

originally posted Thursday, 15 September 2017 by Joan Russow PhD Global Compliance Research Project INTERNATIONAL PERSPECTIVE OF THE PRINCIPLE OF OBTAINING FREE PRIOR INFORMED CONSENT As affirmed in International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, Canada has an affirmative obligation to “promote the realization of the right of self-determination, and ... respect that right, in conformity with the provisions of the Charter of the United Nations.” UN treaty bodies and other diverse entities require or support the standard of Free Prior Informed Consent (FPIC). These include: UN General Assembly and specialized agencies, as well as regional human rights bodies. In 2011, the International Finance Corporation announced: “For projects with potential significant adverse impacts on indigenous peoples, IFC has adopted the principle of ‘Free, Prior, and Informed Consent’ informed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples.” The UN Development Programme (UNDP) “will not participate in a Project that violates the human rights of indigenous peoples as affirmed by Applicable Law and the United Nations Declaration”. UNDP added: “FPIC will be ensured on any matters that may affect the rights and interests, lands, resources, territories (whether titled or untitled to the people in question) and traditional livelihoods of the indigenous peoples concerned.” In March 2016, the UN Committee on Economic, Social and Cultural Rights recommended that Canada “fully recognize the right to free, prior and informed consent of indigenous peoples in its laws and policies and apply it in practice.” In particular, the Committee added that: ... the State party establish effective mechanisms that enable meaningful participation of indigenous peoples in decision-making in relation to development projects being carried out on, or near, their lands or territories ... [and] that the State party effectively engage indigenous peoples in the formulation of legislation that affects them. In July 2015, the UN Human Rights Committee urged Canada to “consult indigenous people ... to seek their free, prior and informed consent whenever legislation and actions impact on their lands and rights” Following his visit to Canada, former Special Rapporteur James Anaya concluded: “as a general rule resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned. “Anaya added: “The general rule identified here derives from the character of free, prior and informed consent as a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within their territories.” FPIC is also highlighted in The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions: “indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination.” In addition to the right of self-determination, the UN Declaration includes a number of provisions that refer to FPIC. No specific provision should be interpreted in isolation, but rather in the context of the whole Declaration and other international human rights law. For example, such approach would apply to article 32(2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. In the Handbook for Parliamentarians on the UN Declaration, 51 the Inter-Parliamentary Union (IPU) emphasizes the importance of Indigenous peoples’ “consent”: When parliamentarians consider draft legislation on matters that

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directly or indirectly affect indigenous peoples, it is important for them to understand and carry out their duty to obtain indigenous peoples' consent, to ensure that such laws not only reflect the views of the non-indigenous communities concerned, but can also be implemented without detrimentally affecting the rights of indigenous communities. I believe that Ms. Victoria Tauli-Corpuz, the current UN Special Rapporteur on the Rights of Indigenous Peoples would concur with the necessity to obtain free, prior and informed consent: I also regret that there are still conflicting interpretations among key actors about how indigenous rights should be applied in specific situations, especially when competing rights and interests are at stake. I continue to observe that discrepancies in interpretation exist especially in relation to rights to lands and resources and the application of the duty of States to consult with and seek the free, prior and informed consent of indigenous peoples before the adoption of measures that affect them. As part of my mandate to promote good practices in this regard, I have provided technical advice through dialogue with Governments on issues such as consultation and consent, indigenous jurisdiction and access to justice for indigenous peoples, particularly indigenous women. Canada has always taken the position that consent does not mean consent; it only means consultation THE UN RAPPOREUR WOULD UNDOUBTEDLY CONCUR ESPECIALLY, IF THE UN RAPPOREUR WERE TO BE INVITED TO VISIT THE SALISH SEA In SDG13 on climate change, addressing climate change is described as urgent; climate change could also preclude the fulfillment of most of the SDGs In 1988, at the Changing Atmosphere Conference in Toronto, the participants including representatives from government, academia, NGO and industry expressed their concern about Climate Change in the Conference statement: "Humanity is conducting an unintended, uncontrolled, globally pervasive experiment whose ultimate consequence could be second only to a global nuclear war. the Earth's atmosphere is being changed at an unprecedented rate by pollutants resulting from human activities, inefficient and wasteful fossil fuel use ... These changes represent a major threat to international security and are already having harmful consequences over many parts of the globe.... it is imperative to act now. The Conference called for immediate action by governments, to Reduce CO2 emissions by approximately 20% of 1988 levels by the year 2005 as an initial global goal. Clearly the industrialized nations have a responsibility to lead the way both through their national energy policies and their bilateral multilateral assistance arrangement. At COP21, Canada's "contribution" was to reduce greenhouse gas emissions by 30% below 2005 levels by 2030. Just under twenty years later, Ban Ki Moon, in Paris, urged states to negotiate with a global vision not with national vested interests (COP 21 press conference) Canada is the highest per capita contributor to greenhouse gas emissions and Canada's carbon budget has been ignored by Canada in 2016 Canada is in danger of being in non-compliance with the purpose of the legally binding United Nations Framework on Climate Change (article 2) ... "to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." A global vision would be to address article 2 and at a minimum to immediately end all subsidies for fossil fuel, to calculate the carbon budget for Canada, to divest in fossil fuels and to reinvest in renewable energy, to conserve sinks - such as old growth forests and bogs (not just as a means to offset emissions), to strengthen conservation of biodiversity, to avoid all false solutions such as nuclear, geo-engineering and biofuels which would all violate principles within the UNFCCC, promote nature-based solutions along with solar energy, wind energy, wave and geothermal and to compensate for historical emissions, and to institute a fair and just transition for workers

affected negatively by the new vision. At COP 21 there was the violation of the non-regression principle because in the legally binding 1992 UNFCCC, states made a "commitment" to mitigate greenhouse gas emissions, while in the Paris Agreement the states only made a "contribution". The contributions by states, including Canada, in the Paris Agreement could result in a temperature rise of over 3 degrees. Canada should seek an advisory opinion from the International Court of Justice on whether Canada's current "contributions" in the Paris agreement violate Article 2 of the UNFCCC and, if so, to determine what actions would be necessary to comply with article 2. Canada, at a minimum, must calculate its carbon budget and make a firm commitment to reduce greenhouse gas emissions to 25% below 1990 levels by 2020 and to achieve decarbonisation and 100 % below 1990 levels by 2050. A real global vision, however, would be time lines and targets in line with existing and emerging science such as 15% below 1990 by 2017, 20% below 1990 by 2018, 30% below 1990 levels by 2019, 40% below 1990 levels by 2020, 60 % below 1990 levels by 2025, 75% below 1990 below 1990 levels by 2035 and 100% below 1990 emissions by 2040, and reaching Decarbonization with 100% socially equitable ecologically sound renewable energy, Canada is bound by the precautionary principle which reads "Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent the threat." (Rio Declaration, UNCED1992). This principle is also contained in the 1992 Convention on Biological Biodiversity, the precautionary principle reads; "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat" in the 1992 UN Framework Convention on climate change: "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and its adverse effects, and where there are threats of irreversible damage, the lack of scientific certainty should not be used as a reason for postponing such measures. And in 1995 agreement "relating to the Conservation and management of straddling fish stocks and highly migratory fish stocks ... is the also the obligation to invoke the precautionary principle. Under the Convention concerning the Protection of the World Cultural and Natural Heritage, 1972) Canada has affirmed the following: "... in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value... (Preamble, Convention Concerning the Protection of the World cultural and Natural Heritage, 1972) Under Article 4 of the. Convention, Canada recognized the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical. BACKGROUND TO RELEVANT SECTION IN THE LEGALLY BINDING INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND TO THE HISTORY OF ADOPTION OF UNDRIP IN CANADA AND TRC Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted [cite references, including 1982 document circulated by External Affairs "Canadian Reply to Questionnaire on Parliaments and the Treaty-making power"] The full context of this statement comes from the "Canadian Reply to Questionnaire on Parliaments and the Treaty-making Power". It is an External Affairs Department communiqué which was put together in 1982 to assist the External Affairs Officers in explaining the division of powers and

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constitutional conventions in Canada in relation to International obligations: Many international agreements require legislation to make them effective in Canadian domestic law. The legislation may be either federal or provincial or a combination of both in fields of shared jurisdiction. Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted. In concluding this section which was referred to by John Hunter, Green, makes a very significant remark, which suggests that Canada is bound by the treaty prior to the enactment into national law: The fact that a treaty has been signed and ratified but not yet enacted into national law does not preclude the international liability of the signatory under the treaty. While the previous Conservative government proclaimed- "consent does not really mean consent, and the Federal and former provincial Liberal s through their actions appear to perpetuate this notion. Article 31, however, in the Vienna Convention on the Law of Treaties states: General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In ordinary language "consent" means consent. HISTORY OF THE ADOPTION OF RELEVANT DOCUMENTS TO THE FREE PRIOR AND INFORMED CONSENT I was in the United Nations in New York, in 2007 when Canada was shamed as being one of four countries to vote against the UN Declaration on the Rights of indigenous peoples (UNDRIP). Also, at that time, Grand Chief Edward John, a Representative to the United Nations Permanent Forum on Indigenous Issues, had an opportunity to speak forcefully reprimanding Canada's refusal, In April 2009, the Australian Government, reversing its previous refusal, adopted the declaration in Parliament. At that point, given that almost all states from all continents representing the full range of legal systems had adopted the Declaration, UNDRIP began to embody peremptory norms. Peremptory norms (often cited as jus cogen) are said to possess a universal character in that no state may derogate from them, despite the will of the state to do so. Not only has the UNDRIP become an international norm, it has been finally adopted in Canada and in British Columbia After years of reluctance, by the Conservative government, to adopt the Declaration, on May 10, 2016 the Federal Liberal government adopted the UNDRIP. Now on September 7 2017, Premier John Horgan, Grand Chief Edward John, and other officials opened the B.C. Cabinet and First Nations Leaders' Gathering in Vancouver with the major announcement. The B.C. government will be governing the province according to principles embodied in the UN Declaration on the Rights of Indigenous Peoples. During the 2015 election, Trudeau proclaimed that he would abide by the recommendations of the Truth and Reconciliation Commission. And on September 7 2017, Premier Horgan also affirmed that the provincial government will implement the 94 Calls to Action in the Truth and Reconciliation Commission's final report. In the UNDRIP is Article 19 which affirms: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. `` As well in the truth and reconciliation recommendations is the call to action 92 which affirms: We call upon the corporate sector in Canada to commit to obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects Thus, Federal and BC governments both incurred the obligation to abide by the principle of free prior informed consent. Given the years of First Nation's being deprived of their own means of subsistence through resource extraction, and given years of inadequate economic support, from Federal and Provincial governments, for the satisfaction of First Nations basic needs; First Nations are

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vulnerable to corporate attempts to buy their consent for projects that are not in their long term health and financial interests. Consent that arises through playing on First Nations vulnerabilities does not fulfill the requirements of free prior informed consent. At a lecture given, at the University of Victoria, by Robert Morales, a member of Cowichan Tribes specializing in the areas of First Nations, compared UNDRIP to the legally binding international Covenant on Civil and Political Rights ratified by Canada in 1976. For example, Article 1 of the legally binding International Covenant on Civil and Political Rights states the following: In no case may a people be deprived of its own means of subsistence. In the UNDRIP. Under Article 20; Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. As well, Article 43 The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world. While the previous Conservative government proclaimed: "consent does not really mean consent, and the Federal and former provincial Liberal governments, through their actions appear to perpetuate this notion. Article 31, however, in the Vienna Convention on the Law of Treaties states: General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In ordinary language "consent" means consent. Kinder Morgan Expansion has not obtained the free prior and informed consent for its expansion