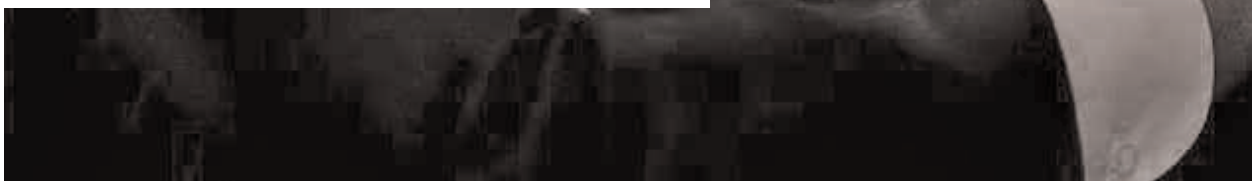




In February, Romeo Saganash, NDP MP for Abitibi—Baie James—Nunavik—Eeyou, sat down with Joshua Gladstone and Ed Bianchi to talk about the right to free, prior and informed consent.



Joshua Gladstone: Thank you very much for agreeing to speak with us today. It really is a pleasure to be here.

Romeo Saganash: It's a pleasure to do this.

JG: Should we get into some questions?

Well, we can do it in Cree if you wish.

JG: Would you like to do that?

[Laughs] No.

JG: Why is the right to free, prior and informed consent important to Indigenous Peoples?

Well I think you need to take it from two perspectives, or at least from two angles when we talk about free, prior and informed consent. One, because it's already part of Canadian law. And two, because it forges partnership between Indigenous Peoples and developers and governments. I say it's part of Canadian law because way back in 2004, the Supreme Court of Canada determined that, on "on very serious issues," you need the complete consent of Indigenous people that are affected by a development project. Way back in 2004, in the Haida Nation case, the Supreme Court has determined that. So the term or the concept of "consent" exists in constitutional law in this country already.

Politicians like to talk about the rule of law, but do we know what the rule of law means? Well here it is: The rule of law would include — according to the Supreme Court again — respecting the Constitution. And in the Constitution, you have Section 35 that recognizes and affirms Aboriginal and treaty rights. And within those rights is the obligation of governments to consult and accommodate Indigenous Peoples whenever development happens. So that's the legal framework that we have in place already in this country.

So free, prior and informed consent is important, and I also say it is the best way to forge that necessary partnership whenever development happens. If people really consider Indigenous Peoples as partners, they wouldn't impose projects on Indigenous Peoples in this country. They wouldn't impose anything. You don't do that to a partner. You're supposed to sit down with the partner and agree on how to go about it, how to develop, what to protect, and how to design the project and so on and so forth. That's what partnership means. And for now, that's not happening.

Whenever development projects are being proposed and Indigenous Peoples are excluded from the process, that's not partnership for me. So we need to respect the law, we need to respect constitutional law in this country, we need to respect that right to free, prior and informed consent, which already exists. And I would care to add that this right is already recognized under international law. The *UN Declaration*

on the Rights on Indigenous Peoples does not create any new rights. Rather, it affirms that right in terms of development projects affecting Indigenous Peoples' lands, territories or resources. So it's all there. All we need to do is respect what's already in place.

JG: How do you see us doing that?

There are many ways of doing it. The most recent report from the United Nations Committee on Economic, Social, and Cultural Rights said: "The Committee recommends that the state party fully recognize the right to free, prior and informed consent of Indigenous Peoples in its laws and policies and apply it in practice."¹ So that's the plan right there. In fact, the Committee is surprised that Canada has been lagging behind in implementing and adopting a free, prior and informed consent policy in legislation or in practice in this country.

I think there are many ways of doing this. I have a private member's bill that will be introduced shortly to ensure that any legislation introduced in the House of Commons respects the provisions of the *UN Declaration on the Rights of Indigenous Peoples*. I think in a certain way, over the last couple of years now, corporations and developers have accepted free, prior and informed consent and went on to take it upon themselves to implement it with their Indigenous partners. So developers are already ahead of governments on that aspect.

JG: Can you tell us a story about a situation where this is being done well?

Well, I come from a region in Northern Quebec, James Bay, where that's been happening for at least 10 years now. Perhaps more. Let me put that into context: In late 90s, early 2000s, the Cree had been complaining for many years that forestry activities in their territory were not compatible with the rights recognized under their treaty, the *James Bay and Northern Quebec Agreement*. The treaty recognizes a whole range of rights for the Cree, including hunting, fishing, and trapping throughout the territory covered by the *Agreement*. And the Cree have been saying for many years, "How can you exercise a constitutionally protected hunting right if the forest is totally cut?" There's no compatibility there. It's always a question of finding the balance, right?

So we went to court because the Quebec government wouldn't listen to us and did not agree with our interpretation of things. The Superior Court of Quebec, in late 2000, came down with its ruling confirming what we have been saying. I can cite by heart what the Superior Court said. It said, "the terms or the provisions of the Quebec Forestry Act are incompatible with the terms of the *James Bay and Northern Quebec Agreement*." That meant the entire Northern Quebec forestry industry was at stake here. Eighteen thousand jobs were at stake. So what did we do?

The Cree could have sat back and said, “Listen. According to the rights that are recognized under the *James Bay and Northern Quebec Agreement*, a treaty, a constitutional document, forestry is incompatible here. It cannot happen here.” Or, sit down and negotiate a new forestry regime for Northern Quebec. Even from an environmental point of view, everybody knows that trees in Northern Quebec do not grow as fast as trees down south, right? So we’ve been saying that for many decades as well. So we needed to change the regime there. And that’s what happened in 2002. Rather than just negotiating a new forestry agreement for Northern Quebec, what we proposed to the Government of Quebec is a new relationship agreement. And that’s the official title of that agreement in 2002 between the Government of Quebec and the Cree Nation: *A New Relationship Agreement*. And that’s a political agreement. That’s the way a real partnership works.

From 1975 to that agreement in 2002, the Premier of Quebec met with the Grand Chief of the Cree approximately four or five times. Since 2002, get this: The Premier of Quebec has met with the Grand Chief of the Cree *at least* twice a year. That’s partnership. That’s a political relationship that works. And that’s how it should be done.

I’ve always maintained that recognizing the fundamental rights of Indigenous Peoples in this country is not only good for the environment, it’s also good for the economy. In this case, we saved 18,000 jobs. We agreed on a balance between the Cree way of life in the territory and the forestry industry. That’s how it should work. That’s what partnership is all about. You give and take. I think since that agreement in 2002, there’s no project that has gone ahead without the consent of the Cree even though you will not find in any of the provisions of the 2002 agreement or in the *James Bay and Northern Quebec Agreement* the word “consent.” But the people agree that if you want to be a real partner, if you want a good relationship, if you want to go ahead with development in a sustainable way in the territory where there are Indigenous interests, then that’s the way to go about it. And it’s good business.

JG: Why do you think the issue of FPIC has become so polarized in Canada, despite the potential for positive outcomes as you just described?

Well, people choose to polarize the issue. I think there’s a lot of misunderstanding about the concept. Not too many people understand what it means. They consider consent as a veto, which is not the case. I participated throughout the process at the UN when we negotiated and drafted the *UN Declaration*, and no

one ever talked about a veto. You have to read the *UN Declaration* as an entire document, not just those provisions that talk about free, prior and informed consent. You don’t read provisions in isolation. That’s how the law works. That’s how our legal system works. So you have to read the entire document, and parts of the document talk about the rights of others. So when you consider the right to free, prior and informed consent, you also have to consider the rights of others that are at stake. And especially the human rights of others. I think that’s how we should approach this.

I still recall when the Cree signed the first modern treaty in 1975, the *James Bay and Northern Quebec Agreement*. I still recall the fear mongering that went on. For instance, the various hunting and fishing associations throughout the region feared the provisions in the *Agreement* that I had the right to hunt, fish and trap anytime I wanted in the territory. A lot of them said, “Well there goes the moose population in the territory. There goes the fish population in the territory. There goes the caribou population in the territory. We won’t be able to do that anymore.” Well, that did not happen. When the Supreme Court came down with the *Haida* decision in 2004, where it mentioned “consent,” the world did not stop. Development did not stop. When the Supreme Court came down with the *Tsilhqot’in* case, where it mentions the word “consent” in about nine paragraphs and “full control of resources and territories” in 11 paragraphs, the world did not stop. So I think that’s how we should view it. There’s nothing to fear.

I think Indigenous Peoples are reasonable people that understand what it’s all about, as the Cree in Northern Quebec did back in 1975. We did win the initial court case against Quebec and Hydro-Québec in the early 70s, but we went on to negotiate the first modern treaty in 1975. So I think that’s the proper approach. That’s the responsible way of doing things. We can achieve a lot by recognizing and respecting Aboriginal rights in this country.

JG: You mentioned that you’re moving ahead with a private member’s bill. How do you see that bill changing the circumstances of Indigenous Peoples in connection with development?

For one thing, it’s going to save a lot of taxpayers’ money, because way too ofte — and I’ve been in this business for 30 years — legislation is being proposed without even considering the rights of Indigenous Peoples, whether Aboriginal or treaty rights. So we always ended up in court, fighting this legislation. In the past couple of decades, in most cases that have been ruled by the Supreme Court, the Aboriginal Peoples won. That’s one thing.

We already have in this country certain constitutional obligations when we propose legislation. For instance,

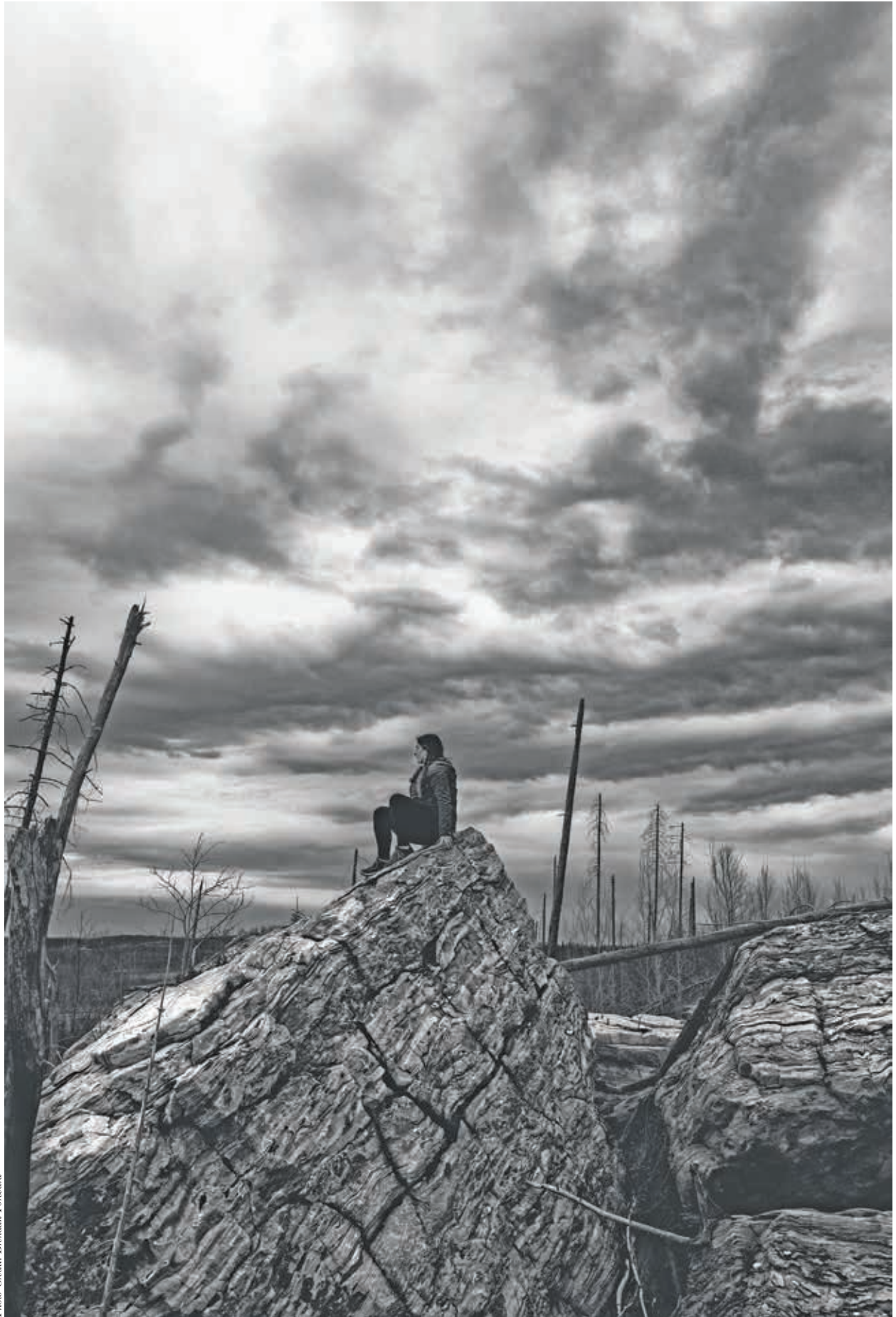


Photo Credit: Brendan Forcand

Robyn on the Rocks

under the *Department of Justice Act*, the Justice Minister, under section 4.1 of that act, has an obligation to make sure that legislation before being introduced is consistent with the *Canadian Charter of Rights and Freedoms*. That obligation already exists. There's no equivalent for Section 35 Aboriginal and treaty rights. My bill would do that by ensuring a collaborative process with Indigenous Peoples to ensure the laws of Canada are consistent with the *UN Declaration*. So it would save us a lot of effort, a lot of resources and a lot of time. Instead of spending 14, 13, perhaps 12 years in court, we would establish a process to cooperatively address such matters. That's how it should happen. So that's one positive aspect that this private member's bill will bring.

The same bill got defeated by 17 votes in the previous parliament because the Conservative government voted in block against it. I still remember that Liberals in the previous parliament voted for my bill. Given their attitude toward Indigenous Peoples and Indigenous issues, I'm hoping that they'll vote for it this time. The Truth and Reconciliation Commission certainly recommends that the *UN Declaration* be the framework for reconciliation in this country. I'm just responding to that call of action to make the *UN Declaration* the framework for reconciliation.

JG: Do you have any indication that the Liberal position on this has changed at all since the last time the bill was proposed?

If I listen to what they've been saying through the campaign and what they've been saying since they were elected — a new nation-to-nation relationship, implementation of the *UN Declaration* — if you listen just to that, I think there's a good indication that they will walk with me on this one. But it's one thing to say the right thing; it's quite another to do the right thing. I've already proposed to the Minister of Indigenous Affairs that there be a Liberal co-sponsor to this bill. I'm still waiting for a response to that proposal. That's my extended hand to the government on this one. But we'll see. I think there's been a lot of work done on this particular private member's bill in the past parliament, and there's been a lot of work done since the October 19th election. I'm hoping that I will convince them this time. That's their promise. That's their commitment to Indigenous Peoples. I'm just offering them help to achieve that.

JG: How do you see the role of grassroots support in those efforts?

I think it's highly important. Reconciliation is not just about Indigenous Peoples and the governments. It's about all of us, including grassroots, Indigenous and non-Indigenous Canadians. There's a collective effort that we need to make. For almost 149 years now, successive Liberal and Conservative govern-

ments have always been adversaries to Indigenous Peoples in the courts. Throughout the history of Canada, Canada has been an adversary to Aboriginal Peoples and their rights before the courts. Contrary to what the U.S. has been doing over the past few years where, in a number of Indigenous cases before the Supreme Court of the U.S., the U.S. government acted as *amicus curiae*, a friend of the court, in favour of Aboriginal rights and the Aboriginal Peoples involved. I think we need to start doing that.

Last year, I asked this question to all departments: For the last 12 years, how much each department has budgeted and spent to fight Aboriginal rights in the courts. No answer. But only in my region last year, Canada has spent \$113 million fighting. They always gang up on us. Still to this day, as we speak, the Department of Justice is fighting certain victims of residential school, and there has been an inadequate response since the Human Rights Tribunal rendered its decision calling on the government to eliminate the discrimination in funding in regard to Indigenous children. The Tribunal ordered, under its powers, the federal government to remedy the situation, to right the discriminatory wrong, "on the first reasonable occasion." Yet it fell significantly short of the Tribunal's order.

Why are the kids obliged to wait? Government abuses have been going on for 149 years. That mentality has to change. OK, I concede the fact that it cannot be redressed overnight. But at least start putting in place things that will change that culture of adversity, of fighting the fundamental rights of the first peoples in this country. The government has spoken against colonialism and about replacing the Indian Act — as well as embracing the *UN Declaration* as a minimum international standard. My private member's bill is just a small contribution, but it is a big step towards affirming Indigenous Peoples' human rights.

JG: Do you see leadership coming out of the provinces and territories on the issue?

Well, all of them have agreed to implement the *Calls to Action* by the TRC. A critical aspect of those calls to action is the adoption and implementation of the *UN Declaration* as "the framework for reconciliation." So, if they've agreed to implement the TRC recommendations, they need to implement this core aspect. The framework is the *UN Declaration*. You cannot say one thing about the rest of what the TRC has recommended and not implement this fundamental part. We need to work together on this one.

I think we have our work cut out to convince the Parliament of Canada and the provinces as well, because that's where they have jurisdiction over natural resources in this country. But whenever we talk about natural resources, we necessarily talk about

fundamental Indigenous rights as well. So might as well work together, like we did in Northern Quebec. And it's working. It's working.

Ed Bianchi: If you were going to talk to the Elders about free, prior and informed consent in Cree, what would that conversation be like? What would it consist of?

It's an easy question, in fact. Under Cree law, we have a trapline system in Northern Quebec where there's about 310 traplines and there's one boss per trap line. He's the tallyman. He determines who comes in his territory to get what, for how long and so on and so forth. So that permission requested to the tallyman, or the chief hunter, is already incorporated in Cree law. So I think the parallel with free, prior and informed consent is pretty easy to make.

That's the conversation, and I've had it as recent[ly] as a month ago when I went to Waswanipi to testify before the review committee considering two forestry roads going into the last piece of our boreal forest, or at least Waswanipi's boreal forest. I did the testimony in Cree, and they pretty well understood what I was talking about when I talked about free, prior and informed consent. So it's there, it's part of Cree law since time immemorial, as they say. So it's pretty easy to understand that. I think it's a natural thing for them.

You cannot consider a new forestry regime in the territory without considering those different family hunting territories that exist. The tallyman has a central role in that new regime. He has to sign at the bottom of the forestry plan for the following year in order for the forestry company to go ahead. So it's already there. The word is not there, but the process leads to that final consent where the tallyman signs the cutting plans for next year for this company, for that company and so on and so forth. It's already there in practice for Northern Quebec.

EB: An element in FPIC that we don't explore is the element of sustainability. How do you understand that?

Like I said, I've been around for 30 years, and I've never seen any negative impact when Indigenous rights are recognized and respected. Never. In fact, it's been the contrary. It's been a benefit for not only the Cree, the environment, the economy, but also for surrounding regions in Northern Quebec.

Val d'Or, which is in Abitibi and not in Northern Quebec or James Bay, is always glad to see when the Cree have an agreement in Northern Quebec because they know that they will receive those positive economic impacts to the south. It's always good news to have agreements, and FPIC allows that to happen. That's why I say that it forges those part-

nerships that are necessary for the environment, but also for economic development. I think we should not be afraid to go there. We need to look at the good practices in all of this, and Northern Quebec is certainly one of them, not just with the Cree, but also with the Inuit. So I think there's positive things that can come when we recognize Aboriginal rights.

EB: I was really interested when you mentioned the adversarial history of the federal government against Indigenous Peoples. What's underneath that?

I think that it's a deep-rooted culture that exists not only at Justice, but also with the Department of Aboriginal Affairs. I think — and I've seen this a lot — that it's the departments that control the Minister, and not the other way around. And it should be the other way around. So that's going to take time to change. I've always said, whenever I talked about the previous Indigenous Affairs Minister, that he was not only incompetent, but also impotent, because he didn't control his department; his department controlled him. And that needs to change.

What do you need more than a mandate letter from the Prime Minister telling you, "This is an important relationship. I'm counting on you to make it work, and take as a basis the *UN Declaration on the Rights of Indigenous Peoples*." So I'm hoping this is going to help. And I'm willing to help and collaborate. I have 30 years of experience in this, I've seen successful models in Northern Quebec and I think although they are not models that can work everywhere, certainly the principles behind them are applicable elsewhere in this country or this planet.

When we're talking about cooperation, respect, partnership, those are very simple principles that can make things work. They are very simple principles, and when you talk about "partnership," it's a very catchy word for a lot of politicians, but when you're confronted with applying it to a certain project, then you're forced to understand it more, because you don't impose anything on a partner. You discuss it, there's a give-and-take that happens between you, but at least you have them at the table. You don't decide first and then impose it on the other one. That's what's been happening and that's what needs to change. Just applying those basic principles throughout this country will make this a better place. ●

Endnotes

- 1 Committee on Economic, Social, and Cultural Rights (2016). *Concluding observations on the sixth periodic report of Canada*. Accessed March 25, 2016. http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2fCO%2f6&Lang=en