

Environmental Assessment Processes and the Implementation of Indigenous Peoples Free, Prior and Informed Consent

Report to the Expert Panel Reviewing Federal Environmental Assessment Processes

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Executive Summary

This report addresses the potential role of the federal environmental assessment process in implementing the principle of Free, Prior and Informed Indigenous Consent (FPIC). We recommend that FPIC be recognized as a one of the core principles guiding a renewed EA process in Canada, through legislative changes and the development of new mechanisms that foster collaborative decision-making, informed deliberation and transparency. FPIC should ideally be an integral part of decision-making at every level of government activities, from legislation and policy development to strategic review and project specific assessment.

We argued that implementing FPIC makes legal, economic, political and ethical sense:

- It is consistent with Canada's commitment under the UNDRIP
- FPIC implementation is also consistent with recent jurisprudential developments concerning Aboriginal and treaty rights.
- Securing Indigenous support for projects through a FPIC process is a good economic strategy as it limits the risks associated with costly litigation over Aboriginal and treaty rights. It can also reduce political tensions and potential conflicts with Indigenous peoples.
- FPIC implementation can also foster sustainable and locally grounded economic development, in partnership with Indigenous communities since it forces all the partners, including government and project proponents, to engage with Indigenous peoples in the decision-making process.
- The recognition of FPIC as a guiding principle for decision-making also contributes to the broader goal of reconciliation with Indigenous peoples. It is therefore consistent with the calls to action of the Truth and Reconciliation Commission, which were endorsed by the current federal government.

A Collaborative Approach to FPIC

We recommend the adoption of a collaborative approach to FPIC. This approach shifts the focus from a consent-as-a-veto to a relational conception of FPIC that emphasizes Indigenous participation in the decision-making process, as co-equal partners.

In order to be effective, this approach has four prerequisites:

- First, all the parties have to agree to the process;
- Second, the parties have to act in good faith and be willing to find mutually acceptable solutions;

- Third, the Indigenous representatives must be full partners in the decision-making process;
- And finally, the possibility that the Indigenous group may withhold its consent has to remain on the table throughout the process.

We also argue that a collaborative approach to FPIC should foster community-level deliberations. Participation in the decision-making process tends to be elite-driven and there is a danger of alienating the community if this process is not sufficiently transparent and informed by community inputs. Ideally, consent should be expressed both through a free, prior and informed deliberation process in the community as well as through elite-level engagement.

The Role of EA Processes in Implementing FPIC

We believe there is a lot of potential for implementing a collaborative approach to FPIC in the federal EA process. To do so, we recommend a series of measures.

- To be consistent with the principle of collaborative consent, Indigenous organizations should always be invited to collaborate as full partners in the drafting of the relevant legislations, policies and guidelines.
- FPIC assessment should become an explicit objective of EA processes, as defined in the Canadian Environmental Assessment Act. This would formally create an obligation for decision-making authorities to consider FPIC and to foster the conditions for FPIC through collaborative decision-making.
- In order to assess the quality of Indigenous consent and foster the development of collaborative approaches to decision-making, we recommend the creation of a FPIC assessment board. This Board should be a distinct, arms-length body, appointed in collaboration with (or with recommendation from) the national Indigenous organizations. This FPIC board should work alongside the EA Agency throughout the EA process in order to foster good practices conducive to FPIC and provide an informed and independent opinion concerning the quality of Indigenous engagement in the process.
- FPIC should be part of the terms of reference for all EA processes in order to ensure it informs actions of all interested parties. Specific operational guidelines could be produced to that effect as well. It is especially important that these guidelines be developed in collaboration with Indigenous organizations.
- In the conduct of the EA itself, specific mechanisms should be put in place to engage with Indigenous peoples in a manner that is consistent with FPIC. Emphasis should be put into jointly developing with the communities culturally sensitive and time sensitive sites for dialogue and deliberation. Deliberative sessions should allow for

specific meetings with groups like women and youth, which usually don't have a strong voice in public hearings.

- Endorsing FPIC as a guiding principle for EA requires government support for capacity building in Indigenous communities.
- Project proponents have a key role in setting the conditions for this type of dialogue. They need to provide timely, transparent and accessible information as well as a level of engagement that is ongoing.
- Once the consultation/deliberation phase is completed, the Indigenous community should be invited to participate in the preparation of the assessment report, either through the inclusion of a section dedicated to the positions expressed by the community or through a more hands-on collaborative process in the drafting.
- The FPIC board should write a distinctive report (or a section of the EA report) that discusses FPIC issues, with specific recommendations to Cabinet in light of its assessment of FPIC.

Finally, we note that in the absence of clear government process or requirement to that effect, Impact and Benefit Agreements (IBAs) have *de facto* become an important mechanism for proponents to secure Indigenous consent to a project. While IBAs reduce legal and political uncertainties and send a strong message to regulatory authorities that local communities support the project, we consider that there are many limits to IBAs as a process for expressing FPIC. Most significantly, IBA negotiations tend to bypass fully informed community-based deliberations.

IBAs can contribute to the expression of FPIC, but they should not replace community deliberation through EA or other processes. In assessing FPIC, the FPIC Board should take into consideration the presence or absence of an IBA, but it should not be considered in and of itself a sufficient condition for FPIC. To be considered as an expression of FPIC, IBA negotiation should be as transparent as possible and should not preclude deliberation in the community. IBAs should also be considered only if negotiated *after* the impact assessment study is completed and information concerning the project and its potential impacts is publicly available and in formats accessible to community members.

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Introduction

The Minister of Environment and Climate Change has tasked an Expert Panel to conduct a review of the federal environmental assessment process. As part of its mandate, the Expert Panel shall consider recommendations to “enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects.” The Panel shall further “reflect the principles of the Declaration (the United Nations Declaration on the Rights of Indigenous Peoples, or UNDRIP) in its recommendations, as appropriate, especially with respect to the manner in which environmental assessment processes can be used to address potential impacts to potential or established Aboriginal and treaty rights.”¹

The present report addresses the potential role of the federal environmental assessment process in implementing one of the core elements of the Declaration, the principle of Free, Prior and Informed Consent (FPIC). We recommend that FPIC be recognized as a one of the core principles guiding a renewed EA process in Canada, through legislative amendments and the development of new mechanisms that foster collaborative decision-making, informed deliberation and transparency. FPIC should ideally be an integral part of decision-making at every level of government activities, from legislation and policy development to strategic review and project specific assessment.

Incorporating FPIC into Canada’s EA framework is not only consistent with Canada’s international commitment under the UNDRIP, it is also consequent with jurisprudential developments concerning Aboriginal and Treaty rights under section 35 of the Constitution Act, 1982. Ensuring Indigenous peoples consent to projects that have an impact on their traditional lands (whether title is established or merely asserted) also makes economic and political sense. Evidence suggests a consent-based approach considerably limits the potential for escalated conflict, including litigation. It also fosters sustainable and locally grounded economic development, in partnership with Indigenous communities.

This report first discusses the normative foundation for FPIC in international and Canadian law as well as ongoing debates over its scope and implications for states, project proponents and Indigenous communities. Following a growing body of work on the question, we suggest a purposive approach to FPIC, which recognizes from the outset that consent implies the right to say no. At the same time, we need to shift away from discussions over if and when Indigenous peoples might have a veto on resource development. We should focus instead on the best ways to ensure constructive and substantial Indigenous participation in decision-making. After making the case for such a collaborative approach to consent, we discuss in the principles that should inform its operationalization. We finally make a series of suggestions as to how this approach can be implemented, focussing on the role of negotiated agreements between project proponents and Indigenous communities (IBAs) and the EA process. We conclude with a series of specific recommendations to the Expert Panel.

¹ Expert Panel’s Terms of Reference, <http://eareview-examenee.ca/panels-terms-of-reference/>

Part.1 Understanding Free, Prior and Informed Consent

1.1 What is FPIC?

In broad terms, **FPIC refers to the rights of Indigenous peoples to participate in decisions affecting their rights, especially as related to natural resource development.** It means that Indigenous peoples can *offer or withhold consent* to developments that may have an impact on their rights. Consent must be obtained freely, that is without force, coercion or pressure from the government or company seeking consent. It must also be offered *prior* to any authorization for a given activity and it must be *informed*, that is based on complete, understandable, and relevant information relative to the full range of issues and potential impacts that may arise from the activity or decision.

The notion that Indigenous peoples should consent to government actions affecting their ways of life and traditional lands is not new. In the Canadian context, both historic land cession treaties and their contemporary counterparts are based on a similar principle, first established in the Royal Proclamation of 1763. In the international context, Indigenous participation in decision-making was first codified in 1989, in the ILO Convention 169 on Indigenous and Tribal Peoples.² Article 6 introduces the right of Indigenous peoples to be consulted and to freely participate when policies and programmes might affect them. While the wording varies, a number of international organizations, business associations and human rights institutions have since adopted some version of Indigenous consultation or consent as a guiding principle for extractive and other activities that might in their well-being (see Boreal Council 2012 and Buxton and Wilson 2013 for examples).

The adoption of the Declaration on the Rights of Indigenous Peoples by the UN General Assembly in 2007 nonetheless constitutes a turning point. While non-binding, the Declaration establishes “the minimum standards for the survival, dignity and well-being of Indigenous peoples” (article 46). These standards should guide states in their relations with Indigenous peoples and, more specifically, in decision-making processes concerning resource development on Indigenous lands (Anaya 2009). The fact that no country formally opposes it (Canada withdrew its opposition in 2010 and fully endorsed its principles in 2016) gives the Declaration powerful moral and political, if not legal, clout.

Interpreting FPIC

Free, prior and informed consent is found in different sections of the UNDRIP, but articles 19 and 32 are most relevant for our purpose (our emphasis):

² International Labour Organisation. *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, Geneva, 76th ILC session (27 Jun 1989), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

Article 19: States shall consult and cooperate in good faith with the indigenous peoples 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.

Article 32: Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. [] 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.

One cannot help but note the ambiguity of the two articles. In both cases, states are expected to “consult” in order to “obtain consent,” therefore suggesting that the obligation might be more procedural than substantive. **This has led some to adopt a restrictive interpretation of FPIC, as an obligation to establish a consultation process for Indigenous peoples to express their preferences, rather than as an obligation to respect these preferences.**³

This interpretation, often favoured by states and project proponents, doesn't seem consistent with the economy of the text, nor with the underlying objectives of FPIC. Indeed, if FPIC amounts to a right to be consulted, then why bother with the word “consent”? Moreover, as Barelli (2012) convincingly argues:

“FPIC should be read in conjunction with the recognition, in Article 3, of the right of Indigenous peoples to self-determination, and to freely pursue their economic, social and cultural development, and with Article 26 on the right of Indigenous peoples to own and control their lands and resources. (...) More generally, Article 32 should be read in accordance with the spirit of the UNDRIP, which fully recognizes the centrality of the relationship with ancestral lands for Indigenous peoples’ cultures and lives. Allowing development projects on indigenous lands regardless of the consequences that they might have on the cultures, lives, and, ultimately, existence of Indigenous peoples would be plainly incompatible with the normative framework of the UNDRIP”

According to James Anaya (2012; 2013), the former UN Special Rapporteur on Indigenous Rights, **the growing consensus on this thorny issue is that consent does indeed mean consent, but that it must be contextualized.** The weight of the expressed consent (or lack thereof) should be modulated according to the impact of the activity or project on the community. While the flooding of ancestral lands may require a strong expression of consent, the building of a road may be held to a less stringent standard. **FPIC, in other words, should be assessed on a “spectrum” and the justification test for states to override a lack of consent should vary accordingly.**⁴

³ See Barelli (2012), Doyle (2014) and Rombouts (2014), for overviews of these interpretation debates.

⁴ This interpretation is also consistent with the jurisprudence of the Inter-American Court of Human Rights in the 2007 *Saramaka People v. Suriname* case. The Court held that in the case of large-scale development projects that would have a major impact within indigenous peoples’ territories, states have a duty not only to consult with indigenous peoples, but also to obtain their free, prior, and informed consent. See Anaya (2009; 2012; 2013) and Barelli (2012).

A number of Indigenous activists, scholars and non-governmental organizations disagree with this contextual interpretation of FPIC. By its very nature, they argue, FPIC has to be an either/or proposition.⁵ In this perspective, Indigenous peoples should effectively have a veto on activities taking place on their traditional lands. Without using the language of veto, some scholars share this strong interpretation of FPIC as a right to say no in all circumstances (Farget and Fullum-Lavery 2014). In the same vein, others also question the notion that the intensity of FPIC should be modulated against the interests of a state or a private corporation given the nature of the rights at stake and the already discussed foundation of FPIC in the right to self-determination (Doyle 2014).

Consent in Canadian Law

While FPIC is not formally incorporated in Canadian law, the Supreme Court has developed a robust jurisprudence on the duty to consult and accommodate Indigenous peoples when their rights might be adversely impacted by Crown actions or decisions. It is outside the scope of this paper to review this jurisprudence (see Newmann 2014). However, **it is worth noting that the Court, while rejecting in principle the notion of a veto (see for example in *Haida* para.48), recognizes that in some instances, Indigenous peoples should be empowered to consent to activities that have an impact on their rights.** The strongest wording to that effect is found in the *Tsilhqot'in* decision and concerns infringement on a recognized Aboriginal title. It is worth quoting at length (our emphasis):

“The nature of Aboriginal title is that it confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses (...). Prior to the establishment of title, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group’s claim to the land and the seriousness of the potentially adverse effect upon the interest claimed.

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the Constitution Act, 1982. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group (...). **Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group.** This s.35 framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.”⁶

⁵ See Coates and Flavell (2016) for a discussion. See also Kenneth Deer, « FPIC: The ‘C’ stands for ‘Consent’ », 10th session, Permanent Forum on Indigenous Issues, New-York, 18 May 2011: www.docip.org/gsd/collect/cendocdo/index/assoc/HASH0189/0a363dff.dir/PF11deer088.pdf.

⁶ *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44

We can see the convergence with the approach to FPIC discussed above. The Court has in effect adopted an intensity scale to the duty to consult, accommodate and, in some cases, seek consent. Consent lies at the very end of this scale and while it does not create a veto right, its infringement can only be justified for a “compelling and substantial public purpose” and must also be “consistent with the Crown’s fiduciary duty” to the Indigenous group.⁷ Moreover, while consent is so far limited to cases where an established Aboriginal title is at stake, there is no reason why the principle should not be extended to other contexts, notably when there is a strong assertion (but no formal recognition) of title, or when the potential impact of an activity is so important that the exercise of an Aboriginal or treaty right is permanently compromised (ex. flooding of a trapline).

1.2 Moving Beyond Legal Debates: the Case for Implementing FPIC

FPIC is arguably an important international norm, but it has not yet crystallized into a clear and broadly shared definition. Canadian law is even more fragmentary in this respect. But that shouldn’t stop us from considering how it should translate in practice. **There are in fact good reasons to implement FPIC as a basic tenet of good governance in the natural resource extraction sector, even in the absence of a clear legal obligation to that effect.** To do so, we suggest, makes legal, economic, political and ethical sense.

Even if FPIC remains a fuzzy norm, **it makes legal sense to adopt it as a good governance practice simply because legal uncertainty can be costly, especially for proponents seeking to finance their projects on international markets.** Governments also have little incentives to constantly expose their regulatory processes to lengthy and costly litigation, especially given the highly uncertain outcome of Court decisions on Aboriginal and treaty rights. In *Tshilqot’in*, the Supreme Court made it clear that if the Crown authorizes a project without consent prior to an Aboriginal title being established, it may be required to cancel the project upon the establishment of the title if continuation of the project would be unjustifiably infringing on the said title. The potential for such retroactive application is a powerful incentive to adopt a preemptive approach to consent, under which the norm is applied much more systematically than the case law actually suggest (Bankes 2015).

There is ample evidence that adopting FPIC is also good economic policy. Buxton and Wilson (2013) document examples from around the world of FPIC-inspired approaches to relations with Indigenous peoples. They argue **FPIC markedly reduces the potential for conflicts with local communities, but it can also speed-up project approval by regulatory authorities and (as discussed) reduce the legal and political uncertainty surrounding the project, therefore facilitating its financing on global markets.** A report prepared for the Boreal Council (2015) similarly suggests that far from bogging down projects in legal disputes over a supposed Indigenous veto, as suggested by some commentators,⁸ adopting

⁷ What constitutes such a compelling purpose is, of course, a matter of debate. See Bankes (2015) and Borrows (2015) for contrasting discussions of the implication of this test for our understanding of the Aboriginal title, the limits of consent and, more broadly, Indigenous-state relations.

⁸ See Tom Flanagan, « Support for UN declaration on native rights may spell trouble for Canada's resource sector », *The Globe and Mail*, Nov. 23, 2015

FPIC as a good governance practice actually contributes to the successful development of projects. If done properly, the report argues, FPIC can build trust with local communities. It also forces project proponents and regulatory agencies to be more responsive to the concerns of the local population, therefore leading to projects that are more likely (although not necessarily) to be environmentally and socially sustainable.

There are also strong *political* incentives to adopt FPIC as a good governance practice. As Coates and Flavell (2016) argue, **whether they are favourable or not to development on their traditional lands, Indigenous peoples increasingly see FPIC as the basic standard against which the legitimacy of a project should be established.**⁹ As ongoing debates surrounding pipelines, mining and hydroelectric developments in recent months suggest, it is de facto becoming increasingly difficult to move ahead with such projects in the absence of some form of social acceptability.¹⁰ Indigenous consent is becoming one of the cornerstones of this social acceptability. Governments and project proponents need to adapt to this new political environment. Otherwise, they not only risk an escalation of opposition, but also their credibility in future policy process involving Indigenous interests. This point is particularly relevant in the context of the current government's commitment to the UNDRIP and, more broadly, to a transformative agenda in relations with Indigenous peoples.¹¹

Finally, implementing FPIC makes *ethical* sense. The Supreme Court of Canada has stated on numerous occasions that the finality of Section 35 Aboriginal and Treaty Rights is to reconcile pre-existing Indigenous occupation with the assertion of Crown sovereignty (*Delgamuukw*, para. 186). This principle, the Court argues, should inform government actions in their dealings with Indigenous peoples. The Truth and Reconciliation Commission also insists on the importance of acting honourably in order to foster reconciliation and heal the wounds caused by ill-advised policies like the residential schools. **Reconciliation, the TRC argues, starts with mutual recognition and mutual respect. Adopting FPIC in our practices would send a powerful message to that effect.**

1.3 A Collaborative Approach to FPIC

Debates on FPIC implementation often get stalled on the veto question. **States and project proponents fear an Indigenous veto will effectively “shut down” resource extraction activities by making project approval too uncertain, complex and contingent, whereas Indigenous peoples see in the language of veto a strong assertion of their authority on the land.** As sovereign peoples, they should decide what happens.

⁹ See for example Assemble of First Nations, AFN National Chief Calls for Free, Prior and Informed Consent in Site C Dam Hydro Project, Press Release, December 18, 2014. <http://www.afn.ca/en/news-media/latest-news/afn-national-chief-calls-for-free-prior-and-informed-consent-in-site-c>

¹⁰ See Kyle Bakx, « Oil export pipelines: will Canada ever build another? », *CBC News*, January 21, 2016. <http://www.cbc.ca/news/business/pipeline-canada-export-transmountain-keystone-energyeast-1.3409134>.

¹¹ See to that effect Prime Minister Trudeau's speech to the Assembly of First Nations, December 6, 2016. <http://pm.gc.ca/eng/news/2016/12/06/prime-minister-justin-trudeaus-speech-assembly-first-nations-special-chiefs-assembly>.

The problem with both views is that they do not correspond to the reality on the ground. Not all Indigenous peoples are systematically opposed to economic development on their lands. Numerous studies show that if the conditions are right (the project is based on sustainability principles, benefits are shared, impacts are minimized and a relationship based on trust and mutual respect is established), Indigenous peoples can be supportive of extractive projects or infrastructure developments (see Coates and Flavelle 2016, Boreal Council 2015). Those conditions, however, need to be created. They do not emerge naturally. To recognize from the outset that the project may not occur, or could end up being significantly different, based on Indigenous input, is the very first step in fostering this type of relationship.

Conversely, even if they are considered sovereign peoples, Indigenous communities do share the land with settlers' societies. The exercise of self-determination (or sovereignty) in this context is necessarily relational and not absolute, as authorities and legitimacies overlap (Murphy 2008). In order to manage their lands or establish environmental protection and economic development strategies, Indigenous peoples have to engage with the settler state, negotiate and, like in all diplomatic relations, compromise. Just as denying Indigenous legitimate claims is counterproductive, using the language of veto is also not conducive to the development of positive, collaborative relationships.

FPIC, in other words, is best understood (and achieved) from a relational perspective. To be sure, Indigenous peoples are entitled to opt out of a collaborative process and express their opposition to a project, but in a relationship based on reciprocity, they should do so only after having engaged in good faith collaboration in the decision-making process. And in such cases, states should respect that choice. Following Buxton and Wilson (2013): "while FPIC does indeed hinge on consent, this is related less to the notion of communities having a veto, and more to the idea of parties coming around a table to debate, negotiate and eventually come to agreement." The idea is to make the decision-making process more inclusive and more horizontal so that Indigenous peoples become true partners in the process.

A similar approach is put forward in a number of recent proposals for implementing FPIC in Canada, notably from a group headed by the Hon. Frank Iacobucci, former Supreme Court Justice, and from Ishkonigan, a consulting firm headed by former Chief of the Assembly of First Nations Phil Fontaine. According to Iacobucci and his co-authors, the objective of collaborative consent should be to "avoid the imposition of the will of one party over the other," and to "strive for consensual decision-making." An approach that is focused on relationships, they suggest, « provides the foundation for meaningful engagement and sets the stage for a successful outcome for all involved» (2016, 29). Ishkonigan (2015) also argues for an approach that integrates Indigenous peoples in the decision-making process by granting them an equal say at every stage of the process. The group headed by Phil Fontaine uses a series of examples from the Northwest Territories to illustrate how collaborative consent is actually a well-established practice in some policy areas.

The idea, again, is to shift the focus from FPIC understood as a parallel process, external to the government decision-making process (it therefore effectively becomes a one-time veto once the decision is made) to a view of FPIC as a participation in the

decision-making itself, as co-equal partner, through deliberation, negotiation and co-decision.

There are nonetheless to caveats to this approach to FPIC. First, **to be effective, this type of collaborative approach hinges on parties agreeing on a process** – if the process itself is imposed, then chances are collaboration will be difficult to achieve. Second, for this type of deliberative process to work, “all parties need to come to the table willing to open their minds to the views of others and seek mutually acceptable solutions” (Buxton and Wilson 2013). **Trust and good faith are essential to this collaborative approach.** Third, and this is fundamental, **the possibility that the Indigenous group will end-up saying no must remain on the table.** In other words, collaboration is not a substitute to the expression of consent, it is a way to enrich it and facilitate it, not replace it. If collaboration does not result in a consensual position, then there should be space for the Indigenous group to express its (lack of) consent. Finally, and this is often underestimated in existing studies looking at models of collaborative consent, **participation in the decision-making process, which is generally elite-driven, should not replace community deliberations as a ‘site’ for expressing FPIC.** This is especially true for project approval processes. A collaborative model that engages representatives of the community in the decision-making process can facilitate the expression of consent, but there is a danger of alienating the community if this process replaces community-level deliberations.

FPIC, we suggest, should be seen as a two-level process, involving at one level the representatives of all the parties in a decision-making process and at a second level, deliberations in the community. Both levels are equally important and should feed off each other.

1.4 Operationalizing a Collaborative Approach to FPIC: Key Dimensions

Translating the principle of collaborative consent into a practical two-level model of decision-making is necessarily context specific. Flexibility and adaptability are key for both process and outcome to be considered legitimate by the participants, even if they ultimately disagree with that outcome. That being said, it is possible to establish some basic elements that should inform policy development towards such a model.

1. FPIC should inform decision-making at every level

The first thing to consider is the scope of FPIC. From a reconciliation standpoint, **consent should be the standard for all decision-making processes that affect Indigenous peoples rights and interests;** from the legislative process and policy making to strategic planning and project authorization. Of course, not all processes are equivalent. Who consent, how and when, will necessarily vary according to the nature of the exercise. The approval process for a mine, for example, will likely focus on one or a few communities, whereas changes to the Environmental Assessment Act calls for engagement at a national level, with Indigenous organizations. For the purpose of the present discussion, we focus mostly on

FPIC implementation at the level of project approval, but many of the elements discussed here would apply to other situations.

2. A Free and Prior Process

No matter the nature and level of the process, **FPIC must be obtained freely; that is without force, coercion, intimidation, manipulation, or pressure, financial or otherwise**, from the government or company seeking consent.

A clear expression of consent is also necessary prior to project approval. This may require some flexibility with the timeline in order to foster adequate learning and deliberation, especially in the context of complex projects. Often, concerns over timelines and deadlines trump quality deliberation. While time limitations are necessary, an overly strict or unilaterally imposed timeline may, in the end, be counterproductive and create resentment in the community. **Ideally the timeframe for the process should be mutually agreed upon and sufficiently flexible for adjustments along the way.**

3. An Informed and Transparent Process

Consent should also be based on complete, understandable, and relevant information relative to the full range of issues and potential impacts that may arise from the activity or decision. **This requires a transparent approach to decision-making as well as specific efforts to make what is often very technical and complex information as accessible as possible.** Very few community members will read a 350 pages technical environmental impact assessment report. Making it public is of limited value if no effort is made to make it community-friendly and create specific, culturally-appropriate and mutually agreed upon mechanisms to diffuse the information and facilitate deliberation on its conclusions and implications.

The relevant information (especially the environmental and social impact assessment reports) should also be made available well before a community is expected to formally express consent. The practice among some project proponents to seek negotiated consent through an IBA before the impact assessment study is completed is certainly not in the best interest of the community and should be avoided, if not prohibited. Transparency is also important in this respect. Joint decision-making exercises and IBA negotiations necessarily have a certain degree of confidentiality attached to them. This confidentiality must be carefully weighted against the general interest of those most directly affected by the decision or the agreement.

3. Mutually agreed processes

The starting point of a free, prior and informed consent is mutual agreement on the process. This has significant implications for governments. Not only the decision must be achieved collaboratively, but how this collaboration occurs must also be the subject of an agreement. Concretely, **this means that the process for approving a project should not be predetermined. Choices over procedures have to be an integral part of the**

engagement process. The practice of negotiating consultation/FPIC protocols with specific communities or regional organizations is one approach to achieve agreement on the process.

4. Emphasize deliberation

There is not a single mechanism to achieve consent. In fact, a multiplicity of tools and mechanisms should ideally be used, in agreement with the concerned Indigenous group. As we discuss below, the predominant model to achieve consent in Canada today is the negotiation of IBAs. Negotiations are important, but they can't be the sole process through which consent is expressed. Negotiations are by nature adversarial and premised on trade-offs rather than the construction of common interests. As the literature on conflict resolution suggests, open exchanges driven by a deliberative ethic are much more conducive to the development of mutual trust, respect and a sense of common purpose. **Creating deliberative spaces, where the project's objectives as well as its positive and negative impacts are openly discussed, questioned and challenged is essential in this respect.** How to do this will vary, but one-sided information sessions, where the project proponent explains the project and answers questions from an otherwise passive audience is not a deliberative process.

5. Respect for internal decision-making

As discussed, it is important to remember that consent ultimately rests in the hands of the affected group. Aboriginal and treaty rights are collectively held and ideally, this same group should be entitled to collectively express support or opposition to a given project. **While governments and project proponents can facilitate the expression of an informed consent through collaborative processes, it is not up to the government, let alone project proponents, to determine how exactly the community chose to express its consent.** It could be through a referendum, a specific mandate to representatives, an elder council, or the process could focus on specific individuals more directly affected (families with traplines for example). The point is that there has to be a self-defined internal process for a community to clearly express its consent. Absent such mechanism, the expression of FPIC might be compromised.

6. Who is entitled to consent?

A thorny question can arise when projects impact multiple communities. Linear developments like pipelines are obvious examples. Who then should be the reference group for expressing FPIC? Should all communities have an equal say in the process? What happens when some communities consent to a project and others refuse? Or when some members of a community are supportive while others aren't? These are relatively frequent situations and there are no easy answers. One possible solution is to give everyone the same weight in the decision-making process and strive for consensus. This, however, could potentially make project approval almost impossible. Another approach would be to follow the contextual approach of the Supreme Court and weight the strength of FPIC according to the strength of the right/title and the potential impact of the project on different communities or groups of individuals in the community. This approach, however, runs the

risk of creating tensions between communities or within communities. It also puts the weight on decision-making authorities to arbitrate consent, a position that is not consistent with collaborative FPIC, unless otherwise agreed by all those involved.

7. Capacity-building

Finally, substantial engagement in policy-making, strategic planning or decision-making requires a degree of expertise and technical knowledge most Indigenous communities don't have. This creates a power imbalance that even the most egalitarian co-management or joint decision decision-making process cannot fully compensate for. **Endorsing FPIC as a guiding principle for decision-making requires governments and project proponents to support Indigenous communities through predictable, stable and unconditional capacity-building funding.**

Part 2. Implementing FPIC: What Role for EA Processes?

In this second section, we focus on possible approaches for implementing FPIC in the context of the Canadian environmental assessment process. One key challenge in moving from theory to practice is that FPIC is not implemented in a vacuum. Indigenous peoples are already involved in decision-making processes in many areas of direct concern to them. In the specific context of natural resource development and infrastructure projects, existing mechanisms include, among others, consultation processes associated with environmental assessment and the negotiation of agreements (IBAs) with project proponents. The challenge is to enhance these practices to make them consistent with the model of collaborative FPIC discussed previously.

2.1 Making FPIC Assessment an Explicit Objective of the Canadian Environmental Assessment Act

EA processes were originally limited to a narrow definition of environmental impacts. With time, social and cultural impacts came to be considered as well, even if they are still a somewhat underdeveloped part of the EA process in Canada. The Canadian Environmental Assessment Act adds Aboriginal rights as a consideration in the evaluation process and includes provisions related to Indigenous peoples in the definition of “environmental effects”¹². The stated purpose is to “assist the Government of Canada in discharging its legal duty to consult and, if appropriate, accommodate Aboriginal peoples when the Crown contemplates conduct that might adversely impact established or potential Aboriginal and treaty rights”¹³.

¹² Canadian Environmental Assessment Act sect. 5(1)(c).

¹³ Excerpt from the Minister's Transition Book (November 2015) available at <https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=2B33FABA-1&offset=1&toc=hide#overview>.

A number of researchers and practitioners are also proposing to increase the scope of EAs, through a better consideration of cumulative impacts or through a broadening of the process to focus on sustainability assessment (see for example Gibson 2016). More recently, the Bureau d'audiences publiques en environnement du Québec (BAPE) has introduced the concept of « social acceptability» in the elements that should be considered before the approval of uranium projects¹⁴. While the concept of social acceptability differs from FPIC, it nonetheless emphasizes a similar principle – that a project not supported by the local population should not be approved. Interestingly, the interim report of the Senate on pipelines¹⁵ also mentions the need to consider social acceptability, although this concept is present only in the summary of the report but not in the report itself.¹⁶

In light of these developments, it is quite reasonable to consider adding FPIC assessment to a modernized and updated EA process. We already discussed some of the key reasons we believe it is in the best interest of Canada to implement FPIC, even in the absence of clear legal or constitutional obligation to do so. The EA process could be one of the main vehicles to achieve such a goal.

- **A first step to that effect would be to legislate in order to add FPIC assessment as one of the purposes of the Canadian Environmental Assessment Act. A clear legislative endorsement of FPIC in the CEEA, accompanied by relevant regulations and guidelines, would send a clear message to all those involved that Indigenous consent is taken seriously.**

2.2 A FPIC Board

One specific challenge with the existing Indigenous consultation model at the federal level (this is also true in provincial systems) is that the government effectively becomes judge and party. It is both responsible for the proper conduct of consultation (which are generally delegated to project proponents or to regulatory boards like the EA Agency) and for assessing whether such consultations meet the standards of the duty to consult. The creation of an arms-length body responsible for assessing FPIC would alleviate some of these tensions. The government (Cabinet) should still be responsible for securing FPIC and ultimately for making the decision to respect or not the will expressed by the concerned communities, but it could act under the advice of a FPIC assessment board that supervises, supports and assess the quality of the decision-making process from a FPIC standpoint.

¹⁴ BAPE. 2015. *Les enjeux de la filière uranifère au Québec*. Rapport d'enquête et d'audience publique. Available at <http://www.bape.gouv.qc.ca/sections/rapports/publications/bape308.pdf>

¹⁵ Senate Committee on Transport and Communications. 2016. *Pipelines for Oil: Protecting our economy, respecting our environment : Interim Report*. Senate Canada.

¹⁶ Contrast the summary found at <https://sencaplus.ca/en/news/transportation-of-crude-oil-senate-committee-urges-overhaul-of-energy-board>, with the actual report http://www.parl.gc.ca/content/sen/committee/421/TRCM/Reports/FINALVERSION-PipelineStudy-2016-12-07_e.pdf.

Some provinces (ex. Quebec) have created arms-length boards that are responsible for EA processes. In the case of most Land Claims Agreements, co-management boards are responsible for EAs. These boards generally don't have decision-making authority, but their recommendations carry significant weight. It is beyond the scope of this paper to detail how these various boards operate but they can certainly serve to inspire the government in creating a distinct structure in charge of assessing FPIC.

A FPIC assessment structure (a board) could be created outside the Canadian Environmental Assessment framework, through distinctive legislation, but we believe Canada would be better served with a more integrated model, under which the Environmental Assessment Agency and the FPIC assessment board work hand in hand, as part of the same process.

- **We therefore recommend the creation of a distinct, arms-length body (a FPIC board) that would work alongside the EA Agency throughout the EA process in order to foster good practices conducive to FPIC and provide an informed and independent opinion concerning the quality of Indigenous engagement in the process.**

The FPIC board would have the following mandate:

- **To support the federal government, project proponents and Indigenous governments and communities in order to facilitate the expression of FPIC**, for example through the publication of guidelines and standards of best practices; through advisory work in the development of Terms of References for specific EA processes; through funding for supporting Indigenous communities in developing their own FPIC capacity and processes; etc.
- **To assess the quality of FPIC during the EA process** (it could issue preliminary reports on FPIC when the environmental impact statement is tabled and final report when EA is completed). This assessment should be based on transparent guidelines jointly defined with Indigenous organizations. It is essential that the criteria for assessing FPIC be jointly defined.

How these objectives are achieved will, of course, vary according to contexts. In a Land Claims Agreement context, the existing joint review boards can play a central role and integrate FPIC in their analyses. The role of the FPIC board would therefore be more limited, in support of the existing process. The nature of the project could also influence the FPIC review: major projects could require the appointment of a specific ad hoc FPIC assessment panel whereas smaller projects can be assessed directly by the permanent FPIC Board. While we recommend setting a pan-Canadian FPIC assessment board, its role and composition could very well vary along regional/local/treaty lines. The process needs to be flexible enough to adapt to different contexts and to Indigenous peoples' expectations.

It is also essential that this board be considered legitimate and credible by Indigenous peoples, but also for government and industry. **Appointments to the board are therefore critical.** It should be independent enough from government and industry. It should also be

attuned to Indigenous realities without becoming an advocacy group for Indigenous peoples. The Governor in Council could appoint members of the FPIC board upon recommendation from Indigenous organizations, they could be appointed jointly (which would be more consistent with co-decision models) or they could be appointed half by the government and half by Indigenous organizations. Each of these appointment methods will have an effect on the legitimacy of the board and they need to be considered carefully.

2.3 Integrating Collaborative Consent Throughout EA Processes

As discussed in the previous section, we believe the most effective way to implement FPIC is to integrate Indigenous peoples fully into the various aspects of the EA process. In order to do so, they need to be involved in the design of the process as much as in the assessment itself. One key aspect to consider in this respect is the role Indigenous representatives could play in drafting the directives (terms of reference) that determine the scope of specific EA and that specify the elements that the proponent has to include in the EIS.

These directives are usually drafted by the agency responsible for the EA (Canadian Environmental Assessment Agency, the National Energy Board or the Canadian Nuclear Safety Commission) and finalized after a comment period from the public and concerned organizations and input from federal departments.

- **To be consistent with a collaborative consent model, such directives should be drafted in conjunction with the representatives of the relevant Indigenous groups or communities and in collaboration with the FPIC board.**

Joint decision-making on the directives is already a current practice in the regions covered by a land claims agreements (LCA), since the directives are usually drafted by a review board co-managed with Indigenous peoples.

In the conduct of the EA itself, specific mechanisms should be put in place to engage with Indigenous peoples in a manner that is consistent with FPIC. This suggests a somewhat different approach than the current model, which focuses essentially on public hearings under which Indigenous peoples are considered stakeholders.

- **Greater emphasis should be put into jointly developing with the communities culturally sensitive and time sensitive sites for dialogue and deliberation. Such deliberative moments should occur throughout the process in order to contribute to the development of trust between the parties.**

Project proponents have a key role in setting the conditions for this type of dialogue. They need to provide timely, transparent and accessible information as well as a level of engagement that is ongoing.

There are various approaches to foster deliberation and the specifics should be defined with and adapted to the Indigenous group. The point is that these engagement sessions should

not be designed as information sessions (unidirectional) but as mutual learning sessions. A dialog needs to be established, through which information circulates in multiple directions so that Indigenous concerns are fully addressed and, eventually, integrated into the EA report. Representatives from the FPIC board (or a specific FPIC review panel) should participate in such deliberations, as these are key moments when the constitutive elements of FPIC can be observed, including the level of information provided on the project and the community support for the project. Deliberative sessions would also allow for specific meetings with specific groups like women and youth, that usually don't have a strong voice in public hearings.

- **Once the consultation/deliberation phase is completed, the Indigenous community should be invited to participate in the preparation of the assessment report, either through the inclusion of a section dedicated to the positions expressed by the community or through a more hands-on collaborative process in the drafting.**

Preliminary versions of the report should be made available for comments and inputs from the community. Finally, the FPIC board or its review panel should write a distinctive report (or a section of the EA report) that discusses FPIC issues, with specific recommendations to Cabinet in light of its assessment of FPIC.

In most cases, FPIC will be fairly straightforward to assess. In cases where the community (or communities) is quasi-unanimous in supporting or opposing the project, little is left to interpretation. This is even more true when the process was jointly agreed upon and was transparent, the project proponent engaged with the community and provided all relevant information and the community was able to deliberate either through the EA process or through its own mechanisms. In some instances, however, the FPIC board may have a more delicate role to play in assessing the quality of consent. One such example is when an IBA was signed despite strong opposition to the project in the community or when a community is deeply divided about a project.

2.4 The Role of IBAs in Establishing FPIC

As discussed previously, project proponents and governments already seek Indigenous consent to projects that may affect their rights. Impact and Benefit Agreements (IBA) have *de facto* become the main vehicle for securing Indigenous support for a project. IBAs are private agreements between a proponent and the representative of an Indigenous community or a nation. In exchange for specific financial and material compensations, the mitigation of impacts and other considerations, community representatives (usually the band council or an equivalent authority) are invited to sign an agreement under which they either explicitly consent to the project or commit to respecting the outcome of the authorization process. The question is to what extent the consent obtained through IBAs can be considered as free, prior and informed and, more broadly, consistent with the model of collaborative consent discussed above.

For Indigenous peoples, IBAs can be attractive as they allow for a more direct engagement with project proponents in order to influence how the development of their traditional lands will take place, minimize its negative impact, and maximize its potential benefits. IBAs are especially attractive for Indigenous peoples in the absence of clear recognition of their authority in decision-making processes, notably under EA processes. IBAs are a practical recognition, by private interests, of Indigenous peoples' right to have a say in the future of their traditional lands (O'Faircheallaigh, 2010; Prno et al., 2010). We suggest there are nonetheless many limits to IBAs as a process for expressing FPIC. To name a few:

- IBAs are generally negotiated by lawyers representing the Indigenous community and the proponent. Given their technical nature, legal expertise is essential. But this also has consequences. It creates an adversarial and fairly opaque negotiation process.
- Most IBAs are kept confidential (although this tends to change). Even those that are accessible generally become so after their ratification. As a result, IBAs are often ratified and implemented without the community's full knowledge of their content. This is clearly not consistent with the notion of "informed" consent.
- In order to speed up the project approval process, proponents often try to negotiate an IBA as soon as possible; even before the EA process is completed. This is especially common with junior mining companies that use IBAs to demonstrate local acceptability as a way to market their project to investors. Again, the community is invited to consent to a project without full knowledge of its impact. Genuine deliberations concerning the project, its pros and cons for the community, are almost impossible under such circumstances. It was the case, for example, for projects such as Nemaska Lithium, the Rupert Diversion in Eeyou Istchee and the Kiggavik Uranium Project near Baker Lake in Nunavut
- There are also incentives for the community to prioritize the negotiation of an IBA over engagement in the EA process. Direct negotiations with the proponent offer a much more effective and direct way to shape the project and benefit from it than what the existing model of EA offers. Given that in our current system, consultations with the community under the EA process are often delegated to the project proponent, the two tend to blend into a single negotiation process.
- IBA negotiations are premised on the fact that the project will be approved. The focus is less on sharing information in order to establish the basis for consent than on the compensation package for consent. The logic is therefore less one of deliberation about the pros and cons of a project than one of bargaining and trade-offs.
- The underlying logic of IBAs (to negotiate compensation) also naturally creates a focus on quantifiable aspects (monetary compensations, share of profits, jobs, etc.) rather than on more abstract but equally important considerations, such as the long-term social impact of the project or its cumulative environmental impact.

- There is an inherent risk with IBAs that the community will feel significant pressure to sign on. The lack of jobs, the poor state of infrastructure and the overall social condition in many communities make it hard to reject what can be a substantive injection of capital for communities in dire needs.
- Finally, and not least, IBAs are negotiated with project proponents whereas FPIC, like the duty to consult, rests with the state. It is the state that is responsible for seeking FPIC and to authorize (or not) the project accordingly. While IBAs do not preclude this role, it can be difficult for decision-makers to fully assess whether the consent expressed through an IBA is genuinely free, prior and informed. Especially if both the negotiations and the content of the agreement are kept confidential.

For these reasons and many more (see Papillon and Rodon 2016; Kaine and Krogman 2010), we have to be careful not to equate the negotiation of an IBA with FPIC. To be sure, IBAs are one piece that contributes to the overall puzzle that is FPIC, and the FPIC board should carefully consider the presence of an IBA when making its recommendations, but IBAs are not a sufficient condition for FPIC in and of themselves.

If we go back to the previous discussion regarding collaborative consent, we insisted on the importance of approaching FPIC as a two-level process. There is a danger that an overreliance on elite-driven IBA negotiations undermines more complex and unpredictable, yet just as important, community deliberations.

- **IBAs can certainly be one mechanism for securing FPIC, but only if 1) they are accompanied by a real and substantive deliberative process in the community and 2) they do not preclude the community to say no to a project in light of the information received through the EA process.**
- **IBAs should therefore only be signed *after* all relevant information concerning the social and environmental impacts of the project are publicly available.**

2.5 Roles and Responsibilities of Different Actors in FPIC Assessment

The FPIC board should act as a facilitator in the collaborative effort to foster FPIC, but other actors need to be engaged as well in this process. The following table summarizes the role and responsibility of the key actors in a collaborative FPIC process. As we have mentioned, **for FPIC not to become a zero-sum game based on a veto, it has to be an ongoing collaborative process where all the actors are playing a part in fostering FPIC and strive to establish a consensus.** Although it is equally important to accept that no matter the quality of the process, the impacted communities are ultimately free to express their consent or not. FPIC, as discussed, is not solely a procedural obligation. In the absence of consent, it is up to the government to decide whether to accept the verdict or not. In the latter case, it of course exposes itself to litigation and other types of mobilizations.

Table 1: Roles and responsibilities in FPIC process and assessment

Actors	Role in FPIC
FPIC Board	<ul style="list-style-type: none"> • Supports relevant government departments, project proponents and Indigenous governments and communities in facilitating the expression of FPIC. • Assesses the quality of FPIC during the EA process and makes recommendations to the decision-making authority • This assessment should be based on transparent guidelines jointly defined with Indigenous organizations and/or Indigenous governments. • When relevant, advises FPIC panels and Co-management review boards
Government of Canada	<ul style="list-style-type: none"> • Creates an environment that fosters FPIC, engages Indigenous peoples at all levels of decision-making through relevant mechanisms: collaborative decision-making; negotiation and deliberative processes. • Support Indigenous communities through predictable, capacity-building funding. • Ensures that FPIC principles are respected by government agents • Makes an informed decision on the project, based on the EA report and the FPIC board recommendations
Proponent	<ul style="list-style-type: none"> • Respects FPIC principles in its dealings with the communities, notably through: providing adequate and timely information, engaging early, building trust, be responsive to community requests, etc.
Indigenous governments and organizations	<ul style="list-style-type: none"> • Ensure a transparent, informed, inclusive and deliberative process in the community. • Collaborate with government agencies, the project proponent and the FPIC board in developing a process that is responsive to the needs and expectations of the communities. • Act as a voice for the communities and clearly expresses FPIC or lack thereof throughout the process, including negotiation of IBAs and the EA process.

4. Conclusions and Recommendations

FPIC has become a controversial buzzword in debates over natural resource development and infrastructure projects in Canada. To be sure, the principle that Indigenous peoples should consent to projects that may have an impact on their Aboriginal and treaty rights has transformative implications for the way decisions over economic development are made in Canada. In this report, we argued that implementing FPIC makes legal, economic, political and ethical sense.

Not only has Canada committed to implementing FPIC under the UNDRIP, it is also consistent with the Supreme Court's interpretation of Aboriginal and treaty rights. The Court recognizes that Indigenous consent, and not simply consultation, may be necessary when a Crown decision significantly infringes on Aboriginal and treaty rights.

In light of this uncertain legal context, implementing FPIC is a good economic strategy as it limits the risks associated with costly litigation over Aboriginal and treaty rights. It can also reduce political tensions and potential conflicts with Indigenous peoples.

FPIC implementation can also foster sustainable and locally grounded economic development, in partnership with Indigenous communities since it forces all the partners, including government and project proponents, to engage with Indigenous peoples in the decision-making process.

Ultimately FPIC implementation contributes to the broader goal of reconciliation with Indigenous peoples, as recommended by the Truth and Reconciliation Commission and as endorsed by the current federal government.

A collaborative approach to FPIC

- **We recommend the adoption of a collaborative approach to FPIC. This approach shifts the focus from a consent-as-a-veto to a relational conception of FPIC that emphasizes Indigenous participation in the decision-making process, as co-equal partners.**

In order to be effective, this approach has four prerequisites:

- All the parties have to agree to the process;
- The parties have to act in good faith and be willing to find mutually acceptable solutions
- The Indigenous representatives must be full partners in the decision-making process;
- The possibility that the Indigenous group may withhold its consent has to remain on the table throughout the process.

We also argue that a collaborative approach to FPIC should foster community-level deliberations. Participation in the decision-making process tends to be elite-driven and there is a danger of alienating the community if this process is not sufficiently transparent and informed by community inputs. Ideally, consent should be expressed both through a free, prior and informed deliberation process in the community as well as through elite-level engagement.

The Role of EA Processes in Implementing FPIC

We believe there is a lot of potential for implementing a collaborative approach to FPIC in the federal EA process. To do so, we recommend a series of measures:

- **To be consistent with the principle of collaborative consent, Indigenous organizations should always be invited to collaborate as full partners in the drafting of the relevant legislations, policies and guidelines.**
- **FPIC assessment should become an explicit objective of EA processes, and defined as such through legislative amendment in the *Canadian Environmental Assessment Act*. This would formally create an obligation for decision-making authorities to consider FPIC and to foster the conditions for FPIC through collaborative decision-making.**
- **In order to assess the quality of Indigenous consent and foster the development of collaborative approaches to decision-making, we recommend the creation of a FPIC assessment board.**
- **The FPIC board should work alongside the EA Agency throughout the EA process in order to foster good practices conducive to FPIC and provide informed and independent advices concerning the quality of Indigenous engagement in the process.**
- **FPIC should be integrated to the terms of reference for all EA processes in order to ensure it informs actions of all interested parties. To be consistent with collaborative consent, Indigenous representatives from impacted communities should play an integral role in defining the terms of reference for the impact assessment process.**
- **In the conduct of the EA itself, specific mechanisms should be put in place to engage with Indigenous peoples in a manner that is consistent with FPIC. Emphasis should be put into jointly developing with the communities culturally sensitive and time sensitive sites for dialogue and deliberation. Deliberative sessions should allow for specific meetings with groups like women and youth, which usually don't have a strong voice in public hearings.**

- **Endorsing FPIC as a guiding principle for EA requires government support for capacity building in Indigenous communities.**
- **Project proponents also have a key role in setting the conditions for this type of dialogue. They need to provide timely, transparent and accessible information as well as a level of engagement that is ongoing.**
- **Once the consultation/deliberation phase is completed, the Indigenous community should be invited to participate in the preparation of the assessment report, either through the inclusion of a section dedicated to the positions expressed by the community or through a more hands-on collaborative process in the drafting.**
- **The FPIC board should write a distinctive report (or a section of the EA report) that discusses FPIC issues, with specific recommendations to Cabinet in light of its assessment of FPIC.**

Finally, we note that in the absence of clear government process or requirement to that effect, Impact and Benefit Agreements (IBAs) have *de facto* become an important mechanism for proponents to secure Indigenous consent to a project. IBAs reduce legal and political uncertainties and send a strong message to regulatory authorities that local communities support the project. However, we consider that there are many limits to IBAs as a process for expressing FPIC. IBAs tend to be negotiated behind closed doors between lawyers. They are usually kept confidential and are often signed before the EA process has been completed. The negotiation of an IBA is also generally driven by a cost and benefit analysis that may not take into account broader and hard to quantify issues of concern to the community.

- **The negotiation of an IBA is an important mechanism for securing community consent to a project. In assessing FPIC, the FPIC Board should take into consideration the presence or absence of an IBA, but it should not be considered in and of itself a sufficient condition for FPIC**
- **IBA negotiation should be as transparent as possible and should not preclude deliberation in the community**
- **IBAs should be considered only if negotiated after the impact assessment study is completed and information concerning the project and its potential impacts is publicly available and in formats accessible to community members**

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