Implementing FPIC:
Challenges and Opportunities in the Canadian Context

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M. Papillon and T.Rodon, *Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach*, IRPP Insight, June 2017

What is consent?

- The capacity to say yes or no
- Not new … treaties are about consent
- Increasingly recognised as a basic principle of Indigenous / settlers relations (UNDRIP)
- Rooted in three principles (James Anaya):
  - Self-determination/jurisdiction - Indigenous peoples can freely decide their future and that of their traditional territories (UNDRIP section 3)
  - Democratic legitimacy – about giving a voice to communities, not solely elites
  - Relational – one expresses consent (or not) in relation to the action of others – a legitimate and mutually agreed upon process is necessary to seek/express consent

Consent in UNDRIP

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. (UNDRIP section 19)

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of minerals, water or other resources. (UNDRIP section 32)

- Must be free, prior and informed
- Ambiguity over meaning
  - A duty to consult in order to seek consent
  - A veto
  - A right to participate in decision
- Ambiguity over scope
  - Who can express FPIC, when and under what circumstances?

Canada's Position on FPIC

- 2007: Canada votes against UNDRIP, notably because of concerns over FPIC
  - 2010: Canada endorses UNDRIP but restates its caveats
- 2016: Canada fully endorses UNDRIP, including FPIC

  But ... "Canada believes that our constitutional obligations serve to fulfil all of the principles of the declaration, including FPIC." (C. Bennett at UN)
- Jurisprudence on consent
  - An extension of the duty to consult
  - So far limited to Aboriginal title (Tsilhqot'in)
  - No veto, not absolute (infringement test applies)
  - Court reluctant to import FPIC in Canadian law
- A number of projects continue to be approved despite clear Indigenous opposition

Principles respecting the Government of Canada's relationship with Indigenous peoples (2017)

- **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.**

- This Principle (…) goes beyond the legal duty to consult. In delivering on this commitment, 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.

- The Supreme Court of Canada has clarified that the standard to secure consent of Indigenous peoples is strongest in the case of Aboriginal title lands. (…) The Indigenous nation, as proper title holder, decides how to use and manage its lands for both traditional activities and modern purposes (…).

- The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands.

- To this end, 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. It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.

From principle to practice…

Avenues for implementing FPIC

Government-driven mechanism: IAs

- Pressure to enhance role of IP in EIA
  - Ex. Federal government's proposal for reforming EA and NEB regulatory processes
- Strenghtening IA processes to make them "joint" or "collaborative"
  - From passive consultation to active role in decision-making
  - Mutual agreement on process and respect for outcome
  - Consensus-based decision-making
- Examples:
  - Mackenzie River Basin Bilateral Water Management Agreements in NWT
  - Some BC Reconciliation agreements and protocols (ex. Haida)
- Limits:
  - Can be complex, lengthy and not necessarily transparent
  - Process remains driven by Crown
  - What if there is no consensus? Who decides ultimately?

B.C. pipeline showdown: Will Kinder Morgan expansion get built?

Proponent-driven mechanism: IBAs

- Private agreement between a proponent and a community
  - Community consent to a project in exchange for mitigation measures and share of benefits
  - Financial compensations, training, jobs, infrastructure, environmental monitoring, etc.
  - More than 400 agreements in Canada

- Participation: provide Indigenous peoples with direct influence and share of benefits (more active engagement)

- But:
  - Elite-driven negotiations
  - Community often consulted only post-facto, if at all
  - Confidentiality creates transparency problem
  - Driven by an economic logic – often assumes project will happen
  - Sometimes a way to sidestep IA for proponents
  - What role for the Crown?

NEWS LOCAL

Tahoe signs benefit agreement with 4 local First Nations

Indigenous-driven processes

- In light of inherent limits of government IA processes and IBAs, some communities establish their own process to express their consent
- Asserting jurisdiction instead of waiting for Crown or proponent-led process
- Many ad-hoc processes, some more sophisticated: ex. Squamish Nation Process
  - Woodfibre LNG project
  - SN creates its own community-based impact assessment
  - Enter into legally binding agreement with proponent, who commits to process
  - Operates in parallel with government IA process, but focus on impact on rights
  - Clear expression of consent (or not) with list of conditions
  - IBA conditional to compliance with process
- Many challenges: costs, capacity, timeline, multiplication of processes, rely on proponent (and government) cooperation, harmonisation with government process can be a challenge
- Advantages: Indigenous-controlled process, an assertion of self-determination, empowering, more culturally resonant, create deliberative space in the community

Conclusions

- FPIC is here to stay… get use to it!
- FPIC is still an “uncrystallised norm” – reflected in diversity of views about scope, debates over veto
- Failure (so far) to establish consistent, transparent and democratic framework to implement FPIC in Canada
- Political ambiguity and legal uncertainty both a challenge and an opportunity for innovation
- Is a political process – limits to litigation in establishing FPIC