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Moving FPIC from the Fringes to the Centre Stage:

Exploring the context of
opposition and opportunity in Canada

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The North-South Institute

International Conference on Extractive Industries
and Indigenous Peoples, Manila
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Indigenous Perspectives Project Partners



Canada:

Lutsel K'e Dene First Nation (LKDFN)

Colombia:

National Indigenous Organization of Colombia (ONIC)

National Afro-Colombian Organization (PCN)

Canada:

Independent First Nations Alliance (IFNA)

Guyana:

Amerindian Peoples Association (APA)

Suriname:

Association of Indigenous Village Leaders (VIDS)



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Indigenous Perspectives Project

Lessons Learned:

- *Indigenous Peoples are not just another stakeholder to be consulted, but rights holders whose identity, autonomy and cultural survival is inextricably linked with their relationship to the land*

For FPIC to be realized requires:

- Strengthening of Indigenous organizations to better understand their rights and to negotiate more effectively in defense of those rights;
- Strengthening of governments to oversee those negotiations;
- Outreach with mining companies to convince them to enshrine FPIC and respect Indigenous rights.



Canada's Justification for Opposing UNDRIP

- It fails to balance the rights of Indigenous Peoples against those of non-Indigenous Canadians;
- Articles addressing lands, territories and resources are “overly broad, unclear and capable of a wide variety of interpretations;”
- Insufficient guidance on implementation;
- Free, prior and informed consent identified as a “core concern” over fears that it would be used as a veto;
- “Not a legally binding instrument, has no legal effect in Canada, and its provisions do not represent customary international law.”



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Canada and the Applicability of International Agreements

“Canada, as a respected member of the international community, cannot ignore these new international norms any more than it could sidestep the colonial norms of the past. Whether we like it or not, aboriginal rights are an international matter.”

—Beverley McLachlin
(Current Chief Justice
of the Supreme Court of Canada)



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Canadian Participation in Agreements/Bodies Endorsing FPIC

- Convention on Biological Diversity, Akwé: Kon Guidelines
- Convention on the Elimination of Racial Discrimination, General Recommendation XXIII
- OAS Draft Declaration on Indigenous Rights
- *Saramaka People v. Suriname*, Inter-American Court on Human Rights: *binding precedent for the Americas?*



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Free, Prior, Informed Consent in Canadian Law and Politics

- House of Commons and opposition parties endorsed UNDRIP in April 2008;
- *Delgamuukw V. British Columbia*: “In most cases, [the fiduciary duty of the state] will be significantly deeper than mere consultation. Some cases may even require the **full consent** of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands;”
- Consent only required where title is established and then not in every case. Instead the standard is consultation and sometimes accommodation.

Free, Prior, Informed Consent in Canada: Legislation and Policy

Nunavut Final Agreement (1993) and the Inuit People



Kiggavik-Sissons Uranium Project



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Free, Prior, Informed Consent and the Nunavut Final Agreement

Positive gains in the NFA:

- Inuit title to 350,000 km² of land, with mineral rights in 35,000 km²;
- Consent of the Designated or Regional Inuit Organization (DIO or RIO) required for entry and access;
- Created 5 co-management boards on water, wildlife, planning and impact assessment, as well as a Surface Rights Tribunal, all with equal representation from Inuit and government appointees;
- Established the right of the Inuit to pursue impact benefits agreements (IBAs).



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Free, Prior, Informed Consent and Uranium Exploration

Initial concerns:

- Executive consent, with FPI *Consultation* at the community level, not FPI *Consent*;
- DIO and RIO very pro-mining;
- Risk of a Heritage River being de-designated to allow mining;
- Opposition by environmental organizations and some community members around risk to caribou;
- What is the vision of the people? The Mine will bring much needed employment, but how will traditional activities be affected?

Free, Prior, Informed Consent in Canada: Legislation and Policy

Yukon Oil and Gas Act (2002) and the Kaska Nation





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Free, Prior, Informed Consent and the Kaska Nation in Yukon

Positive examples:

- The Yukon Oil and Gas Act (2002), entrenched the need for consent and benefit provisions;
- 2003 Bi-lateral agreement between the Government of Yukon and the Kaska Nation sets out that consent is necessary for all new developments;
- Consent-based agreement to lease Kaska land for exploration to Kaska Minerals Corp and Teck Cominco;
- FPIC guaranteed around the use of traditional knowledge by TransCanada Pipelines;
- Consent-based agreement on forestry between the Kaska and the Government of Yukon.



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Free, Prior, Informed Consent and a Reversal in the Yukon

Changing context marked by:

- The Government's failure to renew the bi-lateral agreement;
- Official concern over FPIC as a veto;
- Consent terminology taken off the table in future forestry negotiations.

But...

- A representative of the Kaska has stated that even without the language being used, consent is still achieved when viewed against the desired outcomes of the Kaska People.



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NSI Research on FPIC in Canada

Upcoming collaborative case-study research will:

- Investigate these and other concerns around FPIC in the extractives sector, and in cases of protected areas, forestry and potential hydroelectric developments;
- Highlight Indigenous perspectives on what constitutes FPIC;
- Look at the role of Indigenous Peoples in bringing about pro-FPIC legislation;
- Examine the existence of enabling conditions, like sufficient resources, strong community positions, training and external allies;
- Gauge how genuine examples of FPIC have been, considering: the inclusion of women, youth and elders; whether or not FPIC has been ongoing throughout the project; and if and how it has influencing future negotiations.



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Confusing the language of FPIC

Competing language includes:

- Consultation and accommodation;
- Co-management and Impact Benefit Agreements;
- Shared Decision-making and Free, Prior and Informed Decision-making;

What do they mean in practice?

- Are these terms disguising anti-veto reluctance on FPIC?
- Are Indigenous Communities still achieving what they consider to be FPIC within these terms?



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For more information
or a copy of the expert group paper
email msimms@nsi-ins.ca

or

Visit www.nsi-ins.ca



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“First Nations in Canada... do not need to wait for this to happen. First Nations can move the agenda forward right now.”

— Assembly of First Nations
(on Canada's failure to sign the United Nations Declaration on the Rights of Indigenous Peoples)