Canada's Interpretation of Free Prior Informed consent is out of Sync with the International Interpretation

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While Canada has adopted UNDRIP Canada has failed to comply with Articles 23, 29 and 8, which respectively declare that "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development",

In addition, Canada has failed to comply with Article 19 which is vital to Safeguarding indigenous lands, territories and resources from unsustainable developments

Article 19 of the UN Declaration on the Rights of Indigenous Peoples states: 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.

While the previous Conservative government proclaimed- "consent does not really mean consent, and now, the current Federal Liberal government perpetuates this notion and equates free prior inform consent with consultation. Consultation does not mean consent. Consent means consent

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.

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 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

In no way could Canada claim that they have free prior informed consent from the First Nations in current key development projects in British Columbia such as site C, Kinder Morgan and LNG

IN NO WAY COULD KINDER MORGAN CLAIM THAT THEY HAVE OBTAINED FREE PRIOR INFORMED CONSENT FROM FIRST NATIONS TO PROCEED WITH KINDER MORGAN EXPANSION

THE UN RAPPORTEUR WOULD UNDOUBTEDLY CONCUR ESPECIALLY, IF THE UN RAPPORTEUR WERE TO BE INVITED TO VISIT THE SALISH SEA

Approving Kinder Morgan Expansion would impact on climate change and jeopardize the future conservation projects in the Salish Sea and the rights of future generations and the rights of indigenous peoples

By Joan Russow

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1. Kinder Morgan expansion would contribute to the undermining of Canada's commitment to implement the SDGs and of its obligations under the United Nations Framework Convention on Climate Change

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% below1990 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 below1990 levels by 2035 and 100% below 1990 emissions by 2040, and reaching Decarbonization with 100% socially equitable ecologically sound renewable energy,

In addition, the expansion of the Kinder Morgan would contribute to the violation the precautionary principle

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 in1995 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.

There is sufficient evidence that there could be serious irreversible damage, loss of significant biological diversity, adverse effects of

climate change, and harm to marine life to justify invoking the precautionary principle and to decline the support for the Kinder Morgan expansion

1. The expansion of Kinder Morgan could jeopardize future conservation projects in the Salish Sea, and violate the rights of future generations and the rights of indigenous peoples

In the past few years, there have been many proposals for conservation, comprising terrestrial, marine and coastal ecosystems in the Salish Sea; for promoting and demonstrating a balanced relationship between humans and the biosphere, while integrating especially the role of traditional knowledge in ecosystem management and fostering economic and human development which is socio-culturally and ecologically sustainable.

Kinder Morgan expansion would undermine numerous proposals related to coastal and marine conservation of the Salish Sea are areas of terrestrial and coastal/marine ecosystems; sound ecological practices could reinforce scientific research, monitoring, training and education

With the approval of Kinder Morgan expansion, the Trudeau government will violate legally binding international instruments; such as the Convention concerning the Protection of Cultural and Natural

heritage

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.

In addition, the Kinder Morgan expansion could cause Canada to violate the Law of the Seas;

"The United Nations Convention on the Law of the Sea 1982 (UNCLOS) is popularly considered “a constitution for the oceans”, establishing a global framework for the exploitation and conservation of marine resources. It is one of the most important Treaties in setting out the importance and special nature of whales and dolphins” (http://uk.whales.org/issues/in-depth/united-nations-convention-on-law-of-sea-1982)

Expansion of Kinder Morgan would violate key principle, in the UN Declaration on the Rights of indigenous Peoples: `free, prior informed consent. `` This principle would be completely ignored through the approval of Kinder Morgan expansion. This approval will also contravene Call to Action 92.1 in the Truth and Reconciliation Commission:

Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.

LEAGACY OF ACCIDENTS

In April 2016 was a report, written by the Friends of the Earth and entitled *Tar Sands/Dilbit Crude Oil Movements Within the Salish Sea.* gives an excellent account of previous accidents and warning about potential accidents:

The difficulty and unmet needs for responding to a dilbit crude oil spill motivated this new analysis of oil spill risk in the Salish Sea. The reasons for this concern were rigorously documented in a report published by the National Academy of Sciences (NAS) in 2016.2

Fortuitously, the NAS study was released while this paper was being completed enabling its findings to be incorporated herein. The vulnerability of the Salish Sea to a spill of dilbit crude oil is further heightened by the poorly publicized proposal to triple the Kinder Morgan/ Trans Mountain Pipeline that connects the vast supplies of bitumen in Alberta, Canada to an oil terminal in Burnaby, BC.

The proposal would result

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Tar Sands/Dilbit Crude Oil Movements Within the Salish Sea in an increased capacity to ship dilbit crude from 300,000 bbls/day to 890,000 bbls/day. 3 A 2014 vessel traffic risk assessment, (VTRA 2010) concluded the proposal would result in a 7-fold increase in tanker traffic transiting through the Salish Sea as compared to 2010.

The number of dilbit-carrying oil tankers would increase from approximately 1 per week to 1 per day, significantly increasing the amount of oil being transported through the San Juan Islands in Haro Strait and Boundary Pass (Appendix 1). 4

This paper focuses on existing dilbit shipments between Kinder Morgan's Burnaby, BC terminal and the U.S. Oil & Refining Co. refinery in Tacoma, WA in order to elevate public attention for the need to improve oil spill prevention and response capabilities within the Salish Sea. In addition, it is intended to identify the

significant risk associated with Kinder Morgan's proposed expansion of dilbit crude shipping through the Salish Sea.

Dilbit crude oil is currently shipped from the Burnaby terminal through the Salish Sea on tankers bound to ports on the west coast and overseas. It is also transported within the Salish Sea approximately six times a month (see results section) on barges towed by conventional tugs through the particularly fast currents along Rosario Strait,

Admiralty Inlet and Puget Sound. Though tankers carry more oil than barges, tug and tow marine transport is of higher risk due to the limited maneuvering capabilities and risks of tow wires snapping.

Sause Brothers, a U.S. Oil & Refining Co contractor based in Coos Bay, Oregon owns and operates the barges used in this trade. This is the same company that experienced a tug snapping the tow wire of its barge, Nestucca, in heavy seas along the Olympic Coast in the winter of 1988. 5 The Nestucca was full of heavy, Bunker C oil bound to the ARCO Refinery April 2016 11 at Cherry Point, Washington.

ARCO is now owned and operated by BP. The resulting 231,000-gallon oil spill spread 800 square miles, from Newport Oregon to the west side of Vancouver Island. Much of it remained partially submerged due to its density. Still, it was estimated that over 56,000 seabirds were killed.6 This incident is not intended to reflect on Sause Brothers' current operations, on which we have no information, but to highlight what could occur from increased numbers of barges operating in the region

More recently, there have been a series of incidents involving tugs towing a variety of cargo along Rosario Strait between 2011 and 2013, including collisions with navigational aids. Coast Guard

Sector Puget Sound issued voluntary Marine Safety Advisory 166307 on October 9, 2012 after 5 incidents with tugs and tows in Rosario Strait between October 10, 2011 and December 23, 2011.

Two additional incidents occurred on May 23, 2013 and September 8, 2013 since the issuance of the Safety Advisory. The Advisory was incorporated into the Puget Sound Harbor Safety Plan (Appendix 4) but no state or federal regulations have been proposed since then.

On March 2, 2016 two barges were being towed when high winds blew them to shore near Victoria, BC. One barge, carrying two thousand liters of diesel fuel, was removed the next day. The other, carrying construction debris, took weeks to be removed from the beach. See "Grounded barge was a warning"8 and "Work begins to unload, remove barge grounded off Dallas Road."9 Once again on March 15, 2016 a U.S. tug and barge bound for Alaska carrying general cargo touched bottom near Campbell River, BC.10 Canadian tugs have suffered a similar fate. In 2015 alone, six tugs have sunk in nine incidents along the British Columbia11 coast.

The fact that modern barges are equipped with double hulls does little to assuage concerns about this form of oil transportation. A 2011 study questioned the effectiveness of double hulls in reducing vessel-accident oil spillage.12 Utilizing U.S. Coast Guard vessel accident pollution incidents between 2001 and 2008 the authors found that on average double hulls reduced the size of oil spills by only 20 percent in barges and 62 percent in tankers.

Salish Sea item: http://www.foe.org/projects/oceans-and-forests/oceangoing-vessels/tar-sands-report

In conclusion, If the Kinder Morgan Expansion is permitted to proceed, Canada will demonstrate yet again its defiance of international law.

At international UN conferences, the Harper government had caused Canada to be perceived as an international pariah because of its obsession with profiting from the tarsands at any cost, while being willing to disregard its duty to guarantee fundamental indigenous and ecological rights and to discharge obligations under international law. And it is with great dismay to begin to realize that with the Trudeau government, “Canada is not yet back”.

Approving the Kinder Morgan would demonstrate to the world that Canada is still not serious about reducing greenhouse gas emissions.

Proceeding with the Kinder Morgan Expansion could be grossly negligent. A major oil spill would devastate the marine environment, and coastal communities of the Salish Sea. There is sufficient evidence of precedents of environmental devastation from spills that a prudent or reasonable person would not permit the Kinder Morgan expansion in the sensitive waters of the Salish Sea:

Proceeding with the approval if the Kinder Morgan Expansion would also show that Canada disregards commitments to heritage, to the rights of future generations and to the rights of First Nations and ignores dire warning and social licence.

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 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.

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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 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

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Kinder Morgan Expansion has not obtained the free prior and informed consent for its expansion