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## Aboriginal Consultation in Canadian Water Negotiations: The Mackenzie Bilateral Water Management Agreements

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Andrea Beck\*

Aboriginal Consultation in Canadian Water  
Negotiations: The Mackenzie Bilateral  
Water Management Agreements

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*Due to constitutional protection of Aboriginal water rights, the Canadian government has a duty to consult Aboriginal peoples in water-related decision making. In 2015, Alberta and the Northwest Territories signed an agreement for managing their shared waters in the Mackenzie River Basin. In light of Canada's record, observers have praised the preceding negotiation process as path-breaking due to its high level of Aboriginal involvement. To evaluate such claims, this paper analyzes Aboriginal consultations in the 2011–2015 NWT-Alberta transboundary water negotiation. The comparative case study reaches the following conclusions. In their bilateral water negotiation, the two jurisdictions differed markedly in terms of consultative approaches. While Alberta was oriented towards legal minimum requirements under Canadian constitutional law, the NWT implemented extensive consultations characterized by early involvement, multifaceted engagement mechanisms, emphasis on dialogue and collaboration, capacity building, and recognition of Aboriginal groups as governments. Although shortcomings remained in terms of direct Aboriginal access and accommodation, the NWT achieved a high standard of consultation, which aligns with emerging thinking on the international principle of free, prior, and informed consent (FPIC). Overall, the NWT experience holds important implications for moving FPIC from an international norm to a domestic template for action in Canada.*

*En raison de la protection constitutionnelle des droits autochtones à l'eau, le gouvernement canadien a pour obligation de consulter les peuples autochtones lors de prise de décisions liées à l'eau. En 2015, l'Alberta et les Territoires du Nord-Ouest ont signé un accord pour la gestion de leurs eaux partagées dans le bassin du fleuve Mackenzie. Au vu des précédents canadiens, certains observateurs ont salué ce processus de négociation pour son haut niveau de participation des Autochtones. Afin d'évaluer ces revendications, cet article analyse les consultations avec les groupes autochtones dans la négociation transfrontalière de l'eau, qui a eu lieu entre 2011 and 2015. L'étude comparative de l'Alberta et des TN-O arrive aux conclusions suivantes. Dans leurs négociations bilatérales de l'eau, les deux juridictions diffèrent considérablement en termes d'approches consultatives. Alors que l'Alberta a employé les exigences minimales légales en vertu du droit constitutionnel canadien, les TN-O ont mis en œuvre un procédé de consultation extensif caractérisé par l'implication des peuples autochtones dès le début des négociations, des mécanismes participatifs à multiples facettes, le dialogue et la collaboration, des efforts de renforcement des capacités, et l'identification des groupes autochtones en tant que gouvernements. Même si des lacunes subsistent en termes d'accès direct et d'accommodement des Autochtones, les TN-O ont développé un procédé de consultation aux standards élevés, qui s'aligne avec la pensée émergente sur le principe international du consentement préalable, donné librement, et en connaissance de cause (CPLCC). L'expérience dans les TN-O détiend d'importantes implications pour la mise en œuvre de la norme internationale CPLCC dans un contexte canadien.*

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*Introduction*

Canada's Aboriginal peoples have a special relationship with water. To First Nations, Inuit and Métis peoples,<sup>1</sup> water is critical for health, subsistence lifestyles, traditional practices, and spiritual well-being. Aboriginal cultures are so closely connected to water that "when waters are endangered, the very identity and survival of indigenous peoples

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1. The Aboriginal peoples of Canada include Indian, Inuit and Métis peoples, see *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11, s 35(2) [*Constitution Act*].

is endangered.”<sup>2</sup> Canada’s seemingly abundant water resources are increasingly coming under pressure due to land use activities, water diversion schemes, population growth, climate change, and fragmented interjurisdictional governance mechanisms.<sup>3</sup> In light of these forces, and despite many years of colonialization, “indigenous peoples have maintained awe and reverence for the life-giving force of water and, across generations, have continued to call for the return of indigenous laws and traditions so that [they] can protect [their] peoples, waters, and territories.”<sup>4</sup>

In Canada, Aboriginal water rights are protected under the *Constitution Act, 1982*, section 35(1).<sup>5</sup> As a result of constitutional protection and a series of Supreme Court decisions, the Crown must consult Aboriginal peoples and accommodate their rights when considering actions that may adversely affect their lands and waters.<sup>6</sup> However, in the past, Canadian governments have often failed to live up to their legal obligations. As Deborah McGregor notes with regard to First Nations, when it comes to water, they “still find themselves on the outside looking in, struggling to be heard in the very decisions that affect their lives.”<sup>7</sup> According to Ardith Walkem, “[d]espite the promise of constitutional protection of Aboriginal title, Aboriginal rights, and treaty rights, the ability of indigenous peoples to protect waters remains constrained.”<sup>8</sup>

Indeed, Canadian history is replete with examples of infringements of Aboriginal water rights and the Crown’s failure to fulfil its duty to consult. Early examples include large-scale hydro developments in Quebec and Manitoba.<sup>9</sup> Starting in the 1970s, these developments led to the flooding

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2. Ardith Walkem, “The Land is Dry: Indigenous Peoples, Water, and Environmental Justice” in Karen Bakker, ed, *Eau Canada: The Future of Canada’s Water* (Vancouver: UBC Press, 2007) 303 at 304.

3. Karen Bakker, “Water Security: Canada’s Challenge” (2009) Policy Options 16; Karen Bakker & Christina Cook, “Water Governance in Canada: Innovation and Fragmentation” (2011) 27:2 Intl J Water Resources Development 275; Carey Hill et al, “Harmonization versus Subsidiarity in Water Governance: A Review of Water Governance and Legislation in the Canadian Provinces and Territories” (2008) 33:4 Can Water Resources J 315; John B Sprague, “Great Wet North? Canada’s Myth of Water Abundance” in Karen Bakker, ed, *Eau Canada: The Future of Canada’s Water* (Vancouver: UBC Press, 2007) 22.

4. Walkem, *supra* note 2 at 304.

5. *Constitution Act, supra* note 1; s 35(1) reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

6. Walkem, *supra* note 2 at 306-308.

7. Deborah McGregor, “Traditional Knowledge and Water Governance: The Ethic of Responsibility” (2014) 10:5 AlterNative: An Intl J Indigenous Peoples 493 at 496.

8. Walkem, *supra* note 2 at 308.

9. Bruce E. Johansen, *Indigenous Peoples and Environmental Issues: An Encyclopedia* (Westport & London: Greenwood Press, 2003) at 66-81.

of traditional hunting areas, mercury poisoning, and displacement of communities. They disrupted entire ways of life of Cree and Inuit peoples, who were not consulted before construction began and have struggled with these projects well into the 2000s. Similar disregard for consultation and accommodation has been observed more recently with respect to watershed management in Ontario,<sup>10</sup> as well as oil sands development in Alberta.<sup>11</sup> Moreover, drinking water security has remained a major concern on many First Nations reserves across Canada. As inequalities in provision and management persist, many communities have remained under drinking water advisories for years, and have been exposed to heightened risks of waterborne infectious diseases.<sup>12</sup>

To fight against exclusion from water-related decision making and violations of their water rights, Aboriginal communities and individuals have engaged in multiple courses of action. Beyond filing law suits in Canadian courts, they have found innovative ways of making their voices heard, for example by submitting petitions; organizing campaigns, forums and press conferences; engaging in awareness raising and environmental advocacy; establishing their own environmental monitoring systems; and publishing their own studies. Although the direct impact of these actions on government decision making has sometimes been limited, they once again underscore the fundamental importance of water to the physical, cultural, and spiritual well-being of Canada's Aboriginal peoples.<sup>13</sup>

In the midst of this ongoing struggle, an important water agreement has recently been signed in Canada's Mackenzie River Basin, a vast internal transboundary basin discharging from central Alberta into the

10. Michael Mascarenhas, "Where the Waters Divide: First Nations, Tainted Water and Environmental Justice in Canada" (2007) 12:6 *Local Environment* 565; Peigi Wilson, "First Nations Integrated Watershed Management" in Dan Shrubsole, ed, *Canadian Perspectives on Integrated Water Resources Management* (Cambridge: Canadian Water Resources Association, 2004) 69.

11. Jennifer Huseman & Damien Short, "'A Slow Industrial Genocide': Tar Sands and the Indigenous Peoples of Northern Alberta" (2012) 16:1 *Intl JHR* 216; Monique Passelac-Ross & Karin Buss, "Water Stewardship in the Lower Athabasca River: Is the Alberta Government Paying Attention to Aboriginal Rights to Water?" (2012) 23 *J Entl L & Prac* 69.

12. See, e.g., Laura Eggertson, "Despite Federal Promises, First Nations' Water Problems Persist" (2008) 178:8 *CMAJ* 985; Jason McCullough & Khosrow Farahbakhsh, "Refocusing the Lens: Drinking Water Success in First Nations in Ontario" (2015) 58:2 *Can Public Administration* 271; Alasdair Morrison, Lori Bradford & Lalita Bharadwaj, "Quantifiable Progress of the First Nations Water Management Strategy, 2001–2013: Ready for Regulation?" (2015) 40:4 *Can Water Resources J* 352; Jerry P White, Laura Murphy & Nicholas Spence, "Water and Indigenous Peoples: Canada's Paradox" (2012) 3:3 *Intl Indigenous Policy J* 1.

13. See, e.g., Johansen, *supra* note 9 at 70-74, 80-81; Emma S Norman, *Governing Transboundary Waters: Canada, the United States, and Indigenous Communities* (New York: Routledge, 2015) at 105-160; Passelac-Ross & Buss, *supra* note 11 at 72; Frank Quim, "As Long as the Rivers Run: The Impacts of Corporate Water Development on Native Communities in Canada" (1991) 11:1 *Can J Native Studies* 137; Walkem, *supra* note 2 at 312.

Beaufort Sea. In March 2015, the province of Alberta and the Northwest Territories (NWT) signed a bilateral water management agreement for their shared waters in the basin. While this agreement is significant for a variety of political, economic and ecological reasons, the agreement itself and the preceding negotiation were also praised for their inclusion of Aboriginal peoples and concerns. According to one Canadian water expert, “a path-breaking agreement was signed between Alberta, the Northwest Territories, and all affected indigenous groups for joint management of the huge Mackenzie River basin....” In his view, the agreement can be regarded as a “breakthrough not only for results but also for a process that involved all of the relevant indigenous groups....”<sup>14</sup>

In light of Canada’s past record, such observations warrant systematic attention. Does the NWT-Alberta transboundary water negotiation indeed constitute an unusual achievement in terms of Aboriginal consultation? If so, what are the main factors that account for this success? Finally, what implications does the Mackenzie experience hold for enhancing Aboriginal involvement in government decision making? Answers to these questions can yield important advice for policy makers wishing to break with recurrent cycles of litigation and work toward achieving the aim of reconciliation in Canada.<sup>15</sup>

To examine these questions, this paper proceeds as follows. It begins by reviewing the Canadian and international law on Aboriginal consultation, focusing in particular on the duty to consult and accommodate and the principle of free, prior, and informed consent (FPIC). This review elicits criteria that can be used to assess a consultation process in the Canadian context. After setting out background information about the Mackenzie River Basin and its transboundary water management regime, the identified criteria are applied to the 2011–2015 NWT-Alberta water negotiation. Data from interviews and documents provide the basis for a comparative analysis of Aboriginal consultations in Alberta versus the NWT.<sup>16</sup> To account for the divergent findings in these cases, the next section explores

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14. David B Brooks, Book Review of *Governing Transboundary Waters: Canada, the United States and Indigenous Communities* by Emma S Norman (2015) 40:7 *Water Intl* 1074 at 1077.

15. For a discussion of reconciliation within the context of self-determination in Canada, see Brenda L Gunn, “Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination” (2015) 38:1 *Dal LJ* 237.

16. Data for this research were collected between January and April 2016, and draw primarily on 13 semi-structured telephone interviews, as well as policy documents, public online resources, and published studies. Interviewees were selected purposefully on account of their direct participation in the transboundary negotiation, their involvement in Aboriginal consultation, and/or their expert knowledge. Respondents included three negotiating team members from Alberta; four negotiating team members from the NWT; two Aboriginal representatives; and four members of civil society or academia.

potential explanatory factors, including differences in legal considerations and socio-political relationships, and, more fundamentally, the effects of colonial boundaries. In closing, the paper discusses implications for enhancing Aboriginal consultation in Canada.

### I. *Evaluating Aboriginal consultation*

#### 1. *Canadian constitutional law: The duty to consult and accommodate*

In Canada, Aboriginal water rights can be recognized and protected in several possible ways. These include reserve water rights, as well as Aboriginal title (a right to the exclusive use and occupation of lands, including waters, resulting from historic relationships with territories), Aboriginal rights (collective rights that contribute to the cultural and physical survival of Aboriginal peoples), and treaty rights (rights that are defined in historic treaties or modern land claims agreements).<sup>17</sup> As noted above, Aboriginal title, Aboriginal rights and treaty rights, including those related to water, are constitutionally protected under the *Constitution Act*, section 35(1). In a number of decisions, the Supreme Court of Canada has determined that the Crown has a duty to consult Aboriginal peoples, and must possibly accommodate their proven or credibly asserted rights.<sup>18</sup>

In *Haida Nation*, the Court noted that the content of the duty to consult varies with circumstances, and should be proportionate to the strength of the claim and the seriousness of the potential adverse effect.<sup>19</sup> To clarify the duties that may arise in different situations, the Court proposed the concept of a spectrum. At one end of the spectrum lie cases where Aboriginal claims are weak or the potential for infringement is minor. In these cases “the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.” At the other end lie cases where the claim is strong, the respective right and the potential infringement are highly significant to the Aboriginal peoples, and the risk for non-compensable damage is high. In such cases, “deep consultation” may be required.<sup>20</sup> Although the Court in *Delgamuukw*

17. Walkem, *supra* note 2 at 304-309; for a more detailed discussion of the three species of Aboriginal rights (Aboriginal title, non-title Aboriginal rights, and treaty rights), see David Reid & Stephanie Hickman, “Aboriginal Rights and the Atlantic Canada Petroleum Industry” (2007) 30:2 Dal LJ 383 at 386-393.

18. *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

19. *Haida Nation*, *supra* note 18 at paras 39-51.

20. *Ibid* at paras 43-44.

raised the possibility of “full consent,”<sup>21</sup> it made clear in *Haida Nation* that this option is only available in exceptional cases and does not grant a veto to Aboriginal peoples.<sup>22</sup> The Court also indicated that the duty to consult does not imply a duty to agree.<sup>23</sup>

However, when making decisions that could adversely affect the exercise of Aboriginal rights and claims, the Crown is obliged to follow a process of consultation that is meaningful and conducted in good faith. As noted by the Court, the effect of such a consultation process may be to reveal a duty to accommodate. In other words, “[m]eaningful consultation may oblige the Crown to make changes to its proposed action” to avoid irreparable harm or to minimize the effects of potential infringements. According to the Court, accommodation entails “seeking compromise in an attempt to harmonize conflicting [societal and Aboriginal] interests and move further down the path of reconciliation.”<sup>24</sup>

The duty to consult and accommodate is now firmly established under Canadian constitutional law. Yet, uncertainties about its exact interpretation remain. As Thomas Isaac and Anthony Knox point out, “[s]ince its first appearance, the Crown’s duty to consult has inspired considerable confusion and conflicting views in the academic literature as to its meaning and implications.”<sup>25</sup> Indeed, as noted by Lori Sterling and Peter Landmann, many important issues remain unresolved when it comes to “*who, when, how and on what to consult.*”<sup>26</sup> For instance, uncertainties still exist as to when the duty is triggered, and how to determine an adequate depth of consultation and accommodation.

Another challenge relates to the fact that the existing constitutional framework for consultation and accommodation “does not readily align with the aspirations and expectations of the impacted Aboriginal communities.”<sup>27</sup> From an Aboriginal perspective, constitutional protection of their rights is limited since it only covers those areas which Canadian governments and courts, seen as colonial institutions, are willing to

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21. *Delgamuukw*, *supra* note 18 at para 168.

22. *Haida Nation*, *supra* note 18 at para 48.

23. *Ibid* at paras 42, 49.

24. *Ibid* at paras 46-50.

25. Thomas Isaac & Anthony Knox, “The Crown’s Duty to Consult Aboriginal People” (2003) 41:1 *Alta L Rev* 49 at 50.

26. Lori Sterling & Peter Landmann, “The Duty to Consult Aboriginal Peoples: Government Approaches to Unresolved Issues” in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 1 at 4 [emphasis in the original], online: Canadian Bar Association <[http://www.cba.org/cba/cle/PDF/Constit09\\_Sterling\\_paper.pdf](http://www.cba.org/cba/cle/PDF/Constit09_Sterling_paper.pdf)>.

27. William M Laurin & JoAnn P Jamieson, “Aligning Energy Development with the Interests of Aboriginal Peoples in Canada” (2015) 53:2 *Alta L Rev* 453 at 459.

recognize.<sup>28</sup> Furthermore, protection afforded under constitutional law does not match international human rights standards as they are commonly interpreted by Aboriginal communities.<sup>29</sup>

2. *International human rights law: The principle of free, prior, and informed consent*

The most important of these standards is the principle of free, prior, and informed consent (FPIC), which has emerged over the past decades in various contexts such as United Nations human rights treaty bodies, International Labour Organization (ILO) treaties including *ILO Convention No. 169*, and the Inter-American human rights system.<sup>30</sup> To date, FPIC has been expressed most clearly in the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, which specifically bases FPIC on the right to self-determination.<sup>31</sup>

The basic conditions of FPIC are to ensure that Indigenous peoples are not coerced, intimidated or pressured (*free*); that their consent is sought before any activities are authorized or started (*prior*); that they have full and accurate information in the appropriate language about the scope and impacts of any proposed development, with opportunities for input from traditional knowledge holders and respect for traditional decision making processes (*informed*); and that their concerns must have a meaningful impact on the outcome (*consent*).<sup>32</sup> The question of whether or not “consent” implies an Indigenous veto right continues to be debated, and a clear consensus has yet to emerge.<sup>33</sup>

28. Walkem, *supra* note 2 at 306.

29. Laurin & Jamieson, *supra* note 27 at 459-460.

30. See, e.g., Mauro Barelli, “Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead” (2012) 16:1 Intl JHR 1; Derek Inman, Stefaan Smis & Dorothee Cambou, “‘We Will Remain Idle No More’: The Shortcomings of Canada’s ‘Duty to Consult’ Indigenous Peoples” (2013) 5:1 Göttingen J Intl L 251; Stefan Matiation & Josée Boudreau, “Making a Difference: The Canadian Duty to Consult and Emerging International Norms Respecting Consultation with Indigenous Peoples” in Oonagh E Fitzgerald, ed, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin Law, 2006), 397; Tara Ward, “The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law” (2011) 10:2 Nw J Intl HR 54.

31. *UN Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007), art 19, 32(2); Ward, *supra* note 30 at 65.

32. Ward, *supra* note 30 at 54, 83-84; Andrea Carmen, “The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress” in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 120 at 124-125.

33. Barelli, *supra* note 30 at 16-17; Ward, *supra* note 30 at 58.

Aboriginal peoples in Canada have strongly endorsed FPIC and have tried to advance its implementation by various means.<sup>34</sup> With respect to water in particular, the Assembly of First Nations affirms that “[c]onsultation to attain free, prior and informed consent of the affected First Nations rights holders is a prerequisite prior to any decisions or actions related to water contemplated by Canada, provinces or territories.”<sup>35</sup> In the Canadian water governance literature, FPIC surfaces through calls for collaborative sharing of traditional knowledge,<sup>36</sup> demands for capacity building to level the playing field between Aboriginal and non-Aboriginal actors to allow for meaningful participation,<sup>37</sup> and expectations on the part of Aboriginal peoples to be consulted according to their status as self-determining nations, rather than as one of many stakeholder groups.<sup>38</sup>

The Conservative government of Prime Minister Stephen Harper (2006-2015) long expressed concerns about *UNDRIP*. In 2007, Canada was among the few states who voted against the Declaration.<sup>39</sup> Although Canada issued a *Statement of Support* in 2010, it continuously referred to *UNDRIP* as a non-legally binding, aspirational document, with one of its major concerns relating to FPIC when interpreted as a veto right.<sup>40</sup> The change in federal government from Conservative to Liberal in 2015 seems to have brought about a change in political climate with respect to

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34. Amnesty International Canada, “Free, Prior and Informed Consent” (2013), online: Amnesty International Canada <[https://www.amnesty.ca/sites/amnesty/files/fpic\\_factsheet\\_nov\\_2013.pdf](https://www.amnesty.ca/sites/amnesty/files/fpic_factsheet_nov_2013.pdf)>; Ginger Gibson MacDonald & Gaby Zezulka, “Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada—Part I” (2015) at 14-15, online: Boreal Leadership Council <[http://borealcouncil.ca/wp-content/uploads/2015/09/BLC\\_FPIC\\_Successes\\_Report\\_Sept\\_2015\\_E.pdf](http://borealcouncil.ca/wp-content/uploads/2015/09/BLC_FPIC_Successes_Report_Sept_2015_E.pdf)>.

35. Assembly of First Nations, “Strategy to Protect and Advance Indigenous Water Rights” (2013), online: <[www.afn.ca/uploads/files/water/firstnationswaterstrategy.pdf](http://www.afn.ca/uploads/files/water/firstnationswaterstrategy.pdf)>.

36. McGregor, *supra* note 7.

37. Suzanne von der Porten, Rob de Løe & Ryan Plummer, “Collaborative Environmental Governance and Indigenous Peoples: Recommendations for Practice” (2015) 17:2 *Envtl Practice* 134 at 141; see also Zehra Rizvi et al, “First Nation Capacity in Québec to Practise Integrated Water Resources Management” (2013) 7:3 *Intl J Water* 161.

38. Suzanne von der Porten & Rob C de Loë, “Collaborative Approaches to Governance for Water and Indigenous Peoples: A Case Study from British Columbia, Canada” (2013) 50 *Geoforum* 149; Suzanne von der Porten & Rob C de Loë, “Water Policy Reform and Indigenous Governance” (2014) 16:2 *Water Policy* 222; von der Porten et al, *supra* note 37.

39. Paul Joffe, “Canada’s Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?” in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 70.

40. Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (12 November 2010), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>>; Permanent Mission of Canada to the UN, “Canada’s Statement on the World Conference on Indigenous Peoples Outcome Document” (22 September 2014), online: <[http://www.canadainternational.gc.ca/prmny-mponu/canada\\_un-canada\\_onu/statements-declarations/autres-2014-09-22\\_wcipd-padd.aspx?lang=eng](http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/autres-2014-09-22_wcipd-padd.aspx?lang=eng)>.

Aboriginal issues, and the government of Prime Minister Justin Trudeau is now looking for ways to implement *UNDRIP*, including FPIC.<sup>41</sup> Similar changes are underway in Alberta after the election of a new provincial government in 2015.<sup>42</sup> Against this backdrop, important questions have arisen about the exact differences and similarities between the duty to consult and accommodate and FPIC, and about ways of translating FPIC into Canada's domestic legal context.

### 3. *Evaluative criteria*

As the domestic and international law on consultation is evolving, legal uncertainty leaves some room for interpretation as to what may qualify as a successful consultation process in Canada. Mindful of possible alternative approaches, particularly regarding the exact meaning of consent and accommodation, this paper proposes that such a process should meet the following four criteria.

It should be *free*, meaning the absence of coercion and intimidation; it should leave sufficient time for information gathering and decision making *prior* to the authorization or commencement of any activities; it should allow for *informed* decision making by providing impartial and balanced information in the appropriate language, and by allowing for collaborative incorporation of traditional knowledge; and it should be *meaningful*, implying that Aboriginal groups are supported by capacity building, are treated as self-determining nations in a culturally appropriate manner, and have real possibilities of affecting substantive outcomes should accommodation be called for. Before applying these criteria to Aboriginal consultation in Alberta and the NWT, the next section provides an overview of the Mackenzie River Basin and transboundary water negotiations.

## II. *The Mackenzie River Basin and transboundary water negotiations*

### 1. *The Mackenzie River Basin*

The Mackenzie River Basin covers an area of 1.8 million square kilometres, equivalent to 20 per cent of Canada's landmass. It comprises

41. Office of the Prime Minister, "Minister of Indigenous and Northern Affairs Mandate Letter" (2015), online: Prime Minister of Canada <<http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>>; Joanna Smith, "Canada Will Implement UN Declaration on Rights of Indigenous Peoples, Carolyn Bennett Says" *The Toronto Star* (8 December 2015), online: <<https://www.thestar.com/news/canada/2015/11/12/canada-will-implement-un-declaration-on-rights-of-indigenous-peoples-carolyn-bennett-says.html>>.

42. Office of the Premier, "Premier Notley's Letter to Cabinet Ministers" (7 July 2015), online: Premier of Alberta <<http://aboriginal.alberta.ca/documents/Premier-Notley-Letter-Cabinet-Ministers.pdf>>.

six sub-basins, seven main rivers, three major lakes, and two freshwater deltas, including the Peace-Athabasca Delta, which has been recognized as a wetland of international importance. The basin is roughly split in two by the 60th parallel, with the provinces of British Columbia, Alberta and Saskatchewan being located upstream of Yukon and the NWT.<sup>43</sup>

Home to approximately 397,000 people, the Mackenzie River Basin is sparsely populated. The majority of the population resides in the Alberta portion of the basin. As of 2001, Aboriginal peoples accounted for about 15 per cent of the basin population. The Aboriginal population is highest in the north, where most communities are small and located close to rivers, lakes and the sea. Aboriginal peoples have lived in the basin for thousands of years, and have traditional territories, treaty areas, and land claims settlement regions within the basin.<sup>44</sup> Over generations, they have developed a detailed knowledge of the basin's ecosystems, and until today maintain their traditions and close relationships with water.<sup>45</sup> For instance, the Dene people have a long-standing spiritual bond with the Mackenzie River, which they call the *Deh Cho*, the Big River. Their ancient stories teach the importance of maintaining a balance with the river, which some elders regard as their lifeline.<sup>46</sup>

Over the past few decades, however, the waters of the Mackenzie Basin have become threatened. In the 1970s, environmental stressors began to increase significantly in the basin as a result of land use activities, municipal sewage operations, pulp mills, oil and gas development, hydro-

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43. G D Lewis, D Milburn & A Smart, "The Challenge of Interjurisdictional Water Management in the Mackenzie River Basin" (1991) 16:4 *Can Water Resources J* 381 at 381-383; although parts of Nunavut also fall within the Mackenzie River Basin, the share is so small that Nunavut is not typically considered a basin jurisdiction, see Michelle Morris & Rob C de Loë, "Cooperative and Adaptive Transboundary Water Governance in Canada's Mackenzie River Basin: Status and Prospects" (2016) 21:1 *Ecology & Society*.

44. Rob C de Loë & Michelle Morris, "Cooperative Transboundary Water Governance in Canada's Mackenzie River Basin: Status and Prospects" in Dave Huitema & Sander Meijerink, eds, *The Politics of River Basin Organisations: Coalitions, Institutional Design Choices and Consequences* (Cheltenham: Edward Elgar, 2014) 67 at 70-71.

45. Rosenberg International Forum on Water Policy, *Report of the Rosenberg International Forum's Workshop on Transboundary Relations in the Mackenzie River Basin* (2013) at 13-14, online: The Gordon Foundation <<http://gordonfoundation.ca/sites/default/files/publications/Rosenberg%20Final%20-%20WEB.pdf>>.

46. The Gordon Foundation, "Cold Amazon: The Mackenzie River Basin" (2013), online: <<http://gordonfoundation.ca/water/mackenzie-river-basin-initiative/cold-amazon>>.

electricity generation, and climate change.<sup>47</sup> The bulk of development activities took place in the southern provinces, while the area north of the 60th parallel remained characterized by a subsistence lifestyle highly dependent on the preservation of sensitive ecosystems. By the 1990s, the upstream and downstream portions of the Mackenzie River Basin were divided by “[s]harply contrasting political, cultural and economic conditions, as well as water use patterns....”<sup>48</sup>

## 2. *The Mackenzie River Basin Transboundary Waters Master Agreement*

As pressures on the Mackenzie water resources increased, and upstream-downstream divides continued to widen, the basin jurisdictions recognized the need for a more cooperative management approach. The drying-out of the Peace-Athabasca Delta due to dam operations on the Peace River was a key driver for the creation of the Mackenzie River Basin Liaison Committee in 1972. In 1977, this body was reconstituted as the Mackenzie River Basin Committee, which was in charge of a research program on basin hydrology and ecology. In 1988, the basin jurisdictions began negotiating towards an agreement for joint management of the basin’s water resources. After several rounds of negotiations and public comment, the *Mackenzie River Basin Transboundary Waters Master Agreement* was signed in 1997.<sup>49</sup> This agreement provided a framework of broad principles related to ecological integrity; sustainability; jurisdictional autonomy; consultation, notification and information sharing; and cooperative and harmonious dispute resolution. It also established a coordinating river basin organization, the Mackenzie River Basin Board (MRBB).<sup>50</sup>

As a framework agreement, the Master Agreement left substantive obligations to be negotiated between neighbouring jurisdictions through seven bilateral water management agreements. However, between 1997 and 2014, only the agreement between the NWT and

47. Joseph M Culp, Terry D Prowse & Eric A Luiker, “Mackenzie River Basin” in Arthur C Benke & C E Cushing, eds, *Rivers of North America* (Amsterdam: Elsevier, 2005) 805 at 808-809; Frederick J Wrona, Joseph M Culp & Terry D Prowse, “Basin Management Approaches Used in a High-Latitude Northern Catchment—The Mackenzie River Basin” in Robert C Ferrier & Alan Jenkins, eds, *Handbook of Catchment Management* (Chichester & Hoboken: Wiley-Blackwell, 2010) 477 at 481-483.

48. Lewis et al, *supra* note 43 at 381, 385.

49. R A Creery, “Avoiding Further Downstream Crises: The Mackenzie River Basin Committee” (1979) 4:3 *Can Water Resources J* 60; de Loë & Morris, *supra* note 44 at 72-75.

50. For a more detailed discussion of the MRBB and its performance to date, see Morris & de Loë, *supra* note 43.

Yukon was concluded.<sup>51</sup> In the meantime, the urgent need for a bilateral water management agreement between Alberta and the NWT became increasingly apparent. Tensions kept growing between development activities upstream, and maintenance of traditional lifestyles downstream. Yet, upstream-downstream negotiations were expected to be extremely difficult due to power differentials and the fact that “the upstream jurisdictions have no incentive to act against their own self-interest in the development of the basin’s water resources....”<sup>52</sup>

### 3. *Bilateral water negotiations*

The initiative of the NWT eventually created momentum in bilateral water negotiations: “As the twenty-first century opened, it was the government of the Northwest Territories (GNWT) that took the political lead.”<sup>53</sup> Reasons for this included resource management priorities of Aboriginal land claims beneficiaries, mounting concern about potential negative impacts of upstream industrial developments, evidence of Arctic climate change, and the fact that the Mackenzie River Basin became much more central to the NWT after the separation of Nunavut in 1999.<sup>54</sup>

In 2007, the GNWT, the government of Alberta, and the federal government signed a *Memorandum of Understanding* on bilateral water management negotiations. Although the memorandum was non-binding and did not provide any details on the expected content of the agreement, it described broadly what would be addressed during the negotiations.<sup>55</sup> Further direction was provided by the 2009 MRBB *Guidance Document*, which offered an overview of the bilateral agreement process, indicated

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51. The purpose of the 2002 NWT–Yukon agreement was to cooperatively manage, protect and conserve the ecological integrity of the aquatic ecosystem of the Mackenzie River Basin while facilitating sustainable use of the transboundary waters. The successful negotiation of the agreement has been attributed to the fact that the water resources shared by the two territories are relatively small. The agreement is therefore only of minor relevance for water management in the north. Overall, it is hardly ambitious, neither in substantial nor in procedural terms, with shortcomings including imprecise ecosystem objectives, weak dispute resolution mechanisms, and minimal concern for Aboriginal interests. See J Owen Saunders, “Managing the Mackenzie: Negotiating a Future with the Basin in Mind” (2012) 114 *Resources* 1 at 4-6, online: The Gordon Foundation <<http://gordonfoundation.ca/publication/651>>. Today, the NWT–Yukon agreement is considered to be outdated and in need of revision. See Morris & de Loë, *supra* note 43. Renegotiation of the agreement is currently underway. See “Transboundary Water Agreements” (2016), online: GNWT <<http://www.nwtwaterstewardship.ca/transboundary>>.

52. J Owen Saunders, “Managing Water in a Federal State: The Canadian Experience” in Dustin Garrick et al, eds, *Federal Rivers: Managing Water in Multi-Layered Political Systems* (Cheltenham: Edward Elgar, 2014) 76 at 84.

53. Peter Clancy, *Freshwater Politics in Canada* (North York: University of Toronto Press, 2014) at 197.

54. *Ibid.*

55. Saunders, *supra* note 51 at 6-7.

core issues that should be covered in the agreements, and proposed a process and timeline for their completion.<sup>56</sup>

In 2010, the GNWT released its *Northern Voices, Northern Waters Water Stewardship Strategy*, which specified the advancement of “transboundary discussions, agreements and obligations” as an important key to achieving the vision of clean, abundant and productive waters.<sup>57</sup> The strategy was developed in close collaboration with Aboriginal peoples, and it apparently gave the NWT new confidence to move negotiations forward, despite being the ultimate downstream jurisdiction in the Mackenzie River Basin. While acknowledging that the NWT was “a small jurisdiction of people, and we are going to be up against some big tables with very powerful neighbours” the GNWT was “more prepared than ever” to secure a bilateral agreement with Alberta.<sup>58</sup>

Official negotiations between Alberta, the NWT, and the federal government began in September 2011. For the negotiations, the parties agreed to follow an interest-based strategy.<sup>59</sup> The goal of this strategy was to meet the interests of the parties involved while avoiding positional bargaining. To facilitate the negotiations, the jurisdictions hired the environmental consulting company Compass Resource Management Ltd., based in Vancouver. The company has facilitated multiple bilateral negotiations in the Mackenzie River Basin to allow for a level of consistency among the various agreements.<sup>60</sup>

Aboriginal consultations took place separately in the NWT and Alberta. According to the MRBB *Guidance Document*, “[e]ach MRBB jurisdiction will engage its Aboriginal organizations in the development of the bilateral agreements in a manner consistent with its legal obligations.”<sup>61</sup> The federal government was initially part of the negotiations, but left in 2014 pursuant to a devolution agreement, which transferred responsibility for public

56. MRBB, *Bilateral Water Management Agreements Guidance Document* (2009), online: <[www.mrbbs.ca/uploads/.../mrbbs-bilateral-guidance\\_document-final.pdf](http://www.mrbbs.ca/uploads/.../mrbbs-bilateral-guidance_document-final.pdf)>; see also Saunders, *supra* note 51 at 9-10.

57. GNWT, *Northern Voices, Northern Waters: NWT Water Stewardship Strategy* (2010) at 10, 25-26, online: <[http://www.enr.gov.nt.ca/sites/default/files/strategies/nwt\\_water\\_stewardship\\_strategy.pdf](http://www.enr.gov.nt.ca/sites/default/files/strategies/nwt_water_stewardship_strategy.pdf)>.

58. Michael Miltenberger, NWT Minister of Environment and Natural Resources, quoted in CBC News, “N.W.T. Aims to Sign Water Agreement with Alberta” (5 November 2009), online: <<http://www.cbc.ca/news/canada/north/n-w-t-aims-to-sign-water-agreement-with-alberta-1.783560>>.

59. GNWT, *supra* note 51.

60. Compass Resource Management Ltd, “BC and the Northwest Territories Sign Transboundary Water Agreement” (16 October 2015), online: <<http://www.compassrm.com/news/news/pp.php>>.

61. MRBB, *supra* note 56 at 7.

land, water and resource management to the GNWT.<sup>62</sup> After more than three years of negotiation, the process was concluded in February 2015. On 18 March 2015, the Premiers and Environment Ministers of Alberta and the NWT signed the bilateral water management agreement.<sup>63</sup> The strong desire of the NWT as the ultimate downstream jurisdiction to reach a bilateral agreement with Alberta apparently was a driving force behind the successful conclusion of the agreement.<sup>64</sup>

#### 4. *The Alberta–NWT transboundary water management regime*

Together, the 1997 Master Agreement and the 2015 bilateral water management agreement (and its appendices) constitute the entire regime between Alberta and the NWT with respect to transboundary waters in the Mackenzie River Basin.

In general, the principles of the Master Agreement are affirmed in the bilateral agreement. Its main contribution is filling the broad framework provided by the Master Agreement with substantive provisions. These provisions concern surface water quantity, surface water quality, groundwater, a biological component, and monitoring. In each of these areas, bilateral water management actions will vary according to the classification of shared water bodies. Classification (class 1–4) depends on the level of development and the presence of other stressors and vulnerabilities affecting a water body (e.g., sensitive water or ecosystem uses, use conflicts or controversy). Classifications are to be reassessed at least annually. The classification system is the centrepiece of the agreement’s Risk-Informed Management approach, which aims to facilitate joint learning and proactive, adaptive actions. In procedural terms, the bilateral agreement establishes a Bilateral Management Committee (BMC), which, instead of the MRBB, will be responsible for administering the bilateral agreement and resolving disputes. Like the MRBB, the BMC will be composed of government appointees. The bilateral agreement reaffirms the Master Agreement’s commitment to Aboriginal and treaty rights. But unlike the MRBB, where Aboriginal representation is mandatory, it is optional on the BMC.

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62. On 1 April 2014, the *Northwest Territories Lands and Resources Devolution Agreement* entered into force. This agreement included the delegation of various responsibilities related to land and resources management from the federal government to the GNWT, see Indigenous and Northern Affairs Canada, “Frequently Asked Questions—Northwest Territories Devolution” (2014), online: Aboriginal Affairs and Northern Development Canada <<https://www.aadnc-aandc.gc.ca/eng/1352470624114/1352470863709>>.

63. *Mackenzie River Basin Bilateral Water Management Agreement between the Government of Alberta and the Government of the Northwest Territories* (18 March 2015), online: GNWT <[http://www.enr.gov.nt.ca/sites/default/files/ab-nwt\\_water\\_management\\_agreement\\_final\\_signed\\_2.pdf](http://www.enr.gov.nt.ca/sites/default/files/ab-nwt_water_management_agreement_final_signed_2.pdf)>.

64. Morris & de Loë, *supra* note 43.

The NWT perceived the bilateral water management agreement with Alberta as a big success. According to Michael Miltenberger, who oversaw the negotiations as the NWT Minister of Environment and Natural Resources,

We have agreed about all the principle elements, and indicators and criteria we need across the Basin. We have some very important pieces built in, in terms of aquatic ecosystems, the amount of water left in the system, indicators, how we are going to deal with monitoring. At the same time, we built in a community-based monitoring system that we have been rolling out across the Northwest Territories that will allow communities to work with us to sample water....There is a sense of comfort [in the NWT] that we have the best agreement that we can get and it gives us a level of protection that we never had before.<sup>65</sup>

Not all of the NWT's demands were incorporated into the agreement, however. For example, the NWT negotiating team apparently requested specific objectives for surface water quality, but no such objectives are spelled out in the agreement or its appendices. While the appendices recognize that the task of developing specific water quality objectives is an utmost priority, their development and implementation is said to require further discussion and resources. The objectives for surface water quantity, on the other hand, are more specific. In general, the agreement demands that Alberta passes to the NWT an amount of water equal to the sum of ecological integrity needs, plus 50 per cent or more of the available water. For the Hay River, a vulnerable class 3 water body, the objective is that 90 per cent of instantaneous flows will be allocated for ecosystem use, and the remaining 10 per cent will be shared equally between Alberta and the NWT. This water allocation formula was an important success for the NWT:

When Alberta first came to the table, their offer was 50 per cent of the water, and we ended up with 95 per cent of the water set aside and protected for ecosystems and the environment. Most of the other five per cent will flow into the Northwest Territories, because Alberta won't use it.<sup>66</sup>

The NWT–Alberta bilateral agreement was generally well received by scientists and water experts in Canada, who described it as “an innovative agreement to share and protect the vast Mackenzie River watershed,” and

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65. Quoted in The Droplet, “Dream Team Behind the Mackenzie River Basin Agreements” (20 October 2015), online: Water Canada <<http://watercanada.net/2015/the-droplet-interview-negotiating-dream-team-behind-the-mackenzie-river-basin-agreements/>>.

66. *Ibid.*

as setting “a new standard for environmental management.”<sup>67</sup> Yet, the agreement also raises several questions. Notably, the agreement’s legal language is weak, and binding, judicial dispute resolution is avoided, which raises doubts about the enforceability of the agreement.<sup>68</sup> The fact that monitoring and reporting will be undertaken by the newly established BMC, instead of the basin-scale MRBB, may further weaken the board’s already limited role. Unless effective coordination mechanisms are established, this allocation of responsibilities poses challenges to a bioregional basin governance approach.<sup>69</sup> More fundamentally, the reliance on bilateral agreements has been questioned. As Peter Clancy views it, this approach

has the effect of shifting focus from the basin as a whole to more limited tributaries and sub-basins...Even with high-level government commitments to an agreement, the primacy of bilateral relationships detracts from whole-basin integrity [as] [e]ach jurisdiction concentrates on immediate borders.<sup>70</sup>

Interesting directions for further research thus emerge about the NWT–Alberta agreement itself and its implementation. This paper leaves these opportunities for future work. In light of Canada’s challenges with Aboriginal involvement, the remainder of this paper concentrates on a comparative assessment of Aboriginal consultation in the 2011–2015 negotiation process.

### III. *Aboriginal consultation in Alberta*

Within the Government of Alberta, responsibility for negotiating the bilateral agreement rested primarily with the Transboundary Secretariat, which belongs to Alberta Environment and Parks. The size of the negotiating team fluctuated due to organizational change. For the most part, however, the team consisted of four Government of Alberta employees, namely the director of the Transboundary Secretariat, a negotiations process coordinator, an intergovernmental relations advisor, and a legal counsel.

Before undertaking Aboriginal consultation on the bilateral water management agreement, the team requested a pre-consultation assessment in light of section 35(1) and the duty to consult. According to Brian Yee, the director of the Transboundary Secretariat, the legal opinion of Alberta

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67. The Canadian Press, “Alberta, Northwest Territories Sign Deal on Vast Mackenzie River Watershed,” *Macleans* (18 March 2015), online: <<http://www.macleans.ca/news/alberta-northwest-territories-mackenzie-river/>>.

68. Morris & de Loë, *supra* note 43; Interview of J Owen Saunders by Andrea Beck (3 March 2016).

69. Morris & de Loë, *supra* note 43.

70. Clancy, *supra* note 53 at 200-201.

Aboriginal engagement advisors was that the duty to consult was low in this case, meaning that a letter to Aboriginal peoples may have sufficed in terms of consultation.<sup>71</sup> As indicated by the negotiations process coordinator, Matthew Pals, the legal opinion meant that “we didn’t have to go out there and do really big, expensive, time-consuming consultation. It may have been adequate to just send out a notification that we were entering into these negotiations....”<sup>72</sup> Obtaining such legal advice was considered essential by the team to ensure that minimum requirements were met and legal difficulties avoided. As Yee puts it, “as long as you’re exceeding what’s the minimum requirement, it’s fine. If you don’t meet the minimum, then you have difficulties.”<sup>73</sup>

For the transboundary negotiation, the team decided that “we wanted to go above and beyond the bare minimum,”<sup>74</sup> and Aboriginal groups were invited to face-to-face information sessions. In deciding which Aboriginal groups to consult, the team was partly guided by *Treaty 8*.<sup>75</sup> Some of the larger Aboriginal groups within the *Treaty 8* boundaries include the Athabasca Chipewyan First Nation and the Mikisew Cree First Nation. A number of smaller groups were reportedly also invited for consultation. A concern for compliance with legal requirements again played a role in determining the inclusiveness of the process:

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71. Interview of Brian Yee by Andrea Beck (2 March 2016).

72. Interview of Matthew Pals by Andrea Beck (15 March 2016).

73. Yee, *supra* note 71. While the written legal opinion was beyond access in this research, Alberta’s most recent consultation guidelines suggest that such a low level of consultation (notification with opportunity for First Nation to respond) applies when the sensitivity of the project location, based on treaty rights and traditional uses, is judged to be low, and the impact of the project in question is expected to be low or moderate. See Alberta Indigenous Relations, *The Government of Alberta’s Guidelines on Consultation with First Nations on Land and Natural Resource Management* (2014) at 14, online: <[www.indigenous.alberta.ca/documents/First\\_Nations\\_Consultation\\_Guidelines\\_LNRD.pdf.pdf?0.040441057423940774](http://www.indigenous.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf.pdf?0.040441057423940774)>.

74. Pals, *supra* note 72.

75. *Treaty 8* (1899) is one of 11 numbered treaties that were negotiated between the Dominion of Canada and various First Nations between 1871 and 1921. Treaties were most often deemed necessary within the context of settlement in order to open up land for development. “In essence the treaties involved the natives extinguishing their ‘underlying title’ to their land, usually in return for a variety of economic and material benefits...” See Huseman & Short, *supra* note 11 at 217. *Treaty 8* covers what is today the northern half of Alberta, the area south of Hay River and Great Slave Lake in the NWT, the northeast quarter of BC, and the northwest corner of Saskatchewan. See Indigenous and Northern Affairs Canada, “Treaty Guide to Treaty No. 8 (1899)” (2010), online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca/eng/1100100028805/1100100028807>>.

We tried to be as inclusive as possible. For the most part, we wanted to err on the side of caution. If we were on the fence about whether or not this group should be consulted with, then we decided that yes, let's consult with them, just to be safe.<sup>76</sup>

In an invitation letter (dated 9 May 2012) sent to the Mikisew Cree First Nation, Alberta announced several half-day information sessions, intended to provide First Nations with an opportunity to ask questions about the bilateral agreements, and to provide feedback on an information package. This information package, enclosed with the letter, offered background information on the bilateral water management agreements, a summary of Alberta's interests informed by the province's *Water for Life Strategy*,<sup>77</sup> and an overview of channels for First Nations to provide input. Specifically, the letter invited First Nations to three information sessions: one in Fort McMurray on 30 May, one in Peace River on 5 June, and one in High Level on 6 June 2012. All three sessions would take place in conference centres or hotels.<sup>78</sup> On its website, Alberta Environment and Parks later reported about two of these meetings. As stated on the website, these sessions "provided information on the bilateral agreements, an update on the overall agreement development processes to date, and provided an opportunity for First Nations to identify their concerns and interests related to the bilaterals."<sup>79</sup>

To these meetings, the negotiating team "just went there to listen. We were gathering information, trying to get a handle on what different groups' concerns were."<sup>80</sup> Translators were not present at the meetings, since apparently all attendees spoke English. According to Pals, translation "would be something we would have pursued if there was a need for it."<sup>81</sup> The Aboriginal consultation sessions took place separately, but proceeded in parallel with meetings with municipalities and industry. These stakeholders were also engaged to make sure that the negotiations covered "all Albertans' interests, Indigenous peoples and otherwise."<sup>82</sup>

76. Pals, *supra* note 72.

77. Alberta Environment and Parks, *Water for Life: Alberta's Strategy for Sustainability* (2003), online: Government of Alberta <<https://extranet.gov.ab.ca/env/infocentre/info/library/6190.pdf>>.

78. Alberta Environment and Sustainable Resource Development, *Invitation Letter and Appendices to the Mikisew Cree First Nation, May 9, 2012* (2012) Personal Communication (8 April 2016).

79. Alberta Environment and Parks, "Mackenzie River Basin Bilateral Water Management Agreements" (2015), online: <<http://esrd.alberta.ca/water/education-guidelines/mackenzie-river-basin-bilateral-water-management-agreements.aspx>>.

80. Pals, *supra* note 72.

81. *Ibid.*

82. *Ibid.*

Although this research could obtain no direct insights into the Aboriginal information sessions, a written draft submission prepared by a consultant for the Athabasca Chipewyan First Nation and the Mikisew Cree First Nation highlights a number of Aboriginal priorities for the bilateral water management agreements.<sup>83</sup> Several of the priorities are specifically directed at the agreement that Alberta is currently negotiating with BC. These concern, among other things, seasonal distribution of flow, consumptive use, and water quality. However, the draft submission also contains a number of more general priorities relevant to the NWT–Alberta agreement. In substantive terms, these include the prohibition of bulk water removals from the basin, prevention of introducing foreign biota and pathogens into the basin, establishment of quantity and quality objectives for joint aquifers and precautionary measures to ensure their protection, and joint consideration of adaptive measures. Procedurally, the document calls for the creation of a basin-level governance structure with binding decision making powers to ensure ecological integrity, harmonization and enforcement of relevant laws and regulations in the basin jurisdictions, full respect for Aboriginal rights in the bilateral agreements, and a joint commitment to values and objectives such as protection of future generations, protection of traditional ways of life, and decision making based on traditional, local, and Western knowledge.<sup>84</sup>

After Alberta’s initial interest gathering phase in May and June 2012, no further consultation was undertaken until January 2015, when a draft agreement had been developed. With this draft, the negotiating team went back to Aboriginal groups for follow-up consultation. These sessions were intended to allow for communication feedback, showing the groups to what extent and how their concerns had been accommodated. As emphasized by team members, these sessions did no longer constitute information gathering, but were instead a form of information sharing: “We went back and shared with them where we ended up, not for their permission or their blessing, but just to show them, this is where we have ended up, and this is how we’ve addressed your concerns.”<sup>85</sup> In these sessions, the team “provided them [the Aboriginal groups] with tables of how the interests they have expressed were addressed in the agreement or not addressed, for whatever reason.”<sup>86</sup>

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83. “MCFN and ACFN Bilateral Water Agreement Priorities” (2012) Personal Communication (8 April 2016).

84. *Ibid.*

85. Pals, *supra* note 72.

86. Yee, *supra* note 71.

While Aboriginal groups in Alberta thus had opportunities for providing input at the outset of the negotiations, they did not have influence over the ways in which their concerns affected the subsequent negotiations and the resulting agreement. To some extent, this circumstance reflects Alberta's most recent consultation policy, which explicitly states that "[t]he Crown's duty to consult does not give First Nations... a veto over Crown decisions, nor is the consent of First Nations... required as part of Alberta's consultation process."<sup>87</sup>

One of the reasons why some Aboriginal concerns were left unaddressed is because these concerns were perceived to be outside the scope of the bilateral agreement. According to the negotiating team, First Nations apparently were less concerned about water management in the NWT, since it is located downstream from Alberta. Rather, concerns seemed to focus on upstream dam operations in BC and oil sands operations in Alberta, and their impacts on the Peace–Athabasca Delta. From a governmental perspective, however, "the Peace–Athabasca Delta, being located wholly within the borders of Alberta, is more accurately addressed through regional planning done within the province of Alberta, than through any kind of interjurisdictional agreement...." Thus, Aboriginal groups "had concerns in general with water in the Mackenzie River Basin. However, it wasn't always within the scope of the agreement."<sup>88</sup> In such cases, the team tried to direct Aboriginal groups to Alberta's land use regional planning process as the proper forum to voice their concerns. Yet, team members also acknowledged that First Nations may have preferred the bilateral negotiations as an opportunity to have their concerns addressed sooner due to the slow pace of regional planning.<sup>89</sup>

The above-mentioned draft submission prepared for First Nations confirms that several of their concerns may indeed have focused on transboundary water management with upstream BC, rather than with downstream NWT.<sup>90</sup> More general Aboriginal concerns related to bulk water removal, invasive species control, and adaptive management seem to have been addressed in the bilateral agreement. However, instead of establishing a basin-level governance mechanism, as requested by First Nations, the BMC moves away from a basin-wide approach and lacks binding decision-making powers. Likewise, as noted above, while

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87. Alberta Indigenous Relations, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* (2013) at 4, online: <<http://www.indigenous.alberta.ca/documents/GOAPolicy-FNConsultation-2013.pdf>>.

88. Pals, *supra* note 72.

89. *Ibid.*

90. "MCFN and ACFN Bilateral Water Agreement Priorities," *supra* note 83.

Aboriginal and treaty rights are affirmed in the bilateral agreement, Aboriginal representation on the BMC is not mandatory but optional.

One of the challenges perceived by Alberta during consultations concerned First Nations capacity. Generally, it was observed that many groups were facing consultation overload: “there is a requirement to consult on so many different files that some groups get overwhelmed and overloaded....”<sup>91</sup> A certain “consultation fatigue” was also observed, which may have arisen since “some groups have participated in other consultations in the past, and either didn’t see their concerns addressed, or that communication feedback was not there....”<sup>92</sup> Some efforts were made by the negotiating team to remediate these shortcomings, for example by directing groups to alternative consultation channels and engaging in follow-up information sharing. However, capacity building was not undertaken directly by the Transboundary Secretariat, since in Alberta, this responsibility lies with a separate Aboriginal Consultation Office.<sup>93</sup>

Another major challenge facing the negotiating team was to manage expectations. For the Government of Alberta, the NWT–Alberta agreement was intended to be “a friendly, cooperative agreement that sets out how two jurisdictions are going to work together to manage our shared waters.”<sup>94</sup> Apparently, this interpretation did not necessarily align with Aboriginal expectations:

I think there was some hope by some groups that we would be able to use this agreement to influence or control water management decisions in other jurisdictions, and that was never the intent of the agreements... because they [other jurisdictions] are responsible for their natural resources, and we [Alberta] are responsible for ours.<sup>95</sup>

This emphasis on provincial ownership of natural resources goes back to the 1930 *Natural Resources Transfer Agreements*,<sup>96</sup> which moved ownership of water and other natural resources from the federal government to provincial governments. Based on this legislation, the Government of Alberta takes the position that “water belongs to Alberta and we manage the water at the provincial level.”<sup>97</sup> In the negotiations with the NWT,

91. Pals, *supra* note 72.

92. *Ibid.*

93. Alberta Indigenous Relations, *supra* note 87 at 5.

94. Pals, *supra* note 72.

95. *Ibid.*

96. *Alberta Natural Resources Act*, SCA 1930, c 3, which is also regarded as the *Natural Resources Transfer Agreement*. See J Owen Saunders & Michael M Wenig, “Whose Water? Canadian Water Management and the Challenges of Jurisdictional Fragmentation” in Karen Bakker, ed, *Eau Canada: The Future of Canada’s Water* (Vancouver: UBC Press, 2007) 119 at 124, 139.

97. Yee, *supra* note 71.

Alberta's emphasis on natural resource sovereignty was reflected in inter-jurisdictional interaction:

We had to remind NWT more than once of the principles of the Master Agreement, especially about the part that jurisdictions have the right to use water, and manage the use of that water, as long as we don't cause unreasonable harm to the downstream jurisdiction. We had to remind them, "Do not try to step on Alberta's sovereignty with respect to management of water and decision making."<sup>98</sup>

Considerations for natural resource sovereignty also affected Aboriginal involvement. For the Government of Alberta, the negotiations were to be government-to-government, and the presence of other actors at the negotiating table was firmly rejected. While First Nations were consulted, "[i]n the negotiations themselves, Aboriginal groups played zero role. They didn't play any role because the agreement itself was between two governments."<sup>99</sup> While Alberta was approached by Aboriginal groups to sit at the table, "we said that no, the agreement is between governments, and only governments will be sitting at the table..."<sup>100</sup> Notably, the term "governments" in Alberta usage only refers to provincial, territorial and federal authorities, not Aboriginal groups.

#### IV. *Aboriginal consultation in the Northwest Territories*

In the NWT, the transboundary water negotiations were the responsibility of the Department of Environment and Natural Resources. As mentioned, the Minister at the time was Michael Miltenberger, who was in office over the course of the entire 2011–2015 negotiation and had earlier played a crucial role in championing the *Water Stewardship Strategy*. For bilateral negotiations with Alberta and other neighbouring jurisdictions, Miltenberger assembled a team of nine, which included both GNWT employees and externally-hired experts. Overall, the team consisted of a chief negotiator; lead negotiator and technical advisor; NWT and Aboriginal affairs advisor; negotiations process advisor; negotiations coordinator; water quantity specialist; water quality specialist; technical coordinator; and a transboundary consultation support person.

As suggested by team members, land claims agreements provided a strong legal obligation for Aboriginal consultation in the NWT, because one crucial provision in the *Gwich'in, Sahtu and Tlicho Comprehensive Land Claim Agreements* requires that "waters which are on or flow through

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98. *Ibid.*

99. Pals, *supra* note 72.

100. *Ibid.*

or are adjacent to [Gwich'in, Sahtu, Tlicho] lands remain substantially unaltered as to quality, quantity and rate of flow."<sup>101</sup> This clause has been adopted as one of the goals of the *Water Stewardship Strategy*, envisioning that "[w]aters that flow into, within or through the NWT are substantially unaltered in quality, quantity and rates of flow."<sup>102</sup> According to Ralph Pentland, who served as the negotiations process advisor, this sentence

was a very powerful guiding principle....We had a lot of interests in the NWT, but they all could be translated into that one sentence, which essentially refers to the protection of an Aboriginal lifestyle. In a way, that was strong marching orders for us as negotiators.<sup>103</sup>

As noted by Erin Kelly, the lead negotiator and technical advisor, because of the wording in the land claims agreements, "we were unable and unwilling to commit to less than that standard."<sup>104</sup> For Aboriginal groups in the NWT, these agreements provided strong legal recourse in the case of inadequate consultation. Tim Heron, who represented the NWT Métis Nation during the consultation, makes the Aboriginal perspective clear:

There are legal avenues such as land claims which are constitutionally protected. There are water clauses in there. The territorial government can't just come along, make a deal and say, "Oh, we forgot all you guys down the river." Aboriginal rights are always in our hip pocket. This deal [NWT-Alberta bilateral water management agreement] is not for Aboriginal people. It's for territorial and provincial governments. But we could go to court anytime we want. It's like sitting there with a trump card in your pocket and not playing it until you need it.<sup>105</sup>

This legal basis played a significant role in shaping consultation efforts in the NWT. The negotiating team tried to consult with Aboriginal groups early and to keep them involved throughout all stages of interest-based negotiations:

Our intention was to begin dialogue very early in the process. We wanted to make sure that the concerns could be understood early, and that the process and outcomes could better address Aboriginal government

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101. GNWT, *supra* note 51; *Comprehensive Land Claim Agreement between Her Majesty the Queen in Right of Canada and the Gwich'in as represented by the Gwich'in Tribal Council, Volume I*, [1992] R32-121/1992E at para 19.1.8(a); *Sahtu Dene and Metis Comprehensive Land Claim Agreement, Volume I*, [1993] R32-146/1993E at para 20.1.8(a); *Land Claims and Self-Government Agreement among the Tlicho and the Government of the Northwest Territories and the Government of Canada*, [2003] at para 21.2.3.

102. GNWT, *supra* note 57 at 11.

103. Interview of Ralph Pentland by Andrea Beck (21 January 2016).

104. Interview of Erin Kelly by Andrea Beck (8 February 2016).

105. Interview of Tim Heron by Andrea Beck (9 March 2016).

interests from the beginning. This is a very different approach than just going at the end with the agreement back to people, and explaining why things were there. We were trying to engage in conversation throughout the negotiations process.<sup>106</sup>

Aboriginal consultations on the bilateral water management agreements officially began in March 2012 with a letter from Miltenberger, which was sent to regional Aboriginal governments and invited them to provide comments and input on NWT principles and interests.<sup>107</sup> These consultations were a continuation of close Aboriginal engagement in the development and implementation of the *Water Stewardship Strategy*, which started much earlier, in 2006/2007.<sup>108</sup>

Face-to-face meetings were an important part of the consultation process, which began in 2012 and continued over the course of the following three years. As internal GNWT records show, between March 2012 and January 2015, 77 meetings were held with Aboriginal communities and representatives across the NWT, from Fort Smith and Yellowknife in the south to Fort McPherson and Inuvik in the north. Some of these meetings were exclusively focused on the NWT–Alberta agreement, while others dealt with the agreements with BC, Saskatchewan or Yukon. However, as indicated in the governmental records, all meetings involved at least updates and some discussion on the NWT–Alberta bilateral agreement. Types of meetings included meetings with individual Aboriginal communities, Aboriginal leadership meetings, and regional meetings. They also included traditional knowledge workshops, as “[o]ur aim was to ensure from the beginning that traditional knowledge was being meaningfully included in the negotiation process.”<sup>109</sup>

As described by the chief negotiator, Merrell-Ann Phare, community-based meetings generally occurred in the community’s main meeting place, such as a school gymnasium or community hall. Translators were always present at the meetings, both out of necessity and out of respect:

We always had provided the option of translators, as it’s not unusual for Elders to only speak their Indigenous language. Sometimes, they speak both English and the Indigenous language. And it’s also an issue of respect, where you must recognize that the Indigenous language is important.<sup>110</sup>

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106. Kelly, *supra* note 104.

107. GNWT, *supra* note 51.

108. GNWT, *supra* note 57 at 1.

109. Kelly, *supra* note 104.

110. Interview of Merrell-Ann Phare by Andrea Beck (25 January 2016).

Aboriginal members were invited to give an Aboriginal opening prayer and sometimes acted as co-chairs. During the meetings, which usually lasted between one and two days, members of the negotiating team and GNWT staff typically showed slide presentations to share background information on the negotiations and to provide updates. The rest of the meetings was then reserved for answering questions and providing feedback. As indicated by the NWT team, dialogue and conversation was an important characteristic of meetings with Aboriginal communities:

We would say what we knew and have conversations about what input they would like to provide. The meeting participants were always invited to provide opening remarks, and ask questions throughout, and have discussions.<sup>111</sup>

Questions from Aboriginal members were not only answered on the spot, but questions and answers were also recorded into summaries by GNWT staff. The team then “always responded in writing after these meetings.... Sometimes, the responses were very elaborate—30, 40, 50 pages written of responses.”<sup>112</sup> This material provided the basis for the team to ensure that Aboriginal concerns were considered in the negotiations.

However, the NWT’s multi-pronged approach to consultations was not confined to community-based and regional meetings alone. Additional consultation mechanisms included the NWT and Aboriginal affairs advisor (referred to as the “Aboriginal liaison person” by interviewees) and the Aboriginal Steering Committee (ASC).<sup>113</sup> The NWT and Aboriginal affairs advisor was an Aboriginal representative who was part of the negotiating team and present at all negotiating sessions. This person’s task was to serve as a conduit between the negotiating team and Aboriginal interests:

When we were negotiating, the Aboriginal liaison person would talk to all the Aboriginal governments up and down the valley throughout the NWT about the issues in the water negotiations. And then, the liaison would bring back their views into our negotiating meetings.... This was one function of the liaison with Aboriginal governments: explain to them what we were thinking, and explain to us what they were thinking.<sup>114</sup>

The ASC, for its part, consisted of representatives from NWT regional and community-based Aboriginal governments. The formation of the Committee dates back to 2009, when it was established to help guide

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111. Kelly, *supra* note 104.

112. *Ibid.*

113. *Ibid.*

114. Phare, *supra* note 110.

the development of the *Water Stewardship Strategy*.<sup>115</sup> As documented in GNWT records, between March 2012 and February 2015, the ASC met eleven times in Yellowknife or via teleconference to discuss progress on the bilateral agreements. For the negotiating team, this close interaction provided a mechanism to keep negotiations aligned with Aboriginal interests, as the ASC “did a very good job of continually looking over our shoulders and making sure we remained true to ‘their’ [Water Stewardship] Strategy.”<sup>116</sup> The high level of interaction was also acknowledged by Aboriginal representatives:

The negotiating team always talked to the Aboriginal Steering Committee, which would make sure that the GNWT was on the right path, based on what it says in the Water Strategy .... There was a lot of talking going on when this was happening.<sup>117</sup>

In implementing this multi-faceted consultation approach, the NWT negotiating team recognized the need for capacity building:

Indigenous peoples in particular have the need for resourcing support, either because they don’t have a strong revenue base or they have so many priorities.... They need financial support in order to get staff, or technical people, or to have a community process to find out what their input is. Normally, you would expect that when two governments come to the table, each funds themselves. But that’s not the case generally with Indigenous governments. It might not be always like that, but it’s certainly frequently like that right now, where they are just under-resourced in general, and will need support.<sup>118</sup>

During consultations, capacity support was provided in two main ways. First, capacity building took place directly during meetings with Aboriginal groups as a result of the team’s commitment “to spend the time to talk them through every single line of the agreement, and make sure that the full implications of every element was fully discussed and understood.”<sup>119</sup> Also, the GNWT provided funding for meetings, the NWT and Aboriginal affairs advisor, and the ASC. Overall, it has been estimated that the GNWT spent \$1.6 million per year on the bilateral water negotiation with Alberta,<sup>120</sup> with consultations accounting for a considerable share. In the eyes of the

115. GNWT, *supra* note 57 at 43.

116. Ralph Pentland, *Comments at Celebratory Dinner, NWT–Alberta Bilateral Water Management Agreement, September 17, 2015, Yellowknife* (2015) Personal Communication (21 January 2016).

117. Heron, *supra* note 105.

118. Phare, *supra* note 110.

119. *Ibid.*

120. The Canadian Press, *supra* note 67.

negotiating team, these financial resources spent on consultation were an investment in a long-term relationship:

it was expensive, but that is how you build a long-term relationship. And it means you are not spending money in court, you are not spending money fighting, and you are actually working closely together to get things done.<sup>121</sup>

Second, capacity building occurred indirectly through the *Action Plan 2011–2015*. This plan is intended to help put the *Water Stewardship Strategy* into practice. It includes a variety of initiatives such as community-based monitoring, which aims at empowering communities to become involved in water-related research, monitoring, and traditional knowledge collection.<sup>122</sup>

With respect to the status of Aboriginal groups in the NWT, it is noteworthy that GNWT officials and staff, as well as externally-hired team members, tended to refer to Aboriginal groups as governments:

We need to deal with Aboriginal governments in a respectful way. And don't be afraid of the word "Aboriginal governments." We have municipal governments, we have provincial governments, territorial governments—and they all work together.<sup>123</sup>

We had to involve Indigenous governments at each stage, if we wanted the agreement to represent the views of the governments of the north. You can't say it only represents the GNWT's views if we had agreed to work in partnership, and the Indigenous governments are as valid a government as any other government.<sup>124</sup>

This recognition notwithstanding, some disagreements arose between the negotiating team and Aboriginal groups, in particular about the level of involvement as well as the impact on the final agreement. Some Aboriginal groups reportedly requested to have a seat at the table with Alberta, beyond the NWT and Aboriginal affairs advisor. Such direct participation was unfeasible from the negotiating team's viewpoint, and tensions emerged between control of the negotiations and appropriate involvement:

The one big challenge that kept arising almost all the time, at every meeting, was the level of involvement. What the Aboriginal groups would have liked would be to sit at the table and negotiate with Alberta.

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121. Phare, *supra* note 110.

122. GNWT, *NWT Water Stewardship: A Plan for Action 2011–2015* (2011), online: <[http://www.enr.gov.nt.ca/sites/default/files/reports/nwt\\_water\\_strategy\\_action\\_plan.pdf](http://www.enr.gov.nt.ca/sites/default/files/reports/nwt_water_strategy_action_plan.pdf)>.

123. Interview of Michael Miltenberger by Andrea Beck (21 January 2016).

124. Phare, *supra* note 110.

So how do you get an appropriate level of involvement? ... You can't take each Aboriginal government to the negotiations. When you go to the negotiating table, you have two or three people on each side that are going to speak. If you have more than that, then you are really in trouble. You've got to control the negotiations, but at the same time, you have to have appropriate involvement.<sup>125</sup>

Due to their concerns about upstream development, Aboriginal groups in the NWT also demanded that stronger legal enforcement mechanisms be included in the bilateral agreement:

[They] wanted the agreement to be another layer of regulation. They really wanted it to be a binding contract that created penalties and a new course of action for litigation....But the governments had agreed to a cooperative approach through the Master Agreement as an additional way to achieve common goals.<sup>126</sup>

On the one hand, Aboriginal groups were thus recognized as governments and full partners in the NWT. On the other hand, it was the territorial and provincial governments who reserved for themselves the prerogative to sit at the negotiating table, and who had the final say over the agreement's procedural and substantive provisions. In contrast to demands by Aboriginal groups in both the NWT and Alberta, the final agreement lacks strong enforcement mechanisms. The major substantive goal of Aboriginal peoples in the NWT (and arguably also the GNWT) was to ensure that waters remained "substantially unaltered," but this wording did not enter into the bilateral agreement. Rather, the Master Agreement's "no unreasonable harm" principle was maintained. As noted by Peter Clancy, "no unreasonable harm" and "substantially unaltered" "represent distinct and colliding principles for freshwater management..." The fact that the Master Agreement's wording prevailed suggests that the NWT-Alberta agreement does not set a creative precedent, but "simply perpetuate[s] the balance of political forces to date."<sup>127</sup>

#### V. Discussion

In sum, the foregoing analysis offers a nuanced answer to the question of whether consultations in the NWT-Alberta transboundary water negotiation can be regarded as an outstanding achievement from the perspective of FPIC. Fundamentally, two separate consultative processes were underway during the 2011-2015 negotiation. While this research

125. Pentland, *supra* note 103.

126. Phare, *supra* note 110.

127. Clancy, *supra* note 53 at 202.

detected no indications of restrictions on the freedom of Aboriginal groups in either Alberta or the NWT, important differences emerge between the two cases in light of the other evaluative criteria.

Regarding timing and duration, formal consultations in both jurisdictions began in the first half of 2012. In Alberta, the information gathering phase was limited to May and June 2012, and no further consultation took place until 2015, when a draft agreement had been developed. In the NWT, Aboriginal peoples were consulted continually throughout the entire negotiation period. Although official consultation on the bilaterals began in March 2012, Aboriginal engagement on water-related issues in the territory dated back much further, to the development of the *Water Stewardship Strategy*. In this sense, consultation began a long time *prior* to the start of official bilateral negotiations. Whereas the sharing of *information* in Alberta was confined to a notification package and a small number of meetings, the GNWT undertook an extensive, multi-pronged consultation effort, where information was made available through various channels. At community-based meetings in the NWT, Indigenous language translation was provided, both out of necessity and out of respect. Dialogue and collaboration played an important role in interactions between the negotiating team and Aboriginal communities and their representatives. GNWT capacity building supported Aboriginal peoples to play a meaningful role in consultations, and encouraged them to take on leadership roles in community-based monitoring and traditional knowledge collection. NWT policy makers and negotiating team members also emphasized the special status of Aboriginal groups as governments.

The nature and scope of Aboriginal consultation thus appears to have been different and significantly “deeper”<sup>128</sup> in the NWT as compared to Alberta. Nevertheless, it is noteworthy that Aboriginal groups were denied access to the negotiating table on either side, although the GNWT made an effort to enhance direct Aboriginal participation through the NWT and Aboriginal affairs advisor. While the exclusion of Aboriginal actors in Alberta was mainly due to sovereignty-related concerns, interviewees in the NWT cited logistical difficulties,<sup>129</sup> and, to some extent, resistance by Alberta,<sup>130</sup> as the main reasons for lack of direct access. Accommodation of Aboriginal substantive and procedural concerns likewise reached a limit when demands challenged the previously agreed upon friendly, cooperative nature of the agreement. Contrary to Brooks’s suggestion that

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128. *Haida Nation*, *supra* note 18 at para 44.

129. Kelly, *supra* note 104; Pentland, *supra* note 103.

130. Heron, *supra* note 105.

the agreement “was signed between Alberta, the Northwest Territories, and all affected indigenous groups...”<sup>131</sup> the analysis shows that although Aboriginal groups were consulted they were not a party or signatory to the bilateral water management agreement.

While Alberta’s consultations were oriented towards legal minimum requirements under the duty to consult, the NWT implemented extensive consultations characterized by early involvement, multi-faceted engagement, emphasis on dialogue and collaboration, capacity building, and recognition of Aboriginal groups as governments. Although certain shortcomings in Aboriginal access and accommodation remained when measured against the standard of FPIC, it can be argued that these characteristics qualify the NWT case as an unusual achievement in terms of Aboriginal consultation in Canada. As suggested by Miltenberger, the consultation and accommodation efforts undertaken in the NWT indirectly also benefited Aboriginal groups in Alberta, and partly account for the fact that some of their substantive interests were incorporated into the final agreement:

As Aboriginal governments from northern Alberta told us, they can’t get to the table with their government, but they knew from their relationships with the Aboriginal governments in the NWT and the GNWT that we negotiated an agreement that we all accepted would be good for them as well. The protection of the water, the monitoring issues, the conditions required to maintain integrity of the water all would benefit them.... But they were still frustrated that they didn’t have the same kind of relationship with their government that we have with the Aboriginal governments in the NWT.<sup>132</sup>

Not only is the NWT case a major step forward in light of Canada’s past consultation record, but it also constitutes a proactive attempt to enhance Aboriginal participation in line with FPIC. Legal considerations under the duty to consult—in particular, land claims agreements and the expected impacts on Aboriginal lifestyles in the NWT as the downstream jurisdiction—affected the nature and scope of consultation. But beyond those legal requirements, FPIC was not far from the minds of GNWT officials and team members when describing Aboriginal consultation:

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131. Brooks, *supra* note 14 at 1077.

132. Miltenberger, *supra* note 123.

We are working in many of our initiatives through this whole process of prior and informed consent, and making sure that the Aboriginal governments are involved at the front end of everything that we have going on in the NWT, because they are major players.<sup>133</sup>

In a recent report prepared by Phare and Miltenberger, the GNWT's approach to consultation and accommodation, called "collaborative consent," is explicitly situated within the context of *UNDRIP* and FPIC. As noted in the report, collaborative consent is a process "where all governments—Indigenous and non-Indigenous—work to achieve each other's consent through collaborative approaches tailored to the matter at hand." Initiatives to involve Aboriginal governments in the co-development of legislation, policies, and agreements are cited as examples of how this approach is being put into practice in the NWT.<sup>134</sup>

Besides legal considerations, socio-political relationships emerged as an important factor to explain differences in Aboriginal consultation. Consultation in Alberta took place in a climate where relationships between the provincial government and First Nations had become increasingly acrimonious. Due to frustration among First Nations about the lack of meaningful consultation on resource development, relationships had deteriorated to the extent of a "fundamental breakdown."<sup>135</sup> By contrast, Aboriginal and non-Aboriginal segments of society have traditionally been closely interwoven in the NWT:

We recognized early on that we are all related here, that most of us have been here a long time. We have Inuvialuit, Dene people, Métis, non-Aboriginals, connected by blood lines and family relationships. These kinds of connections are very common here. It only makes sense that we figure out a way to get along, so that we can have political peace.<sup>136</sup>

The fact that 51.9 per cent of the NWT population has an Aboriginal identity, compared with only 6.2 per cent in Alberta and 4.3 per cent of the total Canadian population,<sup>137</sup> has likewise been cited as an important reason for strong Aboriginal involvement:

133. *Ibid.*

134. Phare Law Corporation & North Raven, *Collaborative Consent: A Nation-to-Nation Path to Partnership with Indigenous Governments*. Prepared for the Minister of Natural Resources (2016) Personal Communication (21 January 2016).

135. David Laidlaw & Monique Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook*. Occasional Paper # 44 (Calgary: Canadian Institute of Resources Law, 2014) at 1.

136. Miltenberger, *supra* note 123.

137. Statistics Canada, "NHS Focus on Geography Series: 2011 Census Program" (2011), online: <<https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/fogs-spg/Pages/ProvinceSelector.cfm?lang=E&level=2>>.

The motivation comes from the fact that half of the population of the NWT is Aboriginal. And probably, at any given time, half of the Cabinet, half of the representatives in government are Indigenous. So you don't have this idea that Indigenous people are "the other." The Indigenous people are "us." There is no way that you could exist in the north without recognizing the important role of Indigenous people and Indigenous governments.<sup>138</sup>

Miltenberger, whose political leadership was a driving force behind the bilateral agreement, identifies as Métis. During his terms in office, he advocated, among other things, for a stronger role of Aboriginal peoples and traditional knowledge in northern water management.<sup>139</sup> The backgrounds of leading members on the NWT negotiating team likewise reflect a concern for Aboriginal issues. The externally-hired chief negotiator has been a strong proponent of Aboriginal water rights in Canada,<sup>140</sup> and the GNWT lead negotiator is the main author of two highly influential studies documenting the detrimental effects of oil sands operations on the Athabasca River, including human and environmental health impacts.<sup>141</sup>

Even more fundamentally, differences between Aboriginal consultation in Alberta and the NWT can be attributed to the sharply dividing effect of the provincial-territorial border along the 60th parallel. This observation may at first seem trivial from a Western perspective, but the consequences for Aboriginal peoples are far-reaching. The NWT–Alberta border, and other colonial borders, split the basin into individual jurisdictions that manage water and consult with Aboriginal peoples according to their respective legal and policy frameworks. This fragmented approach runs counter to more holistic Aboriginal perceptions of the basin. According to Tim Heron, "[t]o us, the boundaries are only a figment of the federal government's imagination, because only governments see the borders."<sup>142</sup>

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138. Phare, *supra* note 110.

139. J Michael Miltenberger, "Northern Voices, Northern Waters: Traditional Knowledge and Water Policy Development in the Northwest Territories" in Alberto Garrido & Mordechai Shechter, eds, *Water for the Americas: Challenges and Opportunities* (New York: Routledge, 2014) 206.

140. Merrell-Ann Phare, *Denying the Source: The Crisis of First Nations Water Rights* (Surrey & Custer: Rocky Mountain Books, 2009); Merrell-Ann Phare, "Indigenous Peoples and Water: Governing across Borders" in Emma S. Norman, Alice Cohen & Karen Bakker, eds, *Water without Borders? Canada, the United States, and Shared Waters* (Toronto: University of Toronto Press, 2013) 27.

141. Erin N Kelly et al, "Oil Sands Development Contributes Polycyclic Aromatic Compounds to the Athabasca River and Its Tributaries" (2009) 106:52 *Proceedings of the National Academy of Sciences (PNAS)* 22346; Erin N Kelly et al, "Oil Sands Development Contributes Elements Toxic at Low Concentrations to the Athabasca River and Its Tributaries" (2010) 107:37 (PNAS) 16178.

142. Heron, *supra* note 105.

The former Grand Chief of the Deh Cho First Nations, Samuel Gargan, likewise emphasized Aboriginal peoples' collective approach to the basin:

As First Nations, we take our views collectively. There are no boundaries between us. We try to address issues for the people downstream by those people upstream that can actually try and see if they can stop things from occurring....The border is not there as far as we are concerned....We get together and say, this is the land of our ancestors that we need to protect. The air we breathe we need to protect, the water we drink we need to protect, and the wildlife that we depend on we need to protect. And collectively, we say that we have to do everything possible to do that.<sup>143</sup>

The provincial-territorial border serves as the main demarcation for governments in defining their natural resource rights and consultation obligations. Yet, it fundamentally conflicts with Aboriginal perspectives and worldviews. This tension strongly resonates with the recent findings of Norman, who illuminates the mismatch between colonial borders and traditional Indigenous homelands in Canada–U.S. transboundary water governance.<sup>144</sup>

#### VI. *Translating FPIC from an international norm to a domestic template for action*

A one size fits all approach to Aboriginal consultation does not exist in Canada. Flexibility and adaptability are important to account for specific circumstances and the diverse cultures and traditions of Aboriginal communities.<sup>145</sup> However, with water-related struggles between Aboriginal and Canadian governments intensifying—most acutely with respect to oil sands operations in Alberta and hydro-development in BC—the Mackenzie experience holds important lessons for policy makers trying to work toward more collaborative and reconciliatory relationships with Aboriginal peoples. As newly elected governments at the federal and provincial levels are looking for ways of renewing Canada's relationship with its Aboriginal population, the NWT case can provide the basis for formulating useful pragmatic advice on how to translate FPIC from an international norm to a domestic template for action.

Recent research into collaborative water governance and water policy reform in BC has already generated important recommendations in this regard.<sup>146</sup> These recommendations speak to the importance of approaching and involving Indigenous peoples as self-determining nations; choosing

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143. Interview of Samuel Gargan by Andrea Beck (8 March 2016).

144. Norman, *supra* note 13.

145. Matiation & Boudreau, *supra* note 30 at 440; Sterling & Landmann, *supra* note 26 at 11.

146. Von der Porten et al, *supra* note 37.

venues and decision-making processes that reflect Indigenous instead of Western approaches; supporting Indigenous peoples through capacity building; and creating opportunities for relationship building between Indigenous and non-Indigenous actors. This paper underscores these recommendations, and additionally identifies the following key aspects to realizing FPIC in the Canadian context.

1. *Devising multi-faceted consultation strategies*

Achieving direct access to water negotiations remains an important goal for Aboriginal peoples. Even if such access is unfeasible due to political or logistical challenges, governments should make their best efforts to allow for the greatest possible extent of Aboriginal participation. The provision of written information and face-to-face meetings have become rather common (if not always well-implemented) consultation tools. The NWT case demonstrates that alternative mechanisms—such as the NWT and Aboriginal affairs advisor and the ASC—are available to supplement and enhance these tools. By adopting a multi-faceted consultation strategy, governments can strengthen Aboriginal engagement and provide Aboriginal peoples with multiple channels to make their voices heard. In designing and implementing such strategies, close attention should be paid to adequate representation of diverse and heterogeneous Aboriginal interests, as well as to the availability of sufficient capacity support.

2. *Providing meaningful possibilities for accommodation*

The most participatory process is meaningless without opportunities for Aboriginal peoples to impact the results of decision making. As suggested above, the consultations undertaken by the GNWT meant that a great deal (if not all) of the Aboriginal interests could be accommodated in the final agreement. Yet certain matters, such as stronger enforcement mechanisms, stayed off limits. Generally speaking, more process per se only means mounting costs for both, governments and Aboriginal peoples. In addition, it may further alienate the latter from engaging in consultations, especially when consultation fatigue already exists and consultations are perceived as mere tick-box exercises. Only more procedure with the possibility for accommodation is a desirable goal from an Aboriginal perspective. Even if FPIC may not imply a veto right, governments should try to negotiate towards consent. Among other things, this means involving Aboriginal peoples from the very beginning, and engaging in consultations in good faith with the intention of adjusting the substance of decision making according to Aboriginal concerns.

### 3. *Investing in long-term relationship building*

Rather than approaching relationship building as an ad hoc, instrumental exercise tied to a specific project or program, governments should make a serious commitment to continuously build awareness, understanding, and trust with Aboriginal peoples. In the NWT case, Aboriginal consultation on the bilateral water management agreement benefited considerably from long-standing prior engagement, which has been embedded in an array of water- as well as non-water-related initiatives.<sup>147</sup> Investments in long-term relationship building can help avoid lengthy and costly legal battles, and lay the foundation for collaboration and reconciliation in the future.

### 4. *Promoting Aboriginal networks and leadership*

As this research has shown, Aboriginal peoples have maintained a close network within the Mackenzie River Basin. This network not only crosses, but truly transcends boundaries between provinces and territories, upstream and downstream jurisdictions, and humans and nature. This holistic view of the basin stands in contrast with the interjurisdictional and sovereignty-based approach adopted by provincial and territorial governments. By supporting, rather than suppressing or ignoring, Aboriginal networks in a basin, policy makers can create invaluable opportunities for more integrated approaches to transboundary water governance. In this regard, governments should go beyond incorporating Aboriginal actors and knowledge into existing policy regimes, and instead encourage genuine collaboration and Aboriginal leadership. Establishing community-based monitoring programs under the leadership of Aboriginal peoples could be one promising entry point in this regard. Further inspiration for initiatives aimed at questioning and expanding notions of territoriality and sovereignty could be drawn from Norman's five parables of change. These show how Indigenous peoples along the Canada–U.S. border have engaged in innovative, counter-hegemonic strategies to reshape and enhance water management and environmental protection. As the examples of the Coast Salish Gathering or the Great Lakes water walkers demonstrate, these initiatives have not only achieved more effective water governance, but have also contributed to the strengthening of Indigenous self-determination, decolonialization, cultural revitalization, and empowerment.<sup>148</sup>

### *Conclusion*

This paper has presented a comparative analysis of Aboriginal consultations in the 2011–2015 Mackenzie water negotiation between Alberta and the

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147. Phare Law Corporation & North Raven, *supra* note 134 at 3-6.

148. Norman, *supra* note 13.

NWT. It has found that consultative approaches differed markedly in the two jurisdictions, with possible explanations including divergent legal considerations, differences in socio-political relationships, and the effects of colonial borders.

Comparing this finding with experiences from other ongoing consultations and negotiations in the Mackenzie River Basin could further clarify the causal effects of these explanatory factors. Furthermore, an examination of Aboriginal consultation in Alberta's ongoing negotiation with BC—where Alberta is the downstream jurisdiction—may shed light on the ways in which upstream-downstream considerations affect Aboriginal consultation in transboundary water negotiations. Another key opportunity for further investigation concerns the role that Aboriginal peoples will play in the implementation of the bilateral water management agreements, in particular with respect to the BMCs.

Most importantly, this paper adds to a growing body of research on Aboriginal consultation, and reveals several recommendations for policy makers seeking to implement FPIC in the Canadian context. These recommendations highlight the importance of adopting multi-faceted consultation strategies, providing meaningful possibilities for accommodation of Aboriginal concerns, continuously investing in long-term relationships, and promoting transboundary Aboriginal networks and leadership. Sustained political commitment and provision of capacity support on the part of Canadian governments will be necessary to put these recommendations into practice.

