SHORTCUTS

Essential, accessible knowledge for self-determining First Nations

September 2023

This series is intended to provide high level and short, easy to read information about some very complex issues. It should not be used as a substitute for expert advice. Links to sources and further reading suggestions are provided throughout for further exploration of the issues.

The Issue of Free, Prior and Informed Consent (FPIC) in Canada

by Giuseppe Amatulli, Postdoctoral Fellow, Rebuilding First Nations Governance, Carleton University and Catherine MacQuarrie, Fellow, School of Public Policy and Administration, Carleton University

Among the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Free Prior and Informed Consent (FPIC) is one of the most debated. Properly implemented in Canada, it could support the fulfilment of Indigenous peoples' inherent rights of self-government and rights regarding land and natural resources in traditional territories.

For most First Nations[1], FPIC is a fundamental right to have a meaningful say in decisions about their people, land, and natural resources within their traditional territories, with the word "consent" implying the right to say "no".

It is generally accepted that FPIC should be used to prevent forced removal or protect cultural practices (art. 10-11), but there is much debate on the meaning of *consent* when countries take other actions that could affect Indigenous peoples (art. 19); the use of their traditional territories and natural resources (art. 28-29); and, the approval of any project that can affect their lands and resources (art. 32).

In Canada, FPIC raises 2 main issues. First, whether the meaning of the word consent gives First Nations the right to overturn (veto) federal or provincial government decisions that affect them; and second, the nature of its relationship to Canadians governments' long-standing legal duty to consult and accommodate.

So far, no Canadian government has accepted the definition of FPIC as veto power (Land, p44), even when they have adopted laws to ensure their legal frameworks align with UNDRIP principles. British Columbia (BC) is the first (and so far, only) Canadian province or territory to pass such a law. *The Declaration on the Rights of Indigenous Peoples Act (DRIPA)* was passed in

[1] This article is drafted for a First Nations audience. "Indigenous" is used when referring to all Indigenous peoples – Including Inuit and Metis - within Canada. "Aboriginal" is the legal term in Canada used in reference to Indigenous rights and title (recognized and protected by Section 35 of the Canadian Constitution).

2019. The Canadian government followed suit in 2021 with its own law to adopt UNDRIP principles, and in June 2023 released an Action Plan to implement the law.[2]

When talking about FPIC, Canadian governments tend to emphasize the importance of the *process* of seeking consent but stop short of talking about what happens if it is not given. As an example of the cautious language used, a statement from the BC government says: "Free, prior, and informed consent recognises Indigenous peoples' rights, interests, and voices. It means early, deep, and meaningful involvement of Indigenous peoples on matters that affect their peoples, communities, and territories. Instead of uncertainty and conflict, we can work together to build a stronger B.C., with more opportunities for Indigenous peoples, B.C. businesses, communities, and families."[3]

Long before FPIC became part of the Canadian conversation, a series of important court decisions on cases brought forward by First Nations had already confirmed and detailed governments' solemn legal obligations to consult Indigenous peoples on decisions and actions that may affect them, and to accommodate their Aboriginal and Treaty rights. (Morellato, 2008). (For more details, see our related article "On the duty to consult and accommodate").

Courts have given specific direction to governments acting in right of the Crown on how they must carry out the duty to consult. They have also raised the bar on appropriate accommodations that must be made to minimize infringement of Aboriginal and Treaty rights. But they have so far stopped short of accepting that Indigenous peoples have veto power over resource development on their lands (Morellato, 2008, p. 29).

Canadian case law will continue to evolve, and with the adoption of UNDRIP into the federal and BC legal frameworks, Indigenous peoples may be able to use the FPIC principle to push for legal and policy improvements to the current consultation and accommodation framework and, strengthen their own definition of UNDRIP principles such as FPIC in specific cases.

Naomi Metallic of Listuguj Mi'gmaq Nation, Chancellor's Chair in Aboriginal Law and Policy at Dalhousie University, expects that with the adoption of UNDRIPA, Canadian courts will turn more frequently to UNDRIP to interpret domestic law. "There is a strong argument that the coming into force of the UN Declaration Act removes any lingering doubt that the UN Declaration should be applied to Canadian law as an interpretive guide, and benefit from the presumption of conformity. This is clear from the text of the Act. The preamble of the Act states "the Declaration is affirmed as a source of interpretation of Canadian law," followed immediately by another

[2] https://www.justice.gc.ca/eng/declaration/ap-pa/index.html (last accessed on July 5th, 2023)

[3] https://declaration.gov.bc.ca/

As another example, Canada's UNDA action plan at paragraph 32 says it will "Develop guidance on engaging with Indigenous peoples on natural resources projects… that aligns with the UN Declaration, including article 32(2), which calls for consultation and cooperation in good faith with the Indigenous peoples concerned in order to obtain free, prior and informed consent, prior to the approval of any project affecting their lands or territories and other resources."

preambular clause stating that 'Canadian courts have stated that [s 35] rights are not frozen and are capable of evolution and growth.'" (Metallic, p. 17)

But court challenges are lengthy and costly, and the outcome can't be guaranteed. Another approach is for First Nations to organize themselves to deal with project proposals and consultation requests from a position of strength. Scholars Papillon and Rodon call this a "relational approach" to the question of consent, whereby Indigenous peoples are no longer in a reactionary mode to consultation requests or trying to adapt themselves to project assessment processes designed by others.

> "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." (Papillon & Rodon, 2017, p. 18).

Such an approach, supported by the work performed by the Centre for First Nations Governance, requires First Nations to be ready to respond effectively, clearly, and with self-governing legitimacy to proposals for development in their territories. Among other things, this involves mapping and documenting traditional land use and occupancy; coming to internal agreement between citizens about how they define meaningful consultation; the terms under which such consultation should happen; how as a nation they will determine whether to provide consent; and defining their own standards for reasonable accommodation of their rights.

Read More:

Bankes, N. (2020). 'The Duty to Consult in Canada post-Haida Nation', pp. 256-279, in *Arctic Review on Law and Politics*, 11, 256–279. https://doi.org/10.23865/arctic.v11.2568

Borrows. J. (2018). How the United Nations declaration on rights changes Canada's relationship with Indigenous Peoples [video]. Retrieved from Centre for International Governance Innovation website: https://www.cigionline.org/multimedia/how-undrip-changes-canadas-relationship-indigenous-peoples/

Chan, E. (2019). New BC legislation now in force to implement Declaration on the Rights of Indigenous Peoples Act. *Norton Rose Fulbright*, *Legal Update*, 2.

Land, Lorraine, Who's afraid of the big, bad FPIC? The evolving integration of the United Nations Declaration on the Rights of Indigenous Peoples into Canadian law and policy "Volume 4, Issue 2, May 6, 2016. Northern Public Affairs (ISSN 2291-9902) https://whatis.fpic.info/files/npa_right_to_fpic.pdf (last accessed July 2023)

Manuel, A. (2017). The reconciliation manifesto: Recovering the land, rebuilding the economy. Toronto, Canada: James Lorimer Publishers

Martin Papillon and Thierry Rodon, Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach. IRPP Insight 16 (July 2017). Montreal: Institute for Research on Public Policy.

Metallic, Naiomi, Breathing Life into Our Living Tree and Strengthening our Roots: The Promise, Limits and Challenge of An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples - forthcoming in Rewriting the Canadian Constitution, eds., Richard Alpert, Wade Wright, Kate Berger, and Michael Pal (2023). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4232531

Morellato, M. (2008). The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights. Research Paper for the National Centre for First Nations Governance February 2008). https://fngovernance.org/wp-content/uploads/2020/06/Crown_Duty_to_Consult__Accommodate.pdf

United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, c. 14). https://www.laws-lois.justice.gc.ca/eng/acts/u-2.2/page-1.html

Declaration on the Rights of Indigenous Peoples Act (British Columbia 2019) https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044

United Nations Declaration on the Rights of Indigenous Peoples. Adopted by the UN General Assembly Resolution 61/295 of 13 September 2007. UN doc. A/RES/61/295. https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html