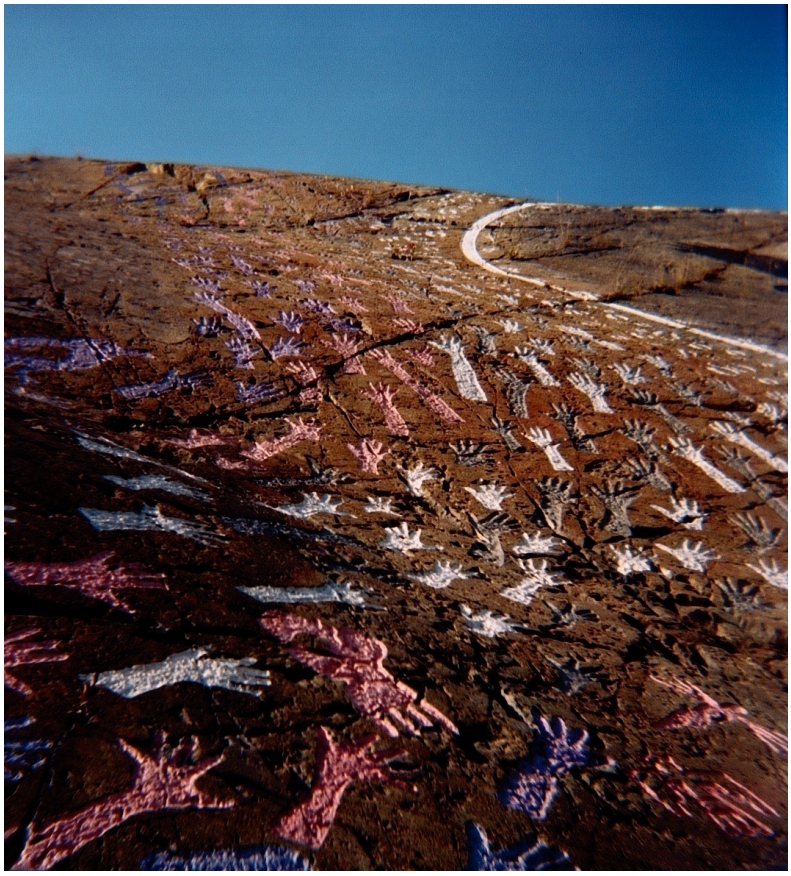


Collaborative Consent

A NATION-TO-NATION PATH TO PARTNERSHIP WITH INDIGENOUS GOVERNMENTS

PREPARED FOR THE MINISTER OF NATURAL RESOURCES BY:

ISHKONIGAN, INC.
THE PHARE LAW CORPORATION
NORTH RAVEN

December 20, 2015

Collaborative Consent

A NATION-TO-NATION PATH TO PARTNERSHIP WITH INDIGENOUS GOVERNMENTS

"No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership."

Minister of Natural Resources Mandate Letter from Prime Minister Trudeau[i]
December 2015

"It has been estimated that, over the next decade, more than 600 major resource projects, worth approximately $650 billion, are planned for Canada, and…every oil and gas project currently proposed in western Canada implicates at least one First Nations community, giving them an opportunity to increase employment and economic prosperity through collaboration in energy development."

Opportunities for First Nations Prosperity through Oil and Gas Development
Fraser Institute, 2013[ii]

THE PROBLEM

Until meaningfully addressed, the need for the free, prior, informed consent of Indigenous rights-holders will continue to be the most contentious element of resource development in Canada. The Government of Canada has less than 1460 days to demonstrate measurable progress in addressing this issue.

THE CONTEXT

After years of opposition, on November 12, 2010 Canada endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) stating, "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."[iii] The issue of the need to secure consent of Indigenous peoples regarding resource development projects, in particular the concern that "free, prior and informed consent when used as a veto"[iv] could stop all resource development, has arguably been the most discussed issue when it comes to giving full expression to the UNDRIP. As very recently argued by Tom Flanagan in the Globe and Mail, "a veto power would be particularly threatening to corridor projects, such as pipelines, railways, highways and power lines."[v]

The Tsilhqot'in decision of the Supreme Court of Canada provided that "governments and others seeking to use the land must obtain the consent of the Aboriginal title holders,"[vi] regarding resource developments being proposed on Aboriginal title lands. If the Aboriginal group does not provide its consent, then the government's only recourse is to establish that the resource development through meeting the justification test under s. 35 of the *Constitution Act, 1982.* This justification test includes engaging in 'consultation and accommodation' with Aboriginal rights-holders. While some wonder at how this requirement for consent applies to Aboriginal traditional (non-title) territories, the Supreme Court is - and has been for many years - sending a very strong message about the significance of Aboriginal rights in the Canadian federation and society. The Supreme Court is not prepared to allow these rights to be ignored in the pursuit of resource development.

THE SOLUTION

While not widely known, jurisdictions within Canada are already engaged - very successfully - in consent-based discussions with Indigenous peoples. The Government of Northwest Territories (the GNWT) is a leader in this area and has been for almost a decade. They have referred to their approach as a 'collaborative consent' process where all governments - Indigenous and non-Indigenous - work to achieve each other's consent through collaborative approaches tailored to the matter at hand.

There are at least five current streams of activity that the GNWT is involved in with Indigenous governments and rights-holders that are aimed at achieving consent through collaboration:

- Development of legislation
- Development of policies and plans
- Negotiations regarding ownership and use of lands and waters
- Sector specific agreements for resource management
- Resource revenue sharing agreements

Collaborative Legislation

The GNWT first developed their Species at Risk Act in full partnership with Aboriginal governments. The model used was to create a working group that was tasked with co-drafting the legislation. The Working Group was comprised of high-ranking officials of the GNWT and all Aboriginal Governments, and all party's legal counsel (including the GNWT's lawyers from the Department of Justice). The process, once defined, took approximately three years and negated the need for subsequent s.35 consultation and accommodation because Aboriginal governments agreed (indeed, co-developed) all provisions. The draft bill went through regular public consultation processes after development.

Then, building on that successful experience, the governments moved to redevelop their wildlife legislation – a very controversial law that had not been amended for many decades, and that was linked to very complex land claim settlements. This law took four years, but given the sensitivity of the subject matter, avoided years of probable litigation.

The GNWT now – building on an established climate of trust and demonstrated collaboration - has five more laws they intend to co-develop (Waters Act, Environmental Protection Act, the Environmental Rights Act, Territorial Parks Act, Forest Management Act) in the next 1460 days of their (recently elected) 18th Legislative Assembly.

As the GNWT began this collaborative consent-based approach, there was an initial period of having to build trust, work through process issues, and overcome old ways of doing things. But now, with that foundation, each legislative development process is taking less time and is more efficient. Also, all governments move quickly through the review and

enactment process because they have all been involved in the creation of laws that will apply to themselves (e.g. there is no Dept. of Justice review of a draft bill because they have been on the Working Group throughout, Aboriginal governments have already engaged their members as the drafting proceeds, etc.).

Collaborative Policies and Plans

In much the same way, the GNWT co-develops territory-wide policies such as their Water Stewardship Strategy. This policy and associated action plan sets the direction for the GNWT regarding water use and protection, and after a similar process (with a Working Group and an additional Aboriginal Steering Committee) was signed by Canada, the GNWT and all Indigenous governments in the NWT. It became a policy that was seen as jointly owned by all governments.

Given the extremely contentious and complex nature of water discussions (the NWT is downstream of Alberta and BC, and also has significant oil and gas development opportunities), this policy is instrumental in continuing to build consensus as resource development proceeds.

Collaborative Negotiations regarding Land and Waters

There are two examples of collaborative consent-based negotiations, both of which build on the positive relationships that are evolving. First, the NWT Water Strategy created the goal to negotiate transboundary water agreements between the GNWT and the governments of AB, BC, SK and Yukon. These negotiations relied on the previously developed Aboriginal Steering Committee for scoping of interests, options and for development of the proposed final text of the agreements (signed with AB on March 18, 2015 and BC on October 19, 2015). The GNWT and Indigenous governments have signed an MOU on Bilateral Water Agreement Implementation that sets out their respective roles in implementing the transboundary water agreements.

Second, the GNWT is engaged in negotiating a massive (33,000 km2) national and territorial park with Indigenous governments and Canada in the East Arm of Great Slave Lake (Thaidene Nene). The GNWT is working with all Indigenous governments to build collaborative consent for these proposed parks, in essence, building an opportunity that all see themselves represented in regarding the park creation. These negotiations are proceeding, achieving an unprecedented agreement on park boundaries within 4 months,

even though the park will be designated in an area where there are contentious and overlapping unresolved land claims. This is the power of collaborative approaches.

The key elements of the model used by the two GNWT negotiation teams were:

- Begin with a very loosely defined mandate (as opposed to the tight win/lose bottom line mandates typical in land related negotiations)
- Report every month directly back to Cabinet with proposed solutions developed with the Aboriginal Government partners (eliminating the drag effect of bureaucratic levels of review and approval)
- Receive Cabinet 'litmus test' direction on proposed solutions (gives negotiators a general sense of the acceptability of a proposed approach while maintaining flexibility with the negotiators to find better solutions at the negotiating table)
- Have additional political 'nation-to-nation' meetings, at key stages, to maintain focus and commitment of political leadership as successive levels of agreement are reached.

All parties are of the view that completion of these negotiations will not require s.35 consultations as, in essence, all parties will co-propose the parks in Thaidene Nene.

Sector Specific Agreements for Resource Management

Various laws in the GNWT allow for the creation of agreements to co-manage resources. For example, the Forest Management Act and the Wildlife Act allow for the GNWT and Aboriginal governments to create agreements on how a particular resource (forests, wildlife) will be managed and who will discharge which responsibilities. In this situation, the two governments reach agreement, even though it is under a provision of territorial legislation. Because s.35 consultation is required where a government is contemplating a decision that might impact Aboriginal rights, a situation where an Aboriginal government agrees or co-proposes does not require this consultation.

Resource Revenue Sharing Agreements

The GNWT has developed and reached agreement with all Indigenous governments that have signed on to devolution - whether they have a settled land claim or not - to resource revenue sharing. Since devolution on April 1, 2014, the GNWT keeps 50% of the revenues collected from resource development on public land (up to a maximum amount) and

Canada retains the remainder. Of the GNWT's share, 25% is shared with Indigenous governments[vii] regardless of where in the NWT the revenue is generated. This is not in lieu of impact-benefit agreements (IBAs) that may be negotiated with proponents of specific projects, or financial payments due to Indigenous governments under land claims, but an additional commitment.

This is a critical consent-based approach that respects the presence of Indigenous governments and greatly enhances the likelihood of Indigenous government support for resource development projects.

CONCLUSION

Working together to build each other's consent is a process federal and provincial governments have done since confederation in almost all areas of jurisdictional management. However, this process has not generally been extended to Aboriginal governments likely because they have not been seen as 'governments'. Now is the time to change that.

A "renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership" is possible with a long-term commitment to work together to find solutions. Section 35 and the honour of the Crown require consultation and accommodation where the Crown might impact Indigenous rights. However, starting from a premise where the goal is *no impact on rights* – through collaboratively crafting a jointly acceptable law, policy, project, negotiation position, or revenue arrangement - is a preferred approach. It is an approach that leads to reconciliation.

While the s.35 consultation and accommodation will always be available and required should collaboration fail, this approach should be used as sparingly as any other unilateral approach might be used in building relationships with any other government.

There are existing models – positive success stories – demonstrating that this process can and does work within Canada's federation and legal framework.

NEXT STEPS

Canada needs to make a timely demonstration of its commitment to addressing the UNDRIP, and stating its confidence that in so doing, greater prosperity and equity for all - especially in the area of resource development - can be achieved.

Key, high-priority political issues require a focused, politically driven process outside the normal operation of the bureaucracy. The nation-to-nation relationship with Indigenous peoples is one such issue. Thus, the first priority is to demonstrate intense political focus, in a fashion very similar to the structure used to address the government's Syrian refugee commitment. The politically driven approach taken to meet this commitment was to: define a very clear goal; elevate achieving the goal to a Cabinet responsibility; provide direct and regular oversight to ensure that the priority is achieved; and determine a time-limited duration for achieving the goal.

Given the numerous processes that are implicated by building a collaborative consent approach, a similar Cabinet directed and overseen approach should be taken, with a lead Minister or Ministers appointed.

Cabinet should then act (presented in broad terms for the moment) in two key areas:

New Projects, Legislation, Policies

- Canada should make a public political commitment to implementing consent-based approaches.
- Canada should secure nation-to-nation commitments from Indigenous governments to work by collaborative consent methods.
- Policy statements, guidance documents and directives on achieving consent should be co-developed with Indigenous governments to provide guidance to project proponents regarding new developments that implicate Indigenous lands, waters, or rights.
- Canada and Indigenous governments should propose talks with provinces to explore collaborative resource revenue sharing models.

Existing Initiatives Not Yet Approved/Complete

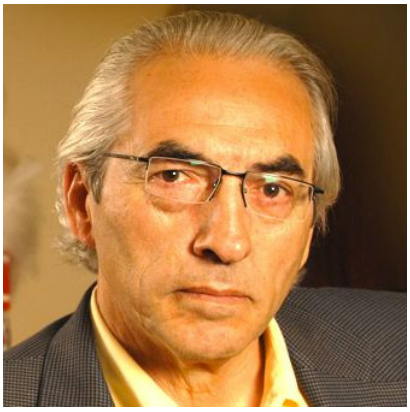
Regarding developments that are currently underway in an approval process, while they will not be subject to dramatically new environmental assessment processes, achieving consent should be a requirement. To begin to implement a consent-oriented approach to existing, not yet fully approved, resource development in Canada:

- Determine which existing projects in the approval pipeline are most likely to achieve early success with this approach (e.g. due to nature of project, characteristics of entities and governments involved, existence of historical trust, willingness to engage, etc.).

- Scope the process and models of participation in more detail given the nature of projects in approval pipeline.

- Set out a phased timeline for the next 1460 days and beyond to address priority projects of varying degrees of complexity. This timeline would build successes to ensure continuation under a subsequent mandate.

Who We Are



ISHKONIGAN, INC.

Established in 2009, Ishkonigan specializes in consultation and mediation services to Indigenous communities, all levels of government and business.

Phil Fontaine is among the most recognizable and respected figures in Canada. His influence goes well beyond politics and the Indigenous communities he loyally serves. Phil has touched the lives of all Canadians.

THE PHARE LAW CORPORATION

Merrell-Ann Phare is a lawyer, writer and the founding Executive Director of the Centre for Indigenous Environmental Resources, a national First Nation charitable environmental organisation. She is the author of the book '*Denying the Source: the Crisis of First Nations Water Rights*' and '*Ethical Water*'. Merrell-Ann is Chief Negotiator on behalf of the Government of the Northwest Territories in their negotiation of transboundary water agreements in the Mackenzie River Basin and for the creation of Thaidene Nene, a national and terrritorial park in the east arm of Great Slave Lake. She is legal counsel and advisor to a number of First Nation and other governments and organisations and regularly speaks on water issues and First Nations.

NORTH RAVEN

Michael Miltenberger served in the NWT Legislature from 1995-2015, 14 of those years as a Cabinet Minister. His roles have been diverse, reflecting his broad interest in improving the effectiveness of the GWNT in bettering the lives of northerners. He has served as Deputy Premier, Government House Leader, Minister of Health and Social Services, Minister of Education, Minister of Finance, Minister of Environment and Natural Resources, and the Minister Responsible for the NWT Power Corporation. He has worked extensively in the areas of water, the environment and working collaboratively with Aboriginal governments. Michael is Métis and lives in Fort Smith, NWT.

Endnotes

[i] Minister of Natural Resources Mandate Letter at http://pm.gc.ca/eng/minister-natural-resources-mandate-letter.

[ii] Opportunities for First Nation Prosperity Through Oil and Gas Development at. https://www.fraserinstitute.org/content/opportunities-first-nation-prosperity-through-oil-and-gas-development - sthash.FeRTYXwX.dpuf

[iii] Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples at http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.

[iv] Ibid.

[v] "Support for UN declaration on native rights may spell trouble for Canada's resource sector", Tom Flanagan in the Globe and Mail, November 23, 2015 at http://www.theglobeandmail.com/globe-debate/support-for-un-declaration-on-native-rights-may-spell-trouble-for-resource-sector/article27415342/

[vi] Tsilhqot'in Nation *v.* British Columbia, 2014 SCC 44, para. 76.

[vii] http://devolution.gov.nt.ca/about-devolution/faq/frequently-asked-questions-about-resource-revenue-sharing