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# Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada

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ABSTRACT

Indigenous peoples have gained considerable agency in shaping decisions regarding resource development on their traditional lands. This growing agency is reflected in the emergence of the right to free, prior, and informed consent (FPIC) when Indigenous rights may be adversely affected by major resource development projects. While many governments remain non-committal toward FPIC, corporate actors are more proactive at engaging with Indigenous peoples in seeking their consent to resource extraction projects through negotiated Impact and Benefit Agreements. Focusing on the Canadian context, this article discusses the roots and implications of a proponent-driven model for seeking Indigenous consent to natural resource extraction on their traditional lands. Building on two case studies, the paper argues that negotiated consent through IBAs offers a truncated version of FPIC from the perspective of the communities involved. The deliberative ethic at the core of FPIC is often undermined in the negotiation process associated with proponent-led IBAs.



In Canada as elsewhere around the world, Indigenous peoples have gained considerable agency in shaping decisions regarding resource development on their traditional lands. This growing agency is reflected in the emergence of the right to free, prior, and informed consent (FPIC) when Indigenous peoples and their traditional lands may be adversely affected by major resource development projects. The right to FPIC is at the heart of the United Nations Declaration on the Rights of Indigenous Peoples and while its interpretation varies considerably, it is increasingly recognized as a new international standard for relations between Indigenous peoples and extractive industries (Buxton and Wilson, 2013; Hanna and Vanclay, 2013; ICMM, 2013; IFC, 2012; OXFAM, 2015). Free, prior, and informed consent is rooted in the recognition that Indigenous peoples, as self-determining collective actors, should be empowered to make decisions over their future and that of their traditional lands. They must therefore consent to economic development projects that may have a major impact on their lands and communities (Page, 2004).

While Indigenous peoples have made significant strides in the international arena toward the recognition of their right to FPIC, its implementation remains highly contentious. Governments and private corporations around the world are reluctant to establish formal requirements concerning FPIC. Those who do endorse FPIC tend to interpret it more as an aspirational norm than a strict obligation (Bellier, 2015; Hanna and Vanclay, 2013; Oxfam, 2015). There are also still significant ambiguities as to the exact nature and scope of the required consent, when such consent is required and, most significantly, how consent is to be achieved and by whom (Anaya, 2012; Barelli, 2012; Farget and Fullum-Lavery, 2014; Hanna and Vanclay, 2013).

Interestingly, while many governments remain non-committal toward FPIC, corporate actors in the natural resource sectors have recently been more proactive at engaging with Indigenous peoples in seeking their consent to resource extraction and infrastructure projects. The language of FPIC is increasingly integrated into the corporate social responsibility guidelines of major players in the extractive industry.[1] In Canada as elsewhere, project proponents have developed a significant expertise at securing Indigenous consent through the negotiation of Impact and Benefit Agreements (IBAs), under which Indigenous peoples trade their support for a project in exchange for compensations and mitigation measures. While there is a growing literature on IBAs (Fidler and Hitch, 2007; Prno and Bradshaw, 2008; O'Faircheallaigh, 2015), there are still very few analyses of their role in, and potential impact for, the implementation the Indigenous right to FPIC (but see Hanna and Vanclay, 2013; O'Faircheallaigh, 2012).

[1] In 2012, the International Council on Metals and Mining released a revised position statement endorsing a "soft" version of FPIC as an obligation to seek consent through consultation (Hanna and Vanclay, 2013, ICMM, 2013). The International Financial Corporation, a division of the World Bank that establishes standards for good corporate practices in the global financial sector similarly adopted a general statement concerning the right of Indigenous peoples to FPIC through consultation mechanisms (IFC 2012).

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Focusing on the Canadian context, this paper discusses the roots and implications of a proponent-driven model for seeking Indigenous consent to natural resource extraction on their traditional lands. IBAs have emerged as a core mechanism to establish the legitimacy of resource extraction projects largely in response to the ambiguity of Canadian law and jurisprudence pertaining to the role and status of Indigenous peoples in resource extraction decision-making. While the Canadian government has so far stopped short of incorporating the right to FPIC in domestic law, the Supreme Court of Canada has developed a fairly extensive jurisprudence on the duty to consult and, when required, accommodate Indigenous peoples when government decisions could affect their rights. The duty to consult is an evolving target in Canada, with many grey areas left to the discretion of the parties involved (Newman, 2014). For project proponents, securing Indigenous consent through private agreements has become a mean to circumvent this legal uncertainty.

Proponents' interest in securing Indigenous consent through private agreements is compounded by existing regulatory mechanisms to implement the duty to consult. In the context of major projects, consultations are for the most part undertaken within environmental impact assessment (EIA) processes, where the proponents play a key role. EIAs create space for debating with proponents the environmental and social impacts of a project, but they offer limited opportunities for Indigenous peoples to shape the decision-making process in light of these debates. IBAs have emerged largely to compensate for the limitations of EIA processes in this respect.

A proponent-driven process for securing Indigenous consent has its advantages. It facilitates stable, substantial relationships between proponents and communities. In the context of projects that may have potential impacts over time, this relationship is essential. But negotiated consent through IBAs also offers a truncated version of FPIC from the perspective of the communities involved. The exercise of free, prior, and informed consent, we argue, is a collective right that requires substantive Indigenous participation in decision-making anchored both in community deliberations and the reconciliation of interests through negotiations. The deliberative ethic of FPIC is often undermined in the negotiation process associated with IBAs. IBA negotiations also lead to a focus on certain issues, such as economic incentives and impact mitigation, but tend to circumvent broader, more complex questions about the social acceptability of projects and their cultural, social, and economic cumulative impact.

After a discussion of the normative foundations and political implications of FPIC as a double process of deliberation and negotiation, we map out the institutional context under which a proponent-driven model for obtaining consent has emerged in Canada. We then illustrate how the negotiation of IBAs structure the politics of Indigenous consent with recent examples. We offer in conclusion some avenues for strengthening the deliberative component of Indigenous participation in land and resource development decision-making.

## 1. The right to free, prior, and informed consent

The principle that Indigenous peoples are entitled to a certain degree of control over resource extraction on their traditional lands has gained growing international recognition following decades of advocacy and mobilizations by Indigenous organizations from around the world (Bellier, 2015; Daes, 2000; Niezen, 2003). The general principle that Indigenous peoples should be *consulted* is now acknowledged in a number of international documents, notably in the 1989 International Labour Organization's Convention 169 on the Rights of Tribal and Indigenous Peoples. However, it is with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the UN General Assembly in September 2007 that the principle of free, prior, and informed *consent* truly emerged as an international norm that ought to guide relations between Indigenous peoples, states, and extractive industries.

While it is a non-binding instrument, the UNDRIP establishes an international standard against which states' practices are measured in their relation with Indigenous peoples (Anaya, 2012; Stavenhagen, 2009). There are a number of references to FPIC in the UNDRIP, notably in articles 10, 11, 19, 28, and 29, but it is in section 32(2) that its clearest articulation in the context of land and resources development can be found:

"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 mineral, water or other resources."

In essence, the right to free, prior, and informed consent requires that Indigenous peoples be empowered to make autonomous decisions regarding the appropriateness of a development project that could have an impact on their traditional lands. This consent must be expressed freely and in possession of all relevant information regarding the proposed activity and its potential impact (Anaya, 2012).

While FPIC is increasingly recognized as an international norm, its implications for governments' policies and practices remain somewhat ambiguous. Many states that have endorsed the UNDRIP consider section 32(2) as an aspirational text that invites authorities to "seek consent" rather than formally obtain it (Barelli, 2012; Gilbert and Doyle, 2011; Hanna and Vanclay, 2013; Ward, 2011). The few substantive legal interpretations of the emerging norm in the international arena so far have moved back and forth between a strong interpretation of FPIC as a requirement to obtain Indigenous consent and a more limited view suggesting states must consult in order to seek (but not necessarily obtain) Indigenous consent (Barelli, 2012; Farget and Fullum-Lavery, 2014; Ward 2011). A similar ambiguity is found in most documents endorsing FPIC emanating from private corporations or associations promoting good corporate practices in relations with Indigenous peoples (Boreal Leadership Council, 2015; ICMM 2013; IFC, 2012).

Ambiguities also subsist as to the mechanisms through which this consent must be expressed. While the notion of consent suggests that a form of exchange or negotiation should take place between the concerned community, the project proponent, and relevant decision-making authorities, it also suggests that the said community be empowered to define its priorities *freely* and *prior* to the decision-making process. FPIC is rooted in the principle that Indigenous peoples are self-determining agents, free to collectively control their own social, economic, and political future and empowered to make decisions over their traditional lands (Anaya, 2012; Hanna and Vanclay, 2013; Page, 2004). The exercise of FPIC therefore suggests more than a negotiated settlement among elites or through representatives. It suggests a collective decision-making process rooted in transparent community-based deliberations.

This is not to say that negotiations with governments and proponents should be excluded, but rather that the latter should be informed by and intimately connected to a community-based 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 UN Permanent Forum on Indigenous Issues similarly suggests 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 (UN, 2016, our emphasis. See also Anaya, 2012).

From principle to practice, the gap can be considerable. Despite significant advances in recent years, FPIC remains a contested norm. 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, the implementation of a norm like FPIC remains an uphill battle. FPIC has nonetheless become a significant political and legal tool that Indigenous peoples increasingly mobilize in order to establish

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