



SERIES - FIRST NATIONS' RIGHTS: THE GAP BETWEEN LAW AND PRACTICE

Consent or Consultation: Examining the Gap

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Overview

- United Nations Declaration on the Rights of Indigenous Peoples;
- Free, Prior and Informed Consent (FPIC);
- Elements of FPIC;
- Legal Status of the Declaration and FPIC (Domestically and Internationally);
- FPIC in Practice;
- Closing the Gap.

Introduction

- As Indigenous Peoples work to resolve the outstanding land question in BC, they face a growing number proposed development activities and other land and resource access and use issues in their traditional territories.
- In seeking resolution to the unresolved land question, Indigenous Peoples are beginning to turn to various tools/instruments including entering into treaties, agreements and other constructive arrangements with the federal and provincial governments, and also seek remedy through litigation.
- Domestic and international tools/instruments such as the the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) and the standard of Free, Prior and Informed Consent (FPIC) are also being utilized in efforts to bring about resolution of the land question.

The United Nations Declaration on the Rights of Indigenous Peoples

- Is a comprehensive, universal international *human rights* instrument containing 46 articles that elaborate on the economic, social, cultural, political, spiritual and environmental rights of Indigenous peoples. Fundamental issues such as FPIC are also addressed in the Declaration.
- Dr. James Anaya, the Special Rapporteur on the Rights of Indigenous Peoples articulated, “Far from affirming special rights per se, the UN Declaration aims at repairing the ongoing consequences of the historical denial of the right to self determination and other basic human rights affirmed in international instruments of general applicability.” (A/HRC/9/9, para. 36.)

Free, Prior and Informed Consent

What is Free, Prior and Informed Consent (FPIC)?

With respect to Indigenous peoples' lands and territories, there are a number of provisions in the Declaration that explicitly require the FPIC of Indigenous Peoples and the right to redress for lands, territories and resources taken without FPIC (Art. 28). The Declaration contains wording that suggests the need for consent (e.g. "in conjunction with" or "in consultation and cooperation with" Indigenous Peoples).

- FPIC is an essential international standard for engagement with Indigenous Peoples which is supported by the UN General Assembly, international treaty bodies, regional human rights bodies, UN Special Rapporteurs and specialized agencies.
- The UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights have also characterized FPIC as a "right". Generally, in international law, it is also recognized as a **legal norm** imposing clear, affirmative duties and obligations on States (See: UN-REDD Programme Guidelines on Free, Prior and Informed Consent).

Elements of Free, Prior and Informed Consent

Free

- Refers to a consent that is given voluntarily, without coercion, intimidation, manipulation, expectations or externally imposed timelines.

Prior

- Consent is sought in timely way, well in advance or commencement of activities. It means engaging at the earliest phase of a proposed project/development (at the strategic level).

Informed

- Providing Indigenous Peoples affected by the proposed activity with the type of information that would assist in making an informed decision based on best available information.

Consent

- A collective decision made by the proper rights holder (affected people or community).

*See: UN-REDD Programme Guidelines re FPIC.

Legal Status of the Declaration and FPIC: International Context

The Declaration:

- Adopted by the UN General Assembly via resolution, represents a commitment on the part of Member States to the standards set out in this human rights instrument, including FPIC (A/HRC/9/9, para. 41) and serves as a guide for interpretation and application of international human rights law to Indigenous peoples.
- Reflects customary international law which are legal standards that have become obligatory on States and their obligations through widespread application. Key elements in the application of customary international law include demonstrating that **most** Member States adhere to the **normative standard** and believe that they have some legal obligation to respect it.
- The Office of the UN High Commissioner for Human Rights has noted that the Declaration is being used by various United Nations treaty bodies, specialized agencies and the Human Rights Council's mechanisms and it is also being relied upon by domestic and regional courts of Member States.

FPIC:

- International law has now recognized that FPIC is a legal norm imposing clear affirmative duties and obligations on States.

Legal Status of the Declaration and FPIC: Domestic Context

- Canada originally voted against adoption of the Declaration (at the Human Rights Council in Geneva and at the UN General Assembly) but later endorsed it through a statement of support on Nov 12, 2010 describing the Declaration as, “... an aspirational document...**a non-legally binding** document that does not reflect customary international law nor change Canadian laws...” and later reaffirming this position in March 2011, when it released its updated guidelines to federal officials on “Aboriginal Consultation and Accommodation”.
- In relation to international standards such as FPIC, the Supreme Court of Canada (SCC) has articulated that:
 - ✓ the various sources of international human rights laws, including declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms are relevant and persuasive sources for interpretation of human rights in Canada (see: *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348; and *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paras. 175, 178);
 - ✓ “It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law” (*R. v. Hape*, 2007 SCC 26).

Legal Status of the Declaration and FPIC: Domestic Context, cont.

- There are great similarities between the duty to consult and FPIC. With respect to the duty to consult, Canadian courts have articulated that:
 - The Crown's duty to consult with Aboriginal peoples and where necessary, accommodate their interests is grounded in the "honour of the Crown," which must be understood generously.
 - The Court's seminal decision in *Delgamuukw*, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a **minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"**; through the "significantly deeper than mere consultation" that is required in "most cases"; to "**full consent of [the] aboriginal nation" on very serious issues**. These words apply as much to unresolved claims as to intrusions on settled claims (*Haida*, para 24).
- Canadian courts have also been clear that the Crown, acting honourably, "cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof." (*Haida*, para 27).

Free, Prior and Informed Consent in Practice

- FPIC is a protective mechanism, a derivative of substantive rights held by Indigenous Peoples. It is embedded in the right to self-determination. The procedural requirements for consultations and FPIC are respectively similar.
- Another way to understand FPIC, is to see it as an important element which gives effect to rights, imposing a duty on a State to engage Indigenous Peoples in a manner that effectively provides opportunity for affected rights holders to meaningfully take part in determining the outcome of decisions that affect them. The duty to obtain the FPIC of Indigenous Peoples is both a procedural and substantive process.
- For example, the Indigenous right to land is really a bundle of rights which include the right to access, use, manage, own, care for lands and the right to make decisions about the use and development of traditional territories. FPIC gives life to the right to be involved in decision-making).

Closing the Gap

- **Declaration is our document:** We do not need to wait for Canada or Canadian courts to approve of the Declaration or adopt FPIC, these are our tools and we must start utilizing them. We do not need to approval of Canada or its courts.
- **Common Appreciation of Democracy:** The Declaration sets out that the principle of democracy is especially important in relation to the right of self-determination of Indigenous Peoples, requiring that all provisions in the Declaration be interpreted in accordance with the "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith". Similarly, the website of the Canadian Parliament suggests that the Canadian Parliament values and upholds the value of democracy.
- **Consultation:** The Declaration does not contain absolute rights. The preamble and Art. 46 reflect the principles of balancing of rights. In relation to these rights, the duty of States to consult with Indigenous peoples on decisions affecting them is affirmed as an overarching principle in the Declaration. Similarly, the SCC has clearly held that our constitutional framework and common law require that the Crown consult and, where appropriate, accommodate aboriginal groups regarding decisions that may impact their interests. In cases of very serious issues, this duty may include seeking the "*full consent of [the] aboriginal nation*" on very serious issues. (*Haida Nation*, para 24) .
- **Not an impediment:** FPIC and consultation are about making decisions relating to land and resource development and economic activities. Ultimately about creating processes that are informative, fair and meaningful and which is not an impediment to progress.

For More Information:

United Nations Permanent Forum on Indigenous Issues (UNPFII):

<http://undesadspd.org/IndigenousPeoples.aspx>

World Conference on Indigenous Peoples 2014:

<http://undesadspd.org/IndigenousPeoples/WorldConference.aspx>

Expert Mechanism on the Rights of Indigenous Peoples (EMRIP):

[http://www.ohchr.org/en/issues/ipeoples/emrip/pages
emripindex.aspx](http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx)

**The United Nations Collaborative Programme on Reducing Emissions from
Deforestation and Forest Degradation in Developing Countries:**

<http://www.un-redd.org>

UN Committee on Economic, Social, and Cultural Rights (CESCR):

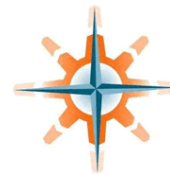
<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>

UN Human Rights Committee:

<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>

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(Thank you)



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