Collaborative Consent:
A NATION-TO-NATION PATH TO PARTNERSHIP WITH INDIGENOUS GOVERNMENTS

THE PHARE LAW CORPORATION
NORTH RAVEN

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"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."

Prime Minister Trudeau
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

"..key elements that will be included in the Pan-Canadian Framework on Clean Growth and Climate Change…include pricing carbon, as well as actions to reduce emissions across the economy, including from electricity, buildings and industry…Indigenous and Northern perspectives will be especially important while developing these key elements."

Government of Canada
October 2016

Collaborative Consent:
THE PROBLEM

Until meaningfully addressed by Canada, the need for the free, prior, informed consent of Indigenous rights-holders regarding any proposed government decision that might impact Indigenous rights will continue to be one of the most contentious elements of government decision-making in Canada. The Government of Canada has less than 1107 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." The issue of the need to secure consent of Indigenous peoples, especially regarding resource development projects, and the concern that "free, prior and informed consent when used as a veto" could stop all 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."

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," regarding resource developments being proposed on Aboriginal title lands. If the Aboriginal group does not provide its consent, then the government's only recourse when establishing that resource development is to ensure it can meet the justification test required by the courts in upholding 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 decision-making.

Finally, Canada accepted all recommendations of the Truth and Reconciliation Commission of Canada, including those which called for the "federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on
the Rights of Indigenous Peoples as the framework for reconciliation" and "to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples." How this will be done is as yet unclear.

THE SOLUTION

A previous version of this paper was provided to Natural Resources Canada to assist in clarifying federal thinking in regards to implementing its commitment to a new nation-to-nation relationship with Indigenous governments. The paper came to the attention of Prime Minister Trudeau who commented on the concept of ‘collaborative consent’: “The talk of veto or not veto is highlighting the failure of the process as it exists right now. It shouldn’t ever even come to the decision, is it a veto or not a veto. We should be working together from the very beginning.”

While not widely known, jurisdictions within Canada are already engaged - very successfully - in consent-based discussions with Indigenous peoples. It can be said that these processes meet UNDRIP and move the parties down the path of reconciliation. The Government of Northwest Territories (the GNWT) is a leader in this area and has been for almost a decade. The consent-based approach is 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. These processes are implemented regardless of the existence of a settled land claim, self-government agreement, or treaty. They are not created based on authorities given or agreed through claims. They exist independently of the land or governance status of an Indigenous government.

They are collaborative processes that are undertaken based on what each party sees as their own authority, regardless of whether others agree. If parties seek to participate and create a mutually acceptable agreement, then a solution has been found that is then 'ratified' or implemented in the legal and political systems of each party (whatever they may be).

These processes are implemented because they are a politically respectful and expedient way to achieve consent of all participating parties, to build trust, and to achieve reconciliation of all interests.
WHAT IS COLLABORATIVE CONSENT?

'Collaborative consent' is about trust and respect. It is a process where all governments - Indigenous and non-Indigenous - work to achieve each other's consent to a proposed action or decision through collaborative approaches tailored to the matter at hand. Hallmarks of a collaborative consent process:

- Governments create permanent discussion and agreement making tables (e.g. such as intergovernmental forums or councils) and commit to agenda items of ongoing mutual concern (e.g. business as usual matters, special matters such as addressing a policy gap, meeting a political commitment, setting a broad vision or goal, achieving reform of laws and regulations, etc.). Governments approach each other with agenda items; collaborative processes are not only engaged by proposed Crown decision-making that might impact Indigenous rights. These arrangements are set out in government-to-government memorandums of understanding.

- Governments engage with each other in an ongoing, iterative way, continually defining interests and goals, articulating assumptions, exploring options, reaching agreement, and then circling back to refine goals, revisit assumptions, check progress, etc. There is an ongoing process of mutual engagement, rather than a specific, singular focus.

- Governments work in areas of overlapping or complementary authorities or jurisdiction, even if they don't agree with each other's views about the scope of their jurisdictions. They treat each other as political governments, even if the legal scope is still under discussion or negotiation at other tables. No government loses or limits its authority by participating; nor is the process a legal affirmation of any authority. The idea is that governments choose to exercise the authority they believe they have to participate in the consent process.

- Governments reach agreements that are articulated in various ways. Some agreements are cooperative intergovernmental agreements; others are strictly legally binding. All are in writing. They are all honoured and acted upon.

- Governments agree that the collaborative consent process may satisfy a duty to consult and accommodate, if the parties agree. If governments reach an accord or understanding that addresses a specific decision, s.35 consultation may be rendered duplicative or unnecessary.
No government has a veto in the process, meaning everyone commits to reaching agreement; best efforts are made to fully explore goals, interests, solutions, etc. But, if consensus cannot be reached with all parties, governments can proceed with whatever their next course of action might be. This could mean tabling the item to be discussed at a time more likely to reach political agreement (as routinely happens in federal/provincial/territorial tables). If this is not possible, s.35 consultation and accommodation or litigation, as the case may be, could be commenced if Indigenous rights might be impacted by the proposed action.

Given the long-term commitment to work together as partners under this process, the framework for discussion tends to be framed as being part of the path of reconciliation. Collaborative consent discussions are about restoring and building trust and respect.

COLLABORATIVE CONSENT EXAMPLES

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:

- Co-drafting of legislation;
- Co-drafting of policies and plans;
- Collaborative negotiations regarding lands and waters;
- Sector specific agreements for resource management; and,
- Resource revenue sharing agreements.

Co-drafting 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 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 (eg. 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.).

Co-drafting 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 four months (despite over 40 years of previously unresolved discussions). This, despite the fact that the park will be designated in an area where there are contentious and overlapping unresolved land claims. This is the power of collaborative approaches.

To meet the political outcomes sought, the key elements of the model used by the GNWT with these two 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);
- Designate a Lead Minister, along with a Chief Negotiator appointed from outside the civil service, both of whom work closely with the Deputy Minister as the file proceeds;
- Report every month directly back to Cabinet with proposed solutions developed with the Aboriginal Government partners (eliminating the slowing 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 and allowing for final approvals by Cabinet upon completion of negotiations); and,
- 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 - on resource revenue sharing. Since devolution on April 1, 2014, the GNWT retains 50% of the revenues collected from resource development on public land (up to a maximum amount) and Canada keeps the remainder. Of the GNWT's share, 25% is then shared with Indigenous governments 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. A modified approach, referred to as 'generalized interest', shares revenue from development occurring in any spot within an Indigenous government's broad land claim area. This is being considered as an aspect of possible land claim settlement and suggests a view that Indigenous governments are partners in the development of the territory, broadly speaking, regardless of whether they have specific entitlements under a final land claim settlement area. This is a shift away from zero sum game model to a win-win approach.

These are critical consent-based approaches that respect the presence of Indigenous governments and greatly enhance 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'. The federal government has indicated that now is the time to change that and we agree.

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, it is the safety net that will always protect Indigenous rights from inappropriate Crown decision-making, 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 the collaborative consent process can and does work within Canada's federation and legal framework and that it can result in expedited, long-lasting, effective solutions. It is implemented well 'upstream' of traditional consultation and accommodation processes, and often renders those processes unnecessary in the face of mutually supported solutions.

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 that commitment was to: define a very clear goal; elevate achieving the goal to a Cabinet responsibility; ensure 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. This should involve appointing a lead Minister or Ministers, and a Chief Negotiator or Senior Political Staff Lead to oversee and push all aspects of implementation of the priority.

Canada should then (presented in broad terms for the moment):

- The federal commitment to implementing UNDRIP is positive. Canada should now make a public political commitment to implementing collaborative consent-based approaches in all stages and aspects of its decision-making, including the creation of budget and program development.

- Secure nation-to-nation commitments from Indigenous governments to work by collaborative consent methods, for example by way of Memorandums of Understanding or other forms of political accord.

- Work with Indigenous governments to articulate feasible cooperative federalism structures and processes. For example, Federal-Provincial-Territorial tables should create permanent seats for Indigenous governments so that politically cooperative decisions can be made that benefit all of Canada and that can be articulated in the context of reconciliation. Further, Indigenous governments should articulate their representation.

- Adopt a co-drafting process (for example, as developed and implemented by the GNWT and northern Indigenous governments) for amending or drafting federal legislation critical to Indigenous governments, or that implicate Indigenous lands, waters or rights.

- Co-develop policy statements, guidance documents and directives with Indigenous governments to provide guidance to all levels within Federal and Indigenous governments regarding collaborative consent approaches to decision-making that implicates Indigenous lands, waters, or rights.
Work with Indigenous governments to propose talks with provinces to explore the adoption of complementary collaborative consent methods, particularly in areas of concurrent decision-making (i.e. regulatory approvals).
NORTH RAVEN

Michael is the principal of North Raven. His interests are water protection and governance, working collaboratively on environmental protection, renewable energy development, building efficient government, expediting land claims, and strategic planning. He works with Aboriginal and Crown governments, environmental organisations, industry and the private sector providing strategic political advice. Prior to his current work, he spent 20 years as MLA in the NWT Legislature, 14 of those years as Minister of the Environment and Natural Resources, 7 as Minister of Finance, Minister of Health and Social Services and 4 as the Minister Responsible for the Northwest Territories Power Corporation. He is Métis and lives in Fort Smith, NWT.

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Merrell-Ann Phare is a lawyer, writer and the founding Executive Director of the Centre for Indigenous Environmental Resources (CIER), 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’. As Chief Negotiator for the Government of the Northwest Territories, Merrell-Ann lead the negotiation of transboundary water agreements in the Mackenzie River Basin and the creation of Thaidene Nene, a national and territorial 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.
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 - shtml.FeRTYXwX.dpuf


v Ibid.


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