry lies with the Crown, project proponents must nonetheless be aware of this issue and may be required to take steps to remedy it. The provision of resources to facilitate engagement will often help facilitate project-related collaboration, as well as building a longer-term relationship that helps achieve reconciliation.

95. Many successful engagements that we have been involved with have involved an up-front articulation of shared foundational principles. While this can be a time-consuming exercise, if done properly, it can clarify expectations and set parties up for success. Such engagements that we have seen have included: recognition and affirmation of constitutional and treaty rights; a commitment to openness and

[135] *Ibid.* at para. 53.

transparency; a commitment from senior-level individuals involved in the process to mutual respect and understanding, to participation in and accountability to the process, to meaningful participation of Indigenous peoples in the project, and to a positive and long-term relationship; establishment of a negotiations committee and working groups; and funding mechanics. These principles should be formalized in a written document that, while not necessarily intended to create legal or justiciable rights, serves to guide each party's conduct.

96. It can also be effective if parties are able to reach a high-level agreement regarding the applicable reasonable timelines, so as to avoid unrealistic expectations, on the one hand, and on the other hand, to set expectations regarding the process and avoid project fatigue.

Substantive participation

97. Once procedural principles are agreed to, parties find it easier to focus on the specific details of the project, their ongoing relationship, and Indigenous peoples' substantive participation. Substantive participation can, for discussion purposes, be grouped into two main areas: impact mitigation and sharing of benefits.

98. Measures to safeguard or minimize the impact of the project on Indigenous peoples may be a crucial substantive element to a successful project. The Special Rapporteur has noted that attention should be paid to impacts on the environment, health, economic activities the Indigenous peoples undertake on the land, and places with special spiritual or historical significance.[136] The project proponent and the Indigenous peoples concerned may want to design mechanisms for monitoring these impacts over the life of the project and a procedure to remedy significant harms.[137]

99. A true partnership between Indigenous peoples and project proponents that respects Aboriginal rights in land, results in some form of sharing in the benefits of the project. The Special Rapporteur is one of many commentators to highlight the need to depart from the traditional model of project development in which Indigenous peoples see little control over and benefit from projects on their lands.[138]

100. Project proponents and Indigenous people have aligned their interests in a variety of areas to achieve successful and enduring relationships and projects. These

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[136] *Report of the Special Rapporteur, HRC* (2013), *supra* note 40 at para. 73.

[137] *Ibid.*

[138] *Ibid.* at para. 76; See e.g. Boreal Leadership Council, "Free, Prior, and Informed Consent in Canada" (September 2012), online: Boreal Leadership Council <http://borealcouncil.ca/wp-content/uploads/2013/09/FPICReport-English-web.pdf>; Truth and Reconciliation Commission, *supra* note 4 at 305-306.

include: socioeconomic matters; economic benefit and revenue sharing; project involvement, management and decision-making; skills training and education initiatives; and employment and procurement opportunities.

101. While there is no "one-size-fits-all" partnership arrangement between project proponents and Indigenous peoples, in our experience Indigenous peoples and project proponents have sought to address some or all of the following issues: equity participation levels; funding of equity, including loans to Indigenous partners to fund their contributions; project layout, design and routing; incorporation of traditional knowledge; recognition of cultural values; impact on the environment, ongoing environmental monitoring and protection, and decommissioning planning; decision-making regarding issues such as project budget, schedule, debt financing; entering into material contracts; and assignment of responsibility for and participation in various permitting and other regulatory procedures.

102. In addition, projects that we have been involved with which have successfully engaged and involved Indigenous people often incorporated an explicit and detailed delineation of roles and responsibilities among the different parties involved, including the project proponent, Band Chief and Council, Economic Development Office, individual Indigenous people, and governments.

103. Where the foundational principles discussed at paragraphs 95 and 96 have been agreed upon in advance, parties are better placed to address these matters. In so doing, they expose their respective interests and objectives, and begin the hard work of relationship-building.

Government's role in facilitating engagement

104. The mindset of partnership in approaching an interests-based consultation process facilitates both the Crown's compliance with its legal duty to consult and accommodate, as well as the commitments that many corporations have voluntarily undertaken. Governments should play a role in consultation, in particular, by: (a) helping align parties incentives to reach mutual agreement; (b) providing guidance on the appropriate form of consultation; and (c) resolving outstanding Aboriginal rights and title claims in a manner that clarifies rights and provides a foundation for other mutually beneficial relationships.

105. In our experience, project proponents and Indigenous peoples find it useful to consider what constructive role government may play in the particular consultation process they face. Governments are uniquely empowered to align incentives for both project proponents and Indigenous peoples so that they may reach mutually beneficial agreement. For example, in Ontario, the renewable energy procurement program provides an economic benefit (in the form of an increased purchase price) for electricity generated from projects with a specified level of Indigenous involvement in the project. In addition, other incentives may be used to further align

the consultation process, including by providing data, studies and other support to the information-gathering processes and by providing technical expertise (or funding to retain such expertise) to Indigenous peoples. Governments should actively embrace this role and do so more often.

106. Where the scale of a project is large or involves significant impact on Aboriginal rights and interests, it can be effective for the applicable government to negotiate an agreement with the Indigenous people(s) involved setting out each other's mutual obligations and responsibilities in the consultation process. Such agreements, rather than outlining specific roles for parties, rights, impacts or benefits, serve from the outset to establish common principles on which the consultation process will be founded. These agreements often explicitly highlight the parties' willingness and commitment to forging a new positive relationship, founded on mutual respect, understanding, participation, accountability, and balancing of interests. While it may be useful for private sector project proponents to undertake a similar exercise, the history of Indigenous peoples in Canada and their nation-to-nation relationships with the Crown provides governments, depending on the context, with a useful role to play in laying the foundation for significant consultation and accommodation exercises, depending on the context.

107. Governments should also do more to set expectations regarding the appropriate form of consultation in a given context and to determine when the duty has been met. We would encourage Canadian governments to provide context-specific advice or guidance in individual consultation processes to avoid significant ambiguity for project proponents and Indigenous peoples alike.

108. As discussed, the federal, provincial and territorial governments have developed differing policies in respect of the duty to consult and accommodate. Ideally, these governments would negotiate a joint consultation and accommodation policy to guide private sector partners and Indigenous peoples alike in approaching the consultation process. This does not mean that all consultation and accommodation policies must be uniform; they will vary by necessity in response to local context, the Indigenous peoples involved, the applicable treaties (if any), the particular rights an Indigenous people holds, and other factors. However, the lack of consultation policies in some jurisdictions, and the practical guidance provided by certain others, demonstrates that more could be done to ensure that these policies emanate from a common framework and provide the guidance necessary to effectively facilitate interests-based consultation. While it may be aspirational, the federal government's stated commitment to implement the Declaration in Canada could include an effort to develop such a framework with the provinces and territories.

109. Finally, governments have played and continue to play a foundational role in resolving outstanding Aboriginal claims to land and other rights. Comprehensive land claims agreements, which are also called modern treaties, are government-to-government agreements generally entered into in circumstances where Aboriginal land and resource rights have not been addressed by previous treaties or any other

legal means. These treaties typically recognize and define the Aboriginal land and resource rights of the Aboriginal signatory, and are intended to meaningfully improve the social, cultural, political and economic wellbeing of the Aboriginal people concerned. While the signatories to these treaties are Aboriginal, federal and provincial or territorial governments and their terms are typically lengthy and complex, their goal of creating long-term relationships built on, among other things, mutual respect, the recognition of Aboriginal rights and the facilitation of partnership is one to which business and Aboriginal peoples should aspire.

110. Modern treaties address a range of issues, including ownership, use and management of lands, waters and natural resources, harvesting of fish and wildlife, environmental protection and assessment, economic development, employment, government contracting, capital transfers, royalties from resource development, impact benefit agreements, parks and conservation areas, social and cultural enhancement, and self-government and public procurement arrangements. The treaties, once ratified, become constitutionally recognized and protected, and their provisions are intended to provide a mutual foundation for the beneficial and sustainable development and use of Indigenous peoples' traditional lands and resources.

111. Although businesses are not signatories to these agreements, provisions in these agreements have provided an effective foundation to support relationships between businesses and Indigenous communities, which have, in a number of cases, generated substantial economic benefits for all parties. Examples of modern treaties include the James Bay and Northern Quebec Agreement, the Nisga'a Final Agreement, the Inuvialuit Final Agreement, the Gwich'in Comprehensive Land Claim Agreement, the Nunavut Land Claims Agreement, and the Yukon First Nations Final Agreements.

PART V

CONCLUSION

112. The basic challenge of Indigenous consultation and accommodation arises because Canada's conduct and treatment of Indigenous peoples has caused immeasurable harm. As a result, Canada's relationship with Indigenous peoples suffers from a lack of respect and trust. The need for reconciliation emanates from the need to establish respectful relationships. Reconciliation must therefore form the core of any consultation and accommodation process.

113. Canada is still beginning its reconciliation with Indigenous peoples. While it is important to acknowledge that progress has been made, we cannot lose sight of the long road ahead. Similarly, the principles of free, prior and informed consent are still relatively novel, and have not been subject to substantial interpretation. While future legislation, government policy, and judicial interpretation will determine whether the duty to consult and, if appropriate, accommodate under Canadian law, and the international principles of free, prior and informed consent differ in certain ways, it is clear that both share the same goal: to protect Aboriginal peoples' rights, remedy historical disadvantage, and provide the foundation for a more dignified and respectful relationship between Indigenous peoples and Canada. Both regimes aim to foster reconciliation.

114. To build the necessary respect and trust that underlies reconciliation, we cannot simply proclaim it. We need to earn that respect and trust through conduct and action. One way in which reconciliation can be fostered is by approaching Indigenous consultation and accommodation processes through the lens of building long-term relationships, aimed at satisfying all parties' interests. It is useful to think

of these relationships through the mindset of partnership. A partnership model is the antithesis of unilateralism, exploitation and neglect.

115. Flowing from the model of partnership, Indigenous peoples should be provided with the opportunity to participate in all aspects—procedural and substantive—of a project or activity that may affect their rights. In the context of this approach, government should play a useful role in determining the appropriate form of consultation in the context and helping parties align their incentives so that all significant interests can be met.

116. It is undeniable that the imperative of reconciliation falls first on the shoulders of the Crown. However, in practice, when Indigenous consultations are required in connection to a project or activity led by the private sector, the consultation process is in whole or in part delegated to the proponent. Various corporate codes of conduct have incorporated the principles of free, prior and informed consent. The Truth and Reconciliation Commission called on the private sector in Canada, as well as Canadian governments, to implement the Declaration. It is therefore important for the private sector in Canada to consider how its actions may facilitate reconciliation as well. By approaching Indigenous peoples as partners, Canadian companies take an important step.

117. The review reflected in this paper reveals many challenges on the path towards reconciliation, but by the same token, those challenges present unique opportunities for Canada and Indigenous peoples to build a relationship that endures and is worthy of celebration by everyone.

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