

Indigenous Consent and Natural Resource Extraction

Foundations for a Made-in-Canada Approach

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Summary

- Controversy over the interpretation of free, prior and informed consent (FPIC) as a “veto” is a major roadblock to Canada’s implementation of the United Nations Declaration of the Rights of Indigenous Peoples.
- Moving forward, a relational approach to FPIC is needed, one that commits governments to recognize Indigenous peoples’ inherent jurisdiction and fully engage them as co-equals in the decision-making process.
- This collaborative decision-making process must be linked to internal Indigenous community deliberation.

Sommaire

- La controverse entourant l’interprétation du consentement préalable, libre et éclairé (CPLE) comme un « droit de veto » est un obstacle majeur à la mise en œuvre de la Déclaration des Nations unies sur les droits des peuples autochtones.
- Afin de débloquer l’impasse, nous proposons une approche relationnelle du CPLE qui repose sur la reconnaissance de l’autorité inhérente des peuples autochtones sur leurs terres ancestrales et qui engage les gouvernements à considérer ces derniers comme des partenaires égaux dans le processus de prise de décision.
- Ce processus décisionnel doit reposer sur la délibération au sein des communautés autochtones.

*No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership.*¹

Justin Trudeau

On May 10, 2016, the federal minister of Indigenous affairs, Carolyn Bennett, declared to the United Nations Permanent Forum on Indigenous Issues that Canada was now “a full supporter of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).”² This was a watershed moment for relations between Indigenous peoples and the settler society in Canada. In the words of former United Nations special rapporteur on the rights of Indigenous peoples James



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Anaya, UNDRIP represents the basic principles and standards that should be guiding states in their dealings with Indigenous peoples.³ Canada's own Truth and Reconciliation Commission similarly considers the implementation of UNDRIP as one of the fundamental pillars of reconciliation with Indigenous peoples.⁴

Canada's full endorsement of UNDRIP represents a significant advance toward reconciliation, but many challenges lie ahead for transforming words into deeds. One of the most controversial and hotly debated elements of UNDRIP is the right of Indigenous peoples to participate in making decisions — and, in some circumstances, to consent to decisions — that affect their lands and communities. The principle of free, prior and informed consent (FPIC) is rooted in the recognition that Indigenous peoples, as self-determining peoples, should be empowered to make decisions over their future and that of their traditional lands. To this day, controversy over the meaning of the right to free, prior and informed consent continues to be one of the major roadblocks to full implementation of UNDRIP in Canada.

Part of the problem lies in the conflicting interpretations of FPIC. While Indigenous peoples see in FPIC the expression of their right to self-determination, states such as Canada fear a strong interpretation of the right to consent would amount to a veto over resource development. They therefore privilege a more restrictive interpretation as a procedural obligation to seek, but not necessarily obtain, consent. This ambiguity over the meaning and scope of FPIC has very real implications for Indigenous peoples, the natural resource economy and Canadians more broadly.

The ongoing controversy over the TransMountain pipeline extension in British Columbia perfectly illustrates the potential fallout when Indigenous consent is not properly addressed in the process of approving major energy infrastructure projects.⁵ Indigenous consent is also at the centre of ongoing debates over the Energy East pipeline, as well as other major development projects — the Site C Dam in British Columbia and the Muskrat Falls hydroelectric project in Labrador are examples. Indigenous peoples expect Canadian authorities to honour their commitment to UNDRIP. The absence of a shared understanding of FPIC creates frustrations, conflicts and a deepening lack of trust. It is ultimately not conducive to the development of a sustainable natural resource economy in Canada, let alone political reconciliation with Indigenous peoples.

In this paper, we discuss avenues for implementing FPIC in Canada.⁶ Building on the rapidly growing literature on the topic as well as case studies, we argue for an approach that moves beyond current debates over whether or not Indigenous peoples have a veto on natural resource extraction and focus instead on actual

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processes for Indigenous peoples to express their consent (or lack thereof) to development projects that may affect their territories. FPIC, we suggest, calls for the recognition of Indigenous peoples as full and equal governing partners in the decision-making process affecting their traditional lands. After a discussion of the normative foundations and political implications of this relational approach to FPIC, we map out the limits of current mechanisms to foster Indigenous participation in decision-making. We then discuss emerging models for translating FPIC into practice.

Understanding Free, Prior and Informed Consent

What is FPIC?

THE GENERAL PRINCIPLE THAT INDIGENOUS PEOPLES should participate in decision-making regarding their lands is now acknowledged in a number of international documents, notably the 1989 International Labour Organization's Convention 169 on the rights of tribal and Indigenous peoples.⁷ Although the wording varies, international organizations, business associations and human rights institutions have also adopted some version of Indigenous engagement, consultation or consent as a guiding principle for extractive and other activities that might affect the well-being of these peoples.⁸

However, it was with the adoption of UNDRIP by the United Nations General Assembly in September 2007 that the principle of free, prior and informed consent truly emerged as an international norm to guide relations between Indigenous peoples, states and extractive industries. While nonbinding, the declaration establishes “the minimum standards for the survival, dignity and well-being of Indigenous peoples” (article 46). There are a number of references to FPIC in UNDRIP, notably in articles 10, 11, 28 and 29, but articles 19 and 32 are most relevant for our purpose:

Article 19: States shall consult and cooperate in good faith with the indigenous peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32: Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources...States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free and informed consent* prior to the approval of any project affecting their lands or territories and other resources, particularly

in connection with the development, utilization or exploitation of minerals, water or other resources.⁹ (emphasis added)

In essence, the commitment to FPIC requires that Indigenous peoples be empowered to make autonomous decisions regarding the appropriateness of development projects on their traditional lands. This consent must be expressed *freely* — that is, without force, coercion or pressure from the government or promoter seeking consent. It must also be offered *prior* to any authorization for a given activity, and it must be *informed* — that is, based on complete, understandable and relevant information about the full range of issues and potential impacts that may arise from the activity or decision.

While FPIC is increasingly recognized as an international norm, one cannot help but note the ambiguity in the wording of sections 19 and 32. States are expected to “consult and cooperate” with Indigenous peoples in order to “obtain...consent.” This ambiguous formulation has led some states to adopt a restrictive interpretation of FPIC under sections 19 and 32 as a procedural obligation to consult in order to seek consent, rather than as an obligation to a specific outcome.¹⁰ A number of Indigenous activists, scholars and nongovernmental organizations disagree with this minimalist interpretation of FPIC.¹¹ In their view, Indigenous peoples should effectively have a veto on activities taking place on their traditional lands. If FPIC amounts to a right to be consulted, they argue, why bother with the word “consent”?¹²

The few substantive legal interpretations of FPIC issued in the international arena to date have maintained the ambiguity between a strong interpretation of FPIC as a substantive yes/no proposition and the more limited procedural view that suggests states must consult in order to seek (but not necessarily obtain) Indigenous consent.¹³ A similar ambiguity is found in most documents endorsing FPIC emanating from private corporations and associations promoting good corporate practices in relations with Indigenous peoples.¹⁴

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This ambiguity has contributed to states’ reluctance, including Canada, to fully endorse and implement UNDRIP. In 2010, the Harper government endorsed UNDRIP but voiced concerns over FPIC “when used as a veto.” It similarly rejected the principle of FPIC in 2014, following the UN General Assembly’s adoption of the World Conference on Indigenous Peoples Outcome Document, stating: “Free, prior and informed consent...could be interpreted as providing a veto to Aboriginal groups and in that regard, cannot be reconciled with Canadian law, as it exists.”¹⁵ Although the Trudeau government has since “fully endorsed” UNDRIP, including FPIC,¹⁶ it has nonetheless rejected the notion of

an Indigenous veto and remains noncommittal as to the exact meaning of FPIC in Canadian law.¹⁷

Thinking beyond the veto question: A relational approach to FPIC

It is our view that the current focus on the veto question obscures more than it enlightens the debate on FPIC implementation.¹⁸ States such as Canada use the fear of veto to restrict their interpretation of FPIC and limit its implementation.¹⁹ An Indigenous veto, they argue, would effectively shut down resource-extraction activities. However, the notion that greater Indigenous control over resource extraction on their traditional territories would be catastrophic to the Canadian economy simply is not borne out by reality. Although Indigenous peoples may uphold extractive industries to different standards (focusing on long term sustainability and the protection of their inherent rights), evidence suggests they are also reluctant to shut down development altogether, especially if they are engaged early in the decision-making process, have influence over it and ultimately stand to benefit.²⁰

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The focus on the veto question also misconstrues FPIC as a unilateral, negative and decontextualized principle. As Jason Tockman points out, “(a veto) grows out of an adversarial relationship in which parties find themselves pitted against one another. In contrast, consent is something mutually achieved with legitimate authorities agreeing on the terms of a project’s approval (or disapproval).”²¹

The key to FPIC, we suggest, lies less in the notion of a veto than in the recognition of a relationship between mutually consenting and self-determining partners. FPIC should be read in conjunction with article 3 of UNDRIP, which enshrines the right of Indigenous peoples to self-determination. For Barelli, “allowing development projects on Indigenous lands without their consent, regardless of the consequences that they might have on their cultures, their lives, and, ultimately, their existence, would be plainly incompatible with the principle of self-determination and the broader normative framework of UNDRIP.”²² Perry Bellegarde, the National Chief of the Assembly of First Nations, similarly argues that “consent principles reflect our right to freely determine our own future and to thrive in our own territories.”²³

Grounded as it is in the principle of Indigenous self-determination, FPIC logically entails more than consultation. It involves the recognition of Indigenous peoples’ inherent authority and capacity to make decisions about their traditional lands. However, just like most governing authorities, this power is not absolute. Indigenous and settler authorities coexist today and they have to be reconciled.²⁴ UNDRIP recognizes that Indigenous rights are not absolute and should

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be understood contextually and relationally. Section 46 allows specific limitations on Indigenous rights, provided such limitations are “non-discriminatory and strictly necessary for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”²⁵ Like general human rights, Indigenous rights must be understood in relation to the context and to other guiding principles governing democratic societies.²⁶

Former UN special rapporteur on Indigenous rights James Anaya also argues for a relational definition of FPIC. Consent, according to Anaya, means the capacity to say yes or no, but it should not be understood in absolute terms. The weight of the expressed consent (or lack thereof) should be modulated according to the impact of the activity or project on the community according to a mutually agreed process. While the flooding of ancestral lands, for example, requires a strong expression of consent, the building of a road may be held to a less stringent standard. According to Anaya, how FPIC is exercised also depends on the nature of Indigenous engagement in the decision-making process. In cases where Indigenous peoples have been entirely and wilfully ignored in the development of a project that will have a major impact on their lands, a veto right is certainly in order.²⁷

In other words, FPIC implementation should start with the recognition of Indigenous peoples' inherent authority and proceed with the development of mutually-agreed-upon processes to align decisions. This is not radically different from intergovernmental decision-making processes in federations such as Canada, where overlapping jurisdictions between co-equal partners make unilateral actions difficult and often counterproductive. As Roshan Danesh argues, “the Crown and Aboriginal groups are different decision-makers acting under different authorities. One does not ‘veto’ the decision of the other. Neither has the power to reach into the other’s jurisdiction and trump the decision of the other. The relationship is one of difference and distinction — not of inferiority and superiority.”²⁸ Some key conditions must be respected for this approach to succeed:

- First, to be effective, this type of approach hinges on federal and provincial authorities, as well as project proponents, accepting the principle of Indigenous jurisdiction on their traditional lands, however shared that jurisdiction is.
- Second, all parties must agree on a process to coordinate decisions — if the process itself is imposed, then chances are collaboration will be difficult to achieve.
- Third, to be truly relational, the process should be informed by and respect Indigenous worldviews, traditions and legal orders.

- Fourth, for this type of process to work, all parties need to come to the table willing to open their minds to the views of others and seek mutually acceptable solutions. Trust and good faith are essential to collaboration.²⁹
- Fifth, and this is fundamental, while the weight of Indigenous consent can vary based on the context, the potential impact of the project and the rights that are at stake, the possibility that the Indigenous group will end up saying no must remain on the table. Collaboration is not a substitute for the expression of consent; it is a way to enrich it and facilitate it.
- Finally, and this is often underestimated in existing studies looking at FPIC from a relational perspective, participation in the decision-making process, which is generally elite-driven, should not replace community deliberations as a site for expressing FPIC.³⁰

This last condition is especially relevant for project approval processes. A model that engages representatives of the community in the decision-making process can facilitate the expression of consent, but there is a danger of alienating the community if this process is disconnected from community-level deliberations. This is not to say that negotiations with governments and proponents should be excluded. Rather, the latter should be informed by and intimately connected to a deliberative process that allows for the free and transparent expression of a community's diverse perspectives, worries and interests.

In a 2005 report on the meaning and implementation of FPIC, the United Nations Permanent Forum on Indigenous Issues similarly suggests that the expression of free, prior and informed consent should ideally “be rooted in discussions and debates within the affected community” in order to establish a collective position regarding the project.³¹

As such, FPIC is perhaps best seen as a double and simultaneous process involving the development of internal mechanisms for Indigenous communities to freely express their own priorities through informed deliberations as well as a collaborative process through which Indigenous peoples are fully engaged in decision-making. These internal deliberation and collaborative decision-making processes should feed into each other to maximize the input of Indigenous peoples in shaping the future of their lands and communities.

The case for implementing FPIC

FPIC is arguably an important international norm, but our understanding of it has not yet crystallized into a clear and broadly shared definition. It is therefore tempting to adopt a wait-and-see approach to its implementation. However,

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FPIC is a powerful political discourse that is transforming how Indigenous peoples see their role in the natural resource economy.³² As the recent and ongoing controversies over pipelines show, ignoring Indigenous claims for a greater say in the decision-making process can be costly, especially for those seeking to finance their projects in international markets.

Buxton and Wilson document examples from around the world of government-sponsored or corporate sector FPIC-inspired approaches to relations with Indigenous peoples. They argue that engaging Indigenous communities in the development of projects early on markedly reduces the potential for legal conflicts. It can also speed up project approval by regulatory authorities and reduce the legal and political uncertainty surrounding the project, thereby facilitating its financing on global markets.³³

A report prepared for the Boreal Leadership Council similarly suggests that the recognition of FPIC as a guiding principle in decision-making builds trust with local communities. It also forces project proponents and regulatory agencies to be more responsive to the concerns of the local population, leading to projects that are more likely to be environmentally and socially sustainable.³⁴

Ultimately, as Coates and Favel argue, regardless of whether they are favourable to development on their traditional lands, Indigenous peoples increasingly see FPIC as the basic standard against which the legitimacy of a project should be established.³⁵ As ongoing debates in Canada about pipelines, mining and hydro-electric developments suggest, it is de facto becoming increasingly difficult to move ahead with such projects in the absence of some form of social acceptance.³⁶ Indigenous consent is becoming one of the cornerstones of this social acceptance. Governments and project proponents need to adapt to this new political (and not just legal) environment. Otherwise, they risk not only escalating opposition but also losing credibility in future policy processes involving Indigenous interests.

This point is particularly relevant in the context of the current government's commitment to UNDRIP and, more broadly, to a transformative agenda in relations with Indigenous peoples.³⁷ The Truth and Reconciliation Commission (TRC) insists on the importance of acting honourably in order to foster reconciliation and heal the wounds caused by ill-advised policies such as the one that gave rise to the residential schools. Reconciliation, the TRC argues, starts with mutual recognition and

mutual respect. Putting FPIC at the centre of decision-making processes related to lands and resources would send a powerful message to that effect.

Implementing FPIC in Canada

The Canadian legal context

ALTHOUGH FPIC IS NOT FORMALLY INCORPORATED IN CANADIAN LAW, the notion that Indigenous peoples should consent to government actions affecting their ways of life and traditional lands is not new. Both historic land cession treaties and modern land claims settlements are based on a similar principle, which is rooted in the Royal Proclamation of 1763 and the subsequent Treaty of Niagara.³⁸ The Supreme Court has also developed a robust jurisprudence under section 35 of the *Constitution Act, 1982*, which recognizes Aboriginal and treaty rights. According to the Supreme Court, the Crown has a duty to consult and accommodate Indigenous peoples when their constitutional rights might be adversely impacted by its actions or decisions.³⁹

The extent of the required consultation and possible accommodation, according to the Court, varies along a spectrum depending on the strength of the Indigenous claim and the potential impact of the proposed measure or activity. At one end of the spectrum, the duty to consult may be limited to an obligation to notify the affected community. In cases where the impact is major, the Supreme Court specifies that consultations must be “substantial” and accommodation measures should be “aimed at finding a satisfactory solution” for the parties involved.⁴⁰

The Court is very clear that the duty to consult does not establish an Indigenous veto on government decision-making processes.⁴¹ It is first and foremost a procedural obligation to take Indigenous concerns into consideration, combined with a limited duty to accommodate these concerns under certain circumstances. It has nonetheless recognized that, in some instances, Indigenous peoples should be empowered to consent to activities that have an impact on their rights.⁴² The strongest wording to that effect is found in the Tsilhqot’in decision and concerns infringement on a recognized Aboriginal title. It is worth quoting at length: “Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest...By contrast, where title has been established, governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.”⁴³

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Consent in Canadian law, at least so far, is therefore derived from the fairly vague concept of the honour of the Crown and is tied to a very specific type of right, the Aboriginal title, which is itself difficult to establish. This approach contrasts with the UNDRIP version of FPIC, which is grounded in the much broader principle of Indigenous self-determination.⁴⁴ That being said, there are some converging elements with the interpretation of FPIC discussed previously. The Court has in effect adopted a contextual and relational approach to the duty to consult based on an intensity scale. While consent lies at the very end of this spectrum and does not create a veto right, its infringement can only be justified for a compelling and substantial public purpose.⁴⁵ The Court similarly encourages governments to engage with Indigenous peoples before conflicts over the potential infringement of an Aboriginal title arise. The purpose of section 35, it insists, is “the reconciliation of Aboriginal rights with the interests of all Canadians.”⁴⁶

Canadian constitutional law, as interpreted by the courts, is therefore not fully consistent with FPIC, but the door is not entirely closed to a more robust definition of consent emerging within the existing framework of Aboriginal and treaty rights.⁴⁷ It may, however, be a mistake to wait for the Court to suggest a clear pathway to FPIC implementation. As discussed previously, the legal and political uncertainties created by the current ambiguity over the status and modalities of FPIC in Canada are costly for everyone. And even if the Supreme Court does eventually extend the duty to obtain consent to a broader set of situations, it has historically been reluctant to engage in discussions over specific governance mechanisms to implement its decisions. The ball, in other words, is in the camp of the political actors.

Existing Indigenous participation mechanisms and their limits

While FPIC is not formally recognized in Canadian law (at least so far), Indigenous activism and the emergence of the duty to consult have contributed to the development of practices to foster Indigenous participation in decision-making over land and resource development. Through impact assessment (IA) processes and the negotiation of impact and benefit agreements, Indigenous peoples have gained influence in the decision-making processes for land and resource development. These mechanisms can play a role in developing a Canadian approach to FPIC, but they would require significant improvements to be consistent with emerging international standards.

Impact assessment processes

Canada’s legislative and regulatory framework supporting IA processes is quite complex. The federal government adopted its first environmental impact assessment legislation in 1973. Provinces have since established their own distinctive environmental impact assessment processes for projects that fall under their

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jurisdiction. Modern treaties with Indigenous peoples have also led to the creation of specific processes in the treaty area.

The main objective of IA is to mitigate the negative impacts of development projects. While they were initially limited to environmental concerns, IA processes now also include public hearings on social and cultural considerations. They therefore provide important institutional space for community engagement. As Hanna and Vanclay suggest, Indigenous communities can gain valuable information about a project and voice their concerns about its impacts through IA processes.⁴⁸

In practice, however, there are many limitations to IAs as spaces for expressing free and informed consent to a given project. For one, the status of Indigenous peoples in such processes is problematic. They are often considered stakeholders on par with other interest groups seeking to influence the decision-making process. Even in cases where their unique status and jurisdictions are considered, consultations as part of IAs remain passive participatory exercises. IA processes are not designed as collaborative decision-making systems; they are consultative exercises, and the final decision still rests with the regulatory authority. By their very design, IA processes are therefore not consistent with the requirements of the relational approach to FPIC discussed earlier.

Furthermore, IAs are ill-adapted to Indigenous realities. They are generally very formal in nature and dominated by scientific expertise. The technical language used during hearings and a lack of translation often limit accessibility.⁴⁹ The public hearing format is in general an adversarial process where intervenors can challenge the project proponents, the experts and even the hearing committee. In contrast, in most Indigenous communities, direct confrontation or contradiction is frowned on. The hearing committee might therefore mistake a lack of clear opposition for support or consent to a given proposal.⁵⁰

As a result, consultative processes undertaken within the context of IAs often fall short in facilitating dialogue and building trust between Indigenous communities, governments and project proponents.⁵¹ In its recent report, the Expert Panel for the Review of Environmental Assessment Processes, tasked by the Canadian government to make recommendations for a renewed federal environmental assessment process, referred to the many complaints it heard from Indigenous groups about the existing IA model. It stated that environmental assessment (EA) processes “are viewed as being based on flawed planning, misinformation, mischaracterization of Indigenous knowledge and Aboriginal and treaty rights, and opaque decision-making...Instead of advancing reconciliation, EA processes have increased the potential for conflict, increased the

capacity burden on under-resourced Indigenous Groups and minimized Indigenous concerns and jurisdiction.”⁵²

This profound mismatch between Indigenous peoples’ legitimate expectations and existing IA processes has contributed to the current climate of suspicion and mistrust. It is not surprising that Indigenous peoples are increasingly challenging these processes through litigation.

Impact and benefit agreements

Impact and benefit agreements (IBAs) are private agreements negotiated by Indigenous organizations and project proponents that have emerged to compensate for the fuzzy legal norms related to Indigenous participatory rights and the inadequacies of existing IA processes. In order to limit uncertainties over the legality and the legitimacy of a given project, the proponent will negotiate directly with the Indigenous community a compensatory package that generally includes mitigation measures and economic benefits in exchange for community consent. These agreements have de facto become the main vehicle for securing Indigenous support for a project in Canada, as in other settler societies.⁵³

In recent years, a number of alternative approaches have emerged to enhance the voice of Indigenous peoples in decisions over land and resource development.

For Indigenous peoples, IBAs can be attractive, as they allow for a more direct engagement with project proponents in order to influence the development of their traditional lands, minimize negative impacts and maximize potential benefits. IBAs appeal to Indigenous peoples in the absence of clear recognition of their authority in decision-making processes, notably under IA processes. More importantly, IBAs are a practical recognition, by private interests, of Indigenous peoples’ right to have a say in the future of their traditional lands.⁵⁴

There are nonetheless many limits to IBAs as a means for expressing FPIC. First, IBAs are often negotiated with limited community input. It is generally lawyers representing the Indigenous community and the proponent who negotiate IBAs, and this can create an adversarial and fairly opaque negotiation process. Most IBAs are also kept confidential (although this is changing). Even those that are accessible generally become so only after their ratification. As a result, IBAs are often ratified and implemented without the community’s full knowledge of their content. This is clearly not consistent with the notion of informed consent.

Second, in order to speed up the project approval process, proponents often try to negotiate an IBA as soon as possible — even before the IA process is complete. This practice is especially common among junior mining companies that use IBAs to demonstrate local acceptance as a way to market their project to investors. Again, the community is invited to consent to a project without full knowledge of its

impact. This was the case for projects such as the Rupert diversion in Eeyou Istchee and the Kiggavik uranium project near Baker Lake in Nunavut.⁵⁵ In both cases, an IBA was signed with the Indigenous representative organization before the IA process took place and in spite of strong opposition to the project from the affected communities. In the absence of informed deliberations at the community level, IBAs can hardly be considered legitimate expressions of FPIC.

Third, IBA negotiations are premised on the assumption that the project will be approved. The focus is less on sharing information in order to establish the basis for consent than on presenting a compensation package in exchange for consent. The logic is therefore less one of deliberating the pros and cons of a project than one of bargaining and making trade-offs. This underlying logic (to negotiate compensation) naturally creates a focus on quantifiable aspects (monetary compensation, share of profits, jobs and so on) rather than on more abstract but equally important considerations, such as the long-term social impact of the project or its cumulative environmental impact.

Finally, but not least, IBAs are negotiated with project proponents, whereas FPIC, like the duty to consult, rests with governments. It is governments that are responsible for seeking FPIC and authorizing (or not) the project accordingly. While IBAs do not preclude this role, it can be difficult for decision-makers to fully assess whether the consent expressed through an IBA is genuinely free, prior and informed — especially if both the negotiations and the content of the agreement are kept confidential. For these reasons and many more,⁵⁶ we have to be careful not to equate the negotiation of an IBA with FPIC. To be sure, IBAs are one piece of the puzzle that is FPIC, but they are not in themselves sufficient to establish free, prior and informed consent.⁵⁷

An alternative approach to FPIC

IAs and IBAs can play a role in fostering FPIC, but in their current forms these mechanisms have limits. In recent years, a number of alternative approaches have emerged to enhance the voice of Indigenous peoples in decisions over land and resource development.⁵⁸ We focus here on two approaches: collaborative consent through joint decision-making processes; and community-driven impact assessment. We conclude that in order to create a truly relational model for implementing FPIC, these approaches should be combined.

Collaborative or joint decision-making

As discussed earlier, a relational approach to FPIC incentivizes collaboration in the decision-making process over a government policy or action (such as the authorization of a resource development project). The idea is to create a mutually

agreed-upon process to reach, as equal partners, a decision that is considered legitimate by all parties involved.

A group headed by former Supreme Court justice Frank Iacobucci recently recommended such a collaborative approach to implementing FPIC in Canada. According to Iacobucci and his coauthors, the objective of collaborative consent is to recognize Indigenous decision-making authority while avoiding the trap of a veto. The goal, in their view, should be to “avoid the imposition of the will of one party over the other,” and to “strive for consensual decision-making.” An approach that is focused on relationships and collaboration, they suggest, “provides the foundation for meaningful engagement and sets the stage for a successful outcome for all involved.”⁵⁹

Ishkonigan, a consulting firm headed by former chief of the Assembly of First Nations Phil Fontaine, proposes a similar approach in a recent report.⁶⁰ It argues for a model that integrates Indigenous peoples in the decision-making process by granting them an equal say at every stage of it. Using a series of examples from the Northwest Territories (NWT), the report illustrates how collaborative consent can in practice be an effective approach to decision-making in a number of policy areas beyond land and resource management. This collaborative approach is based on the institutions created by the NWT land claims and self-government agreements that established resource management boards at different levels to collaborate in the project authorization process.⁶¹

The recent report of the Expert Panel for the Review of Environmental Assessment Processes also recommends an enhanced IA process that incorporates a collaborative approach to FPIC. The panel argues that “Indigenous Peoples should be included in decision-making at all stages, in accordance with their own laws and customs...through a model that fosters collaboration.” The purpose of such a collaborative approach to Indigenous consent, the panel says, is to establish “the right conditions for clear, mutually acceptable and reasonable decisions” to emerge through IA processes.⁶²

The Expert Panel on the Modernization of the National Energy Board, which released its own report a few weeks later, shied away from FPIC and only suggests improving Indigenous engagement through the creation of an Indigenous major projects office “to support true consultation and accommodation, and several other measures to ensure that Indigenous rights, Aboriginal and treaty rights, and title are fully taken into account by the regulator.”⁶³ The contrast between the two reports is quite striking. It also demonstrates the distance still to travel before FPIC becomes fully integrated into government decision-making.

That said, including Indigenous people in decision-making is not a new idea. Modern land claims agreements all have specific provisions for the creation of

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collaborative structures such as comanagement boards and joint committees responsible for IA reviews.⁶⁴ The first such comanagement boards were created by the James Bay and Northern Quebec Agreement in the 1970s. Now most of northern Canada is covered by similar boards.⁶⁵ These comanagement boards can enhance Indigenous input in decision-making and ultimately serve as a basis for collaborative approaches to Indigenous consent. However, existing comanagement processes have their limits. Although Indigenous peoples may have a greater voice through these boards, with few exceptions, decision-making still ultimately rests with the competent government authority. The boards also still, by and large, operate in a way that is not conducive to valuing Indigenous knowledge and modes of deliberation.⁶⁶ In order for the boards to serve as models for collaborative consent, their mandate, authority and process should therefore be significantly enhanced.

The idea of collaborative consent achieved through joint decision-making of one form or another is nonetheless promising — if the process is mutually agreed upon by all participants, including the Indigenous groups, and if it does establish the conditions for coequal decision-making. But even when such conditions are met, there is a danger that the search for compromise trumps the capacity of an Indigenous group to say no. As with IBAs, collaborative approaches can create a negotiation logic under which the objective becomes less to decide whether the proposal should go ahead and more to bargain a better deal in exchange for consent. Collaborative approaches also tend to enhance the role of Indigenous leaders and negotiators, but not necessarily that of community members. FPIC, as we have argued, should be viewed as an exercise of democratic self-determination. A strictly collaborative process that focuses on elite accommodation only partly reflects this democratic aspect.

A community-focused approach

In light of their limited role in existing decision-making processes, a number of Indigenous communities and nations have opted for a community-centred approach to exercising their right to FPIC. This movement gained steam following the Supreme Court's 2014 *Tsilhqot'in* decision, which recognized that Aboriginal title creates a right to consent to land and resource development. A number of Indigenous nations that are asserting an Aboriginal title, notably in British Columbia, have created their own parallel impact assessment processes to inform collective decisions related to their traditional lands.

For example, when they were recently faced with a development proposal, the Stk'emlupsemc Te Secwepemc Nation (SSN) and the Squamish Nation both developed an independent IA process that allowed them to consult their populations, measure the acceptability of the project, propose mitigation measures and, if in agreement with the project, issue a certificate of authorization.⁶⁷

Intergovernmental coordination becomes essential to avoid unnecessary duplication of studies, hearings and expert reports, as well as to make sure the decision-making timeline is reasonable.

FPIC should be expressed through a community-based deliberation process that is informed by and feeds into a collaborative process with governments to allow for the co-construction of decisions.

There are, of course, multiple challenges to this approach. First, in order to be effective, the process has to be recognized by the other actors (governments and proponents). Absent an agreement or a legislative framework that recognizes Indigenous authority in decision-making, community-based process can be largely symbolic. In order to give their process some legal clout, the Squamish Nation signed an agreement with the proponent of the liquefied natural gas (LNG) terminal, who agreed to fund the process and contractually committed to accepting the decision of the Squamish Council. The process therefore creates a binding decision subject to legal remedy under Canadian law. The Squamish Nation process resulted in a recommendation to proceed with the project's authorization, conditional to the respect of 25 conditions, including some substantial changes to the project. So far, the proponent is complying with the certificate issued by the Squamish Nation and the project is proceeding.

In the case of the SSN, the British Columbia government and the proponent have agreed to fund the independent assessment but are not bound by it.⁶⁸ Following a community-based process that gave specific attention to traditional knowledge, the SSN ultimately rejected the KGHM Ajax mine project based on its potential long-term impact on land use.⁶⁹ However, in the absence of a clear commitment from the proponent and the provincial government to respect the process, it is still possible the project will receive the go ahead under the provincial regulatory process. At the time of writing, the provincial EIA process had not been completed.

The latter example illustrates a second challenge. There is a risk that such a parallel process will only reproduce existing assessment and therefore make an already complicated process even more so. For major projects such as pipelines, both federal and provincial IAs are often required. Adding a third layer can make the whole process impossible to manage for all parties involved. The multiplication of parallel Indigenous assessment processes in the case of linear projects like pipelines that cross a number of Indigenous territories could also lead to an even greater balkanization. Intergovernmental coordination therefore becomes essential to avoid unnecessary duplication of studies, hearings and expert reports, as well as to make sure the decision-making timeline is reasonable. In the case of the Squamish Nation process, technical data from the provincial EIA informed the community-driven process, but no formal collaboration was established until after the fact.⁷⁰

The SSN and the Squamish Nation review processes provide good examples of Indigenous agency in asserting the right to FPIC rather than waiting for government to act. But as the Squamish Nation notes in its submission to the Canadian Environmental Assessment Agency review panel, this approach has important limits: "We are the first to explain that conducting an independent EA process is a challenge both in terms of capacity and in coordinating with other levels of government.

Based on these two issues, we do see benefits in integrating our EA process with the federal and provincial EA processes in some way.”⁷¹

Combining collaborative and community-driven FPIC

As discussed earlier, FPIC must be understood relationally. This is especially relevant for Indigenous communities that are embedded in complex multilevel governance systems.⁷² Both collaborative and community-driven approaches are promising in this respect, but each has important limits. A two-pronged approach that combines the strengths of both models could go a long way in solving some of the issues discussed previously. Ideally, FPIC should be expressed through a community-based deliberation process that is informed by and feeds into a collaborative process with governments to allow for the co-construction of decisions.

In such a layered approach, consent should be the standard for all decision-making processes that affect Indigenous peoples’ rights and interests — from legislative processes and policy-making exercises to strategic planning and project authorization. Of course, not all processes are equivalent. Who consents, how and when, will necessarily vary according to the nature of the exercise. The approval process for a mine, for example, will likely focus on one or a few communities, whereas changes to the *Environmental Assessment Act* call for engagement with Indigenous organizations at the national level.

Focusing on natural resource project approval, FPIC must become one of the criteria for project authorization. Without FPIC, no project should be allowed, unless it is clearly demonstrated that it is in the public interest and that the impact on Indigenous rights will be minimal. But the overruling of Indigenous rights holders cannot be a routine event. It has to be an exceptional situation.

In order to avoid such a situation, we must ensure that decision-making is collaborative. If FPIC is derived from self-determination, then the concerned Indigenous groups should have a say in how decisions are made. Given that no single approach to collaborative consent can apply to all situations, governments should adopt a flexible, case-by-case approach to Indigenous participation in decision-making that respects Indigenous worldviews, and legal and political traditions. The key is to make sure that the process for reaching a decision is agreed to by all parties concerned. This can be achieved through a memorandum of understanding or a formal agreement that sets expectations, allocates resources and details how the decision will be reached.

This collaborative process should then be informed by community deliberations. How such deliberations occur can vary according to the context — it can be through a joint IA process or through the community’s own governance mechanisms. It is not

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up to the government, let alone the project proponents, to determine how the community will express its consent. It could be through a referendum, an elder council or a process focused on those most directly affected (families with traplines, for example). The point is that there has to be a self-defined internal process for a community to deliberate and express its consent. This internal deliberation process has to be connected to and recognized by the joint decision-making process.

No matter the nature and level of the process, FPIC must, of course, be obtained freely — that is, without force, coercion, intimidation, manipulation, or pressure, financial or otherwise, from the government or company seeking consent. It should also be based on complete, understandable and relevant information about the full range of issues and potential impacts that may arise from the activity or decision. This requires a transparent approach to decision-making as well as specific efforts to make what is often very technical and complex information as accessible as possible.

Substantial engagement in policy-making, strategic planning or decision-making also requires a degree of expertise and technical knowledge most Indigenous communities do not have. This creates a power imbalance for which even the comanagement or joint decision-making process cannot fully compensate. Endorsing FPIC as a guiding principle for decision-making requires governments and project proponents to support Indigenous communities through predictable, stable and unconditional capacity-building funding.

There is, finally, an important intergovernmental dimension to FPIC implementation. Collaborative consent calls for the full participation of Indigenous peoples in Canada's intergovernmental system whenever policy areas relevant to their rights and interests are discussed. But intergovernmental coordination is also necessary for integrating FPIC in the decision-making process related to specific projects. Within a process combining collaborative decision-making and community-driven consent, a high level of cooperation is necessary among the various jurisdictions involved. This process could certainly be facilitated through bilateral and trilateral intergovernmental framework agreements that would establish basic expectations, facilitate the exchange of information and coordinate decision-making across jurisdictions.

Conclusion

DESPITE SIGNIFICANT ADVANCES IN RECENT YEARS, FPIC remains a contested idea. In settler societies that are built on a long legacy of colonial practices that have undermined Indigenous cultures, governing institutions and relations to the land, trust is in short

supply. The implementation of a relational approach to FPIC therefore remains an uphill battle. Ultimately, how FPIC is defined and operationalized on the ground depends on Indigenous peoples' capacity to mobilize around a clear understanding of FPIC. It also depends on the willingness of governments, project proponents and funding agencies to take Indigenous voices seriously.

We have argued that a relational approach to FPIC that focuses on both the agency of Indigenous communities to make decisions for themselves and the need for collaboration could create a mutually beneficial model for decision-making in land and resource development in Canada.

Although existing decision-making models and instruments fall short on many aspects, there are experiments in some parts of the country that could inspire a general approach to FPIC implementation. The key, we have argued, is to combine collaborative decision-making, where Indigenous peoples are equal partners in the authorization process, with community-driven deliberations over the inherent value of a project. Both processes should feed each other through a model that is mutually agreed-upon by the parties involved.

The Squamish and the Stk'emlupsemc Te Secwepemc Nations in British Columbia have taken steps in that direction with the creation of their own IA process and the negotiation of a collaborative process with proponents and governments. Other Indigenous communities might not be able to take the same approach because of size and capacity, but without conducting their own IAs these communities should still be able to both participate in joint processes and create a deliberative space where they can discuss development projects and make their own decisions. Again, the most important element is to have a mutually agreed-upon process.

This layered and mutually agreed-upon approach would not only be consistent with emerging international standards concerning FPIC. It would also make sense in terms of policy, as it would contribute to eliminating the legal and political uncertainty resulting from ambiguous norms and diverging expectations. By moving away from veto rhetoric, such an approach would also reassure investors, contribute to demystifying FPIC and revise the perception of it as a threat to development. Ultimately, taking FPIC seriously makes political and economic sense. FPIC can foster sustainable and locally grounded economic development in partnership with Indigenous communities as it forces all the partners, including government and project proponents, to engage closely with Indigenous peoples in the decision-making process.

Notes

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Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent (New York: Routledge, 2014).

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13. See, for example, *Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs)*, judgment of November 28, 2007, I/A Court H.R., Ser. C, No. 172. For analyses of this decision and others, see, for example, Barelli, “Free, Prior and Informed Consent”; T. Ward, “The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law,” *Northwestern Journal of International Human Rights* 10, no. 2 (2011): 54-96; and S.J. Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Oisterwijk: Wolf Legal Publisher, 2014).
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**Ideas
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