

Submission to EMRIP study on FPIC

To: Expert Mechanism on the Rights of Indigenous Peoples

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Re: Preventing Practices that Divide Indigenous Peoples

Issue

One of the key issues that arises in consultation and FPIC processes is a practice where governments and businesses seek to work with communities or factions of communities who are “willing to work” with that government or business. This practice is engaged when a particular Indigenous community may be divided on a particular issue. Governments and businesses often see this practice as a pragmatic and innocent practice. However, this practice ignores the concerns of factions of communities and only works with those who are interested or willing to work with the government or business. This is the new way to “divide and conquer” Indigenous peoples and leads to violations of fundamental human rights, undermining free, prior and informed consent.

In relation to the EMRIP study on FPIC, this divide and conquer tactic relates to questions of pre-conditions necessary for FPIC (issue 2), examining whether free, prior and informed consent can be achieved in circumstances where a community is divided (issue 3), as well as on Indigenous peoples’ representative institutions (issue 4). It also connects to the obligations of both governments and businesses who engage in consultation and FPIC processes (issues 6 and 7).

In Canada, this divide and conquer practice is problematic as the Canadian government has directly and indirectly attacked the unity of Indigenous peoples through legislation and various policies. For example, the Residential School system removed Indigenous children from their communities to go to school, and many experienced profound abuse there.¹ Many children never made it home. For many years, the *Indian Act* removed Indian women from their communities if they married non-status men. The imposition of Christianity combined with the *Indian Act* prohibitions on the practice of Indigenous cultural/religious activities has further divided many communities.

This practice may exploit existing divisions within Indigenous communities that were created from generations of colonial policies meant to terminate Indigenous peoples, or may create new divisions. Sometimes this practice has various Indigenous peoples’ competing for perceived limited resources. It also exploits legal distinctions between different Indigenous peoples in Canada, such as between Métis people and First Nations. Sometimes the FPIC process leads to divisions in the community out of the failure of FPIC.

This particularly can occur where there was too small a window for making decisions, not enough transparency in the process as well as the economic duress within Indigenous communities creates a pressure cooker. To protect against these pressures and to limit the potential to divide communities further, FPIC processes need to support consensus-building

¹ Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada, Volume One: Honouring the Truth, Reconciling for the Future* (Toronto: James Lorimer and Company, 2015).

within the community, and also ensure that voices representing distinct sectors in the community have the opportunity to be heard.

The decision to engage with the modern economy, particularly extractive industries is a very difficult decision for many Indigenous peoples. It can often mean Indigenous peoples must choose between continuing traditional economic, social and cultural land based activities or moving toward new economic opportunities. This decision is especially difficult as Canadian government measures (including under the *Indian Act*) specifically hamper Indigenous peoples' market based economic development. Governments or businesses must not exploit these decisions about the survival and future of Indigenous peoples.

It is difficult to provide concrete and documented examples of this practice, as it often happens in nuanced or subtle or confidential ways. There are a number of ways that indicate the potential engagement of the divide and conquer practice. Sometimes a project that has gone forward despite some resistance by some Indigenous peoples. Sometimes a referendum to move a project forward is won by a small margin (based on idea of a majority vote required to move forward). Sometimes there are reports of "small factions" of a community holding back or resisting development. Sometimes, through selective consultation certain communities or factions are left out of consultations. Sometimes it occurs through narrowly construing the impacted communities that need to be consulted, which allows resisters to be ignored.

Manitoba Hydro is a Crown Corporation and the province of Manitoba's major energy utility. Many of their major hydroelectric develops involve significant impacts on Indigenous peoples' traditional lands. Many Indigenous peoples in Manitoba have criticized Manitoba Hydro for engaging with only those First Nations who are willing to work with Hydro with devastating impacts on First Nations communities. Unfortunately, it is difficult to provide evidence of this practice.

Recently Ontario Premier Wynne threatened to invoke such a practice. Frustrated by the lack of progress toward developing infrastructure including a road to access the chromite rich area in northern Ontario, the Premier stated "While I continue to hope progress can be made, I am prepared to continue to advance discussions with those First Nations that would like to pursue transportation infrastructure through our bilateral processes."² This is unfortunately a perfect example of the divide and conquer practice that is used by government and business.

Human Rights Violated

This practice leads to several violations of Indigenous peoples fundamental human rights, including the right to participate in decision making, as recognized in the UN *Declaration on the Rights of Indigenous Peoples*,³ the *Convention on the Elimination of All Forms of Racial Discrimination*,⁴ the *International Covenant on Civil and Political Rights*,⁵ the *American*

² "Wynne pushes Ring of Fire chiefs for decision on regional road", Globe and Mail, May 11, 2017, available at: <https://www.theglobeandmail.com/news/politics/wynne-pushes-ring-of-fire-chiefs-for-decision-on-regional-road/article34964938/>.

³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No. 49, UN Doc A/RES/61/295 (2008) articles 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-32, 36, 37, 38, and 40-41.

⁴ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratification by Canada 14 October 1970) [ICERD] as interpreted by the Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of indigenous peoples*, UN Doc A/52/18, Annex V.

Declaration on the Rights and Duties of Man,⁶ the *American Declaration on the Rights of Indigenous Peoples*,⁷ the *American Convention on Human Rights*.⁸

Building off the previous EMRIP advice on the right to participate in decision making that explains that the right in international law allows for Indigenous peoples to “to actually control the outcome of such processes.”⁹ This divide and conquer practice also undermines Indigenous peoples’ right to their traditional governance and decision making processes.¹⁰

There are also gendered dimensions as many of the governance structures (especially those imposed by colonial state governments such as band councils imposed under the *Indian Act*) that are “consulted” on projects. These councils may be male dominated (as First Nations women were not able to vote in band council elections until 1950 and were not eligible to run in elections during this time). This is why the UN *Declaration* highlights a need to include Indigenous women, Elders and youth in decision making processes.¹¹ Particularly, FPIC processes need to ensure that different gendered impacts are considered.

Recommendations

Where a community is divided on an issue, such as whether an extractive resource project should proceed or how a community should work with a particular business, governments and businesses should work with and support those mechanisms used by the community to achieve consensus based on their own laws, customs and traditions.

When engaging in FPIC, governments and businesses should engage broadly with all potentially impacted Indigenous peoples, including by identifying and engaging with any distinct sectors or groupings that may exist within the community, including those who may be opposed to the business.

FPIC processes should particularly ensure the participation of Indigenous women, and seek to understand the specific impacts on Indigenous women.

When engaging in FPIC processes, all governments and businesses must avoid practices that may cause further division amongst Indigenous peoples.

⁵ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302 art 25 (entered into force 23 March 1976, accession by Canada 19 May 1976), article 25. See also UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Mexico*, 27 July 1999, CCPR/C/79/Add.109; UN Human Rights Committee (HRC), *UN Human Rights Committee: Concluding Observations: Norway*, 26 October 1999, CCPR/C/79/Add.112.

⁶ *The American Declaration of the Rights and Duties of Man*, April 1948, OAS Res XXX (adopted 2 May 1948) [*Rights and Duties of Man*], reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

⁷ *American Declaration on the Rights of Indigenous Peoples*, AG/RES 2888 (XLVI-O/16) (adopted 15 June 2016).

⁸ *YATAMA v Nicaragua (Nicaragua)* (2005), Judgement (Preliminary Objections, Merits, Reparations and Costs), Inter-Am Ct HR (Ser C) No 127; *Saramaka People v Suriname* (2007), Judgement (Preliminary Objections, Merits, Reparations and Costs), Inter-Am Ct HR (Ser C) No 172.

⁹ Human Rights Council, “Final report of the study on indigenous peoples and the right to participate in decision-making” Report of the Expert Mechanism on the Rights of Indigenous Peoples A/HRC/18/42, 17 August 2011 [EMRIP study] at para 2.

¹⁰ UN Declaration article 18 and 19.

¹¹ UN Declaration articles 21 and 22.

FPIC processes must be informed by the particular colonial history of the impacted Indigenous peoples.