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CONSENT WITHIN CONSULTATION

INCORPORATING NEW BUSINESS PRACTICES IN THE EXTRACTION INDUSTRY

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Key Points

- In Canada and worldwide, indigenous peoples have the right to provide, withhold and/or withdraw consent to developments on their territories.
- Industry leaders have emerged as innovators in the recognition of international rights frameworks and the development of consultation processes with indigenous communities. Free, prior and informed consent (FPIC) has become the new business standard when negotiating access to land and resources on indigenous territories.
- The extractive industry should implement FPIC to the new business environment established by international rights frameworks and Canadian case law.
- Negotiators should be trained in indigenous rights to FPIC, emphasizing the unique world views and concepts of land and resource stewardship.
- The government should create policies that harmonize the duty to consult with the principles of FPIC to ensure good governance and stable business environments.

Introduction

Stakeholder risks are rising in extractive industries. For over a century, industry and government have extracted resources from indigenous lands without consent. Following the International Labour Organization's (ILO's) Convention No. 169 (ILO 1989) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), indigenous groups worldwide have increasingly asserted their authority over their traditional lands and the resources that lay beneath. In Canada, natural resources account for nearly 20 percent of GDP and 50 percent of exports (Government of Canada, n.d.). Over the next decade, resource projects will account for over $650 billion in investment (ibid.).

However, a lack of governance frameworks that recognize indigenous rights has resulted in indigenous protests, blockades and court challenges. Non-consensual business practices coupled with poor governance have proved costly for the extractive industry. These risks for companies will only increase as resource extraction intensifies.

While it is clear that UNDRIP requires FPIC from indigenous groups before any extraction projects can begin, it is unclear as to what constitutes consent. This is a problem when all relevant actors come together during consultation processes and there is no consensus on how much involvement indigenous groups should have in decision making.

Moving forward, a new business climate is emerging where extractive companies are employing the principles of FPIC when consulting with indigenous groups. In a Canadian context, the growing Aboriginal population, the recent Supreme Court of Canada rulings, and the internationalization of indigenous rights have together created the groundwork and necessity for new business practices.

CIGI Graduate Fellows Policy Brief Series

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BALSILLIE SCHOOL OF INTERNATIONAL AFFAIRS

In light of rising business risks, new norms of rights-based practices are necessitated by UNDRIP's principles of FPIC. This policy brief proposes best practices for productive consultation, whereby all stakeholders respectfully negotiate terms of conditions throughout all stages of resource extractive projects.

Background

According to Section 35 of the Canadian Constitution and confirmed by *Guerin v. the Queen*[1] and *Haida Nation v. British Columbia*,[2] the federal government has a duty to consult with Aboriginal groups before any exploration can occur on their lands. However, while the federal government has recognized their duty to consult with indigenous communities, this does not include the FPIC principles. Rather, any consultative decision can be overturned if the federal government perceives a project to be beneficial for the greater good of the Canadian public. This interpretation of Canada's duty to consult has been challenged in numerous court cases by indigenous peoples and communities, particularly after the 2004 Haida decision where more than a hundred legal cases challenged the Crown on their policies relating to consultation practices with indigenous peoples (First Nation's Leadership Council 2013). More recently, in 2014, the indigenous right to consent within consultation processes was upheld in the groundbreaking *Tsilhqot'in Nation v. British Columbia* decision.[3]

Internationally, indigenous rights to FPIC in projects affecting indigenous life and land have been recognized in international law and human rights declarations; most notably, ILO Convention No. 169 and UNDRIP. Although Canada initially opposed the adoption of UNDRIP, in 2010 it officially signed on to the document. FPIC is mentioned in five of the 40 articles outlined in UNDRIP, including Article 32.2, which gives particular attention to extractive industries operating on indigenous land:

> 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 mineral, water or other resources. (UN 2007, 12)

Despite these steps toward recognizing indigenous rights in international and national legislative frameworks, tension

1 *Guerin v. The Queen*, (1984), SCR 335, http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2495/index.do.

2 *Haida Nation v. British Columbia (Minister of Forests)*, (2004), SCR 511, http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do.

3 *Tsilhqot'in Nation v. British Columbia*, (2014), SCC 44, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

remains due to a lack of consensus on the meaning and application of indigenous consent with regards to resource extraction. At the September 2014 World Conference on Indigenous Peoples held at the United Nations, Canada voiced objections to UNDRIP and its emphasis on FPIC, stating that the principles of FPIC imply the right of indigenous communities to withhold consent from industry and government projects, and therefore contradicts Canadian law (Government of Canada 2014). The confusion regarding consent within FPIC has created an uncertain investment climate that has frequently erupted into lawsuits and political unrest.

Nonetheless, despite the slow evolution of Canadian legislation and policies to consolidate international indigenous rights frameworks and recent Supreme Court rulings, industry has taken progressive measures to engage and collaborate with indigenous communities. Since July 2000, 8,000 businesses in over 145 countries have committed themselves to abiding by universal principles of human rights, environment and anticorruption practices outlined in the UN's Global Compact (UN 2013). Another key mechanism for guiding ethical business practices is the *UN Guiding Principles on Business and Human Rights* (UN 2012), which encourages companies to meaningfully engage with a human rights development framework that can ensure secure business environments while upholding human rights and promoting good governance. The guiding principles — known as the Ruggie Principles — highlight the interdependence of government and business to Protect, Respect and Remedy. Therefore, it emphasizes the "roles of governments to protect and companies to respect nationally and internationally recognized human rights," while supporting companies to act appropriately to avoid human rights violations and to adequately respond to adverse impacts of project implementations (Buxton and Wilson 2013, 17). If human rights infringements do occur, the principles promote the "access to appropriate forms of remedy, such as non-judicial grievance procedures" (ibid.). These principles are being developed further by James Anaya, former UN Special Rapporteur on Indigenous Peoples, who has carried out a comprehensive survey on extractive industries operating in Canada (see UN 2011).

Furthermore, the International Council on Mining and Metals (ICMM) — which, since its founding in 2001 has brought together CEOs of 22 companies in the mining and metals industry and 35 national and regional associations — has committed to adhering to the principles of FPIC outlined in UNDRIP. Indeed, its forthcoming 2015 Good Practice Guide focuses specifically on guidelines for engaging with indigenous communities, and ICMM members are expected to have adhered to the guidelines by May 2015. The ICMM document displays the progressive steps industry is taking to engage in ethical agreements with indigenous communities. However, the right of these communities to withhold their consent to a project is still met with uncertainty in the ICMM's document. This gap in industry engagement and understanding of the indigenous right to consent within processes of FPIC creates an uncertain business environment when operating on indigenous lands.

Challenges

Employing FPIC within Canada and abroad has been met with controversy due to conflicting interpretations of consent between the extractive industry, national governments and indigenous peoples.

Extractive Industry

There are still companies that have yet to adhere or acknowledge FPIC, albeit in recent years the ICMM has released a position statement advocating for its members to adhere to FPIC principles. The ICMM asserts that indigenous peoples must have "the right to give or withhold consent to a project" (ICMM 2013, paragraph 5). Both the ICMM and many extractive industry guidelines promote the importance of consultation processes that are informed by customary and traditional practices of indigenous groups with attention to their languages, cultures and world views.

However, the ICMM also stipulates that when consent is withheld, governments may still approve exploration and development. In countries such as Peru and the Philippines, which have enshrined FPIC into national law, business risks are minimized. In other resource-rich countries such as Canada, where FPIC is not incorporated into domestic law, governments are overruling indigenous decisions (Buxton and Wilson 2013, 24). Within Canada, companies continue to use government authority to begin projects without indigenous consent.

According to First Peoples Worldwide's 2013 risk report, numerous Canadian resource projects have a high risk of conflict due to a lack of consensual consultation with affected populations. Notably, Southwestern invested US$28.2 million in an exploration project in New Brunswick, but strong opposition by the Elsipogtog First Nation and Mi'kmaq First Nation led to blockades, resulting in a US$60,000 loss per day (First Peoples Worldwide 2013, 30). Other projects at risk include the Chromite Mine in the Ring of Fire, Kinder Morgan's Trans-Mountain Pipeline and Murphy's Alberta Bakken (ibid.). As such, business norms must change as Canadian and international laws move toward respecting indigenous peoples' rights.

Canadian Federal Government

The Canadian federal government adheres to a duty to consult, as outlined in Section 35 of the Constitution. The government has a duty to consult with Aboriginal groups before exploiting

lands to which they may have claims.[4] For consultations, the federal government engages through the Regional Consultation Coordinators, who are part of Aboriginal Affairs and Northern Development Canada (AANDC). The government's obligations are carefully outlined by the *Aboriginal Consultation and Accommodation* report from 2011, which specifically references Canada's endorsement of UNDRIP but argues that because it is a non-legally binding document it does not constitute the need for indigenous consent within consultation processes (Minister of the AANDC 2011). The Crown perceives that indigenous groups do not hold the power to refuse a project, and expects indigenous groups to enter consultations with this in mind (ibid.). However, the report does note that accommodation can mean a decision to terminate a project.

Despite federal government policy that favours consultation without FPIC, recent developments in Canadian case law have recognized indigenous rights over these policies. In *Tsilhqot'in Nation v. British Columbia*, the Supreme Court ruled that consent is required for projects to proceed on verified Aboriginal title land, absent of circumstances where the Crown can justify infringement, and can also be applied retroactively.[5] The *Tsilhqot'in* ruling demonstrates that there is both potential and a need for FPIC to be better incorporated into practices of the Canadian government. The application of consent is now pertinent to all present and future Aboriginal title lands (Bains 2014).

Rulings such as *Tsilhqot'in* and *Haida* recognize indigenous Canadians' right to object federal government policies in which consent is not necessary within consultation. The Canadian federal government's policies are at odds with Canadian case law. To increase business certainty and reduce financial risk, extractive industries must promote consent within consultations.

Indigenous Peoples

Although every Aboriginal band in Canada holds distinct identities and opinions, it is evident that there is widespread dissatisfaction with the government's consultation processes. More specifically, indigenous groups state that resource extraction consultations fail to engage them adequately, which violates their rights to FPIC (Peerla 2012; Tebtebba Foundation 2014).

This perspective is outlined in many indigenous advocacy groups that argue that consent from Aboriginal groups is necessary in any project involving indigenous land. The Boreal Leadership Council (BLC) defines consent as allowing indigenous groups the right to support or reject development that may have an impact on indigenous lands (BLC 2012). The BLC asserts that indigenous consent seeking does not indicate that Aboriginal nations are against development. Rather, "there are many reasons why an indigenous group may reject a project…due to a larger context" (ibid., 10). Aboriginal groups take a unique approach toward understanding the environment, and as such, their input must be valued throughout a project's life cycle to ensure that their land is not harmed or compromised for future generations.

International organizations and advocacy groups recognize indigenous peoples' right to self-determination of their territory, but most importantly, indigenous peoples themselves are asserting their rights. The Canadian federal government's lack of recognition to the indigenous right to consent within consultations has led to public protests, court challenges and social tensions. Not only does this create difficult working conditions for extraction companies, but is also incredibly costly. A mining project with capital expenditure between US$3–5 billion risks a loss of US$20 million per week due to delayed production caused by protests and blockades (Davis and Franks 2014). Therefore, it is in the best interest of extractive industries to work with governments toward a secure business environment where a shared understanding of the right to indigenous consent is present.

Policy Recommendations

FPIC should be implemented as key and critical to the new business environment established by international rights frameworks and Canadian case law. All parties must respect the outcome of consent within consultations, whereby consent is the right to say yes or no to specific terms and projects. Therefore, indigenous peoples as the landholders must give consent for the project to proceed. If consent is not forthcoming for a specific term, or for a project on the whole, no action should be taken to pursue that term or project unless consent is given. There should be no use of legal loopholes or unfair practices to advance projects. Doing so jeopardizes the future sustainability and profitability of the project and undermines good faith negotiations.

Ensuring that consent is provided maintains a strong business environment in which risks are minimized. Past negotiations demonstrate that companies and governments resist seeking Aboriginal consent in fear of project cancellation. However, as Lehr and Smith (2010, 37) argue, applying FPIC more frequently leads to stronger partnerships and licences to operate with minimal risk of conflict. If conflict arises, industry risk increases while also diminishing the project's viability.

4 See *Haida Nation v. British Columbia.*

5 See *Tsilhqot'in Nation v. British Columbia.*

Extractive industries must lobby for government policies that create a more stable business environment by protecting indigenous rights, and train negotiators in indigenous rights to FPIC with an emphasis on cultural awareness. Good governance can be achieved when FPIC is entrenched in consultation processes. Likewise, cultural awareness training is vital to industry's participation in rights-based negotiations. Productive consultations will be informed by the unique contributions of indigenous knowledge and world views. These efforts will ensure that consultations are conducted within the established international rights context and are consistent with Canadian case law. Indigenous concepts of land and resource stewardship provide unique contributions to the processes of consent for resource development; therefore, cultural training for industry representatives is essential to successful negotiations.

By advocating and adopting these practices now, Canadian businesses can become global leaders as business partners and trailblaze a new, sustainable and profitable set of rights-based business practices in the extractive industry.

Conclusion

In Canada, claims made by indigenous peoples about Aboriginal Title and Treaty Land have been upheld by the Supreme Court, setting legal precedent for business standards consistent with consultation and consent processes between indigenous nations and the extractive industries. The implementation of FPIC will allow industry and indigenous peoples to negotiate as business partners to reach well-founded and sustainable agreements on resource extraction in a good governance context.

This creates a new business environment where consent within consultation is no longer a suggested guideline, but a requirement, through which both industry and indigenous peoples benefit. Consent within consultation benefits all parties: government, extractive industries and indigenous nations. For indigenous peoples, it ensures that all projects moving forward on their Title or Treaty lands have been agreed to through culturally appropriate and consensual consultations. For industry actors, it provides social licence, greater business certainty and shareholder confidence. Therefore, the implementation of FPIC fosters a secure business environment where negotiations are rights-based and mutually beneficial.

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Acronyms

AANDC	Aboriginal Affairs and Northern Development Canada
BLC	Boreal Leadership Council
ICMM	International Council on Mining and Metals
ILO	International Labour Organization
UNDRIP	United Nation's Declaration on the Rights of Indigenous Peoples

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Dedication

We dedicate this work to the memory of **Luke David Sauer** (1992–2015), a wonderful friend and collaborator to all of us on this project. His passion and intellect has made a profound impact on the indigenous rights discourse in Canada. His kind spirit will long continue to influence our lives through the memories of his compassion, wit and inquisitive nature. He will be dearly missed by friends, family and colleagues; we can take some comfort in knowing that his legacy will guide research for years to come.

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CIGI was founded in 2001 by Jim Balsillie, then co-CEO of Research In Motion (BlackBerry), and collaborates with and gratefully acknowledges support from a number of strategic partners, in particular the Government of Canada and the Government of Ontario.

Le CIGI a été fondé en 2001 par Jim Balsillie, qui était alors co-chef de la direction de Research In Motion (BlackBerry). Il collabore avec de nombreux partenaires stratégiques et exprime sa reconnaissance du soutien reçu de ceux-ci, notamment de l'appui reçu du gouvernement du Canada et de celui du gouvernement de l'Ontario.

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