Development Divided:

Exploring the Meaning of Free, Prior and Informed Consent by Indigenous Peoples in Resource Development

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ABSTRACT

In 2007 the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly. At the time, Canada held an objector status to the Declaration. The Harper government feared that UNDRIP's provision requiring governments to seek Indigenous communities' "free, prior and informed consent" (FPIC) before approving projects would severely constrain resource development by granting too much power to Indigenous communities. It was not until 2016 following the election of Prime Minister Trudeau that Canada announced its full support of UNDRIP without qualification. While the adoption marks a significant shift in policy, the Trudeau government has not clearly illustrated how UNDRIP's provisions will be implemented. In particular there remains great ambiguity regarding the meaning of FPIC. This paper seeks to contribute to our understanding of the meaning of FPIC as a legal and policy principle that can underpin the approval of resource development projects. The paper is organized in two parts. In the first section, key legal and academic debates about UNDRIP and its FPIC principle are reviewed. The second section of the paper features an analysis of 100 briefs submitted to an Expert Panel appointed by the Trudeau government to review the federal environmental assessment process. This analysis unpacks how both Indigenous communities and industry stakeholders understand the practical meaning of FPIC and Indigenous consent to resource development projects. Ultimately this paper concludes that while the specific mechanisms in which FPIC must be implemented vary across communities and corporations, Indigenous communities and Canadian industry primarily see this principle as a call for building durable and respectful partnerships in resource development as opposed to granting a right to Indigenous peoples to exercise a veto over such projects.

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Introduction:

In recent years, the Canadian government has committed itself to a "reconciliation" with Indigenous peoples. Having taken stock of the legacy of decades of colonization, broken promises and damaging policies as well as the dire living conditions of many Indigenous communities, the Trudeau government has promised to build a relationship with Indigenous peoples that will be more respectful of their rights, their autonomy and their aspirations.

Following a key recommendation of the Truth and Reconciliation Commission, established to address the legacy of the residential school policy,[1] the government has also explicitly committed to make the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) a cornerstone of this new relationship.[2]

UNDRIP has been quite controversial in Canada. When it was officially adopted by the United Nations General Assembly on September 13, 2007, Canada was one of only four countries to have voted against its adoption,[3] triggering great domestic and international controversy. At the time, the Harper government believed that some of its provisions would require fundamental changes to Canadian constitutional law. In particular, the government feared that UNDRIP's provision requiring governments to seek their "free, prior and informed consent" (FPIC) before approving projects potentially affecting Indigenous rights and ancestral lands

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[1] Truth and Reconciliation Commission of Canada, *Calls to Action*, Winnipeg, Manitoba, 2012, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf, 1.

[2] "United Nations Declaration on the Rights of Indigenous Peoples," *AADNC-AANDC.gc.ca*, Indigenous and Northern Affairs Canada, 2017, http://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958

[3] "United Nations Declaration on the Rights of Indigenous Peoples: Historical Overview," *UNDESA,* https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html. The Declaration received 144 votes in favour of its adoption, 11 abstentions, and 4 votes against. Australia, New Zealand, The United States, and Canada comprised those states against the adoption. Since its adoption all those opposed have since reversed their position.

would severely constrain resource development by granting too much power to Indigenous communities. While the government formally endorsed the Declaration in November 2010 in the face of political pressure, it did so only by stipulating that it considered UNDRIP to be an "aspirational" document without force of law.[4]

In this context, the decision of the Trudeau government to fully commit to the implementation of UNDRIP, "without qualification", was a significant shift in policy. However, it did not clarify the meaning of the Declaration's most controversial provisions. In particular, there remains great ambiguity – and controversy – about the meaning of FPIC and its practical implications for resource development.[5] While unequivocally endorsing FPIC, the Trudeau government has not offered much guidance about its actual meaning and application. Yet, clarifying the operational meaning of FPIC, hopefully in a manner that will generate support from the main stakeholders of resource development projects, will be essential to reconciliation with Indigenous peoples and future support for the development of natural resources.

This paper seeks to contribute to our understanding of the meaning of FPIC as a legal and policy principle that can underpin the approval of resource development project. I will argue that, while there is much legal and academic disagreement about the intended and actual meaning of FPIC, Indigenous communities and Canadian industry mostly see this principle as a call for building durable and respectful partnerships in resource development as opposed to granting a right to Indigenous peoples to exercise an *ex ante* veto over resource development projects.

[4] "Canada's Statement of Support on UNDRIP," *Indigenous and Northern Affairs Canada*, 2012, http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.
[5] Article 32 of UNDRIP specifies the principles and rights of Indigenous peoples in relation to development projects occurring on or impacting their traditional lands. See Annex I for the full text of Article 32.

The paper is organized in two parts. In the first section, I will review some of the legal and academic debates about UNDRIP and its FPIC principle. More specifically, I will discuss whether UNDRIP should be seen as having the force of law, whether its drafters intended FPIC to give Indigenous communities a veto over resource projects and, if not, how the principle might differ from the current constitutional obligations of the federal government to consult Indigenous communities before authorizing projects on their ancestral lands. Then, in the second section of the paper, I will analyze a sample of 100 briefs submitted to an Expert Panel appointed by the Trudeau government to review the federal environmental assessment process. The Panel was specifically asked by the government to consider how UNDRIP's principles should be included in the assessment process underpinning project approvals[6] and, in its consultation of the Canadian public, the Panel explicitly invited comments on how the assessment process should engage Indigenous communities. I use this opportunity to analyze 68 briefs submitted by Indigenous communities and 32 briefs submitted by industry groups to unpack how they understand the practical meaning of FPIC and Indigenous consent to resource development projects.

1: Exploring the Meaning of UNDRIP's FPIC Principle

The United Nations Declaration on the Rights of Indigenous Peoples serves as an international instrument to reinforce and support the rights of Indigenous peoples. According to the United Nations Division for Social Policy and Development,

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[6] Expert Panel, "Terms of Reference," *Expert Panel Review of Environmental Assessment Processes*, http://eareview-examenee.ca/panels-terms-of-reference/.

[the Declaration] establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.[7]

The Declaration was developed by the United Nations Working Group on Indigenous Populations, established in 1982 by the Economic and Social Council (ECOSOC). The working group's mandate was to establish a set of minimum standards which would serve to protect Indigenous peoples from the oppression, marginalization, exploitation, and discrimination. The Declaration was officially adopted by the United Nations General Assembly on September 13, 2007.[8]

In 2013, six years after the adoption of UNDRIP by the General Assembly, the United Nations Office of the High Commissioner for Human Rights (OHCHR) published a document providing basic definitions of free, prior and informed consent. According to the OHCHR free implies that consent is given without the presence of "coercion, intimidation, or manipulation;"[9] prior implies that efforts to seek consent occur "sufficiently in advance" of the project or activity being pursued;[10] lastly, informed implies that information relating to the project including but not limited to its duration, size, pace, reversibility, locality, and expected impacts is provided.[11]

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[7] "United Nations Declaration on the Rights of Indigenous Peoples: Historical Overview," *UNDESA,* https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.
[8] Ibid.
[9] *Free, Prior and Informed Consent of Indigenous Peoples,* Office of the High Commissioner for Human Rights, prepared by Indigenous Peoples and Minorities Section, OHCHR Rule of Law, Equality and Non-Discrimination Branch, September 2013, http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf&action=default&DefaultItemOpen=1, 2.
[10] Ibid.
[11] Ibid.

While these definitions provide a base level understanding of FPIC, they do little to acknowledge how FPIC should be implemented in practice. A key factor in the operationalization of FPIC is whether or not supporting states hold legal obligations to adhere to UNDRIP, and how the legal status of UNDRIP influences the implementation of its principles.

1.1: Is UNDRIP Legally Binding?

Unlike treaties, UN Declarations are not legally binding. This has been a point of criticism from those who wish to see UNDRIP incorporated into legislation. Many legal and Indigenous scholars argue that while UNDRIP itself as a document is not legally binding, the principles it sets forth *are*. Scholars such as Alexandra Xanthaki, claim UNDRIP is "substantially informed by international law" and the "rights it proclaims are consistent with general international law and the developments of international standards on indigenous rights is widely perceived as an international law project."[12] Xanthaki supports the perspective that the Declaration is an agreed interpretation of existing legally-binding treaties and human rights concerning Indigenous peoples.[13] This view is also supported by UN special rapporteur on Indigenous rights, James Anaya, who argues that perhaps the Declaration's provisions in full do not reflect international law; however, to claim that none of these provisions reflect existing law is untenable.[14] The United Nations Division for Social Policy and Development also clearly

[12] Ken S. Coates, Blaine Favel, "Understanding FPIC," *Aboriginal Canada and the Natural Resource Economy Series*, Canada: Macdonald-Laurier Institute, 2015, 11.
[13] Ibid.
[14] Ken S. Coates, Blaine Favel, "Understanding FPIC," 11.

supports this interpretation in its summary of UNDRIP as it "elaborates on existing human rights standards and fundamental freedoms."[15]

This argument can be applied to FPIC more specifically as the principles first arose as the struggle for the right to self-determination particularly within the context of involuntary displacement.[16] Under Article 32(1), the right to self-determination prefaces Article 32(2)'s principle of free, prior and informed consent.[17] The right to self-determination is a key purpose of the United Nations, and explicitly noted as such in the Charter of the United Nations signed in 1945. Under *Chapter I: Purpose and Principles* of the Charter, Article (2) states that the United Nations purpose is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples…"[18] *Chapter XI: Declaration Regarding Non-Self-Governing Territories* notes that those Members of the United Nations who have assumed responsibility for the administration of territories in which people have yet to develop a self-government structure are committed to, *inter alia*, ensuring cultural protection of said groups, and assisting in the development of their political institutions.[19]

The right to self-determination is also defined within the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples. In the Declaration, Article 2 states,

[15] "United Nations Declaration on the Rights of Indigenous Peoples: Historical Overview," *UNDESA,* https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.
[16] Philippe Hanna & Frank Vanclay, *Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent, Impact Assessment and Project Appraisal*, 31:2, Taylor and Francis: 2013, 6.
[17] See Annex 1 for full text of Article 32.
[18] United Nations, "Chapter I: Purposes and Principles," in *Charter of the United Nations*, October 1945, http://www.un.org/en/sections/un-charter/chapter-i/index.html.
[19] United Nations, "Chapter XI: Declaration Regarding Non-Self-Governing Territories," in *Charter of the United Nations*, October 1945, http://www.un.org/en/sections/un-charter/chapter-xi/index.html

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[20]

Because it is rooted in the right to self-determination, the principles of FPIC reflect the argument that UNDRIP is rooted in customary norms and rights, thus, making it indirectly binding. The notion that something is indirectly binding creates ambiguity over how to uphold it. Such ambiguity is evident in Canada's evolving approach to the implementation of UNDRIP. From originally opposing the agreement, to accepting it as an "aspirational" and non-legally binding document, Canada's stance on UNDRIP's legal status was clear: the Declaration was not legally binding nor did it reflect customary international law.[21] However, Prime Minister Trudeau has significantly departed from this position. In 2017, he appointed a working group tasked with the review of all federal laws and operational policies as they relate to Indigenous peoples. The objectives of the working group included helping Canada to comply to UNDRIP principles and to implement *all* of the Truth and Reconciliation Commission (TRC) calls to action.[22]

Within the Calls to Action by the TRC, published in 2015, Article 43 and 44 explicitly call upon the Government of Canada and its respective provincial and territorial governments to implement UNDRIP:

> 43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

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[20] United Nations, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, The United Nations and Decolonization, 1960. http://www.un.org/en/decolonization/declaration.shtml.
[21] "Canada's Statement of Support on UNDRIP," *Indigenous and Northern Affairs Canada*, 2012, http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142.
[22] Office of the Prime Minister, "PM announces Working Group," Ottawa, Canada, 2017, https://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related.

> 44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples.[23]

Additionally, in November 2017, Justice Minister Jody Wilson-Raybould announced the Liberal government would back a bill to fully implement UNDRIP.[24] Bill C-262 was put forth by the New Democratic Party (NDP) MP Romeo Saganash in April 2016[25], and calls for the Government of Canada to "take all measures necessary to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples."[26] The Bill was adopted by the Standing Committee on Indigenous and Northern Affairs on May 8, 2018[27] and passed the third reading of Parliament on May 30, 2018 with 206 votes in favour and 79 votes against.[28] On May 31, 2018 the Bill entered into the Senate for its first reading.

These actions mark a clear departure from Prime Minister Stephen Harper's stance on supporting UNDRIP and reflect disagreement over the legal status of the Declaration. While the Government of Canada has not commented on the legal status of UNDRIP in its entirety, they have clearly indicated that the Declaration's principles imply something tangible. UNDRIP is not merely a vague acknowledgement of Indigenous rights; it must translate into specific policies or

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[23] Truth and Reconciliation Commission of Canada, *Calls to Action*, Winnipeg, Manitoba, 2012, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf, 4.

[24] Jody Wilson-Raybould (@Puglass), "Pleased 2 announce our Gov'ts support for Bill C-262," November 20, 2017, https://twitter.com/Puglaas/status/932809267215781890.

[25] *Bill C-262: An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration On the Rights of Indigenous Peoples*, 1st sess., 42nd Parliament, April 21, 2016, http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/first-reading.

[26] John Paul Tusker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration," *CBC News*, November 21, 2017, http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037.

[27] Canada Parliament House of Commons Standing Committee on Indigenous and Northern Affairs. *Report and Government Responses (Bill C-262).* 1st sess., 42nd Parliament, May 8, 2018, Report 13. https://www.ourcommons.ca/Committees/en/INAN/StudyActivity?studyActivityId=9965131.

[28] *Vote Details - Bill C-262*. 1st sess., 42nd Parliament, May 30 2018, Vote No. 684. https://www.ourcommons.ca/Parliamentarians/en/votes/42/1/684. Liberal votes: 159 in favour 0 against; Conservative votes: 0 in favour, 79 against; NDP votes: 36 in favour, 0 against.

actions. To understand how FPIC can translate into specific policies we must first understand the limitations of the right. More specifically, we must address the highly contested notion that FPIC could imply a right to veto a development project.

1.2: Does FPIC Mean a Veto?

Whether or not the principles of FPIC grants Indigenous communities the right to a veto is another primary area of contention highlighted by Mr. Harper. This concern is shared by both states and international bodies who have flagged the ambiguity over whether or not FPIC entails a right to veto development projects. In order to address these concerns, we can look to the drafting process of UNDRIP, specifically in relation to Article 32.

As UNDRIP took nearly two decades to draft, there were significant wording changes to Article 32. The 1993 draft adopted by the Working Group on Indigenous Populations (WGIP) stated that Indigenous peoples had "the right to require that states obtain their free and informed consent."[29] The writing of this draft did not include participation of state delegates and was the product of the five independent members of the WGIP and Indigenous representatives.[30] When the draft declaration reached the Commission on Human Rights, States expressed reservation on numerous provisions including Article 32. In order to incorporate the views of States into the drafting process, the Commission set up the Working Group on the Draft Declaration (WGDD).[31] Suggestions regarding the rephrasing of Article 32(2) weakened its provision on consent. For

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[29] Mauro Barelli, "Development projects and indigenous peoples' land: defining the scope of FPIC", in *Handbook of Indigenous Peoples' Rights*, ed. Damien Short, and Corrinne Lennox Taylor and Francis: 2016, 71.
[30] Ibid.
[31] Mauro Barelli, "Development projects and indigenous peoples' land: defining the scope of FPIC", 72.

example, Brazil suggested the requirement that States "take account of the free and informed consent of Indigenous peoples in the approval of any project affecting their lands and resources."[32] In a 2006 Expert Seminar, Andrea Carmen raised concern with several propositions on the language of Article 32. Carmen noted that suggestions such as "states shall use their best efforts to obtain" or "where possible, states shall undertake effective consultations" effectively sought to weaken the right of FPIC.[33]

In the final adopted Declaration, Article 32's wording changed from "Indigenous peoples have the right to [...] require that States obtain their free and informed consent prior to the approval of any project" to "States shall consult Indigenous peoples in order to obtain their free and informed consent…"[34] In understanding the drafting process of Article 32(2) Mauro Barelli notes that the article could not possibly mean Indigenous groups have a veto – as this would mean the original draft, which required consent be obtained for a project, would have not have been amended. In the same vein, Dwight Newman argues that the wording of Article 32 signifies that an *attempt* to obtain consent is satisfactory.[35]

Despite these revisions of the Declaration, there are theorists and bodies that believe that the principles of FPIC provide indigenous groups the right to veto a project. For example, the Committee on the Elimination of Racial Discrimination (CERD) proposed a more radical understanding of Indigenous groups' rights to territory and culture. CERD has stated that "no

[32] United Commission on Human Rights, *Rerpot of the Working Group on Indigenous Populations of the Sub-Commision on Prevention of Discrimintation and Protection of Minorities,* 53rd session, Economic and Social Council 1996, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G96/143/84/PDF/G9614384.pdf?OpenElement, 53.
[33] Andrea Carmen, "Free Prior and Informed Consent," presented at the *Expert Seminar on Indigenous Peoples' Permanent Sovereignty Over Natural Resources and On Their Relationship to Land*, International Indian Treaty Council, 2006, HR/GENEVA/IP/SEM/2006/BP.7.
[34] Newman, Dwight, *Political Rhetoric Meets Legal Reality*, Macdonald-Laurier Institute, 2017, 14.
[35] Ibid.

decisions directly relating to the rights and interests of Indigenous peoples should be taken without their informed consent."[36] Specifically in regards to UNDRIP, Dr. Pamela Palmater, Chair in Indigenous Governance at Ryerson University, asserted that First Nations communities have a legal right via FPIC to exercise a veto over development projects.[37] However, comments like the one made by Dr. Palmater are in fact incorrect. Ken Coates and Blaine Favel caution against the interpretation of equating UNDRIP to Canadian Law when, as discussed in the previous section, it is not in fact adopted into legislation.[38] Furthermore, the drafting process of Article 32 strongly reflects that FPIC does not equate to a veto right.

If FPIC does not equate to a veto right, what happens when consent is not granted? Keeping in mind the different interpretations of UNDRIP's legal status, there is no definitive consequences laid out in the Declaration in regards to failure to uphold a specific principle. A range of options have been proposed for cases where consent is not given. For example, Haugen states that if Indigenous communities do not consent to a given project the State is still obliged to uphold the human rights of indigenous peoples.[39] Haugen argues that compensation and the continuing of a project should not be the default option when consent is not given; rather, he advises States to temporarily suspend the project and conduct a review period[40] and, if necessary enforce "an outright cancellation."[41] An opposing view is that the duty to consult is suffice, and whether or not consent is given should not impact the development process.[42] Newman, goes so

[36] Mauro Barelli, "Development projects and indigenous peoples' land: defining the scope of FPIC", 75.
[37] Ken S. Coates, Blaine Favel, "Understanding FPIC," 4.
[38] Ibid, 5.
[39] Hans Morten Haugen, "The Right to Veto or Emphasising Adequate Decision-Making Processes: Clarifying the scope of the free, prior and informed consent (FPIC) requirement", *Netherlands Quarterly of Human Rights*, vol. 34/3, Netherlands: Netherlands Institute of Humans Rights, 2016, 266.
[40] Ibid, 267.
[41] Ibid, 268.
[42] Newman, Dwight. *Political Rhetoric Meets Legal Reality*. August 2017. Macdonald-Laurier Institute, 9-11.

far as to state that implicating the duty to consult with the obtainment of consent would actually limit the effectiveness and scope of Canada's current consultation process by tieing up resources in lengthy and futile consultation processes.[43]

The Special Rapporteur on the Rights of Indigenous Peoples Rodolfo Stavenhagen provides a middle ground to these two opposing perspectives by distinguishing between small and large-scale developments projects. Stavenhagen's successor, Special Rapporteur James Anaya, supported this distinction, highlighting that the severity of potential impact should influence the degree to which obtaining consent is prioritized.[44] The Special Rapporteurs have thus supported what has been referred to as a "sliding-scale" approach to FPIC, and therefore indicate that in some cases the process of consultation is enough to respect the rights of Indigenous communities. However this calls into question who must be consulted in order to uphold FPIC.

In order to determine who to consult, it must be clarified the FPIC is a collective rather than individual right.[45] Therefore, as per the UN OHCHR, it is not necessary for every single individual of an indigenous group to consent to a project.[46] Additionally the Canadian Constitution understands Aboriginal rights as collective based rights.[47] This raises the questions of who is to participate in consultation on behalf of these collectives? While UNDRIP clearly

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[43] Newman, Dwight. *Political Rhetoric Meets Legal Reality*. August 2017. Macdonald-Laurier Institute, 11.
[44] Mauro Barelli, "Development projects and indigenous peoples' land: defining the scope of FPIC," , 77.
[45] The wording of Article 32 uses the language "indigenous peoples", as opposed to "individuals" - language which is used in the vast majority of the Articles in UNDRIP.
[46] "Free, Prior and Informed Consent of Indigenous Peoples," *OHCR.org*, Prepared by: Indigenous Peoples and Minorities Section, OHCRC Rule of Law, Equality and Non-Discrimination Branch, Geneva, Switzerland: Office of the High Commissioner for Human Rights, 2013, http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf&action=default&DefaultItemOpen=1.
[47] *Ogichidaakwe v. Ontario (Energy),* 2014, ONSC 5492.

states that “representative institutions” will serve as the focal point for consultation processes,[48] determining which bodies represent the community poses yet another obstacle to even begin engagement let alone obtain consent. As First Nation governments are established under settler-state legislation and elected through democratic processes their band councils are easily recognizable to the Crown in determining who to consult.[49] However, when considering communities whose representative organizations are not established within legislation, such as Metis and “non-status Indians”, issues arise as such bodies are not recognized as legitimate representatives of their communities.[50] Even if representative institutions provide an obvious answer on who to consult, there are questions of legitimacy regarding elected band councils. Particularly in Canada, bands possess the authority to determine the measures in which they grant membership. This has been a point of contention as such authority is important in upholding the right to self-determination; however, the complexities of Indigenous identity have contributed to cases where individuals are not granted membership, or have limited membership rights under band bylaws.[51] Therefore, representative institutions may only represent a limited scope of the individuals impacted by a development project. Additional issues arise when considering that not every individual may agree or accept their represented institution or elected officials. This is evident in the 2009 Proceedings of the Standing Senate Committee on Aboriginal Peoples where Elle Gabriel from the Mohawk Turtle Clan presented on the issues of discrimination and colonial impacts on her community’s traditional longhouse model of

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[48] Hans Morten Haugen, “The Right to Veto or Emphasising Adequate Decision-Making Processes: Clarifying the scope of the free, prior and informed consent (FPIC) requirement,” 259.

[49] Ian Peach, “Who speaks for whom?,” *Canadian Public Administration*, volume 59, No. 1, The Institute of Public Administration of Canada, March 2016, 96.

[50] Ibid, 96.

[51] Megan Furi, Jill Wherrett, *Indian Status and Band Membership Issues*, Library of Parliament, 1996, revised 2003, https://lop.parl.ca/content/lop/researchpublications/bp410-e.htm#3bandtx.

governance. In rejecting colonization, Gabriel and other community members did not recognize the band council as legitimate or representative of their community.[52] Such cases demonstrate the disconnect between Indigenous social structures and knowledge systems and the colonial democratic system.[53]

In sum, the position of whether FPIC equates to a veto, and what processes follow the withholding of consent is highly contested; however, when understanding FPIC in practice, it is reasonable to conclude that FPIC does not support the right to veto a project. Rather FPIC operates as a driving force, if not objective, in a larger consultation process. Considering these factors the question then becomes: if FPIC does not imply a right to veto then how does it differ from Canada's current constitutional obligations?

1.3: How is FPIC different than the Duty to Consult?

In relation to Indigenous land rights, Article 35 of the Canadian Constitution 1982 recognizes aboriginal and treaty rights which includes land claim agreements.[54] In what has become known as the "trilogy of cases"[55] the Supreme Court of Canada (SCC) ruled that the Crown has a duty to consult and accommodate, when necessary, Indigenous peoples in regards to actions that may impact Aboriginal or Treaty rights.[56] Treaty rights refer to the rights set out in

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[52] "Issue 18 - Evidence," *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, October 7, 2009, https://sencanada.ca/en/Content/Sen/committee/402/abor/18ev-e.

[53] T. Alfred, "Colonialism and state dependency," *Journal de la santé autochtone, 5(2),* 2009, 49. In an attempt to organize large and diverse groups of peoples, the government enforced band council elections. The election system disrupted the traditional role of elders within indigenous communities as leaders and sources of knowledge.

[54] "Part II: Rights of the Aboriginal Peoples of Canada", in *Constitution Acts, 1867 to 1982,* Government of Canada Justice of Law Website, 2018, http://laws-lois.justice.gc.ca/eng/const/page-16.html#h-52

[55] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73. [2004] 3 S.C.R. 511., *Taku River Tlingit v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. and *Mikisew Cree First Nation v. Canada*, 2005 SCC 69 [2005] 3 S.C.R. 388.

[56] *Aboriginal Consultation and Accommodation: Updated guidelines for federal officials to fulfill the duty to consult*, Government of Canada, Minister of the Department of Aboriginal Affairs and Northern

both pre-1973 treaties and comprehensive land claim agreements.[57] Aboriginal rights refer to practices and customs, such as hunting and fishing, that distinguish the unique culture of each First Nation and were practiced prior to European contact.[58] Related to Aboriginal rights is Aboriginal title: a collective property right to the land itself that extends beyond specific traditions or practices.[59] Interpreted by the SCC in 1997, Aboriginal title exists when a community can prove use of land prior to assertion of British sovereignty, and present day use of the land must not be irreconcilable with the nature of the community's attachment to the land.[60] Ultimately, the SCC ruled that Aboriginal title granted the title holding community the right to choose how the land is used.[61]

The duty to consult is based on the judicial interpretation of the obligations of the crown under Section 35 of the Constitution. In addition to the common law interpretation, specific requirements to consult are set out in land claim, self-government, and consultation agreements. [62] The Supreme Court of Canada has affirmed that three elements must be present to trigger the duty to consult: contemplated Crown conduct, potential adverse impact, and potential or established Aboriginal or Treaty rights recognized and affirmed under section 35 of the

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Development Canada, 2011.
http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675#chp1_2

[57] "Treaty Rights," *Indigenous and Northern Affairs Canada*, 2010, http://www.aadnc-aandc.gc.ca/eng/1100100028602/1100100028603.

[58] "Aboriginal Rights," *Indigenous and Northern Affairs Canada*, 2010, http://www.aadnc-aandc.gc.ca/eng/1100100028605/1100100028606.

[59] "Aboriginal Title," *Indigenous and Northern Affairs Canada*, 2010, http://www.aadnc-aandc.gc.ca/eng/1100100028608/1100100028609.

[60] Delgamuukw v. British Columbia, 1997 SCC [1997] 3 SCR 1010.

[61] Marie Moratello and Mandell Pinder, "Aboriginal Title and Rights: Foundational Principles and Recent Developments," *Annual Review of Civil Litigation 2008*, (Ottawa: Carswell, 2008), 5.

[62] *Aboriginal Consultation and Accommodation: Updated guidelines for federal officials to fulfill the duty to consult*, Government of Canada, Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011, 8.

Constitution Act, 1982.[63] The Haida Nation(2004), Taku River (2004), and Mikisew Cree (2005) cases resulted in this landmark decision.[64]

The Supreme Court of Canada has also ruled that the Crown, where appropriate, has a duty to accommodate when actions may pose such adverse impacts on Aboriginal or Treaty rights. The duty to accommodate is secondary to the consultation process; that is, while the threshold for triggering the duty to consult is low, the Crown may establish that there is no duty to accommodate due to a weak claim.[65] Fulfillment of this duty may be completed, *inter alia*, through project adjustments, development of mitigating measures, creation of terms and conditions to authorize the project, or financial compensation.[66] In many cases, industry proponents are better equipped to handle accommodation measures as they possess the capacity to make structural changes to a given project.[67]

In the case of *Dalgamuukw* the SCC concluded that when Aboriginal title may be impacted there is *always* a duty to consult, but this duty exists on a spectrum: minor infringements on Aboriginal title would merely require a discussion on decision making, and in more extreme cases the full consent of the Aboriginal nation may be required.[68] In a 2014 decision[69] the Supreme Court concluded that where consent from title-holding groups has not been granted, the Crown must demonstrate substantive consultation and a public purpose that

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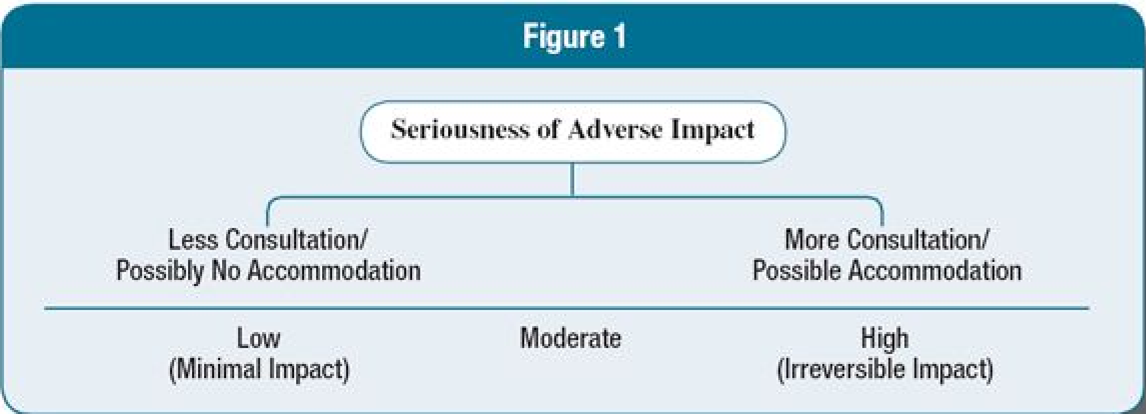
[63] *Aboriginal Consultation and Accommodation,* Government of Canada, 2011, 11.
[64] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73. [2004] 3 S.C.R. 511., *Taku River Tlingit v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550. and *Mikisew Cree First Nation v. Canada*, 2005 SCC 69 [2005] 3 S.C.R. 388.
[65] Ibid, 21.
[66] Ibid, 43.
[67] Ibid, 19.
[68] *Delgamuukw v. British Columbia*, 1997 SCC [1997] 3 SCR 1010.
[69] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44. [2014] 2 SCR 257.

adequately justifies the infringement on these rights. As the Duty to Consult is a SCC interpretation, outcomes vary based on the claim at stake.



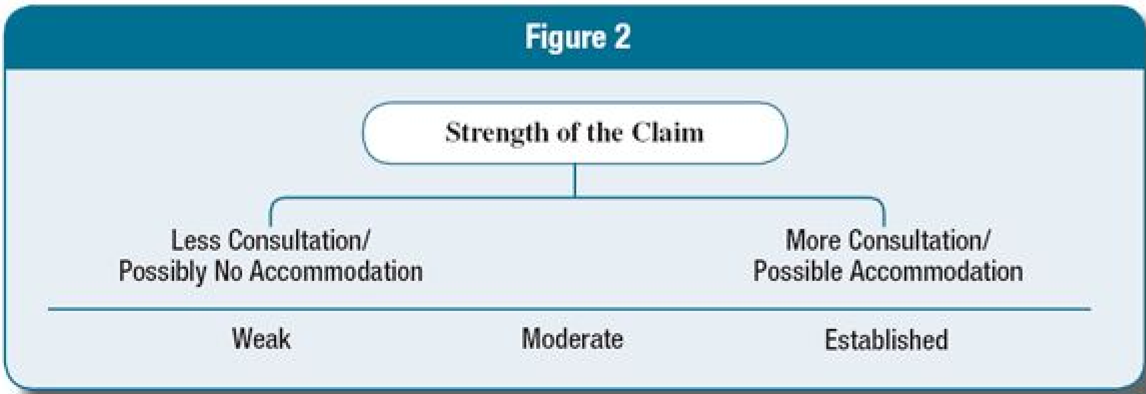


Figure 1 & 2 taken from the 2011 Guidelines, p. 41

The Crown's duty to consult shares similarities with the understanding of FPIC in practice. These similarities are cited as reasons to forgo the adoption of FPIC as Canada's duty to consult is suffice. Dwight Newman for example claims that by manipulating Canada's duty to consult to become a duty to obtain consent would require narrowing the scope of current consolation which would infringe upon the power and authority Indigenous communities hold in regards to natural resources.[70] Newman's argument is based on the assumption that the

[70] Dwight Newman, *Political Rhetoric Meets Legal Reality*. August 2017. Macdonald-Laurier Institute, 11.

implementation of FPIC would adhere to the same framework as the duty to consult regarding strength of claim when in fact UNDRIP does not qualify the application of its provisions based on varying levels or subsets of Indigenous rights. FPIC in practice would thus have a "stronger duty" than the duty to consult.[71] Whether or not a Canadian interpretation of FPIC in practice would maintain such a broad sweeping approach is yet to be determined.

The second key difference lies in what Boutilier calls "limitations on the right at issue." Under the duty to consult, Aboriginal and treaty rights can be infringed upon if the Crown is able to provide adequate justification of the infringement. Justification has been interpreted in several cases including *R v Sparrow* where the test for infringement required the government to show that it "discharged its duty to consult and accommodate, its actions were backed by a compelling and substantial objective; and that the governmental action is consistent with the Crown's fiduciary obligation to the group."[72] Under Article 32, UNDRIP does not provide a test for the justification of infringing on rights.[73]

Finally, the Duty to Consult is not triggered with the intention and objective of obtaining consent.[74] While it has been recommended in SCC cases that obtaining consent is the best way to ensure the duty has been met,[75] it is not the driving force behind consultations. FPIC on the other hand always seeks to obtain consent. Regardless of the degree of potential impact, the objective and intention of consultations under these principles is to move towards consent.

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[71] Boutilier, *Western Journal of Legal Studies*, 2017, 6.
[72] Ibid.
[73] However, under Article 46(2), UNDRIP sets out basic provisions on the limitation of rights which highlight that provisions cannot not be discriminatory or infringe on international human rights.
[74] Dwight Newman, *Political Rhetoric Meets Legal Reality*. August 2017. Macdonald-Laurier Institute 8.
[75] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44. [2014] 2 SCR 257. "Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group."

Conclusion

As evident from this section, there are conflicting claims on how FPIC materializes into practice. The tensions between legal status, veto rights, and the significant differences between FPIC and the duty to consult pose barriers in settling on a concrete practical definition of FPIC. One area where FPIC will soon have to take a more precise operational form is environmental assessment (EA) processes. EAs are legally required before significant development projects are approved. On the basis of a careful assessment of a projects' anticipated impact, the agency responsible for the EA will recommend conditional approval of projects.[76] The impact of projects on the environmental conditions of Indigenous communal lands has always been an important issue to consider.[77] Additionally, EAs are a primary framework in which the duty to consult is mobilized.[78] The following section will provide an overview of the Government of Canada's Environmental Assessment Revision process and analyze the recommendations made on behalf of Indigenous communities and industry stakeholders on how EAs could operationalize the principles of FPIC.

[76] "Basics of Environmental Asessments," *Canada.ca*, Government of Canada, 2018, https://www.canada.ca/en/environmental-assessment-agency/services/environmental-assessments/basics-environmental-assessment.html#gen01.

[77] "Aboriginal Consultation in Federal Environmental Assessment," *Canada.ca*, 2016, https://www.canada.ca/en/environmental-assessment-agency/programs/aboriginal-consultation-federal-environmental-assessment.html.

[78] Bruce McIvoer, "The Duty to Consult at the Supreme Court in 2017: Part 3—Existing Infringements, Environmental Assessments and Remedy," *FirstPeoplesLaw*, 2018, https://www.firstpeopleslaw.com/index/articles/341.php.

2.1: FPIC & Canada's Environmental Assessment Revision

Canada's current environmental assessment process is regulated according to the Canadian Environmental Assessment Act 2012 (CEAA 2012). Within CEAA 2012 impact assessment processes, Indigenous communities and the protection of their rights are marginally accounted for. This claim is made based on the official text of CEAA 2012 where the language regarding Indigenous participation is used in a such a way to depict such participation as merely a suggestion rather than a right.[79]

Where the act fails to clearly define the role of Indigenous peoples within EA processes speaks volumes to its limited ability or intention to protect the rights of Indigenous communities. More specifically, CEAA 2012 makes no mention of UNDRIP despite the Canadian Government's statement of support in 2010. The Act has received criticism from both environmental protection groups and industry experts for its "industry-friendly" approach which seeks to fast-track the assessment process. This approach has come under-fire for its lack of transparency and consideration for environmental damage and risk.[80] Indigenous communities and organizations have been leaders in the call for a revised impact assessment process notably in the Northern Gateway case where First Nation's lead the charge against the pipeline expansion

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[79] *Canadian Environmental Assessment Act 2012*. Published by the Minister of Justice to http://laws-lois.justice.gc.ca/eng/acts/C-15.21/index.html, 12. For example, under paragraph 18, Consultation and Cooperation with Certain Jurisdictions, the act states that the Responsible authority's or Minister's obligations "must offer to consult and cooperate" in EA processes with any jurisdiction that holds power in relation to the assessment referred to under subsection 2.The language used (i.e. must *offer*) retracts from any concrete expectation and requirement of consultation.

[80] Chris Tollefson, "Canada's current environmental assessment law" *PolicyOptions*, 2016, http://policyoptions.irpp.org/magazines/july-2016/canadas-current-environmental-assessment-law-a-tear-down-not-a-reno/ and Robert B. Gibson, Meinhard Doelle, A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment," *Journal of Environmental Law and Practice* vol. 2, 259.

- efforts that resulted in the Federal court overturning the approval of the project after finding Ottawa failed to uphold the duty to consult First Nations within the EA process.[81] The political rhetoric regarding the lack of transparency, prioritization of Indigenous rights, and foresight for environmental damages under the CEA 2012 created a moment of ripeness for the Liberal party to capitalize on the desire for change.

In 2015, as part of her ministerial mandate, Minister of Environment and Climate Change Catherine McKenna was tasked with implementing a review process of Canada's current environmental assessment processes in order to:

> ...regain public trust, help get resources to market, and introduce new fair processes that will restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with provinces and territories to avoid duplication; ensure decisions are based on science, facts and evidence and serve the public's interest; provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and require project advocates to choose the best technologies available to reduce environmental impacts.[82]

On June 20, 2016, the Government of Canada launched the comprehensive review of environmental and regulatory processes including CEAA 2012.[83] The scope of this review process involved recognizing the objectives of UNDRIP to ensure recommendations reflect its principles and how to ensure amended legislation enhances engagement, consultation and participatory capacity of Indigenous groups.[84]

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[81] *Gitxaala Nation v. Canada*, 2016 FCA 187.
[82] "Review of environmental assessment processes: expert panel terms of reference," Canada.ca, 2017, https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/final-terms-reference-ea.html.
[83] "Government launches review of environmental regulatory processes to restore public trust," Canada.ca, 2017, https://www.canada.ca/en/environmental-assessment-agency/news/2016/06/government-launches-review-of-environmental-and-regulatory-processes-to-restore-public-trust.html.
[84] Expert Panel, "Terms of Reference."

In August 2016, following the launch of the review processes, Minister McKenna established an Expert Panel to review federal environmental assessment processes.[85] The Expert Panel was responsible for engaging and consulting Canadians, Indigenous people, provinces and territories and industry stakeholders.[86] Beginning in September 2016 until December 2016,[87] the Expert Panel held in-person engagement events in 21 cities across Canada. The in-person sessions were split into two one day events with one public session and one indigenous session.[88] Canadians were also able to submit online input until December 23, 2016[89] and were provided key questions to answer in their submissions. As incorporating the principles of UNDRIP was a mandated component of the review process, Principle 2.3 of the submission questions asked,

> What is the best way to reflect the principles of United Nations Declaration on the Rights of Indigenous Peoples, including the principles of Free, Prior and Informed Consent and the right to participate in decision-making in matters that would affect Indigenous rights, in federal environmental assessment processes?[90]

The following analysis seeks to extract the recommendations and comments made by Indigenous communities and industry stakeholders to elucidate the practical meaning of FPIC and Indigenous consent within revised EA processes.

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[85] Expert Panel, *Expert Panel Review of Environmental Assessment Processes*, http://eareview-examenee.ca/.
[86] Ibid.
[87] Following these engagement sessions, the Expert Panel's report, *Building Common Ground*, was released on April 5, 2017 The publishing of the report was immediately followed by a public comment period held from April 5 to May 5, 2017 allowing individuals and organizations the opportunity to respond to Building Common Ground. The Government of Canada has published a discussion paper of the new approach to impact assessments. See *Better Rules for Major Project Reviews* https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes.html.
[88] Expert Panel, "About the Review," *Expert Panel Review of Environmental Assessment Processes*.
[89] Ibid. Funding for transportation was also made available to promote in-person participation of Indigenous Peoples and Canadians.
[90] Expert Panel, "What We've Heard," *Expert Panel Review of Environmental Assessment Processes*, http://eareview-examenee.ca/what-weve-heard/.

2.2: Methodology

All in person and online submissions from the engagement process were made available to the public on eareview-examenee.ca.The final data sets were constructed from this list.

Step 1: Data Cleaning and Categorization

Prior to cleaning, there were over 900 submissions available online. Cleaning the data required screening out submissions that were unusable for the data analysis. Submissions that met the following criteria were removed from the preliminary list of submissions: transcripts, duplicate submissions, supporting documents that lacked informative or relevant context (e.g. maps, legal briefs, PowerPoint presentations without text), submissions with no clear author, and submissions made by American organizations or companies.

The categorization process occurred simultaneously with the cleaning process during which submissions that were not screen out were filtered into one of three categories: Indigenous, Industry, and Other. As expected, there were elements of overlap in the categorization process. Overlap was accommodated for by utilizing self-identification as the leading indicator of which category a submission should be placed in and, when necessary, categorization was supplemented by additional research to ensure accuracy.

Submission Type	Criteria
Indigenous submissions	Feedback made by individual bands, tribes, governments, self-identifying individuals,[91] and Indigenous led and mandated organizations.
Industry submissions	Feedback made by development, natural resource, and/or energy companies, and environment-law legal firms or representatives[92]
Other submissions	Feedback made by private citizens on behalf of their own personal views, academic organizations or institutions, Government agencies and departments of all levels, community led organizations, environment non-profits.

Following the categorization and cleaning process, a second round of screening was completed in order to merge multiple submissions made by a single organization into a single datum and to screen out all submissions in the Other category. After the final round of screening there was a total of 179 Indigenous submissions and 85 Industry submissions.

Step 2: Random Representative Sample Selection

As this paper seeks to focus solely on Indigenous and Industry submissions, these two categories were added to determine a total population. A representative sample of 100 submissions was then taken randomly based on each categories population percentage.

[91] In this case, those who self-identified as indigenous were only placed in the indigenous category (as opposed to the Individual category) if they explicitly stated their recommendations were connected to their ethnic and cultural background. This was done so as to not assume indigenous Canadians automatically speak on behalf of a group or community.
[92] Criteria for Industry categorization was based on the premise that someone (or a body) has an exclusively revenue based economic stake in the assessment results of a project, or the assessment process itself

Total Population: 264

Indigenous: 179 (67.8%)

Industry: 85 (32.2%)

Sample: 100

Indigenous: 0.678 * 100 = 68 submissions

Industry: 0.322 * 100 = 32 submissions

The submissions were listed alphabetically and numbered in their respective categories. The random number generator feature in Microsoft Excel was used to randomly select which submissions would be analyzed. The selected submissions were input into NVivo to complete text queries and organize the material.

Step 3: Term Selection

The final step before the analysis of Indigenous and Industry submissions was determining which terms and phrases would be searched for in order to analyze the submissions. Based on the findings laid out in previous sections, the following terms were submitted as text queries:

- Free, prior and informed consent
- FPIC
- Consent
- Consult
- Veto

2.3: Discussion

Indigenous Submissions

The analysis of the 68 Indigenous submissions uncovered several key areas of concern and recommendations. First and foremost, was the issue of meaningful consultation where Indigenous groups found they were not only faced with barriers to participate in EA processes, but when they were able to do so, they found their engagement or contributions were not impactful in the outcome of the EA. Second, was the need for greater collaboration between Indigenous peoples and the Government of Canada. Recommendations included complete overhauls of the EA process itself, and also the development of mechanisms to ensure FPIC was met. The following discussion unpacks these two main areas of concern.

Meaningful Consultation

While this paper seeks to understand interpretations of free, prior and informed *consent*, concepts or mentioning of consultation were also analyzed. As consultation with Indigenous groups is a duty of the Crown, and thus one of the ways in which the SCC interprets the rights of Indigenous peoples within the realm of development projects, understanding how consultation is defined by Indigenous groups is integral to unpacking FPIC. Furthermore, many indigenous submissions provide recommendations on the basis that FPIC should be the objective of consultation, and it is therefore necessary to understand how these consultation processes *should*

occur. These submissions align with the previous sections unpacking of FPIC as an outcome and objective in practice.

Of the language used to reflect on and make recommendations to the EA process, the term "meaningful consultation"[93] was referenced in 52 submissions. The general sentiment of the Indigenous submissions was that in order for FPIC to be given, meaningful consultation must occur; without *meaningful* consultation, any consent would not meet the qualifications of free, prior, or informed.

Upholding Free Consent - Decision Making Power in the EA Process

A consultation process that leads to free consent is one in which Indigenous groups have the authority and ability to make decisions under their own agency. These submissions reflect the notion that FPIC is instrinctly linked to the right of self-determination and that Indigenous communities have the right to determine the manner in which consent is granted or withheld.[94] Shoel Lake provided an example of the exercising of these rights in their recommendation of consent based decision making in which Indigenous peoples have the ability to make final decisions about whether or not they consent to an activity, and, if consent is granted, determine what mitigation, accommodation or other measures are required.[95]

This emphasis on decision making was supported by Roxanne Meawasige who noted that effective consultation is defined as "First Nation's ability to participate in the decision-making process that affects their rights and land, rather than to merely participate in a

[93] Other variations of this phrase were used including "adequate consultation" and "effective consultation".
[94] Cathal M. Doyle. *Indigenous Peoples, Title to Territory, Rights and Resources*, 125.
[95] "Shoel Lake Band No.4," in *Indigenous Submissions Data Set,* 8 and "Magnetawan First Nation," in *Indigenous Submissions Data Set,* 8.

formality that is currently Canada's duty to consult."[96] Indigenous groups would thus not only be heard during the consultation process, but also have their views and recommendations impact the EA process effectively. Similarly, Lyackson First Nation and Gitxaala both called for shared decision making, noting that infringements on Aboriginal title can be avoided by involving Indigenous groups directly in the decision making committee of EAs.[97] The Manitoba Metis Federation went as far as to say that it is "obvious that collaborative assessment and decision-making processes...are necessary to secure [an] agreements' free, prior, and informed consent".[98]

Several of these recommendations also called for legislative changes which would implement the decision-making role of impacted Indigenous communities directly into the legal framework.[99] For example, Lower Nicola Indian Band (LNIB) stated,

> For its application, consent demands a legal and policy recognition by the Federal Crown, ensuring that legislation and policy provides Federal decision-makers the requisite space to recognize Indigenous governments and their decision-making roles and authorities, and appropriately structure their discretion to ensure Title and Rights and the honour of the Crown are upheld.[100]

A single arching theme of LNIB's submission is that the federal environmental assessment requires a complete overhaul rather than a "mere reformation" if it its to adequately align with the standards of UNDRIP and reflect Aboriginal title, rights and treaty rights.[101] Free consent cannot be granted when Indigenous Nations' only option for participation is *within* a federally

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[96] Roxanne Meawasige, "Grand Council Treaty #3" in *Indigenous Submissions Data Set*, 3.
[97] "Gixtaala Nation," in *Indigenous Submissions Data Set,* 10.
[98] "Manitoba Metis Federation," in *Indigenous Submissions Data Set,* 9.
[99] "Lower Nicola Indian Band," "Animakee Wa Zhing First Nation 37," and "Lyackson First Nation" in *Indigenous Submissions Data Set.*
[100] "Lower Nicola Indian Band" in *Indigenous Submissions Data Set*.
[101] Ibid.

structured policy framework.[102] In order for Indigenous peoples to exercise their agency in a decision making capacity, a new framework must focus on creating partnerships and decision-making processes *between* the Federal Crown and Indigenous Nations.

Elsipotog provided a more general recommendation, calling for "indigenous-driven environmental assessment processes" which would ensure Indigenous perspectives and concerns inform the review process.[103] Other submissions did not explicitly call for an entirely new EA process but sought to have "CEAA 2018" explicitly require the participation and decision-making authority of indigenous groups in the process.[104] The takeaway from this subsection on meaningful consultation is that free consent cannot be given in the absence of the ability and agency to make *impactful* decisions.

Upholding Prior Consent - Consent at every stage

A common theme among the recommendations and dialogue surrounding meaningful consultation - and lack thereof - was the notion of when consent was sought, and thus when consultation occurs. Indigenous groups frequently raised concerns over the lack of adequate consultation prior to the final decision making process, and called for their involvement at every stage of the impact assessment process.[105] Aroland First Nation highlighted seven key stages where Indigenous consent should be sought:

1) Determination of whether an EA is required, and what type (screening)
2) Draft and final EIS guidelines (scoping)
3) Assessment of alternative means (alternatives evaluation)
4) Draft and final EIS

[102] CEAA 2012 was structured without the consent and consultation of Indigenous groups. This is a point highlighted in several other submissions including Aroland First Nation.
[103] "Elsipogtog First Nation," in *Indigenous Submissions Data Set*.
[104] "United Chiefs and Councils of Mnidoo Mnising," in *Indigenous Submissions Data Set,* 4-6.
[105] "Animakee Wa Zhing First Nation 37" in *Indigenous Submissions Data Set.*

> 5) Sufficiency and completeness determinations (review panels and NEB/CNSC processes)
> 6) Draft and final Crown EA report
> 7) Prior to final decision by the Minister or GIC, including any determination of whether a project is in the public interest despite significant residual effects.[106]

La Nation des Innus de Matimekush Lac John called for increased opportunities for Indigenous communities to participate in impact assessment processes:

> Currently, "opportunities for participation", that is, the stages where funding is granted to support the participation of the public and First Nations, are limited to revision of the summary of the impact study and the federal environmental assessment report. These should be expanded to allow Aboriginal communities to comment project descriptions and guidelines for the preparation of impact studies. Taking these steps into account would support the principle of prior consultation on plans and project proposals.[107]

The Kitsumkalum Indian Band noted that meaningful consultation would require a consultation process to decide how consultation with an Indigenous group should occur in the first place, noting that the process is currently pre-determined without Indigenous input.[108] In this way, before the consultation process even begins Indigenous voices and concerns are already left unheard. Gitga'a First Nation builds on this point in their recommendation in stating that under the current CEAA the current consultation process is not designed to elicit indigenous consent, as often decisions on whether or not to approve the project have already been made prior to any engagement with Indigenous communities.[109] In relation to this point Gitga'a First Nation provided several project-level recommendations:

> Engage with First Nations early in project development (i.e., prior to planning and development of the Project Description) to properly scope CEA with an adaptive management approach...At the onset of a project (i.e., prior to development of Project Description), proponents must be legally required to provide capacity support to First

[106] "Aroland First Nation" in *Indigenous Submissions Data Set,* 17.
[107] "La Nation des Innus de Matimekush Lac John," in *Indigenous Submissions Data Set.*
[108] "Rina Gremeinhardt - Kitsumkalum Indian Band," in *Indigenous Submissions Data Set*, 3.
[109] "Spencer Greening" in *Indigenous Submissions Data Set*, 4.

> Nations. In addition, the Crown must provide efficient capacity for the early engagement stage as well (i.e. prior to the draft Environmental Impact Statement Guidelines are reviewed by Aboriginal groups).[110]

As indicated by both the Assembly of Manitoba Chiefs and the Gwich'in Tribal Council, consultation throughout the various stages of an impact assessment entails that FPIC is an *ongoing* process and not a one time occurance.[111] To uphold the prior qualification of FPIC, consent must be sought well before the shovel hits the soil.

Upholding Informed Consent - Time & Money

Informed consent cannot be granted if Indigenous communities lack the necessary information, capacity, and time to process, analyze and develop feedback. The two primary and interelated areas of concern raised in this regard were capacity/funding, and timelines. Lack of funding was noted frequently as a cause of limited engagement and participation for Indigenous communities. Beyond the limited ability to simply participate, was also the inability to *effectively* analyze and interpret complex and often scientific data. Such barriers are the result of a combination of lack of resources and time. Timelines often restricted the ability of Indigenous communities to conduct the appropriate outreach (due to a lack of internal capacity) necessary for data analysis, legal feedback, etc. The Saugeen Ojibway Nation (SON) explicitly addressed the principle of informed consent stating,

> In order to satisfy this principle, the Crown will be required to: (a) ensure information about all aspects of the project is provided to the Indigenous Nation including the environmental impact evaluations (created by the proponent or the Crown) on the basis of the Science knowledge system, (b) ensure sufficient time and opportunity is provided to the Indigenous Nation to understand, access, and analyze the information received, and (c) ensure appropriate opportunity and capacity for the Indigenous Nation to engage in

[110] "Spencer Greening" in *Indigenous Submissions Data Set*, 9-11.
[111] "Assembly of Manitoba Chiefs," "Bobbie-Jo Greenland" in *Indigenous Submissions Data Set*.

> reciprocal and meaningful engagement between Indigenous-Science knowledge systems for the purpose of effectively communicating the Indigenous Nation's concerns regarding the predicted effects of the project.[112]

The Science Knowledge system mentioned by SON encompasses the involvement of Indigenous knowledge holders in the process of decision-making, and the incorporation of an assessment process which centralizes the use of traditional knowledge in measuring impacts.[113]

The United Chiefs' also recommended the development of mechanism to ensure capacity and timeline issues were addressed. They called for the development of a Compliance Office to ensure that FPIC principles were followed in EA's. Preparing easily accessible funding for participation and consultations, and building scientific and technical capacity via a mentorship program to develop local expertise were two of the critical functions this Compliance Office would be tasked with.[114] The Conseil des Innus d'Ekuanitshit, Elsipogtog Band Council, Stswecem'c Xgat'tem First Nation, Adams Lake, Dease River First Nation, Spuzzum First Nation, Wabauskang First Nation, and Shuswap Nation Tribal Council also all made separate recommendations in favour of increasing funding when necessary and adopting deadlines that are compatible with the pace of the indigenous communities involved in order to facilitate Aboriginal participation.[115] These 8 submissions highlighted the repercussions of limited internal capacity stating,

> The funding provided to Indigenous peoples is often insufficient to allow them to meaningfully participate in the environmental assessment process. As a result, they are often forced to bear the burden of studying the potential effects of a project on their land

[112] "Saugeen Ojibway Nation," in *Indigenous Submission Data Set*.
[113] Ibid.
[114] "United Chiefs and Councils of Mnidoo Mnising," in *Indigenous Submissions Data Set*, 7.
[115] "Conseil des Innus d'Ekuanitshit," "Elsipogtog Band Council," "Stswecem'c Xgat'tem First Nation," "Adams Lake First Nation," "Dease River First Nation," "Spuzzum First Nation," "Wabauskang First Nation," and "Shuswap Nation Tribal Council," in *Indigenous Submissions Data Set*.

> and resource use. To undertake this work, financial and human resources must be diverted away from other important government programs and services.[116]

They also noted that consultation processes occur because *industry* wishes to proceed with a resource development project, and therefore Indigenous groups should not be expected to fund the resource intensive processes necessary to grant consent.[117]

A common thread in the submissions regarding informed consent was that information provided to communities should be in common language.[118] La Nation des Innus de Matimekush Lac John expanded on this point, noting that such information should also be presented in the common tongue of the community and that mechanisms should be developed to evaluate whether communities actually have a fair understanding of the environmental impacts.[119]

In this way, informed does not simply mean proponents and/or the federal government has provided Indigenous communities with information, but have taken steps to ensure the information can be engaged with, understood, and processed. Taking these additional steps requires acknowledging the existing inequalities between Indigenous communities, proponents, and government bodies that attribute to limited capacity. As Roxanne Meawasige noted, consultation can not be deemed effective if such inequalities are not taken into consideration.[120]

Gitanyow raised an additional issue with consultation and informed consent: consent is not being sought from enough indigenous groups. That is to say, the implications of a

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[116] "Conseil des Innus d'Ekuanitshit," "Elsipogtog Band Council," "Stswecem'c Xgat'tem First Nation," "Adams Lake First Nation," "Dease River First Nation," "Spuzzum First Nation," "Wabauskang First Nation," and "Shuswap Nation Tribal Council," in *Indigenous Submissions Data Set*.
[117] Ibid.
[118] Ibid.
[119] "La Nation des Innus de Matimekush Lac John," in *Indigenous Submissions Data Set*.
[120] Roxanne Meawasige, "Grand Council Treaty #3" in *Indigenous Submissions Data Set*, 4.

development project extend further beyond the borders of consultation process. Gitanyow noted their experience with Salmon Ecosystems and downstream impacts stating:

> We still [have] to demand, prove and even litigate to have our right acknowledged and [be consulted] accordingly, specifically [when] projects [are not based] within Gitanyow territory.[121]

Animakee First Nation addressed a similar issue and recommended a series of community meetings to determine the scope of the EA process and increase the number of Indigenous communities consulted.[122] In this regard, informed consent cannot be given if all impacted parties are not engaged in the consultation process to begin with.

If FPIC is understood by and large as the objective of consultation efforts, then unpacking what meaningful consultation means to indigenous communities is a crucial step in answering the question of how FPIC can be upheld within the EA process. What we can gather from these submissions is that without meaningful consultation, without decision making power, continual engagement, and access to information, FPIC cannot be granted. However, in order to achieve such elements of consultation there is a need for increased collaboration between Indigenous communities, industry, and government.

Increased Collaboration

Perhaps the greatest point of contention in placing the principles of FPIC within the EA Process is whether or not Indigenous groups have the right to a veto. While the Supreme Court of Canada has clearly indicated that indigenous authority over traditional lands and territories does not extend to this length, it remains a crucial component in framing conversations on how FPIC

[121] "Gitanyow Hereditary Chiefs," in *Indigenous Submissions Data Set*, 18.
[122] "Animakee Wa Zhing First Nation 37," 10, in *Indigenous Submissions Data Set*.

should be implemented. Despite this contention the term veto was only used in 4 of the 68 submissions in relation to Indigenous rights: BC Assembly of First Nations, Fort McMurray Metis, *Shíshálh* Nation and Gitga'at First Nation. Even more notably, not a single submission explicitly indicated that Indigenous peoples heald a right to veto projects. All three submissions simply reiterated the government's position that Indigenous peoples do not have a right to veto projects. Within these 4 submissions, the strongest language used which could infer the implementation of something similar to a veto was in Animakee Wa Zhing First Nation's submission which stated that an Environmental Assessment process should, at minimum, require the "full consent of any First Nation whose rights will be impacted by a proposed project."[123] The Fort McMurray Métis (Metis Nation of Alberta Local #1935) et. all submission indicated a more moderate approach to consent, recognizing that the duty to obtain consent is clearly not a duty that infers a veto right. These communities stated that all efforts must be made by the Crown to secure consent.[124] *Shishalh* Nation similarly noted that, "FPIC cannot exist where a people do not have the option to meaningfully withhold consent."[125] However, in citing Supreme Court cases, *Shishalh* Nation's definition of meaningfully withholding consent also recognized that meaningfully withholding consent does not equate to a veto.[126]

While veto was mentioned marginally, the term "consent" was discussed in a total of 52 submissions. These numbers are significant as they suggest where the priorities of Indigenous groups and communities lie: clearly a debate on whether or not they hold veto rights is not a major concern. What was discussed was not the need for Indigenous groups to have ultimate

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[123] "Animakee Wa Zhing First Nation 37," in *Indigenous Submissions Data Set,* 9.
[124] "Fort McMurry [et all]" in *Indigenous Submissions Data Set*, 15.
[125] "*Shíshálh* Nation" in *Indigenous Submissions Data Set,* 6.
[126] Ibid, 7.

control over EA decisions, but rather the need for greater collaboration mechanisms and processes between Indigenous groups and the Crown in making decisions within the EA process; one of which was the implementation of a collaborative consent model. The Manitoba Metis Federation recommended this model stating,

> Collaborative consent within nation-to-nation agreements can provide the flexibility and local and regional accommodations required for practical dialogue, informed decision-making processes, good information sharing, and projects that enhance sustainability objectives.[127]

This model would require, *inter alia*,

> nation-to-nation agreements on how collaborative consent processes will work...mutually determined scoping agreements that include the full range of Metis interests and perspectives on potential project impacts... [and] mutually determined mechanisms for including Indigenous knowledge.[128]

Aroland First Nation and Magnetawan First Nation also supported this model within their own submissions. Magnetawan First Nation supported the collaborative consent model in the following statement,

> To us in essence this approach means making land use and development decisions together, at every step of the way with government...collaboration should include membership on EA review panels and government review teams for those communities potentially affected by a designated project, and participation in writing key EA documents including the EIS guidelines and final government EA report to inform government decision-makers.[129]

Both Nations concluded that collaborative assessment and decision making based on nation-to-nation relationships and agreements is necessary to secure FPIC.[130] In line with this framework, Tk'emlups Secwepemculecw called for a "walking on two legs" approach to EAs.

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[127] Manitoba Metis Federation" in *Indigenous Submissions Data Set,* 10.
[128] Ibid.
[129] "Magnetawan First Nation" in *Indigenous Submissions Data Set*,
[130] "Aroland First Nation," "Magnetawan First Nation," 8 in *Indigenous Submissions Data Set.*

This approach would incorporate both Western and Indigenous knowledge systems, governing structures, and perspectives into the EA process.[131]

LNIB laid out another option with their recommendation of a co-jurisdictional model, recognizing that the standard of FPIC its explicitly linked to self government and thus "speaks to the jurisdictional and decision-making authority of Indigenous peoples."[132] According to LNIB's submission

> We should be consciously and systematically designing a co-jurisdictional model of environmental assessment where Indigenous and Federal jurisdictions are structuring approaches that recognize and respect their distinct authorities, and provides for alignment, effectiveness, and efficiency in how those jurisdictions respectively engage in assessing major projects.[133]

As LNIB stated, FPIC cannot be implemented without a legal and policy recognition of consent by the Crown. A co-jurisdictional model would provide Federal decision-makers the space and ability to recognize Indigenous governments and their decision-making roles.[134] LNIB provided two outlines of potential co-jurisdictional models. First, parallel Crown and Indigenous environmental assessments which would

> involve parallel Crown and Indigenous assessments that interact and intersect in various ways. At the end, decisions would come from the Crown and Indigenous assessments...If decisions are not in harmony, there would be processes outlined to seek to achieve resolution.[135]

Second, a jointly designed, structured and authorized integrated environmental assessment where

> Indigenous governments and the Federal Crown would jointly adopt a model for an integrated environmental assessment pursuant to their respective authorities, jurisdictions,

[131] "Tk'emlups Secwepemculecw," in *Indigenous Submissions Data Set*.
[132] "Lower Nicola Indian Band," in *Indigenous Submissions Data Set,* 13.
[133] Ibid, 15.
[134] Ibid, 13.
[135] Ibid, 15.

> and laws...a joint body would delegate the authority by both the Crown and Indigenous governments to conduct and render a decision regarding an environmental assessment, applying jointly agreed to standards and criteria...Formal efforts to align decisions would be applied prior to, and post, decisions as necessary.[136]

Both models would recognize and respect the distinct authorities of the Crown and Indigenous governments, provide a clear and coherent process for seeking alignment between decisions of the Federal Crown and Indigenous Rights holders, and support a process which would facilitate the development of consensus and "collaborative conflict resolution".[137] Lower Nicola states that these factors must be present in order for consent to be reflected in the environmental assessment process. The Anishinaabeg of Kabapikotawangag Resource Council also called for

> ...a 21st century sustainability assessment process that allows for multi-jurisdictional review at the regional EA level for regions like Kabapikotawangag where significant mineral activity is poised to change the landscape forever.[138]

This model would be tailored to the consultation processes laid out in Treaty #3 which would involve Aboriginal partnership with the Crown in "timeline development, analytical tool development, decision-making capacity development, baseline socio-economic research and reporting, and monitoring, engagement and capacity funding approvals."[139]

Smaller scale recommendations that emphasized the need for increased collaboration were also provided. For example, the *Shishalh* Nation recommended the establishment of a government-to-government board comprised of federal government representatives and those First Nations impacted by a proposed project. Shishalh Nation noted that

> Creating a relationship where further ecological data can be safely shared and used between Indigenous governments and the federal government has the potential to be

[136] "Lower Nicola Indian Band," in *Indigenous Submissions Data Set,*16.
[137] Ibid, 13-15.
[138] "Sara Mainville" in *Indigenous Submissions Data Set*, 4.
[139] Ibid, 6-7.

> mutually beneficial for both parties...For this to be accomplished the federal government needs to respect the First Nations and Indigenous governments are on equal footing and working in partnership.[140]

The board would serve to facilitate said collaboration and partnership between Indigenous communities and federal government. Examples of collaboration would include the joint development of budgets, timelines, expert appointments, and the scoping process.[141]

Proposed collaboration initiatives also touched on what happens when consent is not reached. Coastal First Nations stated that reconciliation requires a collaborative EA process aimed at achieving First Nation consent, and when consent has not been granted, dispute resolution processes should be engaged.[142] Coastal First Nations suggested

> Dispute resolution can be initially undertaken at the political level, with First Nation leaders and Ministerial representatives. If political engagement does not resolve the issue, formal dispute resolution processes could be undertaken, such as mediation. In the event that some First Nations consent, and others do not, there would be an opportunity for First Nations to file "majority" and "minority" reports so that Canada has all perspectives on the issues.[143]

Should First Nation governments and the federal government have opposing views on a project and resolution cannot be reached, Coastal First Nations recommended the use of litigation; however, such measures should be the exception rather than the rule.[144] Kwikwetlem First Nation also recommended a dispute resolution process when a failure to obtain consent arises, noting that such processes should be mutually agreed upon and in place prior to consultations.[145]

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[140] "*Shishalh* Nation" in *Indigenous Submissions Data Set*, 12.
[141] Ibid, 12.
[142] "Coastal First Nations - Great Bear Initiative Society," in *Indigenous Submissions Data Set*, 3, 5.
[143] Ibid, 5.
[144] Ibid.
[145] "Kwikwetlem First Nation," in *Indigenous Submissions Data Set*, 10.

There were, of course, submissions which proposed harsher solutions to a lack of consent. For example, Okanagan Nation Alliance recommended the processes conducted under the Duty to Consult when the Crown has infringed upon Aboriginal and Treaty rights to the operationalization of FPIC. The Alliance recommended that if consent is not granted the crown must past a test in justifying why Aboriginal rights were infringed upon which may lead to the cancelling of permits and repaying to Aboriginal groups.[146]

From a complete overhaul on the structure of the EA process, to the implementation of mechanisms and initiatives, Indigenous submissions largely reflected a desire to improve the nation-to-nation collaboration within the realm of Environmental Assessment processes. Aside from the recommended legislative changes which would implement FPIC directly into law, the Indigenous submissions called upon consultation as the catalyst for upholding FPIC. How Indigenous submissions foresee the fulfillment of the duty is where the impact assessment process verges from its traditional bureaucratic path. While micro level changes are necessary in the EA revision, such as individual project information access, larger scale changes will ultimately seek to influence the dynamic of Crown-Industry-Indigenous relations and cooperation. To further our understanding of how such changes may uphold FIPC we can look to submissions made by Canadian industry stakeholders as industry positioning on FPIC will be paramount to its successful implementation.

[146] "Syilx Okanagan Nation Alliance," in *Indigenous Submissions Data Set*, 14.

Industry Submissions

Of the 33 submissions scanned, only 6 in total contained explicit mention of FPIC or consent. Comparatively, 21 submissions discussed Indigenous consultation processes; however, very few did so within the context of UNDRIP or FPIC. To ensure the scope of this paper remains focused, the recommendations discussed in this section will solely focus on those relating to FPIC, consent, or meaningful consultation.

In general, the Industry submissions demonstrated a passing and occasionally active support of FPIC with some restrictions. The main areas of concern and recommendation overlap with those put forth by Indigenous submissions: a need for increased clarity and process, and increased Government and Indigenous collaboration. In a similar vein, the Industry submissions raised concern with the Duty to Consult impeding on the progression of EA processes.

EAs Without the Baggage:

The Canadian Association of Petroleum Producers (CAPP) published their endorsement of both UNDRIP and FPIC in their submission, noting that FPIC is important in protecting the rights of Indigenous Peoples through meaningful engagement and consultation.[147] However, they indicated that while environment impact assessment processes can help to uphold and advance the principles of FPIC, they cannot do it in isolation. CAPP recommends

> the Government's commitment to FPIC not be implemented through future revisions to CEAA 2012. Consistency and harmonization of consultation efforts across appropriate legislative and policy approaches is needed to fulfill consultation and accommodation requirements.[148]

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[147] "Canadian Association of Petroleum Producers," 12, in *Industry Stakeholder Submissions Data Set*.
[148] Ibid.

The Saskatchewan Mining Association shared a similar sentiment recognizing the importance of engagement with Indigenous peoples within the context of FPIC yet acknowledging the limitations of the EA process to do so adequately. They clearly indicate that EA processes must be focused on the physical environmental impacts of a project stating,

> the federal environmental assessment process must first and foremost be focused on the environmental aspects of a project (including appropriate delineation of potentially impacted communities), and should not be used as a forum to address issues related to the Crown's broader duty to consult or issues related to the fiduciary responsibilities of the Crown.[149]

In line with this recommendation, Industry submissions raised concerns over the duty to consult being shifted to proponents within the EA process. Stantec recommended that

> the Government of Canada develop a single specialized team to support [the role of assessing effects on aboriginal rights and title ...[and] the Agency should not be asking proponents to make a determination of significance regarding the legality of asserted or proven Aboriginal rights and the effects of a project on those rights...Rather, assessment efforts by proponent should be limited to analyzing potential project-specific and cumulative effects to the land and resources" [150]

Cameco Corporation also stated that industry stakeholders "cannot not serve as proxy for the [government's duty to consult Indigenous peoples]."[151] These recommendations infer that industry envisions the upholding of FPIC as entirely separate from the Crown's duty to consult, and this duty as completely removed from the EA process. The need for the Federal Government to step up and fulfill their duty to consult separate from the proponent's EA engagement with Indigenous peoples, translates into the second main concern of Industry: lack of clarity in defining FPIC and the roles and responsibilities throughout the EA processes.

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[149] "Saskatchewan Mining Association," in *Industry Stakeholder Submissions Data Set*, 9.
[150] "Ward Prystay Stantac," in *Industry Stakeholder Submissions Data Set*..
[151] "Cemco Corporation," 5 in *Industry Stakeholder Submissions Data Set*..

Lack of Clarity

Lack of clarity on the roles and responsibilities of EA process participants has resulted in concern over how best to uphold FPIC within the EA process. Raising the point that the definition of FPIC needs to be further clarified Shell Canada included the following passage in their submission:

> Shell acknowledges the rights of Indigenous Peoples in Canada. We seek to understand Indigenous perspectives through engagement and dialogue with impacted communities, and take measures to mitigate the impact of Shell's activities on those communities... However, Shell feels that the definition and implementation [UNDRIP] and [FPIC] in Canada should be further clarified, including how [they] are to be considered into project-specific environmental assessments.[152]

Shell also noted that the requirements for consultation itself were unclear and there were grave inconsistencies between federal agencies and the provinces in regards to defining which Indigenous groups need to be consulted in the first place.[153] Shell recommended that the process be "[laid out] in plain language" for proponents and Indigenous groups from the very beginning of the process.[154]

Enbridge shared a similar sentiment recommending greater certainty and guidance regarding Indigenous consultation and accommodation, and the roles and responsibilities of proponents in consultation efforts.[155] While Enbridge did not explicitly refer to consent, it provided several recommendations on improving the consultation process in regards to increased clarity. First, Enbridge provided an overview of Alberta's policies and guidelines for consultation with First Nations and Metis communities:

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152 "Shell Canada," in *Industry Stakeholder Submissions Data Set*, 3
153 Ibid, 4.
154 Ibid, 3.
155 "Enbridge," in *Industry Stakeholder Submissions Data Set*, 10.

- Early in the development of a project, the proponent contacts the Aboriginal Consultation Office ("ACO") and the ACO provides a list of Aboriginal communities that must be engaged and the level of consultation is required.
- The proponent consults the identified Aboriginal communities about the project and keeps consultation records.
- When the proponent feels that it has completed consultation, it submits the consultation records to the First Nations for review and comment.
- Once the required timelines have passed, the proponent may request a determination of adequacy of consultation from the ACO.
- The ACO issues a letter in which it assesses the adequacy of consultation (Letter of Adequacy), by considering a list of factors.
- Generally speaking, the regulator (in this case, the Alberta Energy Regulator) does not issue a license for the project until the ACO issues a Letter of Adequacy. The Guidelines recognize that agreement of all parties is not required in order for consultation to be adequate.
- There are timelines built in for each of these steps.

Enbridge recommended implementing a similar certainty and guidance to Indigenous consultation within EA's which would include both legislation and policy "as appropriate."[156] Second Enbridge recognizes the complexity of EA documents and their inaccessibility to both Indigenous communities and the general public. Enbridge noted that these documents remain complex due to the fact that

> EAs [lack] clarity for proponents regarding EA requirements (e.g. between social and environmental aspects). EAs can be more structured and concise. Updated or additional guidance documents that more clearly outline the scope and requirements of EAs would help in [this] regard.[157]

Lastly, Enbridge called into question the mandatory timelines included in the CEAA 2012 which have in fact actually resulted in less predictable and longer review processes. Enbridge noted that greater clarity over timeline requirements will translate into predictability which will in turn "allow for greater investor certainty, transparency and clarity for all involved."[158] Both

[156] "Enbridge," in *Industry Stakeholder Submissions Data Set*, 9.
[157] Ibid, 4.
[158] Ibid, 7.

ExxonMobil Canada and the International Association for Impact Assessments also referenced timelines as a key component in revising the EA process. However, ExxonMobil Canada recommended maintaining mandatory timelines with an explicit prioritization on efficiencies.[159] The International Association for Impact Assessments on the other hand, noted that Indigenous communities are particularly vulnerable to timeline restrictions.[160] The Association emphasized that under the current CEAA 2012

> prescribing set time limits for [Indigenous communities] but not for proponents (s.s. 38 (3); s.s. 43(2)), the process risks being unfair to under-resourced parties. Most EAs do not have intervenor funding, often leaving Aboriginal groups, NGOs and others in the difficult position of having inadequate time to review large amounts of technical information, while the developer is not subject to timelines. Discretion on fair timing is better left to those conducting the review. Alternatively, adequate participant funding would also solve this problem.[161]

The International Association for Impact Assessment supports the notion that predictability and efficiencies cannot compromise the ability of Indigenous groups to effectively engage with the EA process.

Canadian Energy Pipeline Association (CEPA) proposed the most thorough recommendation which stems from the uncertainty in what constitutes fulfilling a duty to consult specifically in regards to FPIC. They recommended that specific guidelines be developed that specify that

> FPIC be interpreted as the objective of consultation but not an absolute requirement or veto.[162] clear sets of criteria for consideration in assessing the adequacy of a consultation process [and] Any interpretation should also be flexible so that it can be responsive to the

[159] "ExxonMobil Canada," in *Industry Stakeholder Submissions Data Set*, 14.
[160] "International Association for Impact Assessment - WNC," in *Industry Stakeholder Submissions Data Set*.
[161] Ibid.
[162] "Canadian Energy Pipeline Association," in *Industry Submissions Data Set*, 18-19.

> relevant and varying circumstances,including the strength of claim, severity of impacts, and differing positions on the project amongst affected Indigenous groups.[163]

In line with the uncertainty of consultations and FPIC, CEPA also recommends that

> specific guidance be developed that specifies that (i) FPIC is the objective of consultation and not a veto and (ii) sets out the criteria that will be considered in assessing the adequacy of consultation and accommodation.[164]

CEPA recommended a set of said criteria which includes: current and prior land-uses, efforts made by the proponent to address the concerns of Indigenous groups (including any Indigenous groups that remain opposed to the project), the reasonableness of the position taken by any Indigenous groups that remain opposed to the project, and the positions of Indigenous groups that support the project.[165]

While they clearly recommended greater clarity and guidance in conducting EAs, CEPA also recognized that uniformity in the EA process is unlikely:

> In short, one-size-fits-all approaches are not feasible as not all projects are the same, not all impacts are the same, and not all Indigenous rights and interests at issue are the same. Context matters – and a nuanced approach is needed to align and adapt to the very significant legal and practical differences relating to Indigenous rights and interests across the country.[166]

In line with its call for greater flexibility, CEPA noted that the notion of shared-decision making is "unworkable" for linear projects due to the number of Indigenous groups impacted and the varying degrees of impact a given project may induce. An EA that is developed for specific legal and factual contexts, that involves intensive responsive engagement cannot be scaled to

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[163] "Canadian Energy Pipeline Association," in *Industry Submissions Data,* 18-19.
[164] Ibid.
[165] Ibid, 19.
[166] Ibid, 15.

linear projects, and therefore the application of FPIC must be flexible.[167] To address the issue of scaling, CEPA recommends the development of a nuanced model that can accommodate the diversity of project impacts.[168] CEPA provides two qualifications that must be met in order for a nuanced model to operate effectively: a separate process for broader nation-to nation issues unrelated to the project review process, and clarification of roles and responsibilities with the Crown taking more responsibility in the duty to consult.[169]

A lack of clarity on the roles of proponents was reported as a barrier to meaningful consultation and engagement. Industry felt that a lack of process often resulted in proponents taking on the Crown's responsibility of consultation. While supporting their role in engaging with Indigenous groups in order to implement and uphold the principles of FPIC, Industry marked a clear distinction between the duties of completing an EA and the Crown's duty to consult. Therefore, many of the concerns regarding Indigenous communities were directed at the Crown's duty to consult rather than upholding FPIC.

Conclusion

The analysis of submissions to the Expert Panel has provided insight into the multidimensional elements of free, prior and informed consent. While Indigenous communities and industry stakeholders are typically pitted against one another in development project conflict narratives, this analysis has demonstrated there are significant similarities when it comes to understanding the operationalization of FPIC within EA processes.

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[167] "Canadian Energy Pipeline Association," in *Industry Submissions Data Set*, 18.
[168] Ibid, 14.
[169] Ibid, 15-17.

First and foremost, is the understanding that the Federal Government's current approach to consultations is not working as EA processes and the duty to consult are not clearly seperated or defined. Indigenous groups stated federal consultations, or lack thereof, were directly infringing upon FPIC in the sense that their consent is simply not being sought adequately, by the appropriate bodies, or at all. Industry stakeholders noted that often times the duty to consult was placed on proponents to fulfill within EAs - a point also referenced in the Mohawks of the Bay of Quinte submission.[170] Industry stakeholders found that attempting to fulfill this duty within the EA process was both comberson and rarely materialized into effective consultation. While some Industry submissions framed their concerns in an operational context, by focussing on efficiencies, and Indigenous submissions focused on failure to uphold rights, the recommendation remains consistent across both groups: Canada's current duty to consult framework does not allow for FPIC to be upheld within EAs. Such recommendations affirm that the implementation of FPIC extends beyond Canada's current consultation processes.

A second similarity directly ties to the unpredictable and iccomodeous nature of current EA and consultation processes: the recommendation to establish and utilize community, treaty, and or band specific consultation processes. This recommendation was put forth by both Indigenous and industry stakeholders, and was also supported in the Multi-Interest Advisory Committee's (MIAC)[171] advice to the Expert Panel in Principle 3 which states that,

[170] "Mohawks of the Bay of Quinte" in *Indigenous Submissions Data Set*. This submission emphasized that the Federal Government should not delegate their role in the duty to consult to other parties.
[171] In order to support the Expert Panel, the Minister of Environment and Climate Change established a Multi-Interest Advisory Committee comprised of Indigenous organizations, industry associations and environmental groups tasked with providing advice to the Panel."Multi-Interest Advisory Committee: Terms of Reference," Canada.ca, 2017, https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/miac-tor.html.

> Where cooperative arrangements on EA matters have been established in modern treaties, land claims agreements, and/or self-government agreements, they should be fully implemented and respected…[172]

Following such processes would increase efficiency and respect the structures agreed to by Indigenous communities. While this recommendation does not resolve the question of how consultation should occur for all Indigenous groups, nor does it accommodate for agreements that Indigenous communities themselves do not support, it does help to set a precedent in which consultation processes and Indigenous participation is established.

While parties are generally in agreement that the aforementioned processes should be better utilized there are several differences when considering how other changes to the current EA processes would be implemented. Indigenous communities recommended both the implementation of new mechanisms into "CEAA 2018" and complete overhauls to the EA process itself. In regards to the latter, some industry submissions explicitly noted that a complete overhaul to the CEAA 2012 was not necessary and only minor changes were needed. [173] Some Indigenous submissions also called for legislative changes in regards to the decision making authority of Indigenous governments within the impact assessment process. Decision making capabilities serve as a crucial component of upholding FPIC. To support this notion, Indigenous submissions recommended co-jurisdictional models for EAs. In contrast, some industry stakeholders blatantly rejected the notion of shared decision making as it is not logistically feasible and would only hinder the progression of the EA process.[174]

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[172] Multi-Interest Advisory Committee, *Advice to the Expert Panel Reviewing Environmental Assessment Processes*, 2016, 11.
[173] "Cameco" and "Saskatchewan Mining Association"in *Industry Submissions Data Set.*
[174] "Canadian Energy Pipeline Association," 19 in *Industry Submissions Data Set*.

The Multi-Interest Advisory Committee reflected these conflicting positions on whether or not shared-decision making is an effective method in implementing FPIC with Principle 8 which states, "the federal government should share decision-making with Indigenous governments as a means to achieve [FPIC] and implement [UNDRIP]."[175] While the Principle was put forth in their advice to the Expert Panel, industry members of MIAC expressed discomfort with idea of granting Indigenous communities authority in other arenas of Government reporting. The Committee noted that both Canadian Electricity Association (CEA) and Canadian Hydropower Association (CHA) could not support the principle. The Canadian Association of Petroleum Producers (CAPP), Canadian Construction Association (CCA) and Canadian Energy Pipeline Association (CEPA) could not *fully* support it as it would infer they support the halting of projects if consent is not granted.[176] These reservations reflect the contention and ambiguity over whether or not FPIC implies Indigenous communities have the authority to mobilize a veto. However, the individual submissions of both Indigenous and industry stakeholders demonstrated a rather mutual understanding on whether or not FPIC equated a veto right. Industry stakeholders clearly and explicitly indicated their stance on this issue: upholding FPIC must be done so under Canadian law, and thus does not infer any form of veto right. The third major similarity, and one of the key findings this analysis has produced, is that with the exception of a single submission no Indigenous communities indicated they believed they should hold a veto - or anything in its kind - over project development. Rather, the Indigenous submissions by and large agreed with industry's position when it comes to their right to veto a project. It would appear that the depiction of Indigenous governments seeking full

[175] Multi-Interest Advisory Committee, *Advice to the Expert Panel Reviewing Environmental Assessment Processes*, 12.
[176] Ibid, 12.

control over development projects is nothing more than a caricature - a modern day boogie man out to ravage the Canadian economy. This is a point that Indigenous submissions clearly indicate: their communities do not seek to possess a veto right, nor do they wish to limit economic growth; to paint them as such is to foster a fictional divide that impedes productive discussion and thus reconciliation. The Multi-Interest Advisory Committee makes a similar, though less colorful, point:

> The concept of Indigenous Nation "consent" in free, prior and informed consent within federal EAs should not be diminished by equating it with the concept of having a "veto"over development decisions. Rather, "consent" should be understood to mean that all elements of the federal EA process, including decision-making mechanisms and duty to consult procedures, have the goal of making best efforts to build consensus with Indigenous Nations.[177]

The mutual understanding of FPIC not equating to a veto is a crucial element to work through when considering the operationalization of FPIC and its historical contention in Canada. Other areas of agreement include improving timelines of EAs, increasing Indigenous capacity with funding and resources, involving Indigenous communities sooner in engagement and consultation processes, and establishing clear processes on what information is required by proponents and the medium in which it should be delivered to Indigenous communities. Ultimately, both Indigenous and industry submissions indicated a desire to improve "meaningful consultation" and see such consultation as a crucial if not necessary component in upholding FPIC.

It goes without saying that while common ground can be found between opposing interpretations of FPIC, the conflicting opinions on how FPIC should be materialized still remain. Only so much can be done to water-down the polarizing opinions of industry

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[177] Multi-Interest Advisory Committee, *Advice to the Expert Panel Reviewing Environmental Assessment Processes*, 13.

stakeholders that prioritize efficiency over the protection of Indigenous rights. Such submissions represent the spectrum of opinions and approaches to upholding FPIC within the EA process, and also reflect the complexity in defining not only multidimensional terms such as FPIC, but also in defining rights themselves. These views should not be discarded. The history of oppression and injustice experienced by First Nation, Metis, and Inuit peoples within Canada cannot be easily remedied, nor should it be glazed over by defining opposing perspectives as outliers in a set of data. To return to Roxanne Meawasige's point, the vast inequalities experienced by Indigenous peoples *must* be factored into any form of engagement between descendants of colonial powers and Indigenous communities.

While it is important to depict Crown-Indigenous-Industry relations accurately and refrain from the visual appeal of rose-tinted glasses, there is something to be said about finding areas of common ground as a means to foster productive dialogue. What this analysis demonstrates is that even within the greatest points of contention or friction, revelations can be made by providing a forum for opinions to be heard; and even within shared common perspectives various interpretations and nuances of understanding can thrive. As the Government of Canada works to improve relations with Indigenous communities, providing opportunities for *meaningful* discussion, consultation, and engagement will only grow in importance.[178] Asserting FPIC as an operational norm rather than an aspirational quality will require making room for the ambiguity of the term itself.

In accepting UNDRIP as an influential document that is intended to influence Canadian policy and law, Canada continues to move further away from the position of the former Harper

[178] It should be noted that various Indigenous submissions indicated the difficulty in accessing the consultation forum or in-person sessions. This lends to the point that capacity and funding are crucial for meaningful consultation to occur at *all* stages of EAs - including its revision process.

government. While the upholding of FPIC within development projects will likely remain a point of contention, there is solace in the fact that both Indigenous communities and industry stakeholders share parallel opinions on the way ahead. There is indeed variation on the specific details of how EAs should operationalize FPIC, but there is a clear harmony in the call for building and sustaining respectful engagement mechanisms and partnerships. For FPIC to be upheld in any capacity impacted communities must be provided an arena in which they can adequality voice their concerns, mobilize their rights, and influence the decision making process in partnership with both industry and governmental bodies. Failure to provide such opportunities is a failure to uphold the rights of Indigenous peoples.

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Annex I

United Nations Declaration on the Rights of Indigenous Peoples

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. 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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.