



POLITICAL RHETORIC MEETS LEGAL REALITY

How to Move Forward on Free, Prior and
Informed Consent in Canada

DWIGHT NEWMAN

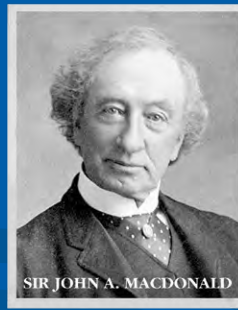
AUGUST 2017



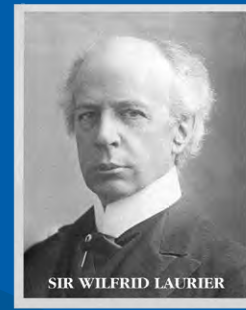
True North in
Canadian public policy



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PREFACE

The year 2013 was the 250th anniversary of the Royal Proclamation of 1763. The Royal Proclamation is widely regarded as having been one of the cardinal steps in the relationship between Aboriginals and non-Aboriginals in British North America – what eventually became Canada.

A quarter of a millennium later it is our judgment that that relationship has often not been carried out in the hopeful and respectful spirit envisaged by the Royal Proclamation. The result has been that the status of many Aboriginal people in Canada remains a stain on the national conscience. But it is also the case that we face a new set of circumstances in Aboriginal/non-Aboriginal relations. Indigenous peoples in Canada have, as a result of decades of political, legal, and constitutional activism, acquired unprecedented power and authority. Nowhere is this truer than in the area of natural resources.

This emerging authority coincides with the rise of the demand for Canadian natural resources, a demand driven by the increasing integration of the developing world with the global economy, including the massive urbanisation of many developing countries. Their demand for natural resources to fuel their rise is creating unprecedented economic opportunities for countries like Canada that enjoy a significant natural resource endowment.

The *Aboriginal Canada and the Natural Resource Economy* project seeks to attract the attention of policy makers, Aboriginal Canadians, community leaders, opinion leaders, and others to some of the policy challenges that must be overcome if Canadians, Aboriginal and non-Aboriginal alike, are to realise the full value of the potential of the natural resource economy. This project originated in a meeting called by then CEO of the Assembly of First Nations, Richard Jock, with the Macdonald-Laurier Institute. Mr. Jock threw out a challenge to MLI to help the Aboriginal community, as well as other Canadians, to think through how to make the natural resource economy work in the interests of all. We welcome and acknowledge the tremendous support that has been forthcoming from the AFN, other Aboriginal organisations and leaders, charitable foundations, natural resource companies, and others in support of this project.

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Wekweeti, Northwest Territories, Canada. Leslie Philipp Flickr photo.

TABLE OF CONTENTS

Executive Summary.....	1	FPIC and the Limits of Federal Jurisdiction.....	17
Sommaire	2	Conclusions and Recommendations	19
Introduction.....	4	About the Author.....	22
Consultation and Consent.....	8	References.....	23
Competing Conceptions of FPIC in the International Arena	12	Endnotes	25
Challenges of Operationalizing FPIC.....	15		

Cover: Cree *misko takiy* moose hide coat ca. 1780 - 1820, Alberta, National Museum of the American Indian photo.
Highland Valley Copper Mine, Logan Lake, BC, Canada, Jeffrey Wynne Wikipedia photo.

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EXECUTIVE SUMMARY

The issue of free, prior, and informed consent (FPIC) from Indigenous communities affected by resource projects has recently received renewed attention in Canada. Indeed, during the 2015 election, Liberal leader Justin Trudeau had gone so far as to say that a “no” from an Indigenous community would assuredly result in a project being cancelled. He soon backed away from this promise by emphasizing only the need for consensus.

Following their election victory, however, the new Liberal government promised to implement all recommendations of Canada’s Truth and Reconciliation Commission, including the TRC’s recommendation to implement the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) that referred specifically to FPIC. And on July 14, 2017, the government finally signalled its intention to implement UNDRIP with the release of 10 principles on the government’s relationship with Indigenous communities. Yet a more careful parsing of that document indicates that the government has a more limited view of FPIC than some of its previous rhetoric would suggest – something two recent Supreme Court decisions released on July 26 seemed to uphold as well. After all, at its extreme, FPIC would entail an explicit Indigenous “veto” over significant government decisions, such as whether pipelines can be built across Indigenous traditional territories.

This report seeks to clarify the meaning behind FPIC and what it would entail to implement it in Canadian law. As part of MLI’s *Aboriginal Canada and the Natural Resource Economy* series, it also builds upon a previous paper from this series, authored by Ken Coates and Blaine Favel, calling for a “made-in-Canada” approach to implementing FPIC.

Legal realities, both within Canada and internationally with the FPIC concept in UNDRIP itself, should be taken into account. Canada already has a judicially-developed duty to consult framework, which in certain circumstances requires something close to consent, such as when the rights in question are particularly strong or when consent is substituted for consultation, such as via negotiations with third-parties like resource developers. Equally important, consultation currently applies to a much wider range of circumstances than is reasonably possible under consent. By narrowing this scope, adapting consent into this legal framework could therefore actually reduce Aboriginal and treaty rights for Indigenous communities.

A more careful reading of UNDRIP also shows that FPIC does not require consent for a project to proceed, but instead only requires good faith effort to obtain consent. It is also only applicable to a narrower range of circumstances to lands that are owned by Indigenous communities, as opposed to those that have asserted claims. On this issue, Canada already meets or exceeds UNDRIP’s requirements for FPIC – by applying the duty to consult framework over lands over which there are asserted claims, and by applying something close to consent in certain circumstances.

Even operationalizing FPIC in the Canadian context would pose important, and often forgotten, challenges. First, it would require extensive foundational work in various sectors, including identifying the extent of its applicability on various projects and whose consent is ultimately required, especially in cases where there are internal divisions within an Indigenous community or multiple communities with divergent views. Secondly, Canada has a federal system of government, and the provinces and territories actually have jurisdiction over many areas that would be affected by FPIC, such as natural resources. Operationalizing FPIC would therefore require a decentralized approach in Canada.

FPIC means something much more complex and multi-faceted than what is often discussed. To better achieve a “made-in-Canada” approach to FPIC, this report proposes the following recommendations:

- 1) Courts should resist efforts to insert consent requirements extensively into the law where they

would actually pose longer-term risks to Canada's existing duty to consult framework.

- 2) Parties should be working constructively together to pursue statutory reforms that remove barriers to Indigenous communities' success.
- 3) Governments need to clearly enunciate the position that FPIC implies good processes but not total control of decisions by Indigenous communities, and should avoid political rhetoric that contributes to ongoing confusion and inaccurately heightens expectations.
- 4) Indigenous communities should continue to make their own governance structures clear and transparent and consider publishing documents concerning those governance structures to facilitate engagement with governments and industry stakeholders.
- 5) Provinces and territories should consider implementing legislation, following full discussion with Indigenous communities and stakeholders, on impact and benefit agreements (IBAs) that would set a legal standard for consent for such agreements to be valid.
- 6) The federal government should consider convening a conference on FPIC implementation that would gather together provincial, territorial, and Indigenous leaders, which would highlight the importance of federal leadership while recognizing the need for decentralized FPIC implementation.

Canada is moving faster than most countries on Indigenous rights jurisprudence. In its duty to consult framework, consultation is required on decisions that affect still-disputed Aboriginal and treaty rights – going further than even international norms have set out. More needs to be done for a made-in-Canada approach to FPIC implementation in Canada. But, given the country's recent track record, there is reason to be optimistic.

SOMMAIRE

La question du « Consentement libre, informé et préalable » (CLIP) de la part des communautés autochtones touchées par les projets de ressources a connu récemment un regain d'attention au Canada. En effet, lors de la campagne électorale, le chef libéral Justin Trudeau était allé jusqu'à déclarer qu'un « non » de la part d'une communauté autochtone donnerait certainement lieu à une annulation du projet en question. Puis, très rapidement, il a pris ses distances par rapport à cette promesse en soulignant plutôt que l'obtention d'un consensus serait nécessaire.

Après la victoire du Parti libéral, toutefois, le gouvernement a promis de mettre en œuvre toutes les recommandations de la Commission Vérité et Réconciliation, y compris celle qui a trait à la disposition de la *Déclaration des Nations Unies sur les droits des peuples autochtones* (DNUDPA) portant spécifiquement sur le CLIP. En outre, il a finalement fait part de son intention de mettre en œuvre la DNUDPA en rendant public, le 14 juillet 2017, un ensemble de dix principes régissant la relation du gouvernement du Canada avec les peuples autochtones. Pourtant, une analyse approfondie de ce document indique que la vision du gouvernement à l'égard du consentement libre s'est resserrée par rapport à la rhétorique professée jusque là – ce que semblent également reconnaître récemment deux décisions de la Cour suprême rendues le 26 juillet. Après tout, dans sa forme la plus extrême, le CLIP attribuerait un véritable « droit de veto » aux peuples autochtones quant à certaines importantes décisions gouvernementales, comme celle de savoir si les pipelines peuvent traverser leurs territoires traditionnels.

Ce rapport vise à clarifier la notion de CLIP et ce que sa mise en œuvre exige du droit canadien. Publié dans le cadre de la série de l'Institut Macdonald-Laurier sur les *Autochtones au Canada et*

l'économie des ressources naturelles, il vient également étayer un article précédent dans lequel les auteurs, Ken Coates et Blaine Favel, plaident en faveur d'un plan de mise en œuvre typiquement « canadien » pour le CLIP.

Les réalités juridiques conséquentes à la mise en œuvre du CLIP et de la DNUDPA elle-même, tant au Canada que sur la scène internationale, doivent être prises en compte. Pour satisfaire à l'obligation de consulter, le Canada a déjà établi un cadre jurisprudentiel qui, dans certains cas, nécessite ce qui s'apparente à un consentement, par exemple si les droits en question sont particulièrement importants ou, encore, lorsque des négociations ont lieu avec des tierces parties qui sont, notamment, titulaires de droits industriels, auquel cas le consentement est substitué à la consultation. Tout aussi important, la consultation est maintenant requise pour un éventail beaucoup plus large de circonstances que ne peut le prévoir raisonnablement le consentement. L'adaptation du consentement à ce cadre juridique pourrait donc en réalité réduire la portée de ce dernier et affaiblir du même coup les droits ancestraux des communautés autochtones et ceux issus des traités.

Une lecture approfondie de la DNUDPA montre également que le CLIP n'exige pas le consentement pour la réalisation d'un projet, mais uniquement des efforts faits de bonne foi pour obtenir ce consentement. La *Déclaration* vise également un éventail restreint de circonstances en rapport avec les territoires appartenant aux communautés autochtones, et non pas les territoires faisant l'objet de revendications. Sur cette question, le Canada a déjà atteint ou dépassé les exigences de la DNUDPA en ce qui a trait au CLIP – grâce à l'obligation de consulter au sujet des terres qui font l'objet de revendications et à la mise en œuvre d'un processus très proche du consentement dans certaines circonstances.

Même l'opérationnalisation du CLIP dans le contexte canadien poserait des défis importants, défis qui sont souvent oubliés. Tout d'abord, elle nécessiterait des travaux préparatoires dans divers secteurs, y compris la détermination de son applicabilité à différents projets pour lesquels le consentement est requis ultimement, et ce, en particulier dans les cas où il y a des divisions au sein même d'une communauté autochtone ou entre un nombre important de communautés. Ensuite, le Canada dispose d'un système de gouvernement fédéral, tandis que les provinces et les territoires ont compétence sur de nombreux domaines qui seraient touchés par le CLIP, tel que celui des ressources naturelles. Opérationnaliser le CLIP exige donc une approche décentralisée au Canada.

Le CLIP fait intervenir des enjeux beaucoup plus complexes et étendus que ceux dont on discute couramment. Pour mieux parvenir à une approche spécifiquement « canadienne », on énonce dans ce rapport les recommandations suivantes :

- 1) Les tribunaux doivent résister aux tentatives de judiciariser d'une main large les exigences de consentement là où elles posent des risques à plus long terme pour le cadre actuel régissant l'obligation de consulter.
- 2) Les intervenants doivent travailler ensemble de façon constructive pour élaborer des réformes législatives qui peuvent éliminer les obstacles à la réussite des communautés autochtones.
- 3) Les gouvernements doivent clairement énoncer la position indiquant que le CLIP fait intervenir de bons procédés et ne cède pas le contrôle entier des décisions aux mains des communautés autochtones. Ils doivent en outre s'éloigner de cette rhétorique politique qui contribue à la confusion en cours et renforce les attentes de façon inappropriée.
- 4) Les communautés autochtones doivent continuer de clarifier leurs propres structures de gouvernance et les rendre transparentes. Elles doivent également projeter de les faire connaître en publiant ces informations pour faciliter la participation des gouvernements et des intervenants de l'industrie.
- 5) Après avoir discuté en profondeur de ces questions avec les communautés et les intervenants autochtones, les provinces et les territoires doivent prévoir l'adoption de lois qui établiraient une norme juridique de consentement visant à sanctionner les Ententes sur les répercussions et les avantages.

- 6) Le gouvernement fédéral doit proposer la tenue d'une conférence sur la mise en œuvre du CLIP, conférence qui réunirait les gouvernements provinciaux et territoriaux ainsi que les dirigeants autochtones et dont l'objectif serait de faire reconnaître la nécessité d'adopter le CLIP de manière décentralisée tout en soulignant l'importance du leadership fédéral en la matière.

Le Canada progresse plus rapidement que la plupart des pays en matière de jurisprudence à l'égard des droits des peuples autochtones. Le cadre dont il s'est doté sur l'obligation de consulter dépasse même les normes internationales – la consultation est obligatoire pour toutes les décisions qui touchent les droits ancestraux et issus de traités faisant toujours l'objet de différends. Il convient d'en faire davantage afin d'élaborer une approche canadienne pour la mise en œuvre du CLIP. Toutefois, compte tenu de l'expérience récente canadienne, il y a lieu d'être optimiste.

INTRODUCTION

The concept of having free, prior, and informed consent (FPIC) from Indigenous communities affected by resource projects before those projects can proceed has received renewed attention in Canadian policy circles in recent years. One very tangible issue interacting with FPIC has been that of whether particular pipelines can be built across Indigenous traditional territories. But that is just one example among many.

Some of the attention to FPIC has come about through ongoing domestic political discussions and subsequent federal government policy statements. In his pre- and post-election rhetoric, Prime Minister Justin Trudeau has repeatedly indicated his intentions for a renewed, nation-to-nation relationship with Canada's Indigenous communities. Amongst his specific commitments has been the implementation of all the recommendations of Canada's Truth and Reconciliation Commission, which included a recommendation to implement the entirety of the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (Trudeau 2015b).¹ The expectation of implementing UNDRIP also featured in the mandate letter written to the new government's Minister of Indigenous Affairs and Northern Development (Trudeau 2015a).

Ottawa's approval of recent pipeline projects . . . seems premised on a view that consent from all potentially affected First Nations is not necessarily required.

Recently, the federal government has offered some initial indications of how it conceives of that implementation, both in general and on FPIC specifically, with its recently released *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. The published document indicates that "The implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* requires transformative change in the Government's relationship with Indigenous peoples." In respect to FPIC specifically, one of the 10 principles is that "The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources." There is a commitment to im-

plementation going beyond the duty to consult: "the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together" (Department of Justice 2017).

The policy context that has received the most attention, and has been subject already to government decision-making, is the approval of pipelines. In an APTN virtual town hall during the election cam-

paign, Trudeau indicated that a “no” from an Indigenous community affected by a pipeline project would “absolutely” result in the project not being approved (Berrera 2015). In subsequent discussions on APTN, he backed away from this position and suggested that he would be open to recognizing a “consensus” in favour of a project even where some communities continued to reject it (APTN National News 2016).

In terms of early decisions by the government, Ottawa’s approval of recent pipeline projects, particularly the November 2016 approvals of Kinder Morgan’s Transmountain Pipeline expansion and Enbridge’s Line 3 pipeline project, seems premised on a view that consent from all potentially affected First Nations is *not* necessarily required for a decision.²

This approach is consistent with Canada’s existing duty to consult framework but not with some common assumptions about how FPIC would require consent from Indigenous communities. Indeed, two Supreme Court of Canada decisions released on July 26, 2017 make clear the Court’s ongoing position that the duty to consult framework – to be discussed further below – does not require consent to projects from affected First Nations. In the *Clyde River* case, the Court quashed a National Energy Board (NEB) approval of seismic testing in marine waters in Nunavut where there had been simple failures to communicate information adequately to potentially affected communities. However, in the companion case of *Chippewas of the Thames* concerning an Enbridge project to reverse the flow of its Line 9 pipeline, the Court rejected the First Nation’s challenge to an NEB approval. It restated the existing law on the duty to consult framework and even emphasized the need to balance Indigenous rights along with other considerations and for governments to make final decisions. As the Court writes:

A decision to authorize a project cannot be in the public interest if the Crown’s duty to consult has not been met (*Clyde River*, at para. 40; *Carrier Sekani*, at para. 70). Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a ‘veto’ over final Crown decisions (*Haida*, at para. 48). (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para. 59)

There is a continuing need for clarification of exactly what is required in terms of agreement from Indigenous communities for infrastructure or resource projects to proceed.

The *Globe and Mail*’s (2017) editorial about these cases highlighted that the Court rejected any notion that Indigenous consent was legally required if the requirements of the duty to consult framework had been met. Meanwhile, a gathering at the Chippewas of the Thames community centre immediately after the judgment in their case saw former chief Leslee White-Eye describe the judgment as “crazy” and indicate an intention by the community to apply its own laws and continue to refuse permission for the pipeline to operate (Pinkerton 2017).

Even the recent pipeline approvals and reactions to them show that current understandings are highly divergent. As this paper will explain, the new *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples* have not resolved the divergence in views. There is a continuing need for clarification of exactly what is required in terms of agreement from Indigenous communities for infrastructure or resource projects to proceed.

The recent political discussion of FPIC arises in the context of a longer Canadian engagement with the concept internationally. When the UN General Assembly adopted UNDRIP in 2007, Canada was one of four states to vote against it – albeit with many others abstaining or remaining absent from the vote.³ Among the reasons that Canada cited was a concern that parts of UNDRIP referring to FPIC would require states to create explicit Indigenous “veto” powers on significant government decisions.⁴

Canada has now subsequently endorsed UNDRIP twice. First, the Harper government endorsed UNDRIP in 2010 in an explicitly qualified way, recognizing UNDRIP as aspirational but indicating specific qualifications on the concept of FPIC (Aboriginal Affairs and Northern Development Canada 2010). Second, the Trudeau government endorsed UNDRIP in 2016 in a purportedly “unqualified” manner, but in a statement still including implicit qualifications that UNDRIP would be implemented consistently with Canada’s existing constitutional system (Indigenous and Northern Affairs Canada 2016).⁵

More recently, Minister of Indigenous Affairs Carolyn Bennett gave a speech in early May 2017 at the UN Permanent Forum on Indigenous Issues, in which she said that implementing UNDRIP “shouldn’t be scary. The Declaration’s principles of free, prior and informed consent are now . . . being built into these forms of reviewing processes for environmental assessment in Canada.” In subsequent interviews, she seems to have indicated only that there would be ongoing work in partnership with Indigenous communities on the best ways of implementing FPIC (Northern Public Affairs 2016).

The UNDRIP is not a treaty, and endorsement of UNDRIP is thus not a legal step equivalent to ratifying a treaty. To ratify a treaty is to accept a set of specific legal obligations enforceable through the international law system. To endorse a UN General Assembly declaration is to make a symbolic commitment that does not involve taking on obligations that could be enforced before international dispute settlement bodies. Yet Canada’s endorsement is still significant, and more clarification on what its endorsement means in relation to FPIC is required.

This paper, part of MLI’s series *Aboriginal Canada and the Natural Resource Economy*, seeks to clarify what FPIC means and what it entails to implement it in Canadian law. In doing so, it builds upon the past paper in this series authored by Ken Coates and Blaine Favel (2016), which called for a “made-in-Canada” approach to implementing FPIC. At the same time, this paper adds further subtleties on the challenges facing FPIC implementation within Canada’s legal system and, in the process, calls for new approaches to thinking about FPIC.

This paper does not advocate for a particular approach on FPIC. Rather, it reveals a number of ways in which legal realities – of Canadian constitutional law and of international law on FPIC itself – affect the potential for different approaches on FPIC. Greater awareness of some of the law that affects FPIC implementation can lead to better informed policy.

The paper proceeds by challenging two assertions that have developed in different sectors relating to FPIC and by raising two further points that signal some of the challenges in implementing FPIC. The hope is to offer a groundwork toward a renewed approach to FPIC that works well for Indigenous communities, governments, and industry.

First, one common assertion relating to FPIC is that a consent requirement is a simple extension of Canada’s regime on a government duty to consult with Indigenous communities and can thus be gradually implemented through that system. The paper specifically shows why consent requirements do not naturally fit within Canada’s judicially-developed duty to consult framework. It would, of course, be possible for the courts to alter this framework. Some have even advocated for them to do so based on principles like FPIC or international instruments like UNDRIP, thus far to relatively little effect. Considering the possibility of future change on this part of the law, the paper analyses the possible effects of the courts attempting to add consent requirements onto the existing framework and suggests that moves in that direction may have very significant unintended consequences.

Second, another common assertion concerning FPIC is that there is agreement that an FPIC requirement exists in UNDRIP, such that all government decisions affecting Indigenous communities must proceed only with the consent of Indigenous communities. The paper goes on to show how a re-

quirement of obtaining consent exists under UNDRIP only in certain specific circumstances. In fact, the FPIC requirement can be thought of more as a requirement to have certain types of processes in operation, many of which are already developing or operating in Canada to a significant degree. In this aspect, the paper is describing a frequently misunderstood reality about the extent of legal requirements on FPIC.

Canada might choose to go further than the law requires, and that would be a significant policy decision. But, if it does, it would need to explain how it is going further than international norms or UNDRIP. Ottawa would also need to explain its FPIC framework. As this section of the paper will explain, the recently announced *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* claim that the government intends to go further than what current law requires, but they also phrase their commitment in a relatively limited way.

Whatever Canada chooses to pursue in terms of FPIC implementation, however, operationalizing FPIC is more complicated than it first appears. The third claim of the paper is that operationalizing FPIC requires extensive foundational work in various sectors. There needs to be clarification of when FPIC does and does not apply in relation to particular decisions. There also needs to be work by Indigenous communities themselves to clarify their governance structures and to define and communicate their preferences on how governments and business are to engage with communities to seek consent on particular issues. And there needs to be the development of shared approaches to what the standard of “consent” means in practical, legally enforceable terms.

The fourth claim of the paper is that, notwithstanding all the attention to commitments on FPIC by the federal government, much of the pertinent jurisdiction to implement FPIC does not actually exist at the federal level in Canada. Although the federal government has jurisdiction in relation to certain types of Indigenous programs under section 91(24) of the *Constitution Act, 1867*, the provinces largely have constitutional jurisdiction over lands and resources and other areas significant within FPIC discussions. That is a legal reality that is not going to change.⁶ The commitments that matter most on FPIC actually involve a range of different governments in Canada and/or even commitments outside of government. The federal government can play a leadership role, but its place is not to dictate all matters of policy to other partners within Canadian federalism. Many Indigenous communities and structures prefer to work with the federal authorities, making this a challenging legal reality in the Indigenous policy context. But that preference does not alter the constitutional powers of the provinces that fundamentally affect what can and cannot happen. The paper will thus propose a number of principles concerning what might be thought of as *decentralized approaches* to FPIC implementation.

If it is to be sound, policy should not proceed based on assertions that are grounded in legal imprecisions. Implementation of FPIC must be based on a sound set of understandings of what FPIC means and how it can and cannot be implemented in the Canadian legal system. Nonetheless, an implementation of FPIC in a manner that takes these legal realities into account will be most meaningful and effective. In the end, FPIC could well be a key feature in the decision-making landscape in Canada. But recognition of FPIC means something much more complex and multi-faceted than what is often discussed.

Much of the pertinent jurisdiction to implement FPIC does not actually exist at the federal level.

CONSULTATION AND CONSENT

The Fundamental Distinction Between Consultation and Consent

Some might think of a requirement of consent as just an extension of Canada's existing duty to consult framework. That is not correct. "Consultation" is not necessarily aimed at consent, particularly within the meaning of the concept in Canada's duty to consult framework. A consent requirement – or even a requirement of pursuing consent – is a more distinctive requirement relative to consultation. Understanding why, though, requires some unpacking.

In Canada, the duty to consult framework with Indigenous communities assumed its modern form in a trilogy of cases in 2004–2005, starting with the *Haida Nation* decision.⁷ Prior to those cases, the Supreme Court of Canada only listed consultation among the factors it *might* consider when analysing whether a government infringement of an Aboriginal or treaty right was justified (*R. v. Sparrow*, [1990] 1 SCR 1075).⁸

Haida Nation set the duty to consult framework on a new path in Canada. The Court said that there was a proactive duty on the part of Canada's federal and provincial governments to consult a potentially affected Aboriginal community prior to making an administrative decision that could negatively impact the community's asserted Aboriginal rights. Treaty rights were then added to the doctrine by the *Mikisew Cree* decision the following year. This proactive duty arises even in the face of ongoing uncertainty about the right, even when it has not been finalized through litigation or a negotiated settlement.

The duty to consult kicks in because of the risk of adverse effects on constitutional rights. It operates as a protection of constitutional commitments to Canada's Aboriginal peoples against negative effects that could otherwise arise from government action.

The duty to consult is triggered hundreds of thousands of times per year.

In Canadian law, this duty to consult doctrine was developed by the courts under section 35 of Canada's *Constitution Act, 1982*. Section 35 is an open-ended clause that entrenches Aboriginal and treaty rights. According to Supreme Court of Canada cases, the specific obligation of the duty to consult in Canadian law stems from the general purposes of section 35 in terms of reconciliation and also from the concept of the honour of the Crown. By protecting Aboriginal and treaty rights when they might otherwise be haphazardly infringed, the duty to consult framework helps to fulfil the purposes of section 35.

The latter concept of the honour of the Crown, while having certain historical common law roots, was now adapted. The Court developed a traditional Crown obligation not to engage in sharp dealing into a new requirement that it consult in advance of a negative impact on Aboriginal or treaty rights. There must be consultation rather than simply a decision to infringe an Aboriginal right or treaty right, even if there was a plan to try to sort out matters later. It serves as a fundamental protection of constitutionally entrenched rights.

A federal government representative presented information at the United Nations in 2011, which noted that the duty to consult is triggered 5,000 times a year for the federal level and 100,000 times a year "for some provinces and territories" (Tremblay 2011). More than one province would be similarly situated in that respect. As a result, we can conclude that the duty to consult is triggered hundreds of thousands of times per year.⁹

Aside from broad judicial pronouncements, every Canadian government has developed policy documents on how it implements this duty. In most cases, these policy documents have gone through more than one iteration or phase. Interim policies were developed rapidly after 2004–2005 to try to meet the legal responsibilities of government. But these were developed by lawyers without consultation with Indigenous communities; a process that was rich in irony. Most governments have now moved to develop second-wave policies following consultation with Indigenous communities. In some cases, those policies have still met with official protest from Indigenous communities in a particular province. However, subject to any countervailing constitutional determinations by the courts, they are the policy frameworks legally in place.¹⁰

The Canadian duty to consult doctrine is often misunderstood. From the outset, the courts were very specific that the duty to consult does not give rise to a veto power held by Indigenous communities. The duty to consult is a specifically defined legal duty owed by governments to Aboriginal communities but does not go so far as a veto. As Chief Justice Beverley McLachlin puts the point in *Haida*, “This process [the duty to consult] does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal ‘consent’ spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case” (para. 48).¹¹

The specific definition of the duty to consult has important consequences. First, the Supreme Court of Canada specifically rejected extending obligations of the duty to consult to third parties, although governments could optionally delegate procedural elements of the duty to industry stakeholders (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at paras. 36, 53). That concept has always been complicated. But it says that industry does not owe any duty to consult. At the same time, governments may rely on industry to fulfill parts of their consultation obligations by delegating tasks to industry.

Second, on a point that is perhaps most often misunderstood, the duty to consult is not a duty to solicit views of communities or their members. Rather, it is a duty to receive information from rights-bearing communities and to meaningfully consider that information in so far as it concerns adverse impacts on asserted Aboriginal or treaty rights and potential accommodations so as to minimize those impacts.

For example, where a government is considering building a road near an Indigenous community’s traditional harvesting area, the duty to consult requires governments to seek information on whether the road will impact on the traditional harvesting rights in question and then consider that information. It does not require the government to ask whether the community wants the road in that area, which could obviously be influenced by many factors not directly related to rights.

Here is where it becomes apparent that consultation and consent effectively operate on different planes. As definitively established by the Supreme Court of Canada, consultation within the Canadian duty to consult framework amounts principally to a procedural obligation to consider certain types of information that must be gathered. That information is not about whether the consulted community agrees with a proposed project or is providing its consent. Rather, it is about whether the proposed project has negative effects on Aboriginal or treaty rights. In the case of more severe impact on rights, there may be accommodation of the rights. But that is still a different concept than obtaining consent. Information on the community’s views per se has no specific legal relevance to the consultation obligations required under the duty to consult framework.

That legal statement, however, might be qualified in two ways. First, in the realities of how the duty to consult operates, even though consultation processes and consent-seeking processes are not the

The duty to consult does not give rise to a veto power held by Indigenous communities.

same thing, attempts at obtaining consent may end up substituting for the consultation process mandated under the framework. That is to say, instead of going through the consultation exercise, there might be an agreement reached that does result in consent.

Even though the legal doctrine developed by the Supreme Court of Canada developed an obligation by governments to consult with rights-bearing Indigenous communities, what actually plays out in many contexts is a negotiation between an industry stakeholder and the rights-bearing Aboriginal community, with the industry stakeholder trying to pursue some measure of consent.

If that corporate engagement is successful, it may lead to a negotiated agreement with the Indigenous community. Indeed, there have been hundreds of impact and benefit agreements (IBAs) negotiated in Canada, partly under the expectations generated by the duty to consult.¹² A corporation that successfully negotiates such an agreement essentially protects itself against risks that a project will face later problems due to consultation issues.

Such IBAs will now typically include a so-called “support clause,” in which the community agrees not to raise issues in or concerning any government consultation. Although consultation may still occur formally, in a certain sense, it has been negotiated around. The crucial thing to recognize is this: negotiation with industry often effectively takes the place of consultation with government.

Negotiation with industry often effectively takes the place of consultation with government.

Second, the Supreme Court of Canada’s 2014 *Tsilhqot’in* decision on Aboriginal title has also specifically authorized the use of negotiated consent in place of ensuring that consultation requirements have been met, thus speaking to a particular overlap between the concepts. There, Chief Justice McLachlin writes that “[g]overnments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group” (para. 97).

The Court also indicated that in certain specific contexts, fulfilling the duty to consult may require something close to obtaining consent. The obligations under the duty to consult vary with how strong the rights claim is and the degree of impact on the right. Where there is a very strong Aboriginal title claim, even before it is definitively recognized, governments are expected to act almost as if it had been and thus to consult in a way that comes close to getting consent. The base requirement in certain scenarios would thus be an expectation of obtaining consent.¹³

This statement effectively refers to a special-case transition from a consultation requirement to a consent requirement. That transition might be thought to naturally exist in the context of any strong rights claim: the management of uncertainty through the consultation requirement naturally verges on negotiation to obtain consent in the face of certain infringement of a right.

Nonetheless, consultation and consent remain conceptually distinct within Canadian jurisprudence. Certain specific situations may exist where an obligation of consent applies as a legal requirement. And sometimes consent is substituted for consultation, particularly in the context of negotiations between corporate stakeholders and Aboriginal rights-holders. However, consultation in general is not necessarily aimed at producing consent, nor is it legally required to be aimed at doing so.

Any suggestions otherwise would actually risk causing confusion as to what the duty to consult framework means. It is specifically developed to try to avoid unnecessary infringements of Aboriginal and treaty rights. It requires governments to obtain more information directly from Indigenous communities before making their decisions and to meaningfully consider information concerning potential

impacts on Aboriginal and treaty rights, even where there is uncertainty on the rights. It does not say that governments cannot make decisions to fulfill their duties to the public interest, and it does not require that governments must negotiate concerning every decision. So, the present legal reality is that consent is not a natural fit within the duty to consult framework.

Potential Unintended Effects of Adding Consent to Duty to Consult Jurisprudence

Because the duty to consult case law was developed through judicial decisions, particularly the highly significant *Haida* trilogy in 2004–2005, it is possible the courts could develop it further over time. Some advocates have argued for the courts to adapt it in light of international law on FPIC. Yet some courts have slammed down that suggestion as being inconsistent with the duty to consult case law.¹⁴ Others, including the Supreme Court of Canada, have simply not done anything in response to such arguments.

There are reasons to question the assumption that an adaptation of the duty to consult into something resembling FPIC would offer more protection of Indigenous rights.

First, an effort at consent on every decision where the duty to consult is triggered would not actually make sense in present circumstances, in which the duty to consult is triggered hundreds of thousands of times each year. The list of affected transactions ranges from decisions concerning major projects affecting Indigenous communities on through to minor licences in areas with very limited connections with Indigenous communities.

The gradations of the duty to consult are meant to provide for practical and efficient government decision-making, depending on how significant a decision's potential impacts on Aboriginal and treaty rights might be.¹⁵ A requirement of always negotiating toward consent would stymie government decision-making, and it would often do so to no particular end. The vast majority of consultations proceed without controversy or debate, as they raise no special issues for Indigenous communities. Most are not seeking to obstruct government decision-making but are simply looking for new forms of participation on those decisions that really affect them and could offer opportunities for their communities.

Second, adapting the duty to consult into requiring consent across many contexts might well cause courts to later revisit some of the parameters of this framework. Negotiating toward consent makes sense in the situations where there are legally established Aboriginal and treaty rights, and that is what the law provides. The duty to consult framework applies much more widely, as it applies to asserted Aboriginal and treaty rights prior to any final agreement on the scope of those rights. Because it applies to situations of uncertainty, the duty to consult actually offers wide protection. Adding any new requirements focused solely on consent processes would lead to a focus on established rights, as one cannot envision consent across all of this wide range of situations. Adding consent into the duty to consult context might well result in the courts offering a narrower protection to Aboriginal and treaty rights than the duty to consult framework presently offers.

Because it applies to situations of uncertainty, the duty to consult offers wide protection.

COMPETING CONCEPTIONS OF FPIC IN THE INTERNATIONAL ARENA

A common assertion suggests that FPIC, as developed in international law or specifically in UNDRIP,¹⁶ creates a requirement to obtain the consent of Aboriginal communities to all resource development projects in Canada. Various statements by some Indigenous rights advocates sometimes end up creating that impression, whether or not they actually mean to do so. That said, it is important to note that this position is *not* held by all Indigenous leaders, as the flexibility of many in working with a wide range of resource projects has demonstrated. But it is a position that appears in some advocacy.

For example, in a 2013 “Fact Sheet” on free, prior, and informed consent, Amnesty International Canada included broad sentences like this one: “Indigenous peoples have the right to make their own decisions to say ‘yes’ or ‘no’ whenever governments or corporations propose actions that could impact their lives and futures.” Later parts of the document clarify that Amnesty recognizes that FPIC does not give rise to “veto powers” and that consent may be required only on certain “very serious issues.” But the initial impression arises for the casual reader who does not delve into the details that a consent requirement applies very broadly.

Pamela Palmater, Chair in Indigenous Governance at Ryerson University, said this in a 2016 CBC interview:

We have . . . a legal right to free and informed and prior consent . . . First Nations aren’t asking for anything. First Nations have the right to free, informed and prior consent. That right is guaranteed in law and in effect that is a veto. First Nations say no on their territory, that means no. (Enright 2016)

Dr. Palmater has also presented what she claims to be established law on consent in presentations to international human rights bodies, such as in a 2015 presentation to the United Nations Human Rights Committee: “Despite decisions from the Supreme Court of Canada directing Canada to consult, accommodate, and obtain the consent of Indigenous peoples, Canada has unilaterally limited debate and refused to consult with Indigenous peoples on legislation which impacts our inherent, Aboriginal and treaty rights.”

Despite Dr. Palmater’s statement referring to the Supreme Court of Canada mandating consent, there has been no Supreme Court of Canada decision requiring consent to legislation affecting Indigenous communities. Indeed, the Federal Court of Appeal has actually recently ruled against exactly such a requirement (*Courtoreille v. Canada*, 2016 FCA 311), although the case will still be heard at the Supreme Court of Canada on appeal and thus be the subject of further analysis.¹⁷

However, even in the context of Canada’s full endorsement of UNDRIP and considering what implementation would mean, there are complications on what the pertinent parts of UNDRIP even mean on consent, and it now appears that the official Canadian government position is opting between the options for a restricted reading.

The UNDRIP was a carefully negotiated text, arising from a process with participation by both Indigenous communities and states, and states sought wording that defined their duties relatively precisely. An early report of the Special Rapporteur on the Rights of Indigenous Peoples on consultation in the UNDRIP recognized that the result of the negotiations had been a text requiring consent in only a

relatively limited range of scenarios involving especially severe impacts on Indigenous communities (Anaya 2008).

It is important to interpret the text of the UNDRIP in accordance with international law approaches to interpretation, and these approaches put a lot of emphasis on the wording of the text. The drafting history of the UNDRIP actually shows the development of wording that may not require that states *obtain* consent. Article 32(2) of UNDRIP, the most commonly referenced article on FPIC in the natural resource context (along with the more general article 19), states:

States shall consult indigenous peoples 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.

The original draft of what has become article 32(2) from 1994 read slightly differently:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (Article 30)

The 1994 draft wording said that Indigenous peoples could “require that States obtain their free and informed consent”; the actual ultimate wording says that states “shall consult indigenous peoples in order to obtain their free and informed consent.” This difference in wording in a legal document is significant. The first wording, from the 1994 draft document, said states could be required to obtain consent. The actually adopted wording says they should take steps “in order to obtain” consent, meaning that they must try to obtain consent – they would not violate this article if they proceed without consent after having made a good faith effort to obtain it.

Some might question whether this interpretation fits the spirit of UNDRIP and might object to seemingly formal and legalistic readings. But if the text was meant to be a legal text, as those arguing most strenuously for its application claim it to be, then it must be approached as a legal text. There are some legal debates amongst actual scholars of international law on exactly how to interpret the words in question.¹⁸ But it matters which words were actually adopted in the legal text – the words actually adopted in UNDRIP are different than the words that some Indigenous rights advocates wish had been adopted, as they were reached following a lengthy negotiation process that altered some of the wording that had first been considered.

If someone thought the English-language text ambiguous on the point, the equally authoritative French-language text of UNDRIP is even clearer in terms of the obligation on states being one of trying in good faith to obtain consent, rather than necessarily actually obtaining it in every instance where a development proceeds. That text reads as follows:

Les États consultent les peuples autochtones concernés et coopèrent avec eux de bonne foi par l'intermédiaire de leurs propres institutions représentatives, en vue d'obtenir leur consentement, donné librement et en connaissance de cause, avant l'approbation de tout projet ayant des incidences sur leurs terres ou territoires et autres ressources, notamment en ce qui concerne la mise en valeur, l'utilisation ou l'exploitation des ressources minérales, hydriques ou autres. (*Déclaration des Nations Unies sur les droits des peuples autochtones*, UNGA Res. No. A/Res/61/295 (13 September 2007)¹⁹

This French-language version of the text contains particular reference to the idea of a good faith process (“bonne foi”) and the idea of consent being an objective (“en vue d’obtenir”). The wording

actually makes clear that the actual obtaining of consent is not mandatory – what is mandatory is a legitimate, good faith process.

Considering the text of Article 32 also highlights another element of note. The article refers to “their lands or territories and other resources.” While even areas of asserted land claims are subject to the Canadian duty to consult framework, the wording of article 32 does not refer to those lands over which there are asserted claims. It is by no means clear that it applies to lands other than those that are actually owned by Indigenous communities. In the context of land over which there is established Aboriginal title, Canadian law already provides for a consent standard. And, in the context of land over which there is a very strong claim, Canadian law already provides for something close to a consent standard within the duty to consult system.

It may well be that Canada’s duty to consult framework already reaches farther on FPIC issues than UNDRIP.

One might properly draw the conclusion that the Canadian legal requirements on duty to consult – and the role of consent in the context of established claims – already meets or exceeds the UNDRIP’s requirements on FPIC. The Canadian system provides for consent as the standard in circumstances where Article 32 of UNDRIP refers to consent. And, in any case, it is not clear that Article 32 requires the actual obtaining of consent so much as good faith processes to try to obtain it. Further, UNDRIP would not necessarily set out any expectations about the situations of uncertainty that the duty to consult

addresses. It may well be that Canada’s duty to consult framework already reaches farther on FPIC issues than UNDRIP. In addition, Canada’s requirements, unlike those sitting in a UN declaration, have an actual legal enforcement mechanism already functioning in the Canadian courts.

The recently announced *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples* (Department of Justice 2017) indicate the government’s intention to implement UNDRIP, taking an approach “that builds on and goes beyond the legal duty to consult.” However, the language of the *Principles*, even while claiming to be about UNDRIP implementation, is actually more limited than the language of UNDRIP itself.

Article 19 of UNDRIP states that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

The commentary section within Canada’s new *Principles* states that “the Government recognizes the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent” (Department of Justice 2017).

The Canadian statement tracks closely the text of Article 19 (as well as part of the preceding Article 18, incorporated into it). But it also chooses English-language wording that commits Canada to the more restricted reading of the UNDRIP obligation. Interestingly, the French-language wording of the *Principles* follows more closely the French-language wording of UNDRIP. But the English-language wording of the *Principles* changes “in order to obtain their free, prior and informed consent” to “with the aim of securing their free, prior, and informed consent”.

These words matter, and Canada’s *Principles* are opting for wording that makes clear that Canada will try to obtain consent but nonetheless sees it only as an “aim” rather than a mandatory requirement. Different people will have different views on whether this choice is the right one. What is clear is that it reflects a sharply limited view of consent as compared to some of the political rhetoric set

out at the start of the paper. If there is to be a focusing of FPIC in Canada toward the more restricted view of FPIC, that focusing is consistent with significant scholarly opinion on the meaning of UNDRIP. But this choice on FPIC should be more clearly and frankly expressed in political discussions rather than having rhetoric floating about that promises one thing while official texts commit to another.

Whatever the complexities on it, FPIC provides an important symbolic principle. In this context, Canada is working within international standards. The ideal of FPIC can offer some guidance for the improvement of certain processes, and Canada must never stop working to improve its processes. It is even open to Canada to go beyond the standards embedded in UNDRIP if it chooses to do so. Even the new *Principles*, though, are at most tracking and perhaps even already limiting the language of UNDRIP. And yet more complexities await in terms of any federal government approaches to FPIC.

CHALLENGES OF OPERATIONALIZING FPIC

Operationalizing FPIC may sound simple – someone might say that it means simply obtaining the consent of Indigenous communities to resource developments or not proceeding with those developments. However, matters are more complicated, and there are many questions that arise. For example, which developments are subject to the requirement, and from which rights-bearing communities? Who speaks for the communities, particularly when there are internally differing positions and potentially different claims as to a particular Indigenous community’s authority structure? And what exactly does the standard of “consent” mean in contexts of ongoing differing views within a community, claims concerning effects on vulnerable groups within the community, or decisions that affect multiple different Indigenous communities with divergent views?

Questions about the exact legal standard for an Indigenous community’s consent have not received a lot of attention in Canada. One possible area for future conflict is if there are legal challenges at some stage to particular IBAs. As noted earlier, such agreements are agreements between industry stakeholders and communities. They typically provide for a range of benefits to the communities. But that does not mean that there might not be internal differences of opinion within a community, and even challenges at some point. Indeed, the negotiation of IBAs is often internally contentious and highly political.

A very recent Australian court decision illustrates some of the possible impacts that could result, even though it arose under the distinctive statutory rules on native title in Australia. In the so-called “McGlade decision” in February 2017 (*McGlade v Native Title Register* [2017] FCA FC10 (2 February 2017)), the full bench of Australia’s Federal Court held that the native title legislation in Australia implies that an Indigenous land use agreement (ILUA, roughly parallel to an IBA) could be properly registered only if signed by all registered native title claimants who were “named applicants” for native title in an area.

The awkward part to the decision was that it concerned a situation where one of the named applicants had become deceased. The result was that the ILUA was invalid, and there was no way a valid ILUA could ever be concluded in the area, as the name of the deceased individual would never disappear from the list of “named applicants.” The Court acknowledged that the result was problem-

atic in these circumstances, but held that it had to interpret the statute as written. The decision put the status of hundreds of other ILUAs in question, and it raised broader questions about whether unanimity amongst a group of Native title applicants is the proper standard for an ILUA that affects their Native title lands. The Australian government actually moved to pass legislative amendments on an emergency basis in response, and the decision has occasioned broader discussion – including within Indigenous communities – on what standard should apply for consent to an ILUA.

Again, that decision comes from a distinctive statutory context in Australia. But the question it illustrates is whether a standard of consent should be higher (potentially so high as to be unachievable) or lower (with the opposite risk that a project could be approved while a community is very divided).

One complex sort of division that has existed in some cases in Canada is when there are competing authority structures within an Indigenous community that hold differing views. For example, in the context of Chevron's Pacific Trail Pipeline for liquid natural gas (LNG), 15 of the 16 First Nations whose traditional territories were along the route had fully agreed and signed on with the project. But the sixteenth had been subject to internal divisions within its different leadership structures, involving differences between the elected leadership and the traditional leadership, as well as some more complex divisions, such as when a particular clan within the community built a

protest camp along the pipeline route. That sixteenth community did eventually come on board eight months after the other 15 communities, but the example still illustrates real challenges that can arise at a practical level.

Complexities of leadership structures are not unique to that community. They present a wide-ranging challenge, and are not necessarily getting simpler. For example, in the *Tsilhqot'in* Aboriginal title decision, the Supreme Court of Canada ended up saying that decisions concerning uses of Aboriginal title lands had to be consistent with the ongoing value of those lands for future generations (para. 74). From a legal standpoint, the question arises of what that means for whether certain forms of consent to resource activities that might have been given by leadership could be subject to legal challenges down the road. Lawyers negotiating IBAs have moved toward often requiring community ratifications, so as to avoid legal risks to the IBA down the road. But the standards on consent have become less clear.

More work needs to be done amongst all stakeholders and rights-holders in defining what *consent* means in various complicated settings. Implementing and operationalizing FPIC depends on achieving more clarity on consent. And that cannot be simply negotiated, as the prior problem is who is legally eligible to negotiate. Legal resolutions are needed to such questions of whose consent is required and in what ways, and courts have sometimes simply exacerbated them.

A higher standard of consent is potentially unachievable and a lower standard carries the risk that a project could be approved while a community is very divided.

FPIC AND THE LIMITS OF FEDERAL JURISDICTION

It was actually impossible for the federal government to commit to implementing all the recommendations of Canada's Truth and Reconciliation Commission. Many of those recommendations are under provincial jurisdiction or outside the jurisdiction of Canadian governments altogether. For example, one recommendation is specifically to legal educators and another is to the Pope.

Similarly, any overly broad commitment the federal government makes on FPIC, such as those that Prime Minister Trudeau had initially rushed to articulate, may actually be constitutionally impossible due to lack of federal jurisdiction. Much of the attention on FPIC recently has been at the federal level, particularly in light of the federal government's indications that it was interested in implementing FPIC. However, that is a largely mistaken focus. Much of the constitutional jurisdiction to implement FPIC instead exists at the provincial and territorial levels.

Canada has what is called a federal system of government in the sense that power is divided between different governments based on principles of federalism. Ever since the adoption at Confederation of the *British North America Act* – later renamed the *Constitution Act, 1867* – power has been divided between the federal (or national) government and the governments of the provinces, with later devolution to territorial governments as well.²⁰

The courts sometimes allow certain kinds of overlap between areas of jurisdiction. For example, the federal and provincial governments have both been recognized as having some jurisdiction to enact regulation of environmental harms, so long as they develop that regulation in accordance with certain rules delineating jurisdiction. However, each level of government still has certain exclusive powers. For example, provincial environmental regulations are not allowed to interfere with inter-provincial transportation infrastructure in ways that fundamentally prevent federally approved infrastructure from operating.²¹

Most issues in relation to natural resources are at the provincial level, both because of jurisdiction on those matters and because of provincial ownership of land and resources, subject of course to any Aboriginal ownership interest. There are certain important exceptions in terms of federal jurisdiction over interprovincial transportation infrastructure (such as pipelines) and uranium development in light of special concerns about national security and foreign affairs connected to the nuclear industry. However, broadly speaking, aside from any confusion arising from overreaching federal government pronouncements, most decisions in relation to resource development will be at the provincial rather than federal level.²²

Despite long-standing uncertainties over the provinces' legal ability to regulate on Aboriginal-held lands, the *Tsilhqot'in* decision of 2014 and the *Grassy Narrows* decision released weeks later have now confirmed a broad provincial regulatory authority – as discussed in a past report within the same MLI series (Coates and Newman 2014) – subject to tests of justification for any outright infringements. So, the primary provincial role is confirmed in most respects. When decisions are required about resource development and FPIC, it will usually be the provincial governments rather than the federal government that have the constitutional jurisdiction.

Much of the constitutional jurisdiction to implement FPIC exists at the provincial and territorial levels.

Federal commitments on FPIC have implicitly recognized this fact. The official statement from the Prime Minister on the release of the Truth and Reconciliation Commission Report was that “we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples” (Trudeau 2015b). But those partnerships do not always receive attention.

Because of the widespread public confusion and lack of interest in details of constitutional jurisdiction, provincial and territorial governments are often let off the hook and not held accountable to the same standard as the federal government. To date, only the province of Alberta has made a strong

commitment to UNDRIP, although its commitment thus far seems to have led mainly to the development of new provincial discussion tables with Indigenous communities in Alberta. British Columbia’s new government has also given indications of planning to commit to UNDRIP, although the meaning of that is not yet clear. The tough work of implementing UNDRIP generally, or FPIC specifically, may require long discussions at a relatively decentralized level. But in most provinces, the topic has simply not even penetrated the provincial political consciousness. In the three territories, of course, the prominence of Indigenous policy issues is ever-present, but even there, UNDRIP has not been a particular focus.

Most decisions in relation to resource development will be at the provincial rather than federal level.

Forgetting about technical matters of constitutional jurisdiction might yield an easier life in some ways. But it leads to problems. There may be heightened expectations on what the federal government can accomplish, when it does not even have the constitutional jurisdiction to act on several of the most critical matters at issue. When it fails to do so, there will be inevitable disappointment and new damage to relationships. At the same time, provincial governments may proceed along the same old paths without anyone raising questions that should be part of provincial policy conversations.

In some ways, realizing the importance of federal and provincial constitutional responsibilities is one of the key lessons of this paper. The implementation of FPIC will take place in a decentralized way, internationally and subnationally. It will involve national and subnational public governments as well as Indigenous authorities and governments. Internationally, different countries will find different paths to FPIC implementation, with Canada finding its own path.

And, frankly, Canada is moving faster than most countries in the world. Subnationally, due to the structures of federalism, different Canadian provinces and territories will do the hard work of implementing FPIC in a way that is meaningful in different local contexts. The federal government may be able to provide leadership and encouragement, but FPIC implementation is inherently decentralized.

CONCLUSIONS AND RECOMMENDATIONS

Canada is not alone in facing challenges in relation to FPIC, although it is taking the issues related to it more seriously than many other states. Cathal Doyle (2015) writes in his book on FPIC, “The requirement for indigenous peoples’ free prior and informed consent is set to become one of the defining issues facing resource-rich States and the global extractive industry” (1). Whether that is so remains to be seen, as many resource-rich states are actually largely ignoring FPIC – as with many UN standards, it has most effect in a small number of liberal democracies, serves a more symbolic function in some countries, and is politely ignored by many others. But Canada is taking FPIC seriously.

In spite of very significant past wrongs, Canada today should not be thought of as a laggard but, rather, as a leader in its Indigenous rights jurisprudence. The duty to consult framework developed by the Supreme Court of Canada over the last dozen years requires consultation on government decisions that affect even still-disputed Aboriginal and treaty rights. In that requirement, Canada’s system goes further than international norms have set out. It goes further than domestic politics have permitted in the vast majority of jurisdictions around the world. While more can be done, there are reasons to be proud of some of the things Canada is doing.

At the same time, within those specific contexts where international standards might end up requiring FPIC, Canada is moving in that direction in specific ways – the courts have effectively mandated FPIC requirements in the context of established rights. Attempting to add consent requirements into the law more generally might well be counter-productive for the reasons explained above: it would potentially have far-reaching unintended effects on governments’ ability to govern and act in the public interest; and it would raise the prospect that some courts would start to limit the scope of the duty to consult, with the latter result ultimately harming Indigenous communities themselves. **Courts confronted with the arguments to do so should resist efforts to insert consent requirements extensively into the law where they would actually pose longer-term risks to Canada’s existing duty to consult framework.**

The challenge is to continue building on Canada’s performance in the practical and effective recognition of Aboriginal and treaty rights, including the duty to consult and accommodate, in the years ahead. The solutions will not necessarily come from waiting around on international law debates about the precise scope of FPIC, some of which may have limited implications for Canada or fall short of existing rights in Canada. Most important is relationship-building of the sort that has been occurring but can become even stronger. Corporations have learned to or are learning to engage earlier with Indigenous communities and to build relationships of trust over time. Governments are working on building stronger relationships with Indigenous communities as well. The present government of Prime Minister Justin Trudeau has gone so far as to try to move explicitly toward nation-to-nation relationships and to transform the place of Indigenous communities and governments in Canada.

Some of the real challenges of removing barriers to Indigenous economic growth and addressing social challenges within Indigenous communities require this trust-building and empowerment of Indigenous communities. Addressing these challenges will also be aided by focused legal work on some of the barriers to Indigenous communities’ success. FPIC may be a sort of guiding principle in some ways, but a lot of important work is needed on other issues. For Indigenous communities and governments in Canada, FPIC may be simply one step along a long and difficult road. **There should**

be an ongoing effort by parties working constructively together to pursue statutory reforms that remove barriers to Indigenous communities' success, including by removing straightforwardly paternalistic restrictions in the *Indian Act*, developing creative solutions for access to credit while maintaining protections of Indigenous lands, considering modifications to overly frequent band election cycles, and otherwise facing up to the challenges of needed legal reforms.

At the same time, it would probably help to balance expectations on all sides if governments in Canada were to be clearer about their views on the scope of FPIC. The government's embrace of principles like nation-to-nation relationships and FPIC has opened creative space for constructive engagement. But seemingly imprecise and fluid descriptions of FPIC presented over the last two years at the federal level may not have helped build trust. They have instead seen the government criticized by an increasing number of voices for first promising one thing and then backing away from it. If that impression sets in, it would seem likely simply to increase cynicism and distrust.

Governments should be clear that FPIC requires the development of good processes of decision-making that have a meaningful role for Indigenous communities. At the same time, governments should communicate that "veto rights" are not embedded in UNDRIP and FPIC and are therefore not a core government commitment. For the sake of clarity and honesty, other rhetoric from the federal government should be better and more frankly aligned with the formulation of FPIC in the July 2017 *Principles* that adopts a restricted interpretation of FPIC. Good faith efforts to seek consent are appropriate in a wide range of circumstances. In certain limited circumstances, such as those involving the most significant impacts on Indigenous communities, government decisions or resource projects should not be allowed to proceed without consent being obtained. But, in general, when consensus is not achievable, decisions must still be made in the provincial or national interest. **The position that FPIC implies good processes but not total control of decisions by Indigenous communities should be enunciated clearly by governments, without political rhetoric being permitted to contribute to ongoing confusion and inaccurately heightened expectations.**

Where consent does legally matter, work needs to be done to sort out what *consent* means in the context of community processes related to agreements and some of the types of complexities on authority structures discussed earlier in the paper. **Indigenous communities themselves should continue work to make their own governance structures clear and transparent and consider publishing documents concerning those governance structures to facilitate engagement with governments and industry stakeholders. In parts of the country, communities have published their own guides to how they expect companies to engage with them. So long as those guides are consistent with the law, they tend to receive respect and to be appreciated, so this sort of initiative can be valuable for many Indigenous communities.**

It might even be possible to define consent in some more specific terms. There should be thought given to setting forth some legal standards for IBAs in statutory form, likely most clearly within constitutional jurisdiction at the provincial and territorial levels, following full discussion between governments and Indigenous communities. The aim would not be to prescribe what is within those agreements but document and lay out what is necessary for an agreement to be on solid legal ground. **Provinces and territories should consider implementing legislation on IBAs that would set a legal standard for consent for such agreements to be valid. The contents of such legislation should of course be determined following full discussion with Indigenous communities and various stakeholders.**

Finally, the federal government must recognize its constitutionally prescribed role. Many of the issues at hand are within the constitutional jurisdiction of the provinces and territories. This implies new

responsibilities on the provinces and territories, and it may restrict the federal government's role to that of symbolic leadership in addition to action within its own areas of responsibility. **The federal government should consider convening a conference on FPIC implementation that would gather together provincial, territorial, and Indigenous leaders, so as to attempt to facilitate FPIC implementation in various jurisdictions in the context of valuable interjurisdictional conversations. This approach would highlight the importance of federal leadership while recognizing the nature of decentralized FPIC implementation.**

Implementing FPIC is not a one-time process. It is about establishing, maintaining, and revising good processes over the longer term and building trust in a complex and diverse Canada. Developing an appropriate consultation process, with buy-in from all levels of government, including Indigenous communities, could transform profoundly the prospects for economic growth for Indigenous and non-Indigenous Canadians alike. It matters immensely to Canada's efforts at reconciliation. Good policy in this area must be built on sound understandings, careful legal work, and meaningful engagement and relationship-building. All of these are great challenges for Canada's next centuries, but the country's track record to date suggests that Canada is up to it.

ABOUT THE AUTHOR



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He holds an economics degree from Regina, a law degree from Saskatchewan, and three graduate degrees in law from Oxford, where he studied as a Rhodes Scholar. He is a member of the Ontario and Saskatchewan bars.

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ENDNOTES

- 1 In Trudeau’s December 15, 2015 “Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission,” he says, “we will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations Declaration on the Rights of Indigenous Peoples”, referring to the United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res No. A/Res/61/295 (13 September 2007).
- 2 See Justin Trudeau, 2016, “Prime Minister Justin Trudeau’s Pipeline Announcement.”
- 3 For discussion, see, e.g., Dwight Newman, 2010, “Africa and the United Nations Declaration on the Rights of Indigenous Peoples,” chapter in *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa*.

- 4 See UN Press Office, 2007, “United Nations Adopts Declaration on Rights of Indigenous Peoples,” which explains comments of Canada’s UN Ambassador John McNee.
- 5 The Indigenous and Northern Affairs Canada press release of May 10, 2016 offers the two simultaneous statements of full endorsement and commitment to implement in accordance with the Canadian Constitution: “The Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, today announced that Canada is now a full supporter, without qualification, of the United Nations Declaration on the Rights of Indigenous Peoples. Today’s announcement also reaffirms Canada’s commitment to adopt and implement the Declaration in accordance with the Canadian Constitution.”
- 6 This will be discussed further below. See also Dwight Newman, 2013, *Natural Resource Jurisdiction in Canada*.
- 7 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.
- 8 For a past Macdonald-Laurier Institute discussion on the duty to consult, see Dwight Newman, 2014, *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector*. For a book-length discussion of the duty to consult doctrine, see Dwight G. Newman, 2014, *Revisiting the Duty to Consult Aboriginal Peoples*.
- 9 See also Dwight Newman, 2017, “The Section 35 Duty to Consult,” chapter in *The Oxford Handbook of Canadian Constitutional Law*, edited by Nathalie Des Rosiers, Patrick Macklem, and Peter Oliver.
- 10 These policies are discussed to some extent in Dwight G. Newman, 2014, *Revisiting the Duty to Consult Aboriginal Peoples*. See also Ravina Bains and Kayla Ishkanian, 2016, *The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies*, Fraser Institute.
- 11 See also *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para. 59.
- 12 See discussion in Dwight Newman, 2014, *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector*.
- 13 Various parts of the *Tsilhqot’in* decisions are applicable; paragraph 97 indicates that consent can substitute for consultation; 91–92 suggest consultation requirements that come close to consent in some specific circumstances; 77–88 deal with justification of infringement; 90 sets out the basic expectation of consent in context of development of land subject to established title claim. *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.
- 14 In *Gitxaala Nation v. Northern Gateway Pipelines Inc.*, 2015 FCA 73, Justice Stratas suggested that many of Amnesty International’s proposed arguments in its intervention in the duty to consult case on Northern Gateway were irrelevant to Canadian law.
- 15 Paragraphs 43–45 of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 describe the spectrum analysis applicable.
- 16 The relationship of UNDRIP to international law is complicated. A variety of scholarly views on the point appear in Stephen Allen and Alexandra Xanthaki, editors, 2011, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. An analysis by a group of international law experts determined that the status of different articles in UNDRIP varies significantly (International Law Association (ILA), Resolution No. 5/2012 (August 2012, Sofia)).
- 17 Leave to appeal was granted by the Supreme Court of Canada in May 2017, and a hearing has been tentatively scheduled for January 2018.

- 18 An excellent brief summary of this debate is found in chapter 2 of Mauro Barelli, 2016, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples*. Barelli specifically refers at 37n. to differing positions on the interpretation of Article 32 amongst publications by Cathal Doyle, Jom Pasqualucci, Gaetano Pentassuglia, Cesar Rodriguez-Garavito, and Dwight Newman.
- 19 Although other language versions also support my point, the comparison here is specifically on the English-language and French-language versions, which would be considered most pertinent for Canada given its official languages.
- 20 For explanation, see, e.g., pertinent chapters of Guy Régimbald and Dwight Newman, 2017, *The Law of the Canadian Constitution*, 2nd edition.
- 21 See explanations in pertinent chapters of Guy Régimbald and Dwight Newman, 2017, *The Law of the Canadian Constitution*, 2nd edition..
- 22 See generally Dwight Newman, 2013, *Natural Resource Jurisdiction in Canada*.



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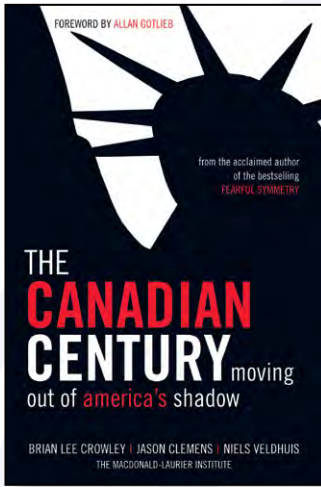
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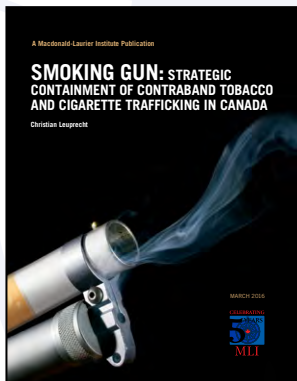
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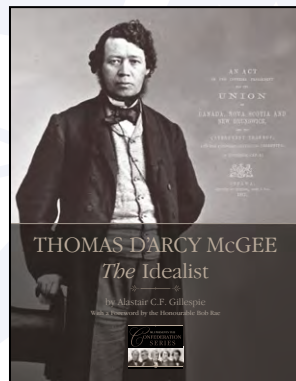
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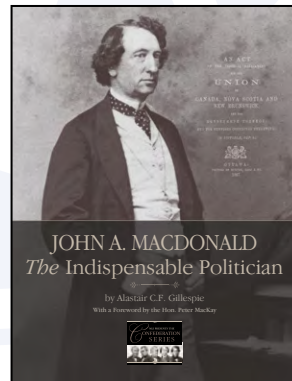
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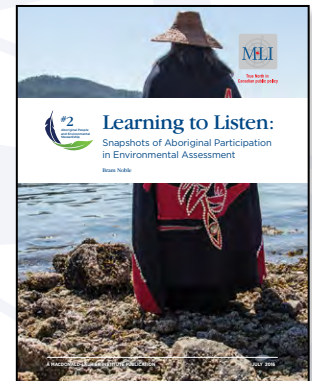
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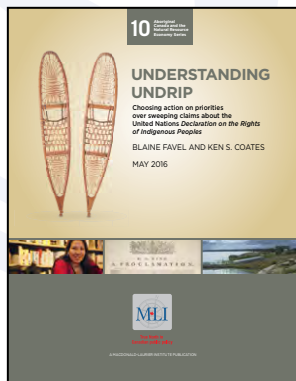
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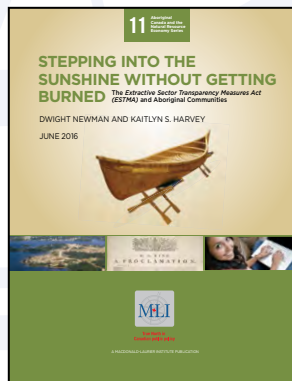
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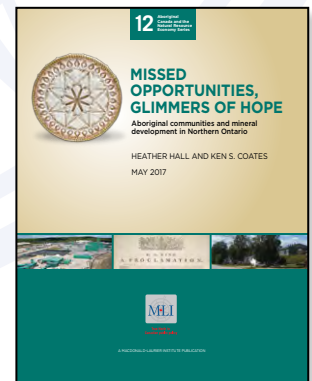
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