



BOREAL
LEADERSHIP
COUNCIL

Free, Prior, and Informed Consent in Canada

*A summary of key issues, lessons, and case studies towards practical guidance
for developers and Aboriginal communities*

A large photograph of a man sitting on a rocky shore looking out at a lake under a cloudy sky. The word "EPIC" is overlaid in large, semi-transparent blue letters.

EPIC

PREFACE

The Boreal Leadership Council (BLC) is comprised of leading conservation groups, Aboriginal groups, resource companies, and financial institutions who have an interest and a stake in the future of Canada's Boreal Forest. Members of the Council are signatories to the Boreal Forest Conservation Framework and are committed to implementing this national vision in their own spheres of activity.¹ The national vision articulated by the Framework seeks to protect the long-term ecological and cultural integrity of the boreal region, while promoting sustainable development of its wealth of natural resources. It calls for a network of large interconnected protected areas covering about half of the country's boreal forest and the application of leading-edge sustainable development standards throughout the remaining areas. The Framework also supports the principle that resource management will recognize and respect the legal and customary rights of Aboriginal peoples over their lands, territories, and resources.

The BLC facilitates solutions-based dialogue on issues affecting the boreal region of Canada.

INTRODUCTION

The Boreal Leadership Council (BLC) recognizes that responsible development of natural resources within Canada's boreal region needs to integrate the principle of free, prior, and informed consent (FPIC) of Aboriginal peoples who inhabit the region. In 2010, as a first step in developing a common understanding of the key issues and promoting a broader dialogue on FPIC in the boreal region, the BLC commissioned The Firelight Group to prepare a report on the current state of FPIC in Canada. The report, *Free Prior, and Informed Consent in Canada: Towards practical guidance for developers and Aboriginal communities* contains a literature review, case studies, and focus group results that pertain to recent developments in FPIC in Canada. This summary provides a synthesis of the key report findings that are supported by the BLC. Our analysis has identified four foundational needs:

¹ Boreal Forest Conservation Framework: <http://www.borealcanada.ca/framework-full-e.php>

1. To express multi-stakeholder support, in the form of the BLC, for the concept of free, prior, and informed consent.
2. To advance the idea that a discussion about FPIC can and should occur within fora characterized by mutual respect, expertise, and a desire to move forward practically and respectfully on issues of common concern.
3. To help shape how FPIC can be defined within the Canadian context.
4. To contribute to a discussion among Aboriginal peoples, developers, environmental organizations, financiers, and investors that will lead to practical guidance on the implementation of FPIC.

It is our hope that this summary will encourage and contribute to a solutions-based dialogue among those interested in collaborating on development of practical guidance for implementation of FPIC in Canada.

WHAT IS FPIC?

Free, prior, and informed consent (FPIC) broadly refers to the rights of indigenous peoples to participate in decisions affecting their lands and resources, especially as related to natural resource development. The principle of FPIC was first introduced by the International Labour Organisation (1989) to protect the rights of indigenous peoples in developing economies who were subject to involuntary resettlement.² The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) broadened the principle to include:

- ➔ a range of project development activities;
- ➔ the right to redress for lands, territories and resources that had been adversely affected; and
- ➔ a commitment by the state to obtain free, prior, and informed consent of indigenous peoples before the approval of any project affecting their lands or territories and other resources.³

² Convention 169, ILO (1989).

³ UNDRIP (2007) Articles 10, 28, 29, 32. <http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>

In 2011 the International Finance Corporation (IFC), the lending arm of the World Bank, incorporated FPIC into its Sustainability Framework (Performance Standard 7).⁴ While the IFC's primary mandate is financing projects in low-income Organisation for Economic Co-operation and Development (OECD) countries, the IFC Performance Standards also form a foundation for the Equator Principles, the voluntary credit risk management framework for environmental and social risk in project finance, adopted by more than 90 signatories in the global financial community.⁵

FREE	Consent is given without coercion, intimidation, or manipulation.
PRIOR	Consent is sought before every significant stage of project development.
INFORMED	All parties share information, have access to information in a form that is understandable, and have enough information and capacity to make informed decisions.
CONSENT	The option of supporting or rejecting development that has significant impacts on Aboriginal lands or culture.

CANADIAN CONTEXT FOR FPIC

Given Canada's unique constitutional relationship with Aboriginal people, and the importance of reconciling the pre-existing rights of Aboriginal people and the jurisdiction of governments in any resource development decisions, there is a pressing need to define and support responsible development that involves FPIC:

- ➔ Canada's economy is the most reliant on natural resource development of the high-income OECD countries, with about 11% of GDP linked to the development of natural resources. The majority of oil and gas, metal and mineral resources, forestry, and hydroelectrical power generation resources are based in the boreal region.

⁴ Performance Standard 7 of the International Financial Corporation. <http://www.ifc.org/ifcext/policyreview.nsf/Content/2012-Edition>

⁵ <http://equator-principles.com/index.php/about-the-equator-principles>

- ➔ Canada's boreal region represents one of the largest intact forest ecosystems on Earth and includes the traditional territories of more than 600 Aboriginal communities⁶.
- ➔ The rights of Aboriginal peoples are specifically protected under Section 35 of the Constitution Act, 1982. Under the law the Crown has a 'duty to consult and accommodate' the interests of Aboriginal groups and this obligation cannot be delegated.⁷
- ➔ The determination of Aboriginal rights is evolving rapidly through settlement of land claims and treaties and a growing body of case law.

There is inherent tension between resource development and protection of traditional lands and territories for the exercise of Aboriginal rights. However, federal and provincial government responsibilities have constitutional obligations to reconcile these imperatives in a manner that is consistent with what the courts have described as 'the honour of the Crown.' While this dimension adds complexity to FPIC concepts in Canada, it also makes reconciliation of the responsibilities of departmental and agency responsibilities for land resource management activities, including tenure, permitting, and approvals for resource development AND protection of the rights of Aboriginal peoples an essential part of how resource management occurs in this country.

While Canada has endorsed the UNDRIP (2007), it considers it to be a "non-legally-binding aspirational document."⁸ The government position is that FPIC is already managed through existing federal policy on Aboriginal Consultation and Accommodation.⁹ Currently, the federal policy includes a right to free, prior, and informed consultation, but does not generally recognize the rights of Aboriginal communities to require consent for development. In specific instances, rights to reject development are recognized through specific bilateral agreements with Aboriginal governments, such as, for example, the Nunavut Final Agreement (1993) and the Kaska-Yukon Government Bilateral Agreement (2003). While such shared-decision making

6 http://www.borealcanada.ca/documents/Boreal_in_the_Balance_Full.pdf

7 <http://www.aadnc-aandc.gc.ca/eng/1309374807748>

8 Minister of the Department of Indian Affairs and Northern Development (AANDC) - <http://www.aadnc-aandc.gc.ca/eng/1309374807748>

9 AANDC, Aboriginal Consultation and Accommodation. Updated Guidelines for Federal Officials to Fulfill the Duty to Consult. Ottawa: Minister of the Department of Indian Affairs and Northern Development, 2011

and co-jurisdictional arrangements are becoming more common as the process of reconciliation and modern treaty-making unfolds, it remains a fact that in most of Canada, encompassing both Treaty and non-Treaty areas, there are differences of opinion between the Crown and First Nations as to the nature, extent, and scope of Aboriginal rights and interests in decisions about the use of lands and resources.

This policy landscape demonstrates why tension exists about what FPIC means and how it should be implemented between both developers and communities. While the two groups are often seen to be in conflict, they can both be affected by similar challenges and uncertainties about interpretation of policy. The following shared challenges have been identified.

Free entry staking of resource claims. In many parts of the country developers may secure exploration rights to subsurface resources through direct online application to the provincial government. This bilateral arrangement requires no direct engagement with Aboriginal communities that may be affected by future resource development, leading to potential conflict regarding land development from the earliest stages of exploration.

Title and rights to land. Where developments occur in areas of unsettled land claims, uncertainty of title and rights can result in loss of future land rights and resource revenue sharing of Aboriginal groups and increased project risk for developers.

Who is responsible for consultation? While the Crown cannot delegate its obligation to 'consult and accommodate' the interests of Aboriginal groups, it often relies on resource developers to implement the consultation process, which is then assessed by the Crown during the permitting and approvals process to determine if it's adequate according to government guidelines.

Granting of permits and approvals. The competing interests of resource developers and Aboriginal communities are frequently played out in the permitting and approvals process. Here multiple government agencies are called upon to assess the adequacy of project planning, including consultation, before granting operating permits and licenses. While joint federal-provincial review panels are often struck for specific projects, this is not always the case. The current state of play often involves multiple

reviews by various department and agencies. For the developer, this can result in project delays, increased costs, and unwanted media attention. Aboriginal communities are

Demonstrating that reconciliation is possible ... is also an obligation that Aboriginal communities and developers must engage, whether or not the Crown is at the table.

placed in the position of negotiating using bargaining tactics as a protective measure to increase their leverage.

This situation is untenable over the long term for developers, Aboriginal communities, and for the Crown.

Demonstrating that reconciliation is possible through constructive relationships between developers and communities is a significant challenge, but it is also an obligation that Aboriginal communities and developers must engage, whether or not the Crown is at the table.

Demonstrating that reconciliation is

IMPLEMENTATION OF FPIC

There is ample evidence to demonstrate the material risks of failure to secure FPIC. For developers these include direct risks, such as project delays, increased expenses, loss of resource access, and indirect risks such as reputational risk. For Aboriginal communities risks can include loss of lands and cultural impacts, failure to participate in economic and developmental opportunities, and division of communities.

Our commissioned research shows that there are many clear and tangible benefits to Aboriginal communities and developers in adopting a proactive and collaboration approach to resource development that does not solely rely on government to engage. This approach incorporates FPIC as part of the project development life cycle—from the early stages until after project completion. It places responsibility on resource developers and Aboriginal communities to develop an effective working partnership.

The research focussed on each of the elements of FPIC—free, prior, informed, consent—to identify implementation challenges and solutions. Key findings from the report are briefly discussed below. Table 1 summarizes key lessons learned.

FREE

Freedom is defined by the ability to make a decision about a development without coercion, intimidation, or manipulation. In the Canadian context, issues associated with freedom raised by Aboriginal communities have strongly linked to the ‘prior’ and ‘informed’ elements of FPIC. Aboriginal communities want the freedom to make their own decisions, using their own methods, and in their own timeframes—and to not feel pressured or rushed by government schedules, developers, or environmental groups.

PRIOR

‘Prior consent’ refers to the ability of Aboriginal communities to have meaningful input before development occurs. Key issues raised in relation to this element are: what scale of project should trigger FPIC, and at what point in the project life cycle should FPIC be initiated.

The BLC believes FPIC should be triggered if there is likelihood that project development would impact sensitive environmental or cultural heritage sites, or if development would significantly affect Aboriginal community life.

A key issue raised is consultation by governments with Aboriginal communities before granting land tenure and associated permits for exploration. This would permit early identification of environmentally or culturally sensitive sites. Aboriginal leaders would need to manage expectations within their communities that exploration activities do not necessarily lead to a viable project.

The research suggests that FPIC should be incorporated as an ongoing process throughout the project life cycle. FPIC issues may be different during exploration, construction, operation, closure, and post-closure. For brownfield sites, FPIC would need to be reviewed where significant project design changes or expansions occur.

INFORMED

‘Informed consent’ is the principle that all parties share information, have access to balanced information from multiple sources, presented in a form that is understandable

and allows an adequate timeframe for learning and decision-making. At the root of this element is the development of an open, mutually respectful relationship between developers and Aboriginal communities. The research shows that developing a two-way flow of meaningful information exchange is key to obtaining consent.

Development of personal relationships and networks is critical to building trust.

Aboriginal knowledge and assessments of significance are often different from those of engineers and scientists. Perspectives

drawn from traditional knowledge need to be included in project planning and incorporated into joint research and participatory monitoring studies on environmental and social impacts.

Information should be provided not just about the project, but also about the company, its policies, performance, and reputation. Similarly, information about the structure and function of Aboriginal communities needs to be collected from a broad perspective, not just those of the leadership. Aboriginal managers need to ensure that adequate capacity is developed to ensure that a broad range of community members understand the project and its implications.

Development of personal relationships and networks is critical to building trust. Case studies cite change of project personnel or of Aboriginal leadership as key reasons for loss of trust both within and between communities and developers.

CONSENT

Consent is the most complex and contentious element of FPIC. It has a number of aspects:

- ➔ **Who consents?** There may be lack of clarity on who can speak for the community. Band Council, hereditary leaders, or both? On-reserve and off-reserve community members? What happens if community leadership changes? How will the views of marginalized groups (e.g., women, youth) be taken into account?
- ➔ **How is consent secured?** The studies show that consent may be achieved through a range of mechanisms such as referenda, majority vote, or band

resolutions. Increasingly, consent mechanisms are being built into impact benefit agreements.

- **What does consent mean for different stages of project development?** When a project is initiated, consent may mean Aboriginal communities agreeing to become engaged in the process, and to commit the time and resources necessary for effective engagement. At project design, consent may involve consenting to project layout, impacts and benefits, and participation throughout the operating life. During operation, consent may mean reviewing project performance and participating in monitoring and reporting studies.
- **Can the possibility of meaningful consent exist without a veto option?** This remains the most contentious public policy issue with respect to FPIC. However, our research suggests that there may be many reasons for lack of consent. Developers need to understand that it is not only the project, but also the larger context that may lead Aboriginal communities to reject a project. It is clear that incorporating FPIC into the project life cycle will provide a better understanding of Aboriginal community concerns and create more productive conversations about what actions can be taken to remedy those concerns in a progressive way over the life of a project.
- **Existing case law:** As mentioned, Canadian case law requires governments to ‘consult’ and ‘accommodate’ Aboriginal communities on land-use decisions. However, the common law precedents establish a spectrum, ranging from consultation in good faith in situations where the impacts are unlikely to significantly infringe Aboriginal rights, to consent in circumstances where the impacts would have significant impacts on established rights and title.¹⁰ The case law on these matters continues to clarify the seminal Supreme Court decision in *Delgamuukw* (1997) case, providing essential guidance on how reconciliation between the respective rights of the Crown and Aboriginal communities is to occur.

¹⁰ <http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp459-e.htm#D>, Justification of Infringements of Aboriginal Title (par. 160-169)

Case studies show that projects where consent has been given share a number of common elements, although different tactical approaches were employed. Common elements include:

- ➔ The project has been well described and understood;
- ➔ The consent process was agreed upon by the developer and the community at an early stage of the relationship and is transparent, well documented, and inclusive of all members;
- ➔ Consent is represented through ongoing and ‘shared decision-making’ between the developer and the Aboriginal community, with adequate time, resources, and capacity developed; and,
- ➔ Consensus building, although complicated and time consuming, yields the most broad-based and longstanding agreements.

CONCLUSIONS

This preliminary research, initiated by the BLC, suggests that:

- ➔ **The Canadian context for FPIC is unique, due to the tripartite responsibilities of government, developers, and Aboriginal peoples.**
 - ➔ **Governments** have a responsibility to provide tenure certainty, clarity on how FPIC will be applied, adequate resources and support to Aboriginal communities, and harmonized project reviews.
 - ➔ **Developers** should incorporate FPIC as an ongoing process within the full life cycle of the project. Developers should be proactive and innovative in engaging with Aboriginal communities, and not default to minimum standards identified in government guidelines.
 - ➔ **Aboriginal communities** hold responsibility for managing the engagement process with all stakeholders in their communities, including providing adequate information, communications, and developing an inclusive decision-making process.

- ➔ **There is benefit to both resource developers and Aboriginal communities in adopting a proactive collaborative approach to FPIC that does not solely rely on governments to act as an arbitrator.**
- ➔ **While the specific tactics employed in securing FPIC may vary on a case-by-case basis, there are a number of common elements that constitute good practice.**

THE PATH FORWARD

The principles of FPIC continue to evolve at an international level and in Canada. In the Canadian context, refinement of the FPIC principles will occur through public

policy, case law, and agreements between governments and Aboriginal communities.

As global demand for Canada's energy and mineral resources continues to grow, there is pressing need for a common sense approach to FPIC.

As global demand for Canada's energy and mineral resources continues to grow, there is pressing need for a common sense approach to FPIC, based on practical guidance that can be used by resource

developers and Aboriginal communities. Sole reliance on government policy change or legal remedies will result in significant project delays and loss of economic benefits for both developers and communities.

The BLC hopes that the issues explored in the background research and highlighted in this summary report will encourage and contribute to a solutions-based dialogue among those interested in collaborating on development of practical guidance for implementation of FPIC in Canada.

Appendix 1: Lessons Learned on Best Practices

FPIC ELEMENT	DESCRIPTION	LESSONS LEARNED	
		Developers	Communities
Tripartite involvement	Involvement of government, developers, and affected Aboriginal communities.	Develop policies and processes that commit to FPIC with clear implementation and monitoring plans, including practical guidelines and training support for staff.	Adopt and adhere to a defined FPIC policy that determines decision points and how consent is required. Build an understanding locally that there is a right to give consent, including stages for consent.
FREE			
Free of coercion, manipulation, or intimidation	Applies equally to developers, government, non-governmental organizations, and communities	Ensure balance of perspectives and information with processes that are open and transparent	Ensure multiplicity of perspectives and balance of information with processes that are open and transparent
Adequate capacity to decide, free of pressure	Self-sufficiency and ability to be self-determining in decision making in a community	Awareness of the on-the-ground reality of a community, and understanding how ready they are to engage	Ability to express community readiness for engagement with a developer
PRIOR			
Early triggers of FPIC	Triggering FPIC early protects developer and communities from potential liabilities. Triggers will vary by scale of project and extent of community impacts.	Conduct due diligence on potential Aboriginal rights or interest infringement before disposition of third party interests.	Identify sensitive areas, less sensitive areas, and areas that will require FPIC in traditional territories
		Engage as early as possible with potentially affected Aboriginal groups.	Identify timing expectations of developers

FPIC ELEMENT	DESCRIPTION	LESSONS LEARNED	
		Developers	Communities
PRIOR (Continued)			
Life cycle approach	FPIC is not only attained, but must also be maintained over the life cycle of the project. This may mean that FPIC is negotiated in stages and renegotiated when there are changes.	Ensure that the conditions of consent are not only initially met but are maintained and kept, with new negotiations where there are changes, such as a material change in the project or where new information reveals cultural resources are at stake.	Consider a staged approach to consent, with process consent at the permit stage and higher levels of consent for exploration and implementation stages.
Timing	Sufficient time for making decisions in advance	Respect requests for additional time for review and decision-making by communities.	Understand the different parties that may need to be engaged and clearly identify when more time is required.
INFORMED			
Balanced information	Provision of relevant, information from a variety of sources and perspectives.	Provide information not just about the project but also about company policies, procedures, and performance.	Provide information based on historical or current use, traditional knowledge, and any areas that are sensitive, critical, or protected.
		Provide as much information as is necessary as early as possible in the engagement process.	Build an understanding of the information available on the project.
Trusted	Information should not be seen as one-sided or biased.	Where possible, integrate Aboriginal groups into the project assessment process such as through community-based assessments or ground verification with communities prior to the environmental assessment process.	Identify what information is available through the community, and identify information that must be collected to satisfy community information needs, and how this might be collected.
Accessible		Take an active role in informing communities using a variety of methods and venues; be prepared to receive information from communities.	Take on an active role to inform the citizens using a variety of methods and venues.

FPIC ELEMENT	DESCRIPTION	LESSONS LEARNED	
		Developers	Communities
INFORMED (Continued)			
		Communicate openly with the Aboriginal group about current and future development.	Be prepared to take information to the community in ways that make sense to the community.
		Present information in language and a manner that is understandable to the audience and in a forum in which they are comfortable.	Present information in a manner that is understandable to the audience
Inclusive	Inclusive of a broad range of community and stakeholder groups and interests as well as the diversity of the community. Elite agreements tend to fall apart over time.	Ensure that consultation is undertaken with a broad range of community members; cast the net widely to mitigate the risk of missing a critical voice. Consider using stakeholder mapping to identify all groups and individuals to work with: elected and nonelected officials, important community members, business, hunter and trappers, women, elders, and those living on- and off-reserve.	Ensure that consultation is undertaken with a broad range of community members. Identify how vulnerable groups will be included in the process for information sharing and consent. Review decisions that are made and assess for their inclusiveness, capacity, and accountability.
Capacity and expertise	All parties involved need to have an adequate understanding of the issues to effectively manage the FPIC process.	Dedicate personnel with the right skill sets to FPIC throughout the project lifecycle; develop practical guidance and training support for staff.	Dedicate personnel with the right skill sets to FPIC throughout the project lifecycle. Develop practical guidance and training support for staff.
		Be proactive in supporting capacity building for specific tasks associated with Aboriginal groups processing referrals, accessing information about the proposed developments and impacts, negotiating consent, and engaging in monitoring and follow up.	Identify supports either in government, university, or not-for-profit groups that can assist in critical stages.

FPIC ELEMENT	DESCRIPTION	LESSONS LEARNED	
		Developers	Communities
INFORMED (Continued)			
		Accept that technical experts of company may not always be the trusted advisors.	Engage experts to help identify critical impacts, such as impacts on Treaty rights, or on key areas, practices, or values.
Financing	Adequate financial resources and capacity to properly make a decision.	As part of project planning, ensure that adequate financial resources are provided to support Aboriginal communities in being well informed and in engaging for consent.	Estimate and negotiate for costs of engagement, of information sharing, and of bringing in local and outside experts to assess the project and describe it locally.
Information throughout project life cycle		Provide information throughout the project, especially if there are changes or new information.	Treat the information process as ongoing for the maintenance consent.
Understanding dissent	When there is strong dissent, the basis and underlying factors need to be understood.	Take dissent seriously and understand the grounds for dissent.	Clearly identify dissent, and gauge the extent of it through participatory processes.
CONSENT			
Definition of consent	Confirm the process both for attaining consent and maintaining consent and obtain agreement from all parties at the beginning of the process.	Respect decisions by Aboriginal groups (including non-consent) rather than falling back on government rules that fall short of consent.	Define how decisions will be made. This may mean that traditional and contemporary ways of making decisions are engaged in parallel or together. Build internal agreements on this process and then share information with the developer.
Broad-based consent	Use multiple processes and seek to build layered consent.	Seek multiple forms of engagement rather than relying on elite or powerful individuals to represent consent.	Build up leadership and figure out if there are internal conflicts how they will be managed and confronted.

FPIC ELEMENT	DESCRIPTION	LESSONS LEARNED	
		Developers	Communities
CONSENT (Continued)			
		Be prepared to start anew with a change in administration.	Understand and review the decisions of previous administrations.
		Respect and adhere to Aboriginal group-specific engagement and consultation protocols, especially where they have a higher expectation than regulatory or government guidelines. This means adapting corporate FPIC practices on the ground to meet community-specific expectations.	Build an understanding of how engagement and internal review will proceed.
Mitigation of impacts		Proactively integrate Aboriginal mitigation recommendations into the project planning.	Identify impacts and who and how they will be experienced. Seek to avoid negative impacts with mitigation efforts.
Dispute resolution	A dispute resolution mechanism should be defined as part of the consent process and as part of the ongoing implementation plan for maintaining FPIC over the lifetime of the project.	Create a transparent complaint mechanism for both the process of consent and for the ongoing maintenance of FPIC.	Create a transparent complaint mechanism so that everyone has an equal voice and complaints can emerge and be managed.
Ratification of decision	Define the mechanisms for determining community support and what constitutes an acceptable outcome.	Seek to understand the process for decision-making.	Define the mechanisms for determining community support and what constitutes an acceptable outcome; ensure that this is public and clear.
Documentation	Document the consent process.	Seek formal documentation of both the process of consent and the consent itself.	Document the process of attaining consent, so that it is replicable and understandable to future administrations and to citizens.

FPIC ELEMENT	DESCRIPTION	LESSONS LEARNED	
		Developers	Communities
CONSENT (Continued)			
Consent through the project life cycle	Consent can be given or removed at different stages of the project, and can take different forms. Consent is maintained.	Internally define what consent will look like through the project life cycle and at what points it is required; remain flexible and responsive to Aboriginal visions of same.	Build monitoring bodies to implement the project, and ensure that major project changes and shifts are newly negotiated.
		Discuss with Aboriginal groups the terms and conditions (including monitoring and reporting of the same) that must be adhered to for FPIC to be maintained.	Maintain a focus on implementation and mechanisms for maintaining consent.
A “no” decision	Understanding of a “no” decision by communities.	Make efforts to ensure a solid understanding of the basis for a “no” decision.	Clearly articulate the process for arriving at the decision, and the basis of the position.

Appendix 2: FPIC Case Studies

This section presents summaries of four case studies completed as part of the *Free Prior, and Informed Consent in Canada: Towards practical guidance for developers and Aboriginal communities* report. They are intended to illustrate some instructive applications of FPIC in the Canadian context. Selection considered sector, geographic location, land claim status, and availability of information. It is acknowledged that circumstances will have changed since this report was authored. The case studies are not necessarily representative of FPIC best practice, but rather represent a range of experiences and perhaps the state of practice at this juncture. The case studies are:

- ➔ Victor Diamond Mine (De Beers Canada), northern Ontario
- ➔ Matoush uranium mine (Strateco Resources), northern Quebec
- ➔ Northwest Hydroelectric Transmission Line (BC Hydro), British Columbia
- ➔ Farrell Creek shale gas (Talisman Energy), north eastern British Columbia

The case studies are described in terms of:

- ➔ Government involvement
- ➔ Policy and process framework in relation to FPIC
- ➔ Timing and ratification
- ➔ Implementation
- ➔ Lessons learned

VICTOR MINE—DE BEERS CANADA

The Victor Diamond Mine is located in northern Ontario on the traditional territory of the Attawapiskat First Nation, about 90 km from the Attawapiskat community. It began operations in 2008.

GOVERNMENT INVOLVEMENT

The federal government was involved in informing the community through the Canadian Environmental Assessment Act (CEAA) process and comprehensive study, and the province was involved in issuing permits and licenses.

POLICY AND PROCESS FRAMEWORK

De Beers' policy, specific to Canada, requires free, prior, and informed consultation (FPICon) before mining exploration begins. De Beers also has an FPIC policy that indicates a project must have Aboriginal community support before initiating mining operations where they will have a substantial impact on community interests.

According to De Beers, the community of Attawapiskat gave consent through an IBA to a defined area for exploration and mining of 18 known kimberlites (potentially diamond bearing geological structures). If kimberlites were to be added to extend the Victor resource, there would be new negotiations (personal communication with De Beers employee, May 24, 2011).

The parties have used a phased approach to agreements, starting with a memorandum of understanding (MOU), moving to an exploration agreement, and finally signing a full IBA.

By the time the IBA was signed, there had been ongoing negotiation of project design options, with substantive revisions to the project to address community concerns, such as fuel transport through critical habitat. Also, mitigation and monitoring programs were introduced for environmental concerns.

The IBA represents FPIC only for the mining development. The De Beers policy on consent requires the company to renegotiate consent if the scope of the project varies significantly from the original IBA. In addition to the operating mine, De Beers is currently conducting preliminary exploration activities within the Attawapiskat IBA area and additional agreements will be required if this is to move into advanced exploration. De Beers is in discussions with Attawapiskat to expand exploration activities beyond the IBA area.

TIMING AND RATIFICATION

The community engagement and negotiation process was initiated in 1999 with the signing of an MOU between the Attawapiskat First Nation and De Beers. Following this, an exploration agreement was signed in 2001. Formal negotiation regarding the IBA was initiated with the leadership in 2002, followed by community consultation and engagement in 2003. The IBA was ratified by the community and signed in 2005, the same year the project received government environmental assessment approval.

The Attawapiskat First Nation ratified the IBA through a community referendum, which received 85.5 per cent (519/607 votes) approval from community members living on and off reserve. The referendum was followed by a band council resolution (BCR).

IMPLEMENTATION

Attawapiskat members participate through an Environmental Monitoring Committee, which meets regularly to review environmental issues and ensure IBA provisions are being met.

De Beers has a designated aboriginal affairs manager who is responsible for working with other De Beers staff, as well as community representatives, to ensure IBA deliverables are met in the prescribed timeframe.

According to De Beers, “Consultation continues until planned activities have been completed,” and activities must be responsive (i.e., showing changes based on feedback where relevant and possible).¹¹

LESSON LEARNED

Consent

The company paid for the referendum, at a cost of \$155,000. It was unclear at the time whether there was an official voters list, and thus the percentage of people voting in the election was difficult to measure. There are various reports suggesting anywhere from 22 to 48 per cent of the population voted in this referendum.

¹¹ http://www.debeerscanada.com/files_3/communities.php

Implementation

There have been conflicts since the signing of the IBA, including a petition circulated for revisiting the IBA, and two blockades in 2009 and 2011 that were resolved. Issues involved use of the winter road and employment, as well as lack of transparency of financial returns from the mine, asserted lack of legitimacy of the leadership, and lack of legitimacy of the IBA. There was not broad community engagement in the blockades and community leadership did not endorse them.

There have been challenges with the implementation of the IBA terms, in particular meeting employment guarantees due to the education, training, and retention of local workers beyond the mine construction phase.

MATOUSH URANIUM MINE PROJECT—STRATECO RESOURCES

The Matoush uranium mine project is located in the Otish Mountains, about 275 km from Chibougamau, Quebec. The property is presently occupied by a 48-person camp, with an 11-km access road linking the camp to a winter access road. The proposed project is located on the traditional lands of the Mistissini Cree First Nation.

GOVERNMENT INVOLVEMENT

Under the James Bay and Northern Quebec Agreement (JBNQA), no consultation was required at the exploration stage between the developer or the province and the Mistissini Cree First Nation. The environmental impact assessment (EIA) and engagement processes were triggered when the company proposed to advance the uranium exploration to include underground work.

The JBNQA governs the process for engagement of the Cree on development projects in the region. Quebec takes the position that the JBNQA requires consultation, while the Cree Nation position is that consent is required for development.

Both provincial and federal reviews have been triggered in this case. CEAA has delegated authority for a comprehensive study report to the federal administrator. The provincial and federal administrators have issued two sets of recommendations, after study and hearings. The Provincial Review Committee submitted its recommendations to the

Quebec administrator, and these documents are considered privileged and confidential; however, interviews suggest the developer must demonstrate “social acceptability” prior to final approval, a term that emerges from the company’s own policies on engagement. The Federal Review Panel (COFEX) has made a series of recommendations as well, after its own review of the case, asking for a revised monitoring program, a new eco-toxicological risk analysis, and an assessment of mechanisms of information. The federal review concluded that, “provided the proposed mitigation measures are implemented, the Matoush underground exploration project is not likely to cause significant adverse environmental effects on the human, biophysical and biological environment” (Canadian Nuclear Safety Commission 2011). However, the administrator also required new information before a decision will be made:

“In view of the nature of the project—which differs from other types of mining projects underway on JBNQA territory—the federal review panel) is of the opinion *that an endorsement of the project by local communities* is a key factor and therefore recommends that the additional information” be provided (emphasis added)¹². (Canadian Nuclear Safety Commission 2011)

The federal government is requiring an evaluation by the proponent, in collaboration with the Cree Nation of Mistissini, of the implementation of information sharing and communication mechanisms.

Once the environmental assessment decisions are made, the Canadian Nuclear Safety Commission will trigger a public process to decide whether or not they will issue a license to Strateco Resources authorizing the Matoush Project.

The provincial ministry organized a visit to a uranium mine in Saskatchewan, but the community declined to participate, stating that the community would meet with and learn from Denesuline Nation representatives from northern Saskatchewan at the appropriate time and in the appropriate way. This meeting has since occurred.

¹² Canadian Nuclear Safety Commission, 2011. Comprehensive Study Report for Strateco Resources Inc.’s Proposed Advanced Uranium Exploration Project, Matoush (Quebec). <http://www.ceaa.gc.ca/050/documents/51558/51558E.pdf> CEAR #08-00-46115

POLICY AND PROCESS FRAMEWORK

Strateco Resources has no specific policy on FPIC; however, its sustainable development policy says it tries to generate “social acceptability” through information sessions, open-house days, individual meetings, door-to-door programs, informative advertisements, media coverage, brochures, and other means.¹³

TIMING AND RATIFICATION

The company engaged in a variety of community information processes as part of the environmental assessment process.

The Mistissini Cree said consent was not given, and requested a temporary moratorium on uranium mining. The moratorium request was decided on after the community ran a door-to-door survey of 650 members, and it was finalized with a show of hands at a community meeting. In March 2011, the Mistissini Cree Band Council passed a resolution for a moratorium and issued statements by the Chief of the Mistissini that the community was not adequately informed. They required a moratorium to allow for baseline data and studies on the potential impacts. A letter to that effect was sent to the EIA review panels from the Chief. This moratorium has been supported by the Grand Council of the Cree.

Strateco responded to the review panels that it had consulted broadly for the social license to operate and the developer feels they have met the requirements for the EIA and JBNQA approval. They have appealed to the panel to grant approval for further exploration.

IMPLEMENTATION

The developer claims to have met all of the necessary criteria and have requested that the federal and provincial panels approve the project. The company at this point has spent some \$80 million and invested more than four years in the pursuit of the permits to continue exploration.

¹³ <http://www.stratecoinc.com/data/pdf/Fiches-dinformation/FactSheetSustainableDevelopmentOct2010VFR.pdf>
Accessed May 20, 2011.

Interview respondents for the current study faulted both environmental activists and the developer for providing conflicting information, noting that the company spoke of “zero risk” and the activists spoke to elders of “two-headed caribou” and made the suggestion that “if one drop of uranium got into the lake, the whole lake would die.”

LESSONS LEARNED

Government role

This exploration proposal has been the subject to two extensive reviews, both of which have now failed to provide clear guidance to parties, even after public hearings and review of the public record. The company is now required to engage new research and prepare a new record of engagement with the Cree. The amount of time that will elapse between these two activities and a decision being taken is unclear.

The government has also concluded *that an endorsement of the project by local communities is a key factor*. Also, the government has asked the proponent to show that risk perception of the community has changed.

Prior

The company is not required to engage with communities in Quebec at the exploration phase. As a result, the company started engagement much too late, according to project interviews. “They should have been in communication four or five years earlier.”

(community interview, May 20, 2011)

Informed

The community argued that engagement with the First Nation did not meet the criteria of ‘informed.’ Some people described the approach of the developer as a one-way transfer of information, rather than consultation. As one community member described it, “Strateco came in with an approach, telling people what was good... and the president of the company came in telling people that the project was on Category 3 lands, telling everyone that he was doing them a favour by consulting them.” (community interview, May 20, 2011)

The band requested that a joint advisory committee be set up for information sharing

and addressing concerns. Strateco instead asked to join the community working group. The community declined and requested a formal advisory committee under the EIA process.

Consent

Opposition from the Mistissini First Nation is based mainly on the engagement process and the adequacy and clarity of information provided in the EIS. The First Nation has major concerns over human health and potential impacts to the environment and project benefits for the community.

The federal government has requested the company demonstrate “social acceptability,” the company’s own term, at the local and regional level. It is unclear how this demonstration will be made, evaluated, or accepted. However, the company must illustrate the communication mechanisms that are in play with the local and regional Cree authorities.

The company raised concerns about the balance of discussion being heavily weighted towards impacts with the project at the Mistissini public hearing, with little discussion of benefits. The review panel then changed the format for the subsequent Chibougamau hearing. The perspective of one NGO was that the second meeting did not include the perspectives of those with impact concerns and was therefore imbalanced. Some community members felt that the anti-mining network controlled the agenda, and discussion in the community was one sided.

Band council elections resulted in a significant change in leadership. Strateco had spent a lot of time with the previous administration, and placed a heavy emphasis for consultation with the families whose trap-lines were directly affected.

At this time, the moratorium cannot be considered absolute refusal of consent for the project—the door is still open. However, this case illustrates that internal conflict can be generated from a choice to not support exploration or development.

The company and the Cree are now in the position where they both have to work together, as suggested by the federal review. They also have to provide some type of guarantee that “risk perception” in the community has changed.

NORTHWEST TRANSMISSION LINE (NTL)—BC HYDRO

This case study involves the proposed construction of the 287-kilovolt Northwest Transmission Line (NTL) connecting large areas of resource rich northwestern British Columbia with reliable energy transmission. The total project cost is anticipated to be \$400 million, with funds for construction from the province, the federal government, and AltaGas Income Trust, among others. There have been two primary routing options considered, with the western route going through Nisga'a lands covered under the Nisga'a Final Agreement, and the eastern route through the Cedar and Kiteen valleys. Other than the Nisga'a Nation, the NTL project also transits through the lands of eight First Nations. The line starts at the Skeena Substation in Tsimshian (Kisumkalum and Kitselas, as well as others) territory and would run to a new substation near Bob Quinn Lake in the traditional territory of the Tahltan Nation. Other than the Nisga'a Final Agreement, no treaties are in place between the Crown and the involved First Nations.

BC Hydro (a Crown corporation) anticipates that the project will bring a reliable and clean supply of electricity to attract and support industrial development, such as mines, in the northwest, and will contribute to overall economic development in the region through direct and indirect employment. It is expected to generate taxes and approximately 860 full-time equivalents (FTE) over the life of the project. An environmental review of the project was completed through the British Columbia Environmental Assessment Office, which was also delegated responsibility for conducting a review relevant to federal guidelines under the CEAA.

GOVERNMENT INVOLVEMENT

In this case, the provincial government was the developer. The province held many portfolios, including managing the regulatory process (through the BCEAO), promoting the development (through BC Hydro), and managing Crown consultation (through the Major Projects Office and the BCEAO).

Neither the federal nor provincial government can delegate the duty to consult, but they can delegate procedural responsibilities. In British Columbia, the government regularly delegates the responsibility to consult through a Section 11 Order to a project proponent,

and the proponent does most of the ‘on the ground’ consultation. In the case of the NTL project, the federal and provincial governments maintained ultimate responsibility for First Nation consultation, but much of the actual consultation, including provision of information, as well as negotiation of appropriate accommodation, took place between BC Hydro and the involved First Nations.

POLICY AND PROCESS FRAMEWORK

Due to the number of First Nations involved, there were multiple streams of consultation, and in some cases consent by First Nations along the transmission line. While BC Hydro consulted extensively about the proposed development, each First Nation made decisions about the transmission line in a unique way:

- ➔ The Nisga’a Nation has a unique constitutional position, with a completed land claim and self-government agreement, while the other Nations continue to pursue land claim agreements with the federal government. The Nisga’a Nation provided consent in March 2011, as required through the *Nisga’a Final Agreement*, through the ratification of an IBA in the Nisga’a legislature.
- ➔ The Tahltan provided their consent through the ratification of an agreement in a nationwide Tahltan referendum.
- ➔ Other First Nations provided consent through the signing of an IBA through council where the extent of consultation and review by the communities is less clear.
- ➔ Many First Nations were publicly against the transmission line for months after the permits were issued, however some have recently concluded agreements (such as the Gitanyow First Nation).

TIMING AND RATIFICATION

The project was initiated and the Section 11 Order issued in 2007 (BCEAO 2009), and the environmental assessment took place through 2008 to 2010. The project Environmental Assessment Certificate (EAC) was issued in February 2011, and the Federal Course of Action Decision was issued on May 6, 2011. The BC EAO stated satisfaction that the

Crown's duty to consult and accommodate First Nation interests and that the Nisga'a Treaty interests had been discharged as they related to the decision to grant the EAC.¹⁴

However five First Nations withheld their consent for some time. The process for achieving consent of First Nations has not been linear, meaning that the negotiators have not pursued consultation from Nation to Nation moving south to north.

IMPLEMENTATION

The construction of the transmission line has begun. "Boot camps" were run to train community members for work along the transmission line. Barriers to construction may be the continued dissent of First Nations, although the spokesperson for BC Hydro has suggested, "We don't have to have all of these resolved. The project is 340 kilometres long so that there are lots of places we can work that are not in dispute."¹⁵

LESSONS LEARNED

There is uniqueness to this case not seen in other resource developments. By providing electrical power, this project offers both green opportunities (through the possible future electrification of communities that are currently diesel based), but also opens up the region to other resource developments that may be far from 'green.'

Government role

The Tahltan negotiations with BC Hydro were complemented by BC government to First Nation government negotiations, and an agreement between these governments was ratified at the same time as the IBA. The agreement, for the Tahltan Nation, provided the kind of relationship that they feel will be required for managing the pace and scale of development in the future.

Informed

Access to information has been a critical component for the Tahltan, in particular due to the public nature of their ratification vote. When the referendum was chosen as a strategy for ratifying the agreements, the Tahltan negotiation team began a broad

¹⁴ British Columbia Government, Feb. 23, 2011. Northwest transmission line project approved. Victoria: BCEAO
¹⁵ Hamilton, G, 2011. Hydro vows to build transmission line despite first nations objections. Vancouver Sun. May 9

effort to get information out to the membership. A negotiator said, “from the moment it began to be clear that the project was impacting on title and rights, we decided it had to go to ratification. The people were adamant we have to have shared decisions, revenues, and we needed to know how it was affecting on rights.” With the referendum scheduled in May, the negotiators were on the ground in every community to hold public meetings and answer questions. The Tahltan Central Council put together a host of materials, including an oral summary of the agreements and their implications (on webcast), factsheets about the projects, and summaries on the proposed agreements. The information was backed up by a contact person and public meetings with the negotiators in each community, as well as the option to see the agreements by visiting the band council or going to the lawyers’ offices.

Consent

There are unique internal processes for signing agreements on any project. In the case of the Nisga’a, a vote in the legislature was implemented to ratify the IBA. The Tahltan ran a referendum, with a chosen threshold of 60 per cent required to support the agreements. One challenge to this particular ratification process was that there was not a “double majority” (i.e., a majority of the people who were eligible to vote did not vote). This leaves potential for a disenfranchised group of people to challenge the nature of the process or the outcome.

In the case of the Nisga’a and Tahltan, there has been either public administrative review (through the Nisga’a government) or public voting and ratification. These two processes suggest a high level of transparency. Other First Nations have signed IBAs, but the nature of ratification is not clear.

FARRELL CREEK SHALE GAS—TALISMAN ENERGY

Talisman Energy has natural gas interests in the Montney Shale formation at Farrell Creek near Hudson’s Hope in northeastern British Columbia. Talisman has estimated that capital investment at its Farrell Montney project could be \$7.5 billion over the next decade. The resource can be accessed only by using hydraulic fracturing (fracking), a technology with strong potential for tapping previously inaccessible gas deposits trapped in shale formations.

In 2010, Talisman applied to the BC Oil and Gas Commission (OGC) to construct a water intake from the Williston Reservoir and pipe a maximum of 2.2 million cubic metres of water to its Farrell Creek Field, and for an associated water allocation license. The pipeline and the resource are both located in the critical hunting territory of the traditional territory of the West Moberly First Nations (WMFN). In 2011 a new series of applications were brought to the attention of the WMFN.

ROLE OF GOVERNMENT

The proposed water allocations and pipeline permits have been issued. The provincial government and OGC do not require FPIC for the project to proceed; however, the first step required of the developer by the OGC is consultation on the project.

The WMFN are seeking clarity from the BC government over its relation to FPIC. According to one WMFN representative:

“Right now [FPIC] is being treated as a social license issue by industry. Government is telling industry to have good relationships and consult. But since government doesn’t acknowledge the need to obtain First Nations consent, it is very difficult to say there is a role for government.” (May 7, 2011)

A big concern for the WMFN is the lack of government-to-government consultation with the province before the application was made. Once a surface or subsurface interest has been disposed by the Crown to industrial interests, it becomes very difficult for proposed developments on that land to be opposed by any interests. The WMFN would prefer consultation before the Crown makes these dispositions. The WMFN received the application and related documents only in early 2011, five months after Talisman submitted its proposal to the OGC, and only after formally requesting them from the provincial government.

POLICY AND PROCESS FRAMEWORK

This situation is somewhat unique in that the developer itself has a defined FPIC requirement on its projects, based on a new policy adopted in 2011. In December 2010,

after a review of the risks and benefits of adopting FPIC¹⁶ Talisman formally adopted a Global Community Relations Policy (GCRP), which recognizes the importance of FPIC, which is further defined to commit Talisman to:

- ➔ Engage in a timely, honest, and culturally appropriate way with communities before undertaking significant activities and throughout the project;
- ➔ Work to build trust and understanding through an open exchange of information that enables knowledgeable decision-making by communities; and
- ➔ Seek to obtain and maintain the support and agreement of communities for its activities.

Policy is one tool for creating guidelines for engagement. However, there are no clear metrics in the GCRP on how to determine whether FPIC is achieved. Key concerns that the WMFN community is raising are not being addressed. The WMFN has ongoing concerns about water availability in the Peace River, the use of fresh water in the process, possible water contamination within their traditional territory, and the impacts on the moose population in the area. They are also concerned about the pace and scale of development.

While in this case, the company is operating with an FPIC policy, the translation of policy into practice is commented on by the community.

“There is no strategic planning with this company. Another company in the area meets with us every three months out on the land to see where their proposal is going. When we raised concerns about the use of fresh water in their process, they worked out a way to not use fresh water for shale gas development. They are using grey water instead. We also go over maps with them, and they reduce their impact in zones that are critical use.” (WMFN interview, October 2011)

¹⁶ The review, conducted by Foley Hoag LLP (Lehr & Smith 2010), is a valuable resource on FPIC, available at http://www.foleyhoag.com/NewsCenter/Publications/eBooks/Implementing_Informed_Consent_Policy.aspx.

TIMING AND RATIFICATION

The timeframe for consultation and review of applications is 10 days from receipt of notice. The WMFN Lands Department estimates that it manages 1,000 applications each year, each of which brings in upwards of eight associated documents. This means that up to 8,000 documents are being reviewed each year by the Lands Department (interview with WMFN, October 2011). A September request by Talisman to review new applications was received while core staff was on vacation. Given the lack of response by the Lands Department, no comment was placed on the public record.

The WMFN, when it considers applications, uses three general parameters to consider development:

- ➔ It must not threaten WMFN cultural sustainability, especially as it relates to land-based activities;
- ➔ It must provide equitable benefit to the WMFN and its members; and
- ➔ It must be conducted without degrading the landscape beyond an acceptable threshold (i.e., make the area no longer suitable for meaningful practice of Aboriginal and treaty rights as protected by the Canadian Constitution).

The WMFN do not feel they have provided consent for Talisman's many permits and licenses for a few reasons. First, they are particularly concerned about the impacts this developer will have on their most critical hunting territory (interview with WMFN, July, 2011). When asked to work together to provide information on the moose population, the company unilaterally commissioned research, the findings of which did not correlate with local knowledge (interview with WMFN, October, 2011). Second, they feel they have not had sufficient or proper information to judge the project effects.

The lack of proactive provision of documentation to the WMFN by both parties (OGC and Talisman) raises questions about the transparency of the process and whether it meets the requirements of 'prior' or 'informed.'

The WMFN has a well-defined process for reviewing and providing consent for proposed developments within their traditional lands.

LESSONS LEARNED

Informed

The WMFN do not feel they had sufficient information or enough time to make informed decisions. Critical information on wildlife was not available, and the process for developing new information was managed alone by the developer.

Consent

Even with a policy in place for obtaining consent, companies may adhere to the position that federal or provincial authorization provides for FPIC in Canada. While the Talisman policy seems to set a higher bar or threshold, the absence of clear and precise definitions leaves the door open to potential conflict.

In this case, consent might have been achieved through ongoing and direct negotiation. This consent requires active engagement in the form of joint review of sensitive zones (and avoidance strategies for key areas), engagement out on the land with the developer, and imaginative solutions to manage core concerns.

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