

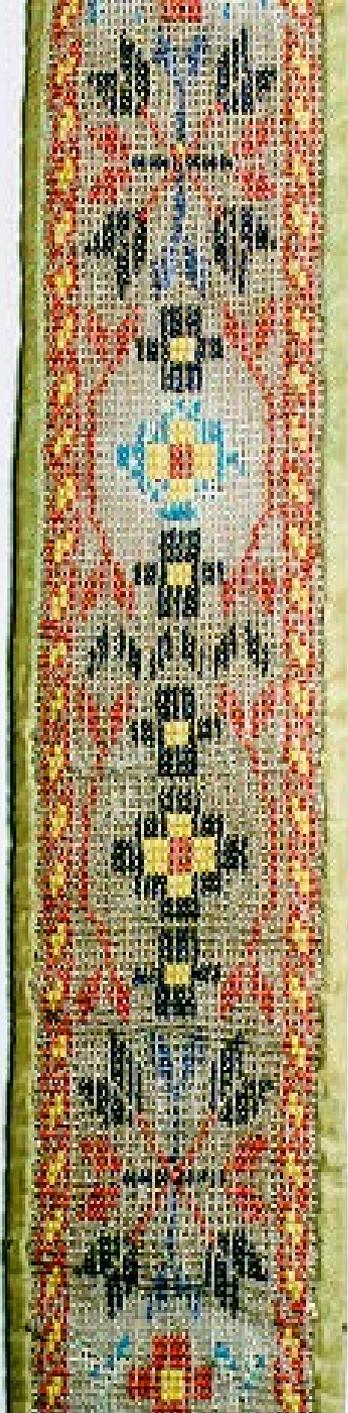
Free, Prior & Informed Consent

The New Way Forward?

Peggy Smith, R.P.F.

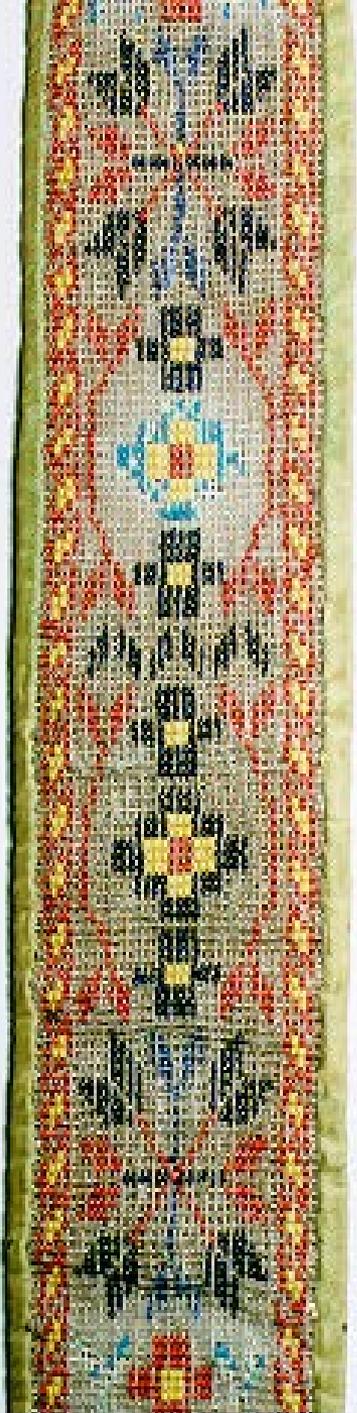
National Aboriginal Forestry Association National Forum
“Free, Prior & Informed Consent (FPIC) & Indigenous Forests:
Landscapes, Certification & Nationhood”

April 12-14, 2016, Ottawa



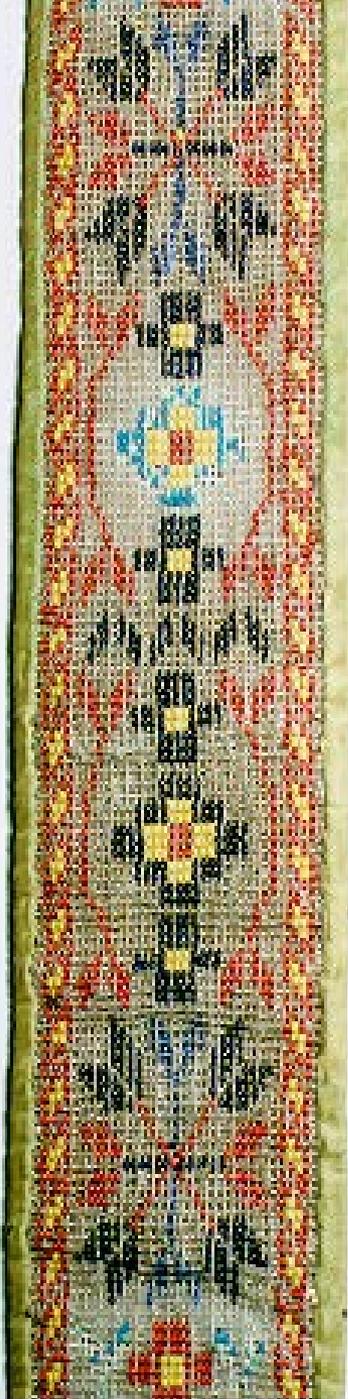
History of UNDRIP (IBA 2011)

- 1984: Working Group on Indigenous Populations (WGIP) began drafting UNDRIP—took >20 years
- 1989: Int'l Labour Organization Convention No. 169, Concerning Indigenous & Tribal Peoples in Independent Countries—right to self determination within nation states; FPIC for resettlement—not ratified by Canada
- 1994: first draft approved by Sub-Commission on Prevention of Discrimination & Protection of Minorities



History of UNDRIP (cont'd)

- 1995: Commission on Human Rights established Intersessional Working Group to finalize UNDRIP
- WG spends 11 years revising
- 2006: Human Rights Council approves
- 2007: Passed in General Assembly (144 in favour; Australia, Canada, New Zealand & US opposed)
- 2010: Canada issues Statement of Support

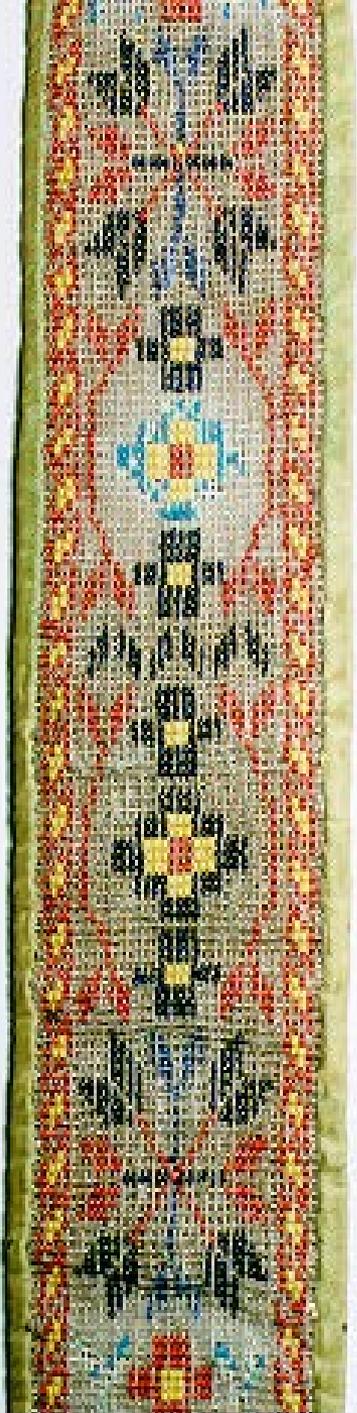


UNDRIP – “Monumental”

- Created with rights holders themselves

or... Toothless tiger?

- Soft law, not legally binding
- Built on premise of nation state’s sovereignty—
interpreted through national laws



UNDRIP ACKNOWLEDGES RIGHTS TO:

- Self-determination & Indigenous institutions
- Life, integrity & security
- Culture, religious & linguistic identify
- Education, public information & employment
- Participate in decision making and **Free, Prior, & Informed Consent**
- Economic & social rights
- Lands, territories, & resources



Article 32

1. Indigenous peoples have the right to determine & develop priorities & strategies for development or use of their lands or territories & other resources.
2. States shall consult & cooperate in good faith with Indigenous peoples concerned through their own representative institutions to obtain their free & informed consent prior to the approval of any project affecting their lands or territories & other resources, particularly in connection with development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just & fair redress for any such activities, & appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impacts.

Free, Prior & Informed Consent— A new approach?

FREE

Consent is given without coercion, intimidation, or manipulation.

PRIOR

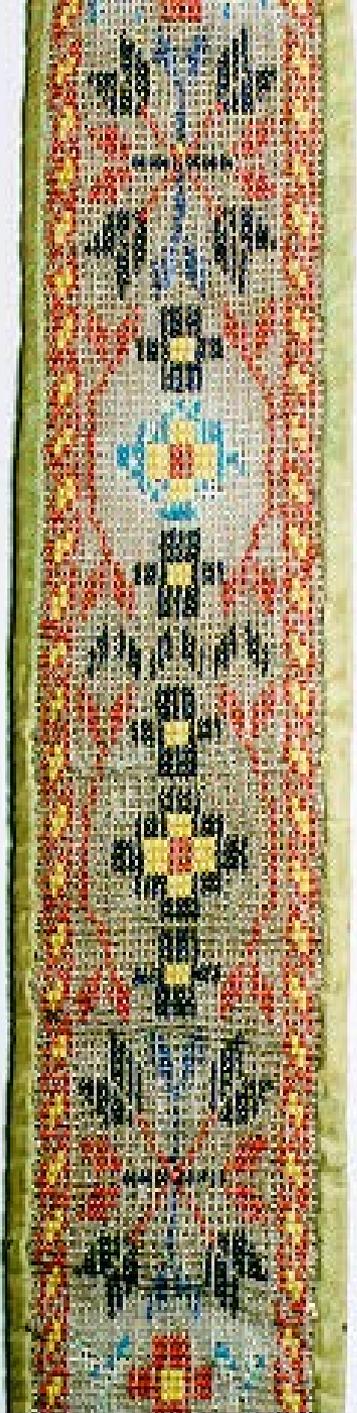
Consent is sought before every significant stage of project development.

INFORMED

All parties share information, have access to information in a form that is understandable, and have enough information and capacity to make informed decisions.

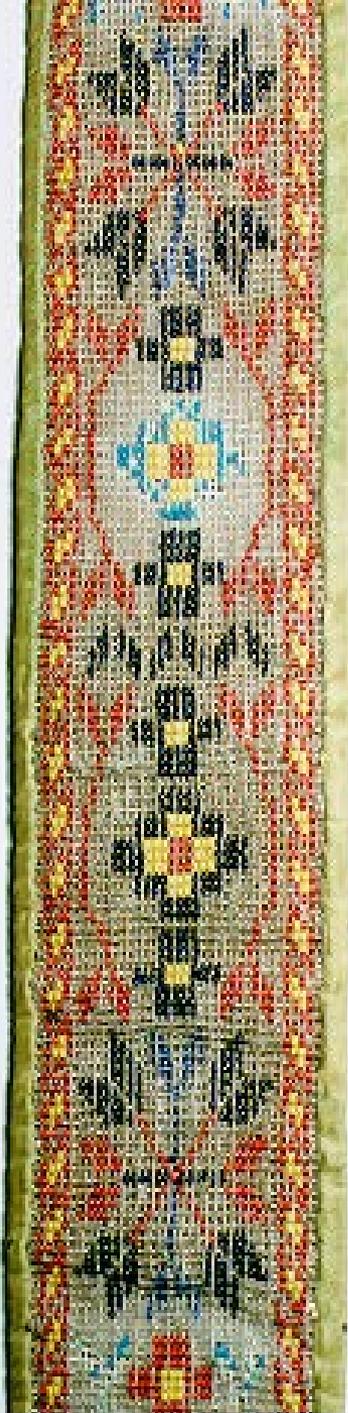
CONSENT

The option of supporting or rejecting development that has significant impacts on Aboriginal lands or culture.



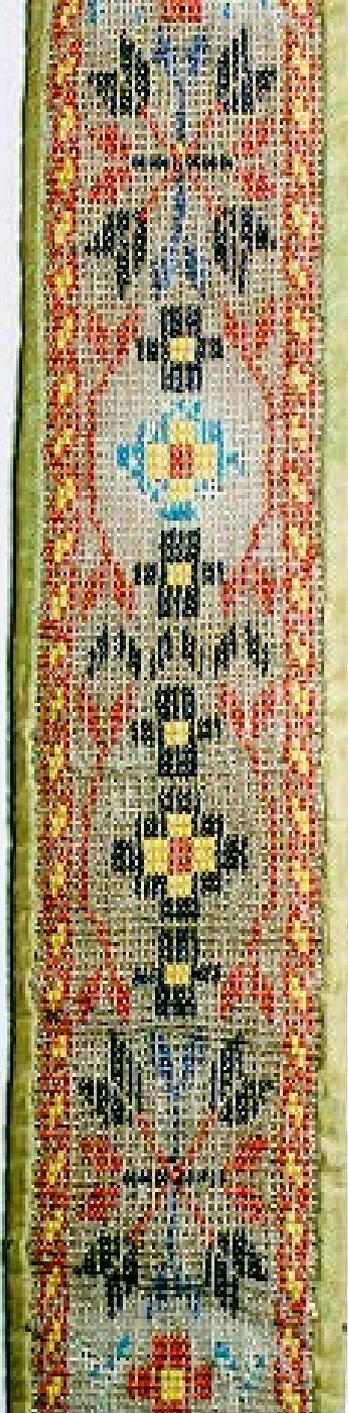
FPIC Support Growing

- In Canada frustration with provinces' narrow interpretation of Duty to Consult & Accommodate
- Consent not required
- Onus on Indigenous peoples to prove infringement of rights
- Failure to "substantially address" Indigenous concerns
- FPIC a means to strengthen negotiations between provinces & Indigenous peoples?



FPIC Support Growing

- 2012-13: Private & non-governmental support for FPIC: International Finance Corporation Performance Standards, Forest Stewardship Council, Internat'l Council on Mining & Metals
- 2014: Supreme Court Tsilhq'ot'in—Aboriginal Title proved; consent required
- 2015: New Prime Minister Justin Trudeau declares Canada will implement UNDRIP



FPIC Support Growing

- Alberta's commitment to review all laws & policies in light of UNDRIP & FPIC
- Deadline Feb 1, 2016
- "It's not something that's happening overnight," said Notley. "We sent a letter to ministers about UNDRIP to evaluate the work that they do and come back to us to report on what's already aligned, what can be improved and whether there are problem areas that are potentially in conflict." (APTN, Sept. 15, 2015, <http://aptn.ca/news/2015/09/15/its-not-something-that-happens-overnight-alberta-premier-asks-indigenous-peoples-to-be-patient-while-government-works-on-promises/>)

Indigenous Support in Canada

“Our organizations are deeply concerned by the continued opposition to FPIC by some states. There appear to be increasing efforts to undermine or roll back this vital human rights standard. At the time of its endorsement of UNDRIP in Dec 2010, the US indicated that FPIC calls for “a process of meaningful consultation with tribal leaders, but not necessarily ... agreement ..., before the actions addressed in those consultations are taken.” In May 2011, at the Commission on Sustainable Development’s Working Group on Mining, Canada, Australia, New Zealand & the United States asked for deletion of “free, prior and informed consent” regarding indigenous & local communities.” (Jt Statement to UNPFII, 2011,

[Vhttp://www.ubcic.bc.ca/News_Releases/UBCICNews05191101.html#axzz3ySPd8ITX](http://www.ubcic.bc.ca/News_Releases/UBCICNews05191101.html#axzz3ySPd8ITX))

CERTIFICATION



Forest Stewardship Council®

FSC 2012—
FPIC

SFI 2015—
UNDRIP

FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC)

Version 1 | 30 October 2012





FSC guidelines for the implementation of the right to free, prior and informed consent (FPIC)

Version 1 | 30 October 2012

A close-up profile photograph of an indigenous woman wearing a traditional, intricately beaded headband. The background is dark and out of focus.

Principle 3: Indigenous peoples' rights – to identify & uphold Indigenous peoples' rights of ownership & use of land & resources



Further Reading

- Indigenous Bar Association. 2011. Understanding and Implementing the United Nations Declaration on the Rights of Indigenous Peoples: A Handbook.
http://www.indigenousbar.ca/pdf/undrip_handbook.pdf
- Boreal Leadership Council. 2012. Free, Prior and Informed Consent in Canada.
<http://borealcouncil.ca/publication/view/fpic-report-english/>
- Colchester, M. and F. MacKay. 2004. In search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent. Paper presented to the 10th Conference of the International Association for the Study of Common Property Oaxaca, August 2004. Forest Peoples Programme, Moreton-in-Marsh, England.
<http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/fpicipsaug04eng.pdf>
- Jamieson, J., J. Olynyk & D. Rodzinyak. 2015. Free, prior & informed consent to become part of Alberta law? Project Law Blog. Lawson Lundell LLP, Vancouver, BC.
<http://www.projectlawblog.com/2015/07/27/free-prior-and-informed-consent-to-become-part-of-alberta-law/>
- Lehr, A.K. & G.A. Smith. 2010. Implementing a Corporate Free, Prior, & Informed Consent Policy: Benefits & Challenges. Report for Talisman Energy. Foley Hoag LLP, Boston MA.
<file:///C:/Users/user/Downloads/Implementing%20a%20Corporate%20Free%20Prior%20and%20Informed%20Consent%20Policy%20Benefits%20and%20Challenges%200710.pdf>
- Tamang, P. 2005. An Overview of the Principle of Free, Prior & Informed Consent & Indigenous Peoples in International Law & Domestic Practices. Workshop on Free, Prior & Informed Consent, New York, 17-19 January 2005. PFII/2004/WS.2/8. Dept. of Economic & Social Affairs, Secretariat of the Permanent Forum on Indigenous Issues, United Nations, New York. 16 pp.
www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_tamang.doc