



free, prior & informed consent

“Indigenous Peoples must be part of decision making when our rights and well-being are at stake. Working with us to determine what that looks like is the smart thing to do. It will lead to fewer acrimonious decisions, fewer court battles, more timely decisions, and better outcomes for us all.”

- Grand Chief Wilton Littlechild, UN Permanent Forum on Indigenous Issues 2018

Indigenous peoples have the right to self-determination which the United Nations recognizes as a fundamental human right. This includes the right to determine their own priorities and control how their lands and resources will be used and for what purposes. First Nations, Inuit and Métis peoples also have the right to fully participate in federal, provincial and territorial decision-making processes that impact their rights. The federal, provincial and territorial governments also have a responsibility to ensure that their decisions, and those of third parties, do not contribute to further harms to Indigenous peoples.

In this broad context, Indigenous peoples have a clear right to determine for themselves whether to say ‘yes’ or ‘no’ or ‘yes with conditions’, whenever governments or corporations propose actions that could impact their lives, lands, jurisdictions and futures. The exercise of this aspect of the right to self-determination is known as “free, prior and informed consent” or FPIC.

FPIC matters

Indigenous peoples are still living with the devastating impacts of colonialism and decades of ill-advised decisions imposed on them by governments. In contrast, FPIC is the remedy and the protection required to ensure that



decisions are made by the very people who best understand what is at stake and who must live with those consequences.

Meeting the FPIC standard also 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 the federal, provincial and territorial governments, corporations 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, including the customs, traditions and laws 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 the translation of information into Indigenous languages. This may also require access to independent assessment of the proposal and its potential consequences, including possibly through a formal environmental and social impact assessment process. 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 peoples' right to grant or withhold consent is foundational in Canadian history and law

The Royal Proclamation of 1763 affirms the legal standard that the Crown can 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.

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

Canada's Supreme Court has identified the protection of Aboriginal and Treaty rights as an "underlying constitutional principle" and a "constitutional value." The rights in s.35 of the *Constitution Act, 1982* are described as "a national commitment." The Court has called for reconciliation of the pre-existing sovereignty of Indigenous peoples and the assumed sovereignty of the Crown. The perspectives of the common law and the legal traditions of Indigenous peoples must be "reconciled", with equal weight placed on each. In other words, the federal, provincial and territorial governments cannot simply impose their will on Indigenous peoples. A joint resolution of any differences must be worked out.

The Supreme Court has defined a mandatory constitutional obligation that is described as "the duty to consult." 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 Supreme Court added that, on "very serious issues", the full consent of the Indigenous 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 high standard of protection is necessitated by the situation of discrimination, marginalization and disadvantage faced by Indigenous peoples around the world.

Prime Minister Justin Trudeau declared to the United Nations General Assembly in September 2017: "the world expects Canada to strictly adhere to international human rights standards - including the *United Nations Declaration on the Rights of Indigenous Peoples* - and that is what we expect of ourselves, too."

FPIC requirements in international law have legal implications in Canada

Canadian courts and tribunals generally favour interpretations of domestic law that are consistent with Canada's international obligations. Canadian courts and tribunals have already used the *UN Declaration* as a source of interpretation of Canadian laws. The federal government has also committed to harmonizing Canada's laws with the *UN Declaration*.

Governments must do more than merely 'seek consent'

During the negotiations on the *UN Declaration*, Indigenous peoples expressly rejected the phrase "to seek consent" and it is not found in the *Declaration*. The standard of FPIC in international law requires more. Wherever the FPIC standard applies, decisions should only move forward if Indigenous peoples have granted their consent.

When does FPIC apply?

Whether or not FPIC is the appropriate and necessary standard depends on the facts and law in each specific case.

Indigenous peoples' inherent rights and title means that there is a consent requirement for decisions about the use of their lands. There may also be consent requirements written into treaties and other agreements between Indigenous peoples and the state. In other instances, the risks that a particular decision poses may give rise to the necessity of FPIC. Factors to be considered would include the severity of the potential harm to the exercise of Indigenous rights, and any heightened risks or vulnerability resulting from past violations.



The former UN Special Rapporteur on the rights of Indigenous Peoples, James Anaya, said in his 2014 report on Canada, “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.”

FPIC is not an ‘absolute veto’

For years, the federal government mis-characterized FPIC by incorrectly describing it as an absolute veto. This was a misleading effort to raise false concerns about the *Declaration*. The implication was that FPIC was an arbitrary power that would automatically override all other considerations. This is not accurate.

Human rights are rarely absolute. The *UN Declaration* includes numerous balancing provisions. These provisions affect how other specific provisions such as the requirement of FPIC are interpreted and applied. Two important principles stand out. First, in applying the standard of FPIC, the impact on the legitimate rights of others, including other Indigenous peoples, must be considered. Second, all states have an obligation to ensure a fair and transparent process to resolve disputes arising from implementation of the *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. 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.

Who has the right to grant or withhold FPIC on behalf of an Indigenous nation?

The *UN Declaration* is clear that decisions must be made through the processes and procedures freely chosen by Indigenous peoples themselves.

Canada’s colonial policies have had a disruptive and often devastating impact on Indigenous peoples’ own governance institutions. For many, this is a period of restoration and revitalization of Indigenous governance and law. Under the *UN Declaration*, the federal, provincial, and territorial governments have an obligation to support Indigenous peoples in strengthening and maintaining their institutions. Governments and corporations must not take advantage of any capacity challenges or internal divisions within Indigenous communities. That would not be free, prior and informed consent.

Support for FPIC is growing

Major international industry associations, such as the International Council on Mining and Metals, have already endorsed FPIC as a voluntary standard of corporate practice. The UN Global Compact - a global initiative to promote responsible business practices - has concluded, “FPIC should be obtained whenever there is an impact on indigenous peoples’ substantive rights (including rights to land, territories and resources, and rights to cultural, economic and political self-determination).”

The International Financial Corporation - the private sector arm of the World Bank Group - has made FPIC a mandatory condition of its lending to private corporations wherever there is potential for “serious, unavoidable impacts.” A growing number of ethical funds are also applying FPIC as a criterion for investment.