Free, Prior And Informed Consent

"...resource extraction and other major development projects in or near indigenous territories [are] one of the most significant sources of abuse of the rights of indigenous peoples worldwide. In its prevailing form, the model for advancing with natural resource extraction within the territories of indigenous peoples appears to run counter to the self-determination of indigenous peoples in the political, social and economic spheres."
United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, 2011.

Indigenous peoples have the right to participate in decisions that could affect their rights, property, cultures and environment. They have the right to determine their own priorities.

In this broad context, Indigenous peoples have the right to make their own decisions to say 'yes' or 'no' whenever governments or corporations propose actions that could impact their lives and futures. The exercise of this human right is known as "free, prior and informed consent" or FPIC.

FPIC matters

FPIC puts decision-making power in the hands of the people who will live with the consequences of the decision. Indigenous peoples are still living with the tragic impacts of decades of ill-advised decisions imposed on them by governments that claimed to be acting in their best interests.

Respect for FPIC puts Indigenous peoples in a more equitable position when their representatives come to the table with government or industry. A commitment to move forward on the basis of mutual respect and agreement promotes reconciliation rather than conflict. FPIC also provides government, business and Indigenous peoples with the certainty that they seek for long-term planning.

What does FPIC require?

The way in which FPIC is applied will vary, depending on the facts and law of each situation and the traditions of the Indigenous peoples affected. There are, however, a few common elements.

Indigenous peoples must have access to all relevant information to make their decisions. This may require independent assessment of the potential consequences, such as an environmental and social impact assessment. It may also require a human rights impact assessment. The process may require the translation of information into Indigenous languages. Critically, Indigenous peoples must have the time and opportunity to reach an informed conclusion based on their own forms of decision-making. The process must be free of intimidation, threat of retaliation or other forms of duress.

Indigenous consent is foundational in Canadian history and law

The Royal Proclamation of 1763 – sometimes referred to as an Indigenous bill of rights – sets out the principle that the government could only gain access to Indigenous peoples' land and resources with their free consent. This same principle is at the heart of the Treaty-making process.

This factsheet is endorsed by: Amnesty International Canada, Assembly of First Nations, Canadian Friends Service Committee (Quakers), Chiefs of Ontario, Grand Council of the Crees (Eeyou Istchee), Indigenous World Association, KAIROS: Canadian Ecumenical Justice Initiatives, Union of BC Indian Chiefs

Free, prior and informed consent enables governments to meet their constitutional obligations

The Supreme Court has called the protection of Aboriginal and Treaty rights an "underlying constitutional principle" and a "constitutional value." The rights in s.35 of the *Constitution Act, 1982* are described as "a national commitment." Governments cannot simply impose their will on Indigenous peoples. The Court has called for reconciliation of pre-existing Aboriginal sovereignty and assumed Crown sovereignty. The perspectives of the common law and Aboriginal peoples must be reconciled, with equal weight placed on each.

The Supreme Court has defined a mandatory constitutional obligation that is described as "the duty to consult." But this duty requires more than just informing Indigenous peoples about a project. Canadian courts have consistently said that where there are impacts on Indigenous peoples' rights, appropriate *accommodation* is also required. In the *Delgamuukw* and *Haida Nation* decisions, the Court added that, on "very serious issues", the full consent of the Aboriginal nation would be required.

Respect for FPIC required by international law

FPIC is well established in international human rights law. FPIC is affirmed in numerous articles of the *UN Declaration on the Rights of Indigenous Peoples*, adopted by the United Nations in 2007. A decade earlier, the UN Committee on the Elimination of Racial Discrimination issued an authoritative interpretation of the *International Convention on the Elimination of All Forms of Racial Discrimination* that called on states to respect Indigenous peoples' right of free, prior and informed consent.

FPIC is one expression of the right of self-determination, a foundational principle of international law. Indigenous peoples' right to make their own decisions about the use of their lands, territories and resources also flows from their customary land rights, which are affirmed and protected in international law.

In addition, the expert bodies responsible for the oversight of international and regional human rights treaties have also recognized that FPIC is an essential safeguard for other human rights, such as the rights to culture, health, food and development. This standard of protection is necessitated by the situation of discrimination, marginalization and disadvantage faced by Indigenous peoples around the world.

All governments in Canada are expected to live up to international human rights standards. Canadian courts and tribunals use such standards in the interpretation of domestic laws. Courts presume that Canadian legislation conforms with international law.

FPIC is the term to use

The federal government has denounced FPIC by saying that Indigenous peoples don't have the power of "veto." However, the term "veto" is not used in the *UN Declaration*.

The term "veto" implies an absolute power, i.e. an Indigenous people could block a proposed development regardless of the facts and law in any given case. However, human rights, including the rights of Indigenous peoples, are generally relative and not absolute. International and regional human rights bodies have been clear that the standard of FPIC is not absolute, FPIC must be applied on objective grounds, based on consideration of all the rights at stake and the importance of their protection. In calling on states to respect the right of FPIC, the *UN Declaration* also calls on states to work with Indigenous peoples to ensure that any disputes over the application of Indigenous peoples' rights are resolved in a fair and timely way through effective procedures.

The federal government's use of the term "veto" is deliberate and misleading. The government is invoking Supreme Court decisions stating that Indigenous peoples don't have the power of "veto." It's important to note, however, that in the Indigenous context, the Supreme Court has not defined what "veto" means. Critically, as noted above, the Supreme Court has clearly stated that Indigenous consent is required "on very serious issues."

In other words, despite government claims, the standard of FPIC in international law is not incompatible with Canadian Constitutional law as interpreted by the Supreme Court.

Support for FPIC is growing

Major international industry associations, including the International Council on Mining and Metals, have already endorsed FPIC as a voluntary standard of corporate practice. The International Financial Corporation has gone farther, making FPIC a condition of its lending to private corporations wherever there is potential for "serious, unavoidable impacts." A growing number of ethical funds are applying FPIC as a criterion for investment.