

Expert Mechanism on the Rights of Indigenous Peoples
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Country Engagement

Joint Statement of: Amnesty International, Assembly of First Nations, BC Assembly of First Nations, Canadian Friends Service Committee (Quakers), Grand Council of the Crees (Eeyou Istchee), KAIROS: Canadian Ecumenical Justice Initiatives, Union of British Columbia Indian Chiefs, Grand Chief Wilton Littlechild, Mariam Wallet Aboubakrine, Past Chair, UN Permanent Forum on Indigenous Issues, Sheryl Lightfoot, Canada Research Chair of Global Indigenous Rights and Politics, University of British Columbia,

Recommendation:

That EMRIP remind States of the meaning of FPIC in international law, and reiterate State responsibilities when resource development is being proposed in or affecting the lands and territories of Indigenous peoples. That EMRIP further articulate the conclusions from its FPIC study in this regard.

As the Expert Members will be aware, the UN Committee on the Elimination of Racial Discrimination has called on the Government of Canada to seek the Expert Mechanism's assistance under EMRIP's mandate to provide technical advice and facilitate dialogue over Indigenous rights. In three separate letters issued under its the Early Warning and Urgent Action Procedure in late 2018ⁱ, CERD encouraged Canada to engage with EMRIP in the context of concerns expressed by Indigenous peoples over participation in decision-making and respect for free, prior and informed consent.

Our Nations and organizations commend CERD for this. We would like to see more states avail themselves of the expertise and assistance available under EMRIP's mandate and welcome the role of Treaty bodies in actively encouraging states to engage in this manner.

Unfortunately, to the best of our knowledge, Canada has not acted on CERD's recommendation. We are encouraged by the fact that Canada's written responses to CERD implicitly acknowledge an obligation to live up to international standards, including FPIC, as they are understood and interpreted by the expert bodies of the UN system. However, we are concerned that despite referring to EMRIP's 2018 study on FPIC in one of their responses to CERD, Canada included serious misrepresentations of FPIC. These misrepresentations have harmful implications for Indigenous peoples in Canada and around the world.

Our Coalition would like to highlight two central concerns about Canada's responses to CERD, as they highlight challenges in effective implementation of international human rights standards

in domestic law and policy and the need for EMRIP's continued engagement with the global discourse around FPIC.

1. International human rights obligations require more than merely “aiming to secure consent”

In separate responses to CERD concerning the Site C dam and the Trans Mountain pipeline -- large-scale development projects approved over the express objections of some of the directly affected First Nations – Canada asserts that its actions are consistent with international human rights standards because First Nations have been given the opportunity to consent, and could still provide consent despite key decisions having already been made.

Canada's response concerning the Site C dam asserts that “Canada and British Columbia have approached Site C in a manner that is consistent with the recent study of the United Nations Expert Mechanism on the Rights of Indigenous Peoples on free, prior and informed consent” because “[t]he process has sought to achieve consent of impacted Indigenous groups” and because, although construction has already begun, “Canada continues to consult, accommodate and negotiate with Indigenous groups who have not reached an agreement.”

Both responses from Canada quote the federal government's *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples (Principles)*. The *Principles* include useful content on many points. However, Principle 6, referred to in Canada's response, is highly problematic:

The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

Indigenous peoples were not consulted in the development of the *Principles* and have not generally agreed to the federal government applying this interpretation of FPIC. In addition, the former Minister of Justice and Attorney General of Canada assured First Nations at their annual national meeting:

[The Principles] are a start, as the government needed to tell itself, internally, how to act. In this sense, the Principles, Chiefs, are not really directed at you, but rather for federal officials and the bureaucracy – to begin shifting decades old patterns of internal behaviour to a new reality. They will evolve over time as need be.

The phrase “aims to secure their free, prior, and informed consent” is inconsistent with the UN Declaration. It is also inconsistent with the jurisprudence from UN treaty bodies, special rapporteurs, among others. In the view of our Coalition, Canada's commitment to merely seek consent provides no meaningful recognition or protection for the right of self-determination or

Indigenous peoples' rights to lands, territories and resources. In particular, the state provides no assurance that it would ever honour the decision of an Indigenous Nation to withhold its consent.

Although Canada says its actions are consistent with the EMRIP study, its own description of what has happened in respect to Site C illustrates exactly the practice condemned by the Expert Mechanism when it wrote in that study that, "The principle of free, prior and informed consent, arising as it does within a human rights framework, does not contemplate consent as simply a "yes" to a predetermined decision."ⁱⁱ

2. Limitations on the rights of Indigenous peoples must be rare exceptions and subject to requirements of strict justification

Canada's responses to CERD focuses on a word that does not appear in the *UN Declaration* – the word "veto" – while failing to acknowledge the explicit provisions on justifiable limitations on human rights that are set out in this instrument. Canada repeatedly states that FPIC is not a "veto." However, the fact that the FPIC is not absolute, does not mean that states can arbitrarily limit the rights of Indigenous peoples in order to benefit other "societal interests" as Canada has done.

Article 46 states that "The exercise of the rights set forth in this Declaration shall be subject to only such limitations as are determined by law and in accordance with international human rights obligations." The Article further states "Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."

EMRIP's 2018 study was clear that limitations on the rights of Indigenous peoples must be exceptional.ⁱⁱⁱ As James Anaya wrote in his report on Indigenous peoples and extractive industries, the requirement of strict justification "will generally be difficult to meet... reinforcing the general rule of indigenous consent to extractive activities within indigenous territories."^{iv}

Consent "must include the option of withholding consent." This conclusion clearly makes sense. It would be absurd to conclude that Indigenous peoples have the right to say "yes", or "yes, with conditions", but not the right to say "no" – even in the most damaging circumstances.

Conclusion

The Government of Canada, and a number of provincial and territorial governments, have committed to building new relationships with Indigenous peoples based on recognition and implementation of Indigenous peoples' human rights, including full implementation of the *UN Declaration*. Domestic implementation is crucial to give life to the standards set out in the

Declaration and elsewhere in international law. It is crucial, however, that interpretation and application not diverge from, and fall to a lower standard than intended by the international human rights system. State engagement with EMRIP is essential to ensuring that domestic implementation and application of Indigenous rights standards remains in conformity with the continued progressive development of human rights at the global level.

The Canadian Coalition for the Human Rights of Indigenous Peoples is a network of Indigenous Nations, national and regional Indigenous peoples' organizations, human rights groups, and individual experts and advocates. The Coalition works to promote understanding and implementation of international standards for advancing the human rights of Indigenous peoples, including, in particular, the *UN Declaration on the Rights of Indigenous Peoples (UN Declaration)*. The Coalition also serves as a clearing house for information on Indigenous peoples' engagement with the human rights systems of the United Nations and Organization of American States.

ⁱ CERD/EWUAP/Canada-Indigenous Framework/2018/JP/ks; CERD/EWUAP/Canada-Trans Mountain Pipeline/2018/JP/ks; CERD/EWUAP/Canada-Site C dam/2018/JP/ks

ⁱⁱ EMRIP para 25 citing A/HRC/24/41, para. 30.

ⁱⁱⁱ EMRIP study, para 39.

^{iv} Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, July 2013, A/HRC/24/41, Para. 36.