

Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada. Part I.

Recent Developments and Effective Roles for Government, Industry, and Indigenous Communities

FPIC



In partnership with The Firelight Group



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The Boreal Leadership Council commissioned the Firelight Group (www.thefirelightgroup.com) to provide the core research and analysis for this project.

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Executive Summary

The Boreal Leadership Council (BLC) undertook this report as part of its ongoing effort to express multi-stakeholder support for the concept of Free, Prior, and Informed Consent (FPIC) in Canada and to promote understanding of, and progress towards, its successful negotiation.

Canada's context for FPIC is unique because, unlike in most countries, the rights of Aboriginal peoples are protected under the Canadian Constitution. This ensures that the rights confirmed through treaties are protected, however, it does not provide clear guidance on consent. There is an evolving debate about how the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) can be interpreted in a manner consistent with Canada's Constitution and legal framework.

Since the publication of the BLC's first FPIC report in 2012, there has been a growing focus on how to address both the conceptual and practical challenges of operationalizing FPIC in Canada.

Internationally, FPIC-supportive policies and guidelines are evolving through institutions like the International Finance Corporation and the International Council on Mining and Metals. The Forest Stewardship Council (FSC), the world's largest and most respected forest certification system, recently advanced a major global initiative that will incorporate FPIC standards into their certification requirements with the goal of increasing meaningful and tangible benefits to Indigenous peoples and communities. In Canada, FSC is working towards effectively adapting the values of FPIC and strengthening forest certification requirements in its national Forest Management Standards.

Canada has been urged by the *Special Rapporteur on the Rights of Indigenous Peoples* to "put in place a policy framework for implementing the duty to consult that allows for indigenous peoples' genuine input and involvement at the earliest stages of project development."

Domestically, the Supreme Court of Canada (SCC) continues to rule on the question of consultation and accommodation and, most recently, on the question of title. The SCC's *Tsilhqot'in* decision underscored that without obtaining consent prior to Aboriginal title being established, it might become necessary to cancel an approved extractive or other kind of project upon establishment of title if continuation of the project would unjustifiably infringe these rights. It follows that *consent is the mechanism that will offer the most certainty for proponents who wish to develop projects on Aboriginal title lands*. It is not yet clear, however, what implications this decision will have for Aboriginal groups whose title is not yet proven, or for those facing development projects already

undertaken without consent on titled lands. There may also be future implications of this decision for treated lands.

In the wake of court rulings and growing international awareness, many First Nations across the country are advancing FPIC in a variety of ways, including procedural guidelines, Band Council Resolutions, Consultation Protocols, Indigenous land use planning, policy, and law. These initiatives aim to achieve certainty and transparency, which is fundamental to generating and supporting consent, and effective consultation, participation, and information management for developments at the community-specific level.

The path forward to reducing conflicts and increasing the number of successful agreements among government, industry, and Indigenous communities includes opportunities for all parties.

- ⇒ The federal government can focus on developing, in collaboration with Aboriginal governments, a legal framework for strategic-level and application-level collaborative decision-making processes. It can provide consistent funding for the development of capacity for Indigenous communities to strengthen lands stewardship.
- ⇒ Industry can engage with Indigenous communities to understand and support their preferred engagement protocols, culture, values, and rights. Through this understanding they can build working relationships by establishing Impact Benefit Agreements (IBAs) to guide project development and management. Importantly, they can also support the review of projects through community-controlled research, in particular on the Traditional Knowledge and Use of the Indigenous peoples in the region or other studies identified as key by the affected Nation.
- ⇒ Indigenous communities can aim to set their FPIC frameworks collaboratively with the appropriate governments to create clear expectations regarding land use planning or decision protocols, where this is feasible. There is also the need to further strengthen governance capacity internally, creating implementation units or departments to oversee negotiations and project implementation with government and industry. Significant advances have been made across the country on a variety of major projects and these lessons can be leveraged through a more active exchange of lessons learned, both good and bad.

It is clear from the evolving body of international and national laws and policies that the need to seek consent from, and to partner with, Aboriginal governments and communities across Canada will increase in the coming years. The most effective and efficient means to achieve agreement and consent will need to be understood and embraced at many levels of our society and our governing institutions. The Boreal Leadership Council hopes to continue to promote progress in this important endeavour by analyzing lessons learned and highlighting successes along the way.

1.0 Introduction

The Boreal Leadership Council (BLC) seeks to express multi-stakeholder support for the concept of Free, Prior, and Informed Consent (FPIC) in Canada and to promote understanding of and progress towards its successful negotiation.

In 2012, the BLC published a report, *Free, Prior, and Informed Consent in Canada: A summary of key issues, lessons, and case studies towards practical guidance for developers and Aboriginal communities*,¹ which reviewed the Canadian context for FPIC and described the roles of government, companies, and communities in its implementation.

A synthesis of the key report findings that are supported by the BLC is summarized as follows:

- ⇒ To advance the idea that a discussion about FPIC can and should occur within fora characterized by mutual respect, expertise, and a desire to move forward practically and respectfully on issues of common concern.
- ⇒ To help shape how FPIC can be defined within the Canadian context.
- ⇒ To contribute to a discussion among Indigenous peoples, developers, environmental organizations, financiers, and investors that will lead to practical guidance on the implementation of FPIC.

In 2015, the BLC commissioned the Firelight Group to build on that earlier work and to review recent developments affecting the interpretation and implementation of FPIC in the current context of the extractive sector in Canada. The work is presented in two documents:

Part I – An overview of recent developments in the extractive sector and evolution of the roles of governments, companies, and communities in contributing to FPIC agreements.

Part II – Current case studies and lessons learned, including a detailed look at recent processes aimed at achieving FPIC in Tłıchǵ, Haida and Mikisew Cree First Nation territories. A brief overview/profile of the Forest Stewardship Council (FSC)'s work with FPIC is included.

The reports are based upon peer-reviewed and industry literature released since 2011. The reports also incorporate relevant current developments shaping the implementation of FPIC in Canada through interviews and outreach with individuals and organizations from government, industry, and Indigenous communities.

1 <http://borealcouncil.ca/wp-content/uploads/2013/09/FPICReport-English-web.pdf>

The Origins of FPIC

The call for FPIC is built on the foundation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a means to recognize and address historical and current concerns. Specifically, the UNDRIP is:

“...Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

“Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

“Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States...”

http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

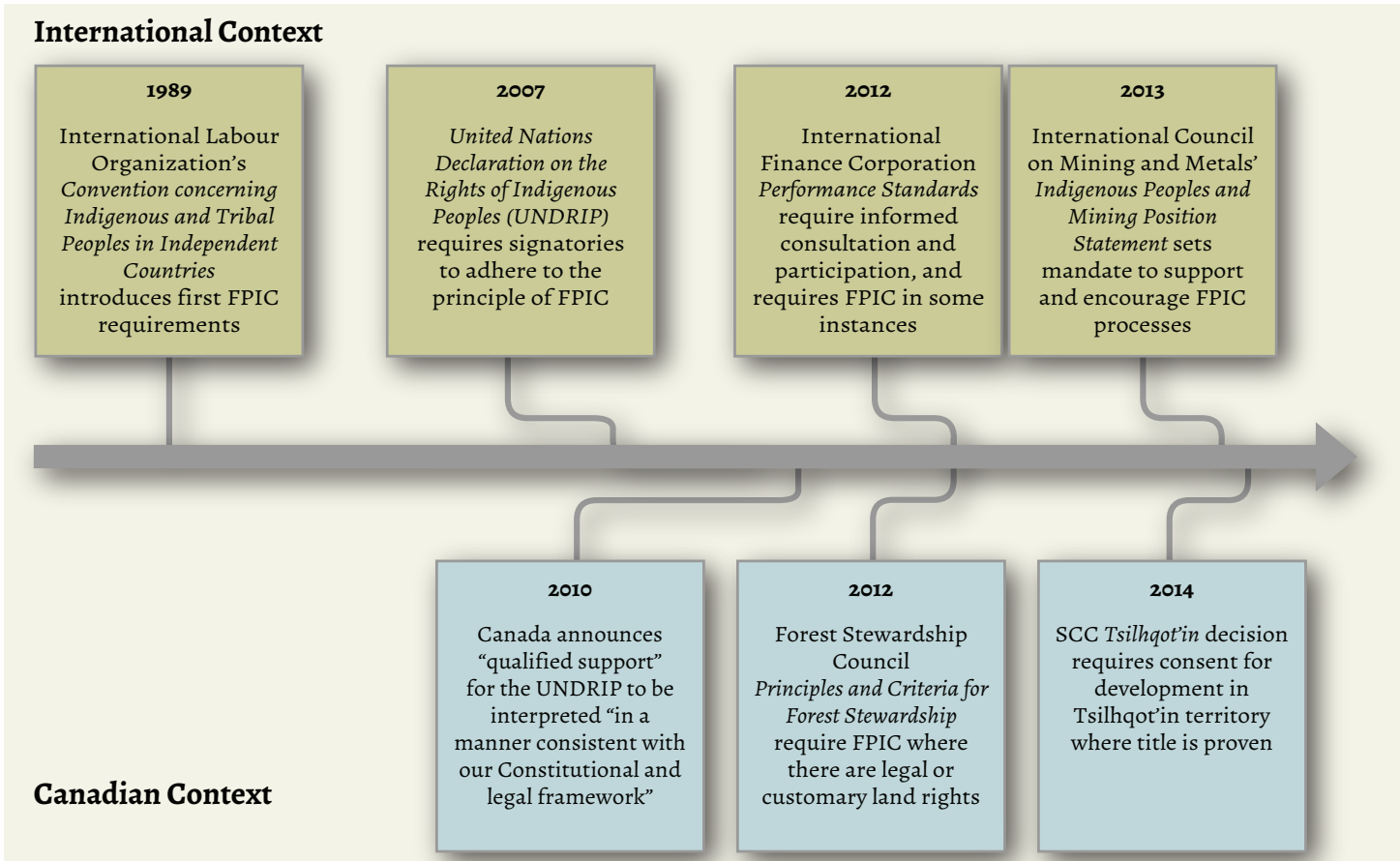
FPIC Defined

FPIC is commonly used as a short-hand expression to describe the right of Indigenous peoples to offer or withhold consent to developments that may have an impact on their territories or resources.² To be true to its definition, FPIC must be obtained without force, coercion, intimidation, manipulation, or pressure from the government or company seeking consent (**free**); with sufficient time to review and consider all relevant factors, starting at the inception stage, in advance of any authorization for, and continuously throughout the planning and implementation of activities (**prior**); based on an understanding of adequate, complete, understandable, and relevant information relative to the full range of issues and potential impacts that may arise from the activity or decision (**informed**); and can be given only by the legitimate representatives of the people affected, with any caveats or conditions stipulated by the people whose consent is given (**consent**). It must be noted that FPIC cannot exist where a people does not have the option to meaningfully withhold consent.

2 UNDRIP (2007). <http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>

2.0 FPIC in Context

Canada’s position on FPIC is perhaps best understood within the broader international context that gave rise to the principle of FPIC and to its application in global industrial practices (see Figure 1). FPIC has been defined as a human right by the United Nations.



Timeline for FPIC in the International and Canadian Context

International Origins of FPIC

First formally introduced in the 1989 *International Labour Organization’s Convention concerning Indigenous and Tribal Peoples in Independent Countries*, FPIC was defined as the requirement to acquire consent before Indigenous communities are relocated or before development is undertaken on their land. FPIC became a more commonly-cited concept when it was emphasized in several articles of the 2007 *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, which broadened the scope of situations in which FPIC should be sought as a best practice, specifically in negotiations regarding land, culture, property, resources, and conservation.

The UNDRIP makes clear that FPIC is required specifically, though not only, in situations in which a development project may affect Indigenous lands and territories or the resources therein.³

3 UNDRIP, Article 32.

Canadian Context for FPIC

Canada voted against adopting the UNDRIP in 2007. Though it issued a Statement of Support in 2010, it noted that the Declaration was a “non-legally binding aspirational document,” rather than one that would directly guide policy or decision-making.⁴

Canada maintains that the rights of Aboriginal peoples are enshrined in its Constitution, and that the principles expressed in the UNDRIP, including FPIC, must be interpreted and implemented through the lens of Canadian domestic law. Section 35(1) of the Constitution Act, 1982, specifically recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada.” These rights are unique within Canadian law, and include rights to lands, resources, and inherent self-government. A number of Supreme Court of Canada (SCC) decisions, including *Haida* and *Taku River* in 2004 and the *Mikisew Cree* in 2005, have affirmed and clarified the constitutional requirement of the Crown to consult and, as necessary, accommodate Aboriginal peoples when it contemplates actions that might adversely impact or infringe upon a potential or established Aboriginal right. Such consultations and accommodation must be carried out in good faith and in accordance with the legal obligations described as the “honour of the Crown”. This requires public governments to act equitably in seeking to reconcile the interests of all Canadians with those of Aboriginal peoples.

The Government of Canada issues consultation guidelines to its officials⁵ and maintains a Consultation Information Service (CIS). The CIS provides non-confidential information to interested parties (not only to federal officials) on the location and nature of established and potential Aboriginal rights, the contact information of Aboriginal groups and their leadership, and information related to historic and modern treaties, agreements, claims, and litigation.

Consultations usually occur before, during, and after the conclusion of a Crown decision that is likely to lead to an action that might adversely impact or infringe upon an established or potential Aboriginal right. For most major projects in Canada, the Environmental Assessment (EA) process is the main statutory process to which consultation is tied, as per the provisions of the *Canadian Environmental Assessment Act 2012* (CEAA 2012).⁶ Provincial or territorial processes may be substituted for the federal legislation when:

- ⇒ the process to be substituted will include consideration of the same factors that are required to be assessed under CEAA 2012;
- ⇒ the public will be given an opportunity to participate in the EA;
- ⇒ the public will have access to records in relation to the EA to enable their meaningful participation;
- ⇒ at the end of the EA, a report will be submitted to the Canadian Environmental Assessment Agency (CEAA) and the report will be made available to the public; and
- ⇒ any other conditions that the Minister establishes are or will be met.⁷

4 Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011. <http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>

5 Ibid.

6 <http://www.ceaa.gc.ca/default.asp?lang=En&n=9EC7CAD2-1>

7 <https://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=0719702C-270E-4D5F-8609-5DB1461C9951>

Notably, in the province of British Columbia substitutions are the norm because the provincial framework in question has been regionally tailored, and meets CEEA conditions.

If a proposed development project does not trigger an EA,⁸ consultation is still required if the proponent seeks specific permits and licenses from the Crown.⁹ Consultation is also necessary in cases in which a statutory authorization by the Crown is required for physical activities on land and water that may impact the meaningful practice of Aboriginal or treaty rights. Federal regulatory bodies, such as Fisheries and Oceans Canada (DFO) and Environment Canada, among others, are subject to these “per authorization” consultation requirements with affected Aboriginal peoples. Provincial authorization bodies, such as BC’s Oil and Gas Commission (BCOGC), are also subject to similar consultation requirements.

If an Aboriginal group shares written concerns with the regulator, the regulator is duty-bound to consider them. If the concerns are deemed valid and substantive, the regulator must avoid, reduce, or accommodate for those impacts on Aboriginal rights by requiring revisions to a proposal, or setting terms and conditions that protect Aboriginal rights.

These regulatory systems do not require or explicitly solicit consent. An Aboriginal group’s decision to withhold consent for a project may or may not have an impact on whether the project proceeds. For example, a Husky Energy exploration project for frac sands in a culturally and recreationally significant area in the NWT is now being reviewed in a full EA rather than simply through project screening, after substantive concerns were expressed. In practice, there are few examples wherein the regulator rejected a permit request for project development because consent was withheld but a recent case is instructive of the roles of all parties in this circumstance. Fortune Minerals and POSCAN held leases for the exploration of coal anthracite in northern BC, in an area that is sacred to the Tahltan Nation, who clearly expressed their lack of consent for project exploration. The province appointed a mediator, and in May of 2015 it bought back the coal licenses at a cost of \$18.3 million. The companies have the option to buy back the same licenses at the same price in the event that an agreement is reached with the Tahltan in the next ten years.¹⁰

Canadian assessment and regulatory bodies must act within the scope of their legislative mandates. Typically, they will consider impacts on the environment and the adequacy of mitigation measures but most are not empowered to determine whether consent has been granted or whether consultation has been adequate. Aboriginal rights may figure into such assessments only to the extent that project activities may affect specific issues of importance to the Aboriginal group, such as sacred sites or harvesting activities. Taking into account the significance of such impacts and whether they can be mitigated, this is, at best, an indirect approach to considering FPIC. In 2011, the United Nations’ Permanent Forum on Indigenous Issues noted that Canada’s regulatory system is not conducive to FPIC, and asserted that the right of Indigenous peoples to FPIC “can never be replaced by or undermined through the notion of ‘consultation.’”¹¹

8 The EA process is triggered when a development exceeds a specific project size or is deemed to result in potentially significant effects.

9 Regulatory authorities and Aboriginal groups still disagree about the type and degree of impact that should trigger the need to consult, and the depth of the consultation required.

10 See links to different perspectives on the situation: <http://www.tahltan.ca/deal-halts-klappan-development-long-term-plan-to-be-set>; <http://www.fortuneminerals.com/news/press-releases/press-release-details/2015/Fortune-Minerals-and-POSCAN-complete-sale-of-Arctos-coal-licenses-to-BC-Rail-with-a-10-year-repurchase-option/default.aspx>

11 Permanent Forum on Indigenous Issues, Report on the tenth session (16-27 May 2011), Economic and Social Council Official Records, 2011, Supplement No. 23, E/2011/43-E/C.19/2011/14, para. 36.

In his *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (2014), James Anaya reinforced this critique of Canadian frameworks, and referred specifically to resource development projects in Canada and the role of the federal government:

The federal Government informed the Special Rapporteur that the duty to consult and accommodate in connection with resource development projects could be met through existing processes, such as the environmental assessment process. Since the passage of the controversial 2012 Jobs, Growth and Long Term Prosperity omnibus legislation, [...], fewer projects require federal environmental assessments. When they do occur, they often require indigenous governance institutions – already overburdened with paperwork – to respond within relatively short time frames to what has been described as a “bombardment” of notices of proposed development; the onus is placed on them to carry out studies and develop evidence identifying and supporting their concerns. Indigenous governments then deliver these concerns to a federally appointed review panel that may have little understanding of aboriginal rights jurisprudence or concepts and that reportedly operates under a very formal, adversarial process with little opportunity for real dialogue.¹²

Anaya reiterates that FPIC should be better integrated into Canada’s development decisions and the country could benefit from clear policies to guide implementation:

In accordance with the Canadian Constitution and relevant international human rights standards, as a general rule resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned. Also, Canada should endeavour to put in place a policy framework for implementing the duty to consult that allows for indigenous peoples’ genuine input and involvement at the earliest stages of project development.¹³

Canada did not issue a formal response to this statement.

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12 <http://unsr.jamesanaya.org/docs/countries/2014-report-canada-a-hrc-27-52-add-2-en.pdf>, para 72.

13 Ibid., para 98.

Recent Supreme Court Rulings Clarify FPIC in Canada

The Supreme Court of Canada's 2014 *Tsilhqot'in* decision is a watershed decision in Canadian law. It granted legal recognition of the Aboriginal title of the Tsilhqot'in to much of their traditional territory, and confirmed that Aboriginal title confers possession and ownership of titled land and resources. Unlike private property under common law, for the First Nation it includes jurisdiction to determine:

- ⇒ how the land will be used;
- ⇒ authority over the economic benefits of the land; and
- ⇒ authority to proactively use and manage the land.

This aspect of Aboriginal title has significant implications for FPIC, as it limits the rights of Crown governments to authorize developments on lands where Aboriginal title has been proven or is likely to exist. The Court stated:

Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group... If the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent it unjustifiably infringes Aboriginal title.¹⁴

This ruling makes clear that consent is the approach that will offer the most certainty for those who wish to develop projects on Aboriginal title lands, but it does not mean that consent is required in all circumstances. The Court advises that, "Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult **by obtaining the consent** of the interested Aboriginal group," but the decision also sets out a legal threshold for justifying infringements in circumstances when such consent cannot be obtained.

In situations in which title has been proven or is likely to exist, this threshold will not be easy to meet. The Crown must show that the project fulfills a compelling public purpose but that its proposed actions will go no further than required to achieve it, i.e., it must "minimally affect" rights or title. The Crown must demonstrate that it has balanced the interests of the affected Aboriginal group with those of other Canadians and prove that the impacts and benefits will be proportionate.

The implications of this decision for Aboriginal groups whose title is not yet proven, or for those facing development projects already undertaken without consent on titled lands, are not yet clear. This decision may also have implications for treated lands in the future.

¹⁴ *Tsilhqot'in Nation v. British Columbia*, 2014 S.C.C. 44, 26 June 2014 (para 92).

Industry-led FPIC Guidelines

Several key industry organizations with influence in Canadian extractive sectors have developed guidelines that are influencing the application of FPIC principles in Canada. Some key guidance documents and position statements are summarized below:

- ⇒ The International Council of Metals and Mining (ICMM) has committed to work “to obtain the consent of Indigenous peoples for new projects (and changes to existing projects) that are located on lands traditionally owned by, or under customary use of, Indigenous peoples, and that are likely to have significant adverse impacts on Indigenous peoples.”¹⁵
- ⇒ The Mining Association of Canada (MAC), has issued a protocol providing guidance on meaningful dialogue with communities, requiring companies to self-report on “community of interest identification,” engagement and dialogue, response mechanisms, and reporting.¹⁶ MAC has also developed an Aboriginal Affairs forum for sharing experiences and developing practical strategies for issues on the ground.
- ⇒ The Prospectors and Developers Association of Canada (PDAC) has prepared guidance documents on Aboriginal engagement, but these do not require consent. PDAC provides both a guide and a trainer’s manual for exploration companies.¹⁷
- ⇒ The Canadian Association of Petroleum Producers (CAPP) notes that the duty to consult and accommodate Aboriginal peoples lies with the Crown, and that ultimately this duty cannot be delegated. CAPP has published a document that provides guidance for industry proponents to take action to reduce the risk of legal challenges on the basis of a failure to consult.¹⁸

Indigenous-led FPIC Guidelines

Consultation processes across the country are not consistent as they are adapted to the location and nature of the activity proposed, as well as to the specific rights held by each Indigenous community. Aboriginal groups with historic treaties have specific provisions and rights¹⁹ protected by the Constitution. These rights must be considered in consultations and negotiations. Aboriginal groups with modern treaties may have distinct rights or specially defined

15 <http://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining>

16 <http://mining.ca/sites/default/files/documents/TSMAboriginalandCommunityOutreachFramework.pdf>

17 <http://www.pdac.ca/programs/aboriginal-affairs/information/aboriginal-information/2014/03/03/trainer-s-manual>

18 *Developing Effective Working Relationships with Aboriginal Communities*, <http://www.capp.ca/publications-and-statistics/publications/100984>

19 The terms of treaties are almost always contested, dating back to differences between oral and written treaties and the intent/purpose of the treaties between two peoples.

consultation processes associated with land claim agreements, self-government agreements, or agreements with neighbouring Aboriginal groups who have shared territories. Aboriginal groups with no treaty at all, including many with unproven title rights that have a strong case to be proven, have unique individual situations; some are pursuing modern land claims while many are no longer seeking these modern treaties and instead are relying on community-specific reconciliation tables and/or government-to-government negotiations and agreements.

First Nation efforts to advance FPIC are reflected in procedural guidelines, Band Council Resolutions, Consultation Protocols, Indigenous land use planning, policy, and law. These initiatives are aimed at achieving certainty and transparency in processes related to generating consent, consultation, participation, and information management more generally, at the community-specific level. Some example agreements include:

- ⇒ The Kluane First Nation's (*KFN Proponents Engagement Guide* (2012)²⁰ outlines the initial engagement process for the development of relationships between proponents and KFN, with a view to negotiating MOUs and benefit agreements.
- ⇒ The Tahltan Nation's *Shared Decision Making Agreement between the Tahltan Nation and the Province of British Columbia*²¹ (2013) sets the formal framework within which, "Without prejudice to their differing views with regard to sovereignty, jurisdiction, title and ownership, the Province and Tahltan intend to work collaboratively and are committed to engaging across a spectrum of land and resource issues to reconcile interests and improve business relationships and their government-to-government relationships and to fulfill their respective legal obligations."
- ⇒ The *Nak'azdli Nation Stewardship Policy* (undated)²² outlines the ways in which external agencies are invited to participate in the process of land and resource stewardship within the Nation's consultation area. This document also outlines principles, processes, and specific provisions, as well as a fee schedule.
- ⇒ The Mikisew Cree First Nation's Band Council Resolution (2013) was developed in response to the "unprecedented level of current and proposed industrial activities ...[and] the need to determine how to respond to proposed developments," in which decision-making indicators are listed that are to be used in making consistent, principled decisions based on agreed-upon Mikisew values.

20 [http://www.kfn.ca/documents/lands-resources-heritage/KFN Proponent Engagement Guide KFN 2012-01-10.pdf](http://www.kfn.ca/documents/lands-resources-heritage/KFN_Proponent_Engagement_Guide_KFN_2012-01-10.pdf)

21 http://www2.gov.bc.ca/gov/search?id=2E4C7D6BCAA4470AAAD2DCADF662E6A0&q=sdm_tahltan.pdf

22 [http://www.nakazdli.ca/pdf/Stewardship Policy%281%29.pdf](http://www.nakazdli.ca/pdf/Stewardship_Policy%281%29.pdf)

A standard expectation of industry is an Impact Benefit Agreement (IBA)²³ and other contracts, and these can also be used to inform the ways in which communities may negotiate or offer consent for development projects.

What are Impact Benefit Agreements (IBAs)?

Simply put, these negotiated, private agreements serve to document in a contractual form the benefits that a community can expect from the development of a local resource in exchange for its support and engagement. Specific content varies widely, and typically addresses provisions on financial payments, employment and training, business opportunities, stewardship and environmental protections, and cultural and social protections and enhancements.

IBAs are novel and noteworthy for a couple of reasons. First, they provide for a structured relationship, and the flow of tangible benefits, for local communities facing a major resource development in a way that conventional regulatory mechanisms (like environmental impact assessment) have not. Second, they are contracted without the explicit involvement of the state, the traditional authority in matters of natural resource allocation and development. IBAs are often contracted between a company and many Nations. For example, Ekati Diamond Mine in the Northwest Territories has contracted separate agreements with five Indigenous Nations and parties.

Generally, IBAs are completed during the regulatory review process, but recently some IBAs have been considered in contexts where projects are already permitted and constructed.

Adapted from <http://www.impactandbenefit.com/Background/>

Multisector-led FPIC Guidelines

- ⇒ The Forest Stewardship Council offers quality-assurance certification for forest products that are produced according to a set list of performance standard criteria. FPIC is required for members who wish their products to receive an FSC quality designation. Principle #3 of the *FSC Principles and Criteria for Forest Stewardship (2012)* is focused on Indigenous peoples' legal and customary rights, including the right to FPIC. In addition to Principle #3, FSC Canada recently launched an FPIC-specific initiative, in which it will work to improve and strengthen forest certification requirements with the primary goal of increasing meaningful and tangible benefits of certification for Aboriginal peoples and communities in Canada. To do this, FSC Canada will work towards effectively adapting the values of FPIC and strengthening forest certification requirements in FSC's Forest Management Standards in Canada, which are set to be completed by 2016.

23 See Gibson and O'Faircheallaigh, 2010. *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements*.

3.0 Roles of Government, Industry, and Communities

While the roles of government, industry, and communities in maintaining FPIC may change with every project context, there are consistencies in the relationships and general protocols followed by each. These are described below and summarized in Table 1.

Role of Government

As noted already, the federal government of Canada expressed its disagreement with the application of consent provisions of the UNDRIP in the Canadian context. However, it does play a role in supporting FPIC by ensuring that consultation and accommodation take place in development projects. From these processes, industry representatives may negotiate agreements that support FPIC or at least move towards consent. During the consultation process, the role of the Crown is to provide clear direction to proponents on consultation expectations.

The document, *Aboriginal Consultation and Accommodation Guidelines (2011)*,²⁴ sets the consultation framework adopted by the federal government. The *Guidelines* outline four phases in the consultation process:

1. **Pre-Consultation Analysis and Planning:** During this phase, the responsible authority describes the proposed Crown or third party activity (e.g., issuance of a permit, approval or provision of project funding) and identifies the potential or established rights of the Aboriginal groups in the area and potential impacts of the project. The Crown decides if there is a duty to consult and accommodate and, if consultation is required, the form and content of the process and the documentation system to be used.
2. **Crown Consultation Process:** The consultation process is implemented with associated documentation of meetings, correspondence, and maintenance of issues tracking and may be adjusted as necessary.
3. **Accommodation:** Accommodation measures and options identified through the consultation process are documented.
4. **Implementation, Monitoring and Follow-up:** Crown decision(s) are communicated and implemented, with monitoring and follow-up where necessary. This phase may also include an evaluation of the consultation process.

Other roles of the federal government include:

- ⇒ Coordinating with the provinces to ensure that jurisdictional confusion does not occur. Contradictions sometimes emerge. For example, the Province of British Columbia directed the proponent of the Mount Milligan project to engage with two Indigenous communities, while the federal government considered five communities to have rights to consultation.

24 https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf

- ⇒ Holding proponents accountable to the purpose and intent of environmental laws, e.g, ensuring appropriate financial security is held for reclamation purposes, providing expertise to monitor and research critical environmental values, and sharing information and/or involving Indigenous groups in these processes.
- ⇒ Setting clear and transparent monitoring systems, often in collaboration with the proponent and Nations.
- ⇒ Providing funding to Indigenous groups for engagement in consultation processes.
- ⇒ Developing guidance on key issues related to extraction or use of resources, including resource revenue sharing.²⁵

Possibilities for future roles that are already emerging in some contexts include:

- ⇒ Developing, in collaboration with Aboriginal governments, a legal framework for strategic-level and application-level collaborative decision-making processes.
- ⇒ Providing consistent funding for the development of capacity of Indigenous communities to strengthen lands stewardship.

Many industry representatives see Impact Benefit Agreements (IBAs) as standard business tools, and the government's job of issuing permits and licenses effectively becomes easier when an agreement is present. The government does not review the agreement itself, but signed IBAs often require that a letter be sent to the appropriate authorities to indicate consent and that satisfactory consultation with the company has occurred.

When there is no consent for a project to proceed, one company has suggested that the government has a particular role to ensure that the rights and interests of communities are protected, specifically:

If government decides absent consent [to proceed with permitting a project], how does it decide the rights and interests of communities are sufficiently protected? That is the point where smart companies would place the responsibility on the government – either decide not to go ahead or if they say yes, it should be a conditional yes, that the rights and interests of communities are protected. What are you going to do to ensure that? The company doesn't want to be on their own and ignore the will of the people.²⁶

As identified earlier, this case resolved with the provincial government buying back the coal licenses from the companies involved. Consultation before the issuance of leases for mineral exploration may provide a less costly and more transparent mechanism. Further, proactive planning through multi-stakeholder land use planning is meant to set the boundaries for a variety of land uses.

25 A description of the use of government resource revenue sharing programs and agreements can be found in the Prospectors and Developers Association of Canada manual, *Government Resource Revenue Sharing with Aboriginal Communities in Canada: A Jurisdictional Review*: www.pdac.ca/docs/default-source/default-document-library/pdac-grrs-report-2014.pdf?sfvrsn

26 Interview with Fortune Minerals, February 17, 2015.

Role of Industry

The role of industry in the consultation process is defined in large part by what the government's regulatory agencies delegate to industry partners. However, some industry organizations and individual companies go above and beyond the legal requirements to ensure that consent is obtained. As Pierre Gratton, President of the Mining Association of Canada, has noted, "companies that do not strive to build healthy relationships with Aboriginal communities do so at their peril."²⁷

The roles that industry representatives may take on to build such relationships and potential consent include:

- ⇒ Supporting Indigenous communities to advance key policy issues, such as resource revenue sharing, with the government. Gratton makes specific reference to this issue in his speech: "BC's Resource Revenue Sharing policy should be seriously considered by other Canadian governments. And we need to improve and expand policies and programs that take us beyond legal requirements that provide genuine opportunities for participation in mining and other sectors."²⁸
- ⇒ Engaging with Indigenous communities to understand their preferred engagement protocols, culture, values, and rights. Jointly defining the engagement and consultation processes, as early as possible in project planning (e.g., at project exploration phase).
- ⇒ Working to obtain community consent through IBAs may be included in this engagement. Consent does not (as indicated by the ICMM) confer veto rights to individuals or sub-groups. Indeed, IBAs include specific clauses for those instances in which individuals or sub-groups reject a project.
- ⇒ Supporting the review of the project through community controlled research, in particular on the Traditional Knowledge and Use of the Indigenous peoples in the region. In addition, social and economic impact assessments are commonly led, or jointly defined, by the Indigenous community in order that the nature and extent of impacts have local resolution.
- ⇒ Financially supporting Indigenous communities' engagement and participation in negotiations, and their internal technical reviews of project and consultation documents.

27 2014. Gratton, Pierre. *The Canadian Public: Perspectives on Mining and Resources Extraction*. Speech to the Vancouver Board of Trade. http://mining.ca/sites/default/files/documents/Pierre_Gratton_VBOT_Speech_Sept_11_2014_0.pdf

28 Ibid.

Role of Indigenous Communities

Many Indigenous communities have set out their own consultation protocols, land use plans, and other guidance documents that will clarify expectations of their participation in consultation and consent-building processes. Other roles of communities in upholding the FPIC principle include:

- ⇒ Setting the framework collaboratively with the appropriate governments to create clear expectations regarding land use planning, or decision protocols, where this is feasible.
- ⇒ Seeking involvement in project decisions and studies (e.g., Traditional Knowledge and Use studies, as well as social, cultural, economic, and ecological impact assessments), and informing the government of the concerns of the community through ongoing meetings.
- ⇒ Providing a clear and transparent process for accessing the appropriate authorities for decision-making, as well as an understanding of the time required for decision-making, the appropriate decision processes, and the requirements for informed consent. Where feasible, the relationship of hereditary leaders to other governance authorities should be defined, and internal processes for managing consent processes should be worked out.
- ⇒ Building governance capacity internally, creating implementation units, or departments, to oversee negotiations with government and industry. Some Nations are using IBAs to build their own governance capacity internally, creating implementation units as well as delivering hard-to-fund but culturally significant programs. Others use government-to-government negotiations or other methods.
- ⇒ Leveraging IBAs to protect Traditional Use or other key valued components in order to illustrate to the community that consent can be provided due to the protections and benefits that have been achieved. Nations are also leveraging funds from IBAs to protect Traditional Use.
- ⇒ Building up community-based consensus processes regarding resource management and monitoring.
- ⇒ Engaging community members (including under-represented groups within communities) so that they stay informed and have trust in the process that will better enable FPIC to be maintained on an ongoing basis.

See **Table 1: Typical roles in maintaining FPIC during phases of project development**

Conclusions

This update on FPIC confirms that constructive collaboration and consent has become a major feature of the economic and political landscape in Canada. Building on the initial foundation of the UNDRIP, and articulated by the evolving direction of the courts, we are learning more about how our Constitutional commitments to Aboriginal rights can align with international standards, community aspirations, and industrial practices.

While debate continues over details of interpretation and implementation, the path forward to reducing conflicts and increasing the number of successful agreements among government, industry, and communities includes opportunities and roles for all parties. The report lays out a variety of things that can contribute to progress towards a better balance of cultural, economic, and ecological objectives.

The federal government can contribute to successful projects by working with communities and Aboriginal governments to develop legal and policy tools that strengthen strategic-level and application-level collaborative decision-making processes. In addition to its fiduciary obligations related to Aboriginal rights and title issues, there is a clear need to address capacity building to strengthen lands stewardship skills and resources in Indigenous communities.

For industry, building understanding and support for the preferred engagement protocols, culture, values, and rights of the affected Indigenous communities early in the process is critical. While there is no “one size fits all” approach, early engagement can provide a foundation for the necessary working relationships and can provide the opportunity to establish Impact Benefit Agreements that can help guide project development and management. Notably, there is a growing recognition of the value of supporting community-controlled research and project reviews, in particular related to the Traditional Knowledge and Use of the Indigenous peoples in the region.

Indigenous communities across the country are making progress in collaborative processes on major projects. It is important that the lessons learned (both good and bad) from these experiences be actively exchanged among communities. Some key lessons highlighted in this report relate to appropriately scaled internal governance and management structures that can support both the negotiation and implementation phases of major projects. Where FPIC frameworks are being established, clear expectations regarding land use planning or decision protocols are helpful and, whenever possible, these should be developed and communicated collaboratively with appropriate government players.

The trend towards the need and expectation of establishing effective and lasting agreements with affected Indigenous communities as part of major project development is clear. From recognition through international law, to national court decisions, and the increasing number of voluntary industry codes and policies, the role of FPIC-related processes is a growing part of the landscape. While the core responsibilities reside with government to government decision-making, it is vital that the practical means for achieving agreement and consent be better understood and embraced at many levels of our society and our governing institutions. It is a rapidly evolving field of knowledge and practice that can be advanced from many different angles.

The Boreal Leadership Council is committed to promoting dialogue and progress in this important endeavour by analyzing lessons learned and highlighting successes along the way.

Join us.

Table 1: Typical roles in maintaining FPIC during phases of project development

Government	Industry	Indigenous Groups
Proposal Phase		
<p>Publish notice of project proposal and any related documentation</p> <p>Consult before issuance of mineral leases to companies</p> <p>Identify (and notify) Indigenous people who have Constitutional or other rights to consultation</p> <p>Issue decision regarding consultation process and whether it will be delegated to the federal or provincial authority, or to the proponent</p> <p>Provide funding where applicable to support Indigenous involvement in consultation process</p> <p>Assess gravity of impacts to Indigenous groups, and whether or not accommodation is required</p> <p>Keep consultation logs to document engagement with all interested parties</p>	<p>Identify appropriate authorities who represent Indigenous peoples</p> <p>Identify intent to seek consent, and request any protocols or engagement mechanisms for consent-building process</p> <p>Provide funding where applicable to enable Indigenous participation and data-collection</p> <p>Consult with Indigenous communities to set an agreed-upon consultation process, including creation of protocols and opportunities for information-sharing</p> <p>(Ongoing: communicate regularly, share information, build relationships in community)</p> <p>Engage in formal consultation process as required by government (at a minimum), and by industry best management practices and Indigenous protocols (at best)</p> <p>Consider and integrate data contributed by Indigenous communities, including participatory mapping and social, environmental, and culture and rights impact assessments</p> <p>Identify opportunities for mitigations / project alternatives that could lead to consent, agreement, or non-opposition</p> <p>(Allow sufficient time for Indigenous communities to consider and evaluate options)</p> <p>Create formal agreement with Indigenous communities, including ongoing consultation protocol and conflict resolution mechanisms</p>	<p>Notify industry representative of Indigenous interests in project</p> <p>Share with proponent any internal protocols that will be used</p> <p>Identify opportunities and expectations for consultation and engagement (including funding requirements)</p> <p>Engage in the environmental assessment process at critical stages</p> <p>Conduct necessary studies to assess potential impacts of project</p> <p>Share findings of studies, including the Indigenous community’s key concerns, values, and priorities</p> <p>Identify opportunities for mitigations / alternatives that would lead to consent, agreement, or non-opposition</p> <p>Create Impact and Benefit Agreement or other agreement with proponent or identify as early on as possible that consent may not be an option</p>

Table 1: Typical roles in maintaining FPIC during phases of project development (continued)

Government	Industry	Indigenous Groups
Permitting Phase		
<p>Assign permit and licences conditions that are protective of rights and title</p>	<p>Continue providing fulsome information on project developments</p> <p>Formalize agreement (although this could be previous to permitting), including dispute and grievance processes</p> <p>Seek independent verification of FPIC if desired (for industry certification purposes). At this point the only certification route is through FSC for the forest products sector</p>	<p>Continue to assess impacts to right and title as well as to resource values such as culture, fish, wildlife, plants, archaeology, social, health, economy regulated under some decision processes, like EA. Communicate evidence and likely effects to Crown and industry</p>
Operations Phase		
<p>Ongoing permitting</p> <p>Duty to consult when re-issuing licences</p> <p>Different Ministries have different roles; DFO, for example, would be consulting if monitoring data shows a need for further investigation</p>	<p>Implement agreement</p> <p>Engage in participatory monitoring</p>	<p>Monitoring (administrative and physical) of the terms of project permits and agreements</p> <p>Continued assessment of new information, new planned activities, conflicts, accidents, breaches of terms and conditions</p> <p>Continued communication of Aboriginal concerns if any</p>
Decommissioning and Reclamation Phase		
<p>Follow-through on closure requirements, ongoing monitoring and consultation</p> <p>Ensure compliance with terms of agreed-upon closure plan; consultation necessary for any changes</p>	<p>Follow-through on closure requirements, ongoing monitoring and consultation</p> <p>Ensure compliance with terms of agreed-upon closure plan; consultation necessary for any changes</p>	<p>Ongoing engagement with industry or government for closure planning</p> <p>Ongoing monitoring</p>