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The Implementation of Free, Prior and Informed Consent in Canada:

Different mechanisms in the Canadian treaty landscape

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Master thesis in Governance and Entrepreneurship in Northern and Indigenous Areas
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Abstract

This research is intended to contribute to the current conversation in Canada on the implementation of the United Nations Declaration on the Rights of Indigenous Peoples by providing an overview of what different actors across Canada are currently doing to implement 'free, prior and informed consent' (FPIC). Even though the concept of FPIC is found in several places in the UN Declaration, this study looks specifically at its application in relation to natural resource development projects and how it is implemented in Indigenous communities that have varying treaty relationships with their traditional lands. Thematic analysis was the primary method used to answer the research question 'are there differences in how FPIC is operationalized with Indigenous groups that have modern treaties when compared to areas in Canada where Indigenous peoples have historical numbered treaties or no treaties at all?' The academic literature specifically related to FPIC and addressing 'consent' was coded for themes and analyzed for cases of FPIC implementation in relation to natural resource development. These cases were categorized into types of mechanisms as well as whether they were primarily driven by government, industry or Indigenous peoples. The cases were then placed in a table to look for patterns in the choice of approach. Based on the limited sample of cases found in the literature, there does not appear to be any difference in how Indigenous communities, governments or industry choose to implement the principle of FPIC based on the presence or absence of treaties. There was no identifiable trend between the signing of a treaty and the mechanisms used to operationalize FPIC. The range of cases analyzed demonstrates that mechanisms can be found through a variety of approaches and there is no single mechanism that is optimal. Given the diverse legal traditions of Indigenous peoples in Canada, any attempt to create a standardized approach would be inappropriate. Indigenous consent to development projects should not be a yes or no question being asked by governments to Indigenous peoples but rather a process that builds relationships to help to guide the decision-making process. There is no singular tool for the implementation of FPIC but rather a combination of vehicles that are adapted to the local circumstances. Indigenous consent is ideally a relational process and not a decision made at a single point in time.

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1 Introduction

Free, Prior and Informed Consent (FPIC) has been one of the most discussed aspect of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration[1]). The UN Declaration is an aspirational international declaration that describes and clarifies the rights of Indigenous peoples across the world. Rather than describe new rights, the statement codifies how existing international human rights should be applied to the particular circumstances of Indigenous peoples. The declaration proposes the responsibilities that states have towards Indigenous populations within their borders to address colonial legacies and the discrimination faced by most Indigenous peoples across the world. Since the UN Declaration was approved by the United Nations General Assembly in 2007, governments in Canada have been under increasing pressure from Indigenous peoples to implement it.

Of the more challenging aspects of the UN Declaration is the principle of FPIC, which would require States to seek Indigenous peoples' consent before undertaking actions that may affect them. Government officials, academics, and legal thinkers have been turning their minds to how this principle of FPIC can best be implemented within a Canadian legal context. Although the UN Declaration is not legally binding in Canada, it has been getting increasing attention. Federal and other levels of government have begun to make commitments about its implementation. For example the Government of British Columbia recently passed legislation implementing the UN Declaration, the first of its kind in Canada. The UN Declaration has given Indigenous peoples international support to demand control over their traditional territories, putting FPIC at the center of the debate on Indigenous land rights in Canada.

Not only is there political pressure from increasingly powerful Indigenous voices demanding the right to consent to development but many industry players have also indicated support for implementing FPIC. Operating without consent may lead to litigation, which is often a long and expensive process. Obtaining FPIC may have the added benefits to proponents of providing a social licence for development activities. FPIC is a principle in several of the

[1] Some Indigenous peoples have asked that the United Nations Declarations on the Rights of Indigenous Peoples not be referred to as 'UNDRIP' but rather 'The UN Declaration' as a sign of respect, so I will be referring to it as such in this document.

articles of the UN Declaration but this study will look specifically at how it relates to consent over development projects on traditional indigenous lands, as described in Article 32(2) of the UN Declaration states:

> *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 General Assembly, 2007)*

A public dispute over the implementation of FPIC is currently raging in British Columbia over the TC Energy pipeline project. The Wet'suwet'en Nation's protest of the pipeline construction reached a peak in February of 2020. Protestors shut down railways across Canada, handicapping the movement of goods and commodities across the country. These protests are an example of what can happen when there are differing perceptions and expectations of FPIC. Without consensus around the mechanisms and processes for seeking to obtain consent, economic development projects are put at risk and Indigenous communities are disempowered. Even with international pressure, some governments and corporations in Canada are still reluctant to fully establish ongoing processes to obtain the consent of Indigenous communities to development projects.

Throughout this document, 'Indigenous group' will be used to identify a self-identified collective of Indigenous peoples, and 'Indigenous community' will refer to a geographic location mostly populated by people identifying as Indigenous. For the purposes of this study, the term 'modern treaties' refers to land claims agreements negotiated after 1972 while 'numbered treaties' refer to the historic treaties signed prior to 1921, which cover much of Canada (Issac, 1999). Unceded lands will refer to those lands that are not covered by any kind of treaty agreement, in Canada these lands are most often found in the province of British Columbia (Issac, 1999).

1.1 Purpose and Objectives

The objective of this research is to inspire innovation in the implementation of the UN Declaration in Canada. It seeks to provide a broad overview of what approaches to FPIC are

being explored by Indigenous communities and project proponents in Canada and analyses some of the pros and cons to the different options that have been explored so far. A comparison of approaches that have already been tried can inform Indigenous communities seeking to have the principle of FPIC recognized in their community and a summary of factors to take into consideration may provide a starting point to adapt mechanisms to individual community needs. Because of the importance of treaties in the relationship between Indigenous peoples and the Crown in Canada, the presence or absence of treaties is one of the factors that may need to be considered when looking at the best approach to FPIC for an Indigenous community.

The primary research question seeking to be answered by the analysis is:

Are there differences in how FPIC is operationalized with Indigenous groups that have modern treaties when compared to areas in Canada where Indigenous peoples have numbered treaties or no treaties at all?

This research seeks to investigate whether there are differences in how FPIC is, or could be, operationalized with Indigenous peopleswith modern treaties versus those with historic treaties or no treaties at all. In better understanding what factors play a role in the successful implementation of FPIC, both Indigenous peoples and those who wish to seek their consent may more effectively take the treaty status of the land into consideration when selecting a mechanism. The examples of implementation are limited at this time, thus it may be useful for Indigenous communities, as well as governments and industry, to be aware of the options currently being explored. Given the ambiguous nature of what the ‘right to consent’ means, the different experiences of communities may help inform approaches and stimulate innovation. The information that can be extracted from the academic literature is by its very nature limited and may not convey the nuance of how Indigenous communities perceive FPIC and the true impact on their communities, but the descriptive nature of the information may nevertheless provide some inspiration.

The approach used to answer the research question will consist of 1) describing and classifying some of the main approaches being explored in Canada to implement FPIC in relation to natural resource development projects and 2) exploring the link, if any, between the choice of approach and the type of treaty status held by the Indigenous community.

1.2 Thesis organization

Chapter 2 presents the results of the literature review looking at some of the ideas and major arguments being circulated in the academic literature, as well as some of the options for implementation that are being proposed by the literature. It then goes on to describe some of the cases of implementation found in the literature that will be used as the data for analysis. Chapter 3 provides a framework for understanding the important core concepts of FPIC, such as 'consent' and 'veto' and chapter 4 discusses some of the challenges to implementation in Canada, including the legal framework and Indigenous views on 'consent'. The complexities around seeking to obtain consent in Canada will be illustrated by the recent example of the Wet'suwet'en protests and the TC Energy pipeline. Chapter 5 analyses the different approaches being explored in Canada, using the cases identified in the literature review. Chapter 6 is the conclusion, summarizing the findings and describing some of the limitations to the study as well as some suggestions for future research.

2 Current Research

The UN Declaration as a document is less than 15 years old and examples in the literature of successes and failures in Canada, particularly by governments, are limited. Some authors have tried to tackle the topic of the UN Declaration by proposing mechanisms and approaches that might be considered in its implementation while others have attempted to describe some of the attempts to implement. This literature review will explore FPIC within the Canadian system by looking at some of the major ideas around its implementation as well as some Indigenous and academic perspectives on FPIC. Though FPIC is being explored by indigenous peoples and academics worldwide, literature specific to Canada was prioritized for this review given that it is within Canadian legal and political realities that the cases of FPIC are being analysed.

Within the UN Declaration, the principle of FPIC has been the source of some confusion and differing perception, both nationally and internationally, which have brought about conflict and uncertainty (Coates and Favel, 2016). Much of the academic literature is split between those who are looking to describe the challenges that FPIC poses within the Canadian legal framework (Coates and Favel, 2016; Torys, 2016) and those who assert that the implementation of FPIC is not only possible, but necessary, to respect the human rights of Indigenous peoples (Mitchell et al., 2019; Yellowhead Institute, 2019). Differing

interpretations have tended to either lean towards the 'strong', where seeking consent determines the outcome, or the 'procedural' where consent is to be sought but not necessarily obtained (Askew et al., 2017). Some interpretations suggest FPIC as being equivalent to a 'veto', allowing Indigenous peoples to have the final say on whether a project goes ahead, while others argue that the UN Declaration is aspirational and does not convey any special authority over development (Coates, 2016).

The Yellowhead Institute at Ryerson University has published a report detailing some of the experiences of First Nations trying to establish control over their lands, noting that the communities they featured had very strong title claims, primarily in British Columbia (Yellowhead Institute, 2019). The authors argue that governments seem to be less tolerant of Indigenous communities demanding consent in historic treaty areas than in areas where legal battles over Aboriginal[2] title are currently being fought. The authors posit that this may be due to the legal losses that governments have recently suffered in the courts and the time expended on litigation when Indigenous communities have successfully defended their right to consent (Yellowhead Institute, 2019). This is a likely explanation given governments tend to be averse to litigation. An alternative explanation might be that the strongest cases to be made for Aboriginal title are happening mostly in British Columbia, which is already a province that leans socio-politically towards recognizing Indigenous rights. While the report contains examples of Indigenous communities using a variety of mechanisms, the study focuses on those that are Indigenous led, such as use and occupancy of land to assert ownership. Not all the approaches detailed in the report would be appropriate in every Indigenous community because the circumstances vary, but the breadth of examples do emphasize that models for implementation are best kept flexible to meet the different needs of individual communities.

Some authors focus on the economic and legal aspects of FPIC, but Owen and Kemp (2014) argue for the need to broaden the discourse to engage with the sociological and socio-historical complexities of FPIC. They assert that this would highlight the different dimensions

[2] Note that even though the term 'Indigenous' is the preferred term when referring to communities, nations and peoples, 'Aboriginal' will be used when referencing legal rights as that is the term used in Section 35 of the Canadian Constitution (1982).

implied by obtaining consent and bring attention to the different ways these processes can affect communities. This focus on the social aspects of FPIC might also start to point to why attempts to articulate a national strategy are so challenging. Implementation at the territorial scale or regional scale may be more appropriate than national guidance according to Owen and Kemp (2014) who advocate for a locally determined process. The debate may also be shifting towards its application beyond idealized notion of consent by focusing in more on finding practical means of implementing a process of FPIC at the community level (Owen and Kemp, 2014).

Coates and Favel (2016) argue for a "made-in-Canada" implementation plan for FPIC that is based on an Indigenous-driven process. The process would start to establish standards for consultation and engagement that meet the goals and values of the UN Declaration while still being in accordance with Canadian Law. They also argue that it would be a mistake to ignore the robust regime of consultation and accommodation, though there are improvements which could further reflect the spirit the UN Declaration in the Canadian model (Coates and Favel, 2016). This perspective represents one extreme of the debate, which argues that small adjustments to the current legal regime can meet the requirements of the UN Declaration, rather than using the document to push for the large-scale systemic change being advocated by many Indigenous peoples.

Some authors have started to look at mechanisms for FPIC to help align expectations and create an environment of certainty for industry and development. Danesh and McPhee (2019) examine the potential utility of using land-use planning as a mechanism for implementing FPIC. They focus particularly on British Columbia and argue that, if structured properly, land use planning can be a vehicle for operationalizing FPIC and allow relationship building and important conversations to occur ahead of any single project approval (Danesh and McPhee, 2019). It can also offer a forum for shared decision making that provides a process for both the Crown and First Nation to make and accept recommendations, although they note that a dispute resolution mechanism is often absent which would be beneficial (Danesh and McPhee, 2019).

Papillon and Rodon (2016) focus on discussing the implication of IBAs as models of seeking Indigenous consent for development on their traditional lands. They use this process to

examine whether these types of proponent-driven negotiations are consistent with the principles of FPIC. IBAs are currently the most practiced form of consent seeking in Canada and, though this mechanism has many advantages, it is limited in scope and may not reflect the spirit of FPIC as understood by many Indigenous communities. One of the objectives of Sadiqu's research (2017) is to try and identify some of the other tools and mechanisms that are being used to implementing FPIC while looking for opportunities to incorporate those tools and mechanisms into already existing processes (Sadiqu, 2017). The research has a particular focus on mining in Manitoba and found that the key players in a mine development all had different interpretations of FPIC, from being an important vehicle for reconciliation to reflecting a new way of doing business that is more respectful of Indigenous rights (Sadiqu, 2017). The variety of interpretations and definitions are being used in the debate, which can partially help to explain how complex it is to collectively decide on a national strategy.

2.1 Documented instances of implementation

Drawing on the literature explicitly referencing the right to FPIC in the UN Declaration, examples of its implementation were selected to represent a spectrum of the options currently being explored in Canada. These mechanisms and approaches originate from Indigenous groups or industry and less commonly, government.

2.1.1 Government initiated approaches

Public commitments made by governments about the UN Declaration, though vague, are being interpreted by Indigenous peoples as representing a major shift. The expectations surrounding government promises to implement the Declaration, are being met with the expectation of more say over project development processes (Coates and Favel, 2016). Even though many of the interactions that occur when a resource development project is initiated are between the proponent and Indigenous communities, governments have an important role to play. The regulatory mechanisms that are codified by government laws can have a significant role in development processes and can create points of influence for Indigenous views to be incorporated into projects. If governments choose to implement FPIC, they have the capacity to significantly support Indigenous peoples in FPIC processes. Three examples were found in the literature where government intervention was able to support Indigenous peoples in granting consent.

In 2015, the government of British Columbia bought back a lease from Fortune Mineral that was situated in a sacred area of the Tahltan Nation where the Tahltan had clearly expressed their lack of consent for the exploration (Gibson MacDonald, 2015). In the future, the lease could be bought back by the company at the same price, if they succeed in reaching an agreement with the Tahltan. The government is amenable to leaving the door open for the development to occur in the future if consent can be secured. The Tahltan are on unceded land in British Columbia and have no agreement in place that requires consent but by buying back the lease, the Government of British Columbia was able to support the Tahltan's right to grant or withhold consent.

BC Hydro is a Crown Corporation of the Government of British Columbia. In 2007, the installation of a 287-kilovolt Northwest Transmission Line was proposed. The transmission line would have connected large areas of resource rich northwestern British Columbia with reliable energy transmission and so it required multiple streams of consultation with a number of First Nations (Boreal Leadership Council, 2012). The government supported each First Nation in making a unique decision about the transmission line. The Nisga'a had a completed land claim and self-government agreement that required consent through an IBA which they negotiated and ratified through a referendum in 2011 (Boreal Leadership Council, 2012). Not all the First Nations along the route consented but many agreements were signed. The governments did not impose a single mechanism for Indigenous support of the project but rather each First Nation chose their own internal process to come to a consensus of consent within their community to then communicate to government.

Article 26 of the Nunavut Land Claim Agreement (1993) makes it mandatory for a proponent to sign an IBA with the regional Inuit organization. Regional Inuit organizations represent the individual communities within the Nunavut Land Claim Agreement area but the land claim also establishes the Nunavut Tunngavik Inc (NTI) as the central body that implement the land claim and represents the Inuit in the whole of the agreement area. The IBA for the proposed Kiggavik Uranium mine was negotiated between the proponent, Areva Resource, and NTI, which is the land claim organization but not the organization representing the land claim beneficiaries at the community level. The residents of the affected communities did not consider NTI as representative of their interests and so the agreement did not establish the legitimacy required from those were most affected in the community and therefore was not

consistent with FPIC (Papillon and Rodon, 2016). In addition, residents of the affected communities made numerous presentations for the Nunavut Impact Review Board against the project (Zerehi, 2016). Ultimately, through the EIA process established by the Nunavut Land Claim, the project was rejected by government in large part because of the strong community concerns associated with the project (Zerehi, 2016). The Government of Canada agreed with the board's recommendations and supported the process established by the land claim to seek to obtain consent of the Inuit in Nunavut. Ultimately, the proposal was rejected.

2.1.2 Industry approaches

The literature emphasizes the importance of IBAs in obtaining consent from Indigenous peoples in Canada (Papillon and Rodon, 2016) but specific documented examples of IBAs were not detailed in the literature, possibly because they are often confidential documents. Published examples of industry-developed approaches were primarily found through industry guidelines and not through case studies of the implementation of these guidelines.

The Forest Stewardship Council (FSC) is an international certification body that promotes the sustainable use and management of forestry resources. In 2012, the FSC released *Free Prior Informed Consent in Canada*. This guidebook aims to improve outcomes in developing a common understanding of the right to consent when organizations wishing to be certified implement FPIC in cooperation with Indigenous communities. It intends to help improve standards of consent in forest stewardship and incorporate FPIC in the way the industry does business, though it is not an FSC certification requirement. The FSC is looking to use FPIC as way of increasing the benefits of the forestry industry to Indigenous peoples (Gibson MacDonald, 2015; Imai, 2016). FSC suggests a three-phase process that can broadly be applied in the context of FSC certification: 1) Gathering information and Building Understanding, 2) Building Relationships and Capacity and 3) Making Agreements and Monitoring Progress (FSC, 2019). These guidelines emphasize that obtaining Indigenous consent is about creating long-term relationships between communities and proponents. It also demonstrates that industry is in many cases voluntarily moving towards FPIC even if there is not much direction being provided by governments.

The mining industry has also moved towards to development of guidelines to implement FPCI. The International Council of Mining and Metals (ICMM) is an association that brings together mining and metals companies from around the world as well as regional and global

commodity associations. Canadian representation on the ICMM includes the Prospectors and Developers Association of Canada and the Candian Teck Mining company, as well as other mining companies with operations in Canada (https://www.icmm.com/en-gb/members). The ICMM was established to improve the sustainable development performance in the mining and metals industry (Imai, 2016). In 2013, they released *Indigenous Peoples and Mining Position Statement* (the *Statement*), demonstrating a shift in the industry's approach to consultation. It explicitly requires its member companies to work to obtain consent from Indigenous peoples on projects that are likely to adversely impact Indigenous peoples or their traditional lands (Imai, 2016). The *Statement* asserts that FPIC is intended to be both a process and an outcome and it characterizes the right to consent as including the right to both give or withhold consent consistent with the traditional decision-making processes of the community (International Council on Mining and Metals, 2013). The implementation of *the Statement* is a condition for continued membership in the ICMM, requiring that members respect Indigenous peoples' right by undertaking meaningful engagement and ensuring meaningful participation in decision-making (Owen and Kemp, 2014). It further directs proponents to seek agreement with Indigenous communities on what constitutes consent and create opportunities for dialogue and collaboration (Owen and Kemp, 2014). The ICMM guidelines support the ideal of encouraging relationships with Indigenous peoples about resource development projects and the importance of seeking to understand what 'consent' means to the community. These guidelines do not set up processes according to the treaty status of the Indigenous community but rather focuses on the impact to the community as a starting place for the dialogue.

Some within the mining industry may believe that consent is already the norm in the Yukon. Martin and Bradshaw (2018) quote mining representatives as believing that no mining project that goes ahead in the Yukon on settlement lands can do so without First Nations essentially giving consent. The Yukon Umbrella Agreement is well respected in the Yukon and establishing governance systems and implementing treaties has been a priority (Martin and Bradshaw, 2018). Chapter 18.3 and 18.4 of the Yukon Umbrella Agreement identifies that consent of a First Nation is required when exploration is occurring on settlement lands and proponents must secure permits from the affected First Nation in order to operate on settlement lands (Martin and Bradshaw, 2018). This requirement for consent to access land for exploration is limited to settlement lands and does not extend to the whole of the

traditional territories. Settlement lands are lands controlled by Indigenous peoples through First Nation governments that own the lands on behalf of the beneficiaries as a collective, subject to the conditions of the land claim agreements. Settlement lands are privately owned parcels held within a larger agreement area and so the ability to give or withhold consent for access to lands for exploration is limited in geographic scope. Martin and Bradshaw (2018) caution that before FPIC can truly be considered an operational requirement for the mining industry in the Yukon, key institutions, as well as First Nations, would have to articulate that this is so.

2.1.3 Indigenous approaches

The Yellowhead Institute (2019) recently released their report titled *Land Back: A Yellowhead Institute Red Paper*. It describes communities across Canada and how they are operationalizing their vision of consent-based jurisdiction over land. The report documents regimes of consent in the context of land restitution and how Indigenous people are re-asserting jurisdiction. The case studies they present are proposed as examples of "promising practices" areas where Indigenous control could be exerted. Among them are the environmental assessment process and formal permitting process (Yellowhead Institute, 2019). Examples of Indigenous communities insisting on consent and engaging in processes are found across Canada and are not limited to a single approach or mechanism, nor are they limited to areas where there are treaties.

The Secwépemc are on unceded land in British Columbia and were able to organize a process that involved the whole community. The Secwépemc created an environmental assessment process and applied it to the proposed Ajax mine within their traditional territory near Kamloops in British Columbia. The process used both Secwépemc traditional knowledge and western science to make the assessment and there was a high degree of community consensus. The process concluded that the mining project would have adverse effects on the community on a social and environmental level and that the camps required for construction of the project would make women and girls vulnerable. In light of these findings, the Secwépemc informed the Canadian Government and the Government of British Columbia in 2017 that it did not give free, prior and informed consent to the mine development project (Yellowhead Institute, 2019). The government of British Columbia rejected the permit for the mine given the nearly unanimous community rejection of the project (Yellowhead Institute, 2019).

The Neskantage are on land in Ontario with a historic numbered treaty. They have developed a protocol that asserts their rights to the land despite what other legislation may say and insist that their jurisdiction be respected so that they receive their fair share of any benefits from a project. The protocol references Treaty 9 in affirming the right to consent and states that it must be community-derived and not simply derived by leadership (Yellowhead Institute, 2019). The Neskantaga community has refused to meet with any developers who do not meet certain criteria and require that a suitable relationship be built with the community in order for the development to go forward (Yellowhead Institute, 2019). Once again, the focus is on the creation of a relationship for the implementation of FPIC and communities deciding for themselves what they require from developers to provide consent on behalf of the community.

The Saugeen Ojibway Nation (SON) has a traditional territory on the Bruce Peninsula in Lake Huron and are signatory to a historic numbered treaty (no.72) with the Crown. The SON participated in joint panel hearings on an Ontario Power Generation proposal to build a deep geological repository to store nuclear water in the Lake Huron area of Ontario. The SON dug deep into the implications of this proposal for their communities on their commercial treaty and Aboriginal fishing right because of real and perceived threats to the health of the water and fish in the area of the nuclear waste site (Lands, 2016). In the SON's view, 'consent' is not just approval or no approval but a relationship-building exercise to exchange information and address existing 'legacy' issues by fully integrating the community in the process of decision making (Lands, 2016). In 2015, after rigorous efforts to ensure meaningful engagement, the SON were able to obtain a commitment from Ontario Power Generation that the project would not proceed without the consent of the SON (Lands, 2016). The SON used an already established process of testifying at hearings to develop a relationship with the developer that allowed them to obtain a commitment to honour their right to consent. This agreement with Ontario Power Generation could also fall under the category of government action, but is an initiative that the SON advocated for. The internal community process has emphasized the importance of broad community consensus.

The Anishinabek Nation represents 39 First Nations in the province of Ontario with an approximate combined population of 65,000 citizens, which is about one third of the province of Ontario's First Nation population (https://www.anishinabek.ca/who-we-are-and-what-we-do). In 2011, they came together to make their own internal recommendations on a new

mineral and mining act for the Government of Ontario. After consulting with the communities they represent, a report was produced and presented to the Government of Ontario consisting of 30 recommendations in 10 broad categories. One of the recommendations was the importance of obtaining informed consent from First Nations affected by mine development (Union of Ontario Indians, 2011). They recommended consent be required for early exploration and that no permits be issued without written agreement from the First Nation affected by the activity (Union of Ontario Indians, 2011). The Anishinabek Nation has sought to influence government decisions-making processes directly and get ahead of project-specific processes by lobbying for consent to be part of the broader process. There is an emphasis on community consensus and looking ahead to future development. In contrast to some of the other examples, which are specific projects, this work being done by the Anishinabek Nation is to guarantee that consent will be sought ahead of any proposed project.

In 2014, the Supreme Court of Canada decided in the *Tsilhqot'in Nation Vs. British Columbia* decision that an Indigenous community has the right to require that consent be obtained for any activities on their land if they can prove Aboriginal Title to that land. (Human Rights Council, 2018). This mechanism currently is only available to those Indigenous peoples who choose to pursue litigation through the court to obtain this right.

The Yellowhead Institute report (2019) asserts that there is a link between the successful outcome of the pressure applied by the Indigenous community and the strength of a claim to Aboriginal title. Unfortunately, this points to a current reality that seeking consent is most likely to occur when the risk of litigation from not seeking consent is the highest. This suggests that decisions around implementing FPIC may be made primarily to avoid the risks of being taken to court with all the associated delays, expenses and uncertainty.

3 Theoretical Framework and Methodology

3.1 Core Concepts

There are some core concepts essential to explaining the challenges in implementing FPIC. Words such as 'veto' have contested understanding in the context of FPIC, leading to misunderstanding and differing expectations.

3.1.1 Free, Prior and Informed Consent

Since the Royal Proclamation of 1763, Indigenous peoples have expected the Crown to honour the right to give or withhold consent in regards to anything related to lands and resources on their traditional territories (Lands, 2016). Some of the debate on the challenges of implementing FPIC focus on the different perceptions surrounding the concept of FPIC itself. As Coates explains "While the debate remains unresolved, the political reality is that First Nations believe their rights and influence have expanded greatly under UNDRIP, giving them an effective veto over major resource developments, including pipeline construction" (Coates, 2016, p.8).

The detailed common law around the duty to consult may create even more complexity around any obligation to obtain consent. Newman (2017) cautions that FPIC can be read as only requiring a good faith effort be made to obtain the consent and that the wording may also point to a narrow interpretation of only applying to lands that are owned by Indigenous communities. If read this way, the obligation under Canadian law of the "Duty to Consult" would already meet and exceed the obligations under the UN Declaration since the framework applies to all lands where there is an asserted claim (Newman, 2017).

Conflicts can arise when Indigenous perceptions of consent are not compatible with government interpretations of FPIC and there is an expectation for control that is not met. Approaches to FPIC need to include Indigenous perspectives in order to ensure that, in the operationalization, Aboriginal rights and laws are respected (Mitchell et al., 2019). No Article in the UN Declaration should be read in isolation and the national debate often fails to emphasize that within the UN Declaration itself Article 46 limits this consent to being implemented within domestic laws (Joffe, 2018). The dialogue can get stuck on 'consent' and 'veto' when in reality the UN Declaration itself includes some flexibility in the interpretation of FPIC (Askew et al., 2017; Barelli, 2012).

Case law has already established that prior to taking actions that might affect existing or asserted Aboriginal rights, governments must consult and FPIC would be triggered by much the same standards as activities that trigger the duty to consult and accommodate (Boutilier, 2017). Though the obligation to consult before implementing development projects recognizes the special relationship that Indigenous peoples have with their traditional lands, the duty to obtain consent is not a clear legal obligation in Canada yet (Askew et al., 2017).

The jurisprudence is clear starting with the *Haida* decision (SCC, 2004) that the duty to consult does not extend to a veto over government decision making, however in some cases if the impact is major the duty to consult can extend to seeking consent (Papillon and Rodon, 2016). This consent can only be overridden by governments in cases where substantive engagement and 'compelling and substantial' public purpose can be shown (*Tsilhqot'in*, 77) (Papillon and Rodon, 2016).

3.1.2 What is understood by 'consent'?

Mitchel et al. (2019) characterizes FPIC as a set of Indigenous peoples' rights to make an informed judgement. This should be done within a community's own cultural framework, enabling them to "provide or withhold consent, to say "yes" or "no" or "yes with conditions," to pursue further discussion and action regarding proposed developments (p.5). Pappilon and Rodon note that FPIC suggests a collective decision-making process rooted in the community and not just a settlement negotiated exclusively through representatives (Papillon and Rodon, 2016).

Owen and Kemp (2014) point out that in order to be clear on when the community has given 'consent', there must be a mechanism to determine what steps are necessary in order for the project to proceed. Given that communities are rarely homogenous, there may be minority or dissenting positions. For the consent to be valid, it is essential that there be no duress and that it be sought prior to the project being initiated (Joffe, 2018). Some authors emphasize that consent is only valid if the option to withhold consent is also a viable reality (Joffe, 2018; Mitchell et al, 2019).

Martin and Bradshaw (2018) suggest that Indigenous peoples' consent of projects should be viewed as a means of rebalancing the power relationship between proponents and Indigenous communities. In order to assess the standard of consent it can be useful to focus on the impact of the project on the community instead of the impact to land rights (Boutilier, 2017). It can be useful then to think of consent as falling on a spectrum where its precise nature is determined by the circumstances of the project and community and "as part of a relationship and process, rather than a simple "go/no go" decision" (Lands, 2016, p.47).

Danesh and McPhee (2019) classify the different models of consent into three fundamental categories, regardless of the specifics of the instance: 1) models of consent where one party or

the other is designated to be the final decision-maker; 2) both jurisdictions agree to designate a decision-maker regarding a specific matter; or 3) both jurisdictions come to their own decision and there is an agreed upon mechanism for addressing divergent outcomes in the decisions to reconcile them. This typology illustrates that within the concept of FPIC 'consent' does not have a single definition but is rather a process to reach agreement (or not). The model of consent proposed by Danesh and McPhee (2019) clarifies that there are multiple ways that the process to reach agreement can be structured.

3.1.3 'Veto'

According to some authors, the right to consent must necessarily include the ability to withhold consent (Gibson Macdonald, 2015; Mitchell et al., 2019). This may lead to a perception that Indigenous peoples have the equivalent of a 'veto' over development (Coates, 2016). This interpretation often does not serve the interests of Indigenous peoples since it may entrench the government's hesitation to cede any control of a primary revenue source (Yellowhead Institute, 2019). Indigenous peoples and industry would both benefit from some clarity around FPIC. The ambiguity surrounding 'veto', given the debate surrounding the application of FPIC in Canada, may raise expectations that FPIC will be establishing a 'higher standard of Indigenous approval' and increasingly create an environment of uncertainty in resource development discussion (Coated and Favel, 2016).

Much of the dialogue surrounding the 'dangers' of FPIC seems to rely on the assumption that "all development proposals are reasonable and that all Aboriginal groups are anti-development and unreasonable in their decision making" (Lands, 2016, p.48). However, many Indigenous communities are pro-development (Coates, 2016) and political and economic realities influence development proposals.

FPIC operated within a broader context, not an absolute right (Danesh and McPhee, 2019) and can be used to structure relationships between Indigenous peoples, proponents and the state by providing a framework to safeguard the rights of Indigenous Peoples (Danesh and McPhee, 2019). "In a very limited number of cases FPIC might amount to a veto, but these would only be cases in which good faith negotiations fail to reach a reconciliation of interests and where no justification meets the specifications of Article 46" (Boutilier, 2017, p.8). A suggested approach to FPIC would shift away from the question of 'veto' and move toward

creating processes that engage with Indigenous peoples in partnerships and seek to reach mutually agreeable outcomes (Papillon & Rodon, 2016; Mitchell et al., 2019).

3.2 Research method

Document and thematic analysis were the research methods for this study. Document analysis is a systematic procedure for reviewing documents, which entails selecting and synthesizing the data they contain (Bowen, 2009). The document analysis was further refined with a research method known as thematic analysis. Thematic analysis is a qualitative research method that is meant to identify patterns in data (Maguire and Delahunt, 2017). Thematic analysis is not tied to a particular theoretical perspective and the goal is to identify themes and interpret patterns in data to say something about an issue (Maguire and Delahunt, 2017).

For the document analysis, I collected the preliminary documents by conducting a word search of 'consent', 'United Nations Declaration on the Rights of Indigenous Peoples' and 'implementation' in iPortal, the Indigenous Studies portal research tool, a library database of the University of Saskatchewan and in an online search engine. I also made extensive use of the Indigenous Rights and Resource Governance Research Group whose mandate it is to promote access to information and resources related to FPIC to Indigenous communities. This research group has already compiled a significant collection of the academic work being done on FPIC and many of the resource from their website https://www.fpic.info/en/ were considered for inclusion in the data set. I sought to identify documents that contained information about approaches that could be broadly applicable within Canada, but only those examples that were accompanied by sufficient descriptive information for analysis were retained. The document search focused on academic literature and I did not include primary sources, legal decisions or government documents.

The documents analysis was used to collect the primary data sources that I then subjected to thematic analysis. Thematic analysis is highly flexible and an approach that can be modified to summarize the key features of complex data. My methodology for the thematic analysis was primarily based on the 6 phases approach described by Nowell, Norris, White and Moules (2017).

- ‘Phase 1: Familiarizing Yourself With Your Data’: I read and familiarized myself with the different documents to understand what data was available and what some of the broader themes of the research were based on the earlier document analysis
- ‘Phase 2: Generating Initial Codes’: I developed an initial coding framework to analyze the relevant documents. Generating initial codes for the analysis helped to organize the data into smaller chunks (Maguire and Delahunt, 2017). The initial coding framework included categorizing the instances of FPIC by type of project, involvement of government or industry and any mention of treaty status.
- ‘Phase 3: Searching for Themes’: In searching for themes, patterns are captured that add something significant towards answering the research question (Maguire and Delahunt, 2017). The initial coding identified the information relevant to the research question and that information was then searched to identify other themes and subthemes. I used a deductive analysis to develop the conceptual framework that helped to identify the themes that were further refined based on the results of the literature review and description possible implementation mechanisms.
- ‘Phase 4: Reviewing Themes’: I reviewed the initial themes in light of the data extracted by the coding exercise, and I used the categories that were suggested by the literature review to ensure the themes and subthemes were coherent with the pattern of the coded data.
- ‘Phase 5: Defining and Naming Themes’: I used the themes identified in the data to further define and describe the categories in the data using the literature review.
- ‘Phase 6: Producing the Report’: Once the final themes were established, the final phase is to report on the results. This document is that final phase.

I placed the coded instances of the implementation of FPIC in Canada in a simple table to illustrate the themes or patterns. The literature review details the themes related to the implementation of the UN Declaration in Canada. Table 1 summarizes how I have classified the cases from the literature for the purposes of the analysis. For the purposes of this study, I am assuming the selection of instances mentioned in the academic literature, are representative sample of some of the approaches to implementation being used in Canada. It would be unworkable to attempt to identify every instance made by industry and Indigenous

peoples to implement FPIC so examples documented and published, are used as a proxy to represent the variety of experiences currently found in Canada.

4 Key challenges in Canada

FPIC and consultation are different, but can be complementary (FSC, 2019). The duty for developers to consult and accommodate Indigenous people's wishes is well-articulated through case law. The Duty to Consult details a spectrum of obligations depending on the strength of the affected Indigenous interests while the FPIC standard has yet to be clearly articulated (Boutilier, 2017). "The Government and the courts have focused on the participatory aspects of decision-making processes, not the right to self-determination which is the foundation of the right to FPIC" (FSC, 2019, p.12).

Those who are opposed to implementing FPIC within Canadian resource development often point to the duty to consult as being sufficient and protest the perceived constraints on development that Indigenous consent might mean. However, as Lands (2016) points out, FPIC is already considered the international standard to meet. "On a practical level, FPIC is now clearly the standard that must be met in order to provide the legal, moral, and social support for projects to go ahead" (Lands, 2016, p.44). Indigenous peoples in Canada have had access to the courts to refine and define their Aboriginal rights, and though they have gained much recognition of their rights, it can be costly and lengthy to rely on court processes.

The challenges in Canada are magnified by the fact that there are six hundred and thirty-four recognized band councils with different interest and ambitions (Boutilier, 2017). Relying on national Indigenous organizations might seem like a potential approach to work on FPIC but the legitimacy of the views expressed by these organizations is often disputed and may not be representative (Boutilier, 2017).

The challenges of representation in the process of obtaining FPIC are also present within a community where the consent must be consistent with the wishes of the community as a whole. A process ideally is "[…] community-based deliberative process that allows for the free and transparent expression of a community's diverse perspectives, worries, and interests" (Papillon and Rodon, 2016, p.2). The debate in Canada around how to implement the UN

Declaration often fails to express clearly that it is intended to be implemented within the national context of the various countries who implement it (Coates and Favel, 2016).

4.1 Indigenous expectations of consent

Mitchell et al. (2019) examined Indigenous perspectives on FPIC by collecting the opinion of a First Nation in northern Ontario on consultation and consent. They recorded the views of the community on the concepts of 'free', 'prior', 'informed' and 'consent' and compared them to existing definitions of FPIC in order to propose an Indigenous-informed approach (Mitchell et al., 2019). It is useful to understand how the western academic and Indigenous community perspectives on FPIC are similar and where they may differ, since any attempt to implement the principles of FPIC will necessarily have to be largely based on the views and aspirations of Indigenous communities themselves. There are limitations, however, in extrapolating an 'Indigenous perspective' from a single community, given the breadth of different Indigenous cultures and interests across Canada.

According to Coates and Favel (2016) the principle of FPIC is simply affirming the pre-existing views of Indigenous peoples whose understanding of traditional land rights and responsibilities includes the right to approve of any project before it is undertaken on their traditional territory. Consent in this view seems a logical extension of the duty to consult and aligns with Indigenous understanding of sovereignty and nationhood (Coates and Favel, 2016). Indigenous peoples have their own customs and laws. Even if Indigenous practices and perceptions surrounding consent may not be homogeneous in Canada, these values tend to be rooted in a unique relationship to traditional territories, which can be different than western concepts of land ownership (Gilbert, 2007). Indigenous values around consent are often steeped in rich traditions of asking for permission from all beings on the land for activities, which may disrupt the natural balance (Carmen, 2008). When a process to conceptualize FPIC comes out of an Indigenous-led process, these customary laws are more likely to be respected (Yellowhead Institute, 2019).

Implementing FPIC in a way that allows for the inclusion of Indigenous values in the design may give a forum for Indigenous perceptions of FPIC to be realized in the operationalization. Indigenous communities may see it as their duty to protect the land, so a successful process will involve more than a strictly 'Western' economic lens and benefit from reflecting

Indigenous view of sustainability and ongoing responsibility in addition to benefits (Mitchell et al., 2019)

4.2 Canada's legal framework

One of the main perceived obstacles to incorporating FPIC into the approval process of projects is the opinion that it is incompatible with the Canadian legal and constitutional framework. Section 35 of the Constitution Act (1982) sets a minimum standard for the treatment of Indigenous people but Boutilier (2017) argues that this should not preclude stronger standards from additional sources. There is a lack of consensus on the question of how to interpret FPIC in the context of Canadian law and while staying consistent with the Canadian Constitutional framework (Askew et al., 2017, Gunn, 2013).

The *Delgamuuk* v. *British Columbia* (1997) tentatively identifies that consent is required in certain cases where Aboriginal title to lands have been established, but it also articulates some constraints, such as not allowing development activities that prevent use of land by future generations (Imai, 2016). In all cases, the state must justify any infringement on Aboriginal rights by proving a balance of interest with the public good (Torys, 2016). There is a broader institutional context that affects how FPIC is operationalized in practice:

> *The constitutional norms, legislations, regulations, and governance mechanisms that establish the conditions under which Indigenous peoples can participate in decision-making processes over natural resource extraction shape how FPIC is understood and translated in actual practices of governance (Papillon and Rodon, 2016, p.3).*

Though governments have a legal right to go forward with projects if they are 'in the public good', the approval that is obtained from the Indigenous group with claim to the traditional territory on which a project is being proposed will carry significant weight. Not obtaining consent is likely to lead to long and expensive legal battles and the uncertainty surrounding the future of the project is unlikely to provide an environment that stimulates economic development. Many governments and industries in Canada are starting to experiment and work with Indigenous groups to find different ways in which consent could be obtained to meet the needs of the project and of Indigenous groups.

4.3 The Wet'suwet'en and the TC Energy Pipeline

Many of the themes surrounding the challenges with implementing FPIC can be seen in action when looking at the case of the Wet'suwt'en hereditary chief and the escalations of their protest of the TC Energy pipeline in 2019/2020. The pipeline is a natural gas project that began construction in 2019, despite protests, injunctions and a national movement of support for the Wet'suwet'en fight. The issues with the project began even before it was approved by the British Columbia Environmental Assessment Office in 2014. It has been criticized ever for its poor consultation process (Proctor, 2020) as well as for not respecting the principle of FPIC (Pasternak, 2020).

The TC Energy pipeline project has been forging ahead despite strong opposition from the Wet'suwet'en Nation's traditional leaders, the hereditary chiefs (Brown and Bracken, 2020). Along the route of the pipeline all 20 elected bands chiefs had given agreement to the pipeline, but the hereditary chiefs have remained in opposition saying the Wet'suwet'en laws has been ignored and consent to enter the unceded land has not been given (Breanm, 2020). While the band chiefs govern the affairs of the bands as a result of the Indian Act, the traditional territory of the Wet'suwet'en is governed by the hereditary chiefs, a responsibility that they have had since before the establishment of Canada (Bracken, 2020).

> *The Wet'suwet'en are not a nation divided, they are a nation with differing opinions on the best route to a better future after history of oppression. The band councils have sought opportunity, and funding, where they can find it. But based on Wet'suwet'en and Canadian law, it's ultimately the hereditary chiefs who have jurisdiction to the territory, and they have been clear about their aim—to assert self-governance over their land and demand a nation-to-nation relationship with Canada (Bracken, 2020, paragraph 8).*

The case of the TC pipeline and the Wet'suwet'en provides a vivid example of some of the challenges of implementing FPIC. By getting agreement from the elected leaders along the pipeline route, the government thought it had obtained consent, but the processes were flawed. There were internal rifts within the community (Smith and Yousif, 2020) and the model of consent was not relational, providing insufficient opportunities for diverging interests to be reconciled. As suggested by the literature, if the community had been allowed

to lead the process, and design the approach by which consent would be given, many of the problems might have been avoided.

More recently, the Wet'suwet'en hereditary chiefs and government have signed a Memorandum of Understanding towards negotiating an agreement addressing the questions of Aboriginal title (Smith and Yousif, 2020). It remains to be seen how this approach will help to bridge the current gap in regards to the pipeline, especially since the process excludes the elected band leaders and at the moment does not seem to have unified community support (Smith and Yousif, 2020).

5 Analysis

5.1 Proposed approaches to implementation

A broad body of work exists that proposes a variety of approaches to the implementation of FPIC. Some approaches are already being tried in Canada while others are more theoretical or suggestions on how current structures and processes could be modified to meet the goals and principles of the UN Declaration. Below are some of main categories of mechanisms being proposed.

5.1.1 Industry Initiatives

International and national industry certification bodies have begun to proactively propose guidelines for their members to follow. For instance, the Forest Stewardship Council (FSC, 2019) has a program of voluntary certification for forest management that lays out a process for the non-state forest managers to establish FPIC relationships with Indigenous peoples. Industry initiative is also on the rise with the increasing negotiation of IBAs. As FPIC becomes an international benchmark for sustainable development worldwide, not obtaining consent becomes increasingly risky due to possible legal challenge. In order to manage this risk, industry appears to increasingly be moving ahead of government to work directly with Indigenous communities to obtain their consent when proposing natural resource development projects.

5.1.2 Environmental Impact Assessment

Environmental Impact Assessment (EIA) processes may be one avenue for Indigenous peoples to provide consent, though EIAs have their limitations. In the public analysis of the environmental and social impacts of a project, there may be some limited opportunities for

Indigenous peoples' input to be included in the decision making. However, in these public EIA processes, Indigenous peoples may be considered just another stakeholder group (Papillon and Rodon, 2017). In addition, the EIA engagement process is usually a single event or short-term engagement in the approval phase of a development project. This does not provide for the ongoing relationship between proponent and community, which is so important within an FPIC process (Papillon and Rodon, 2016).

Until recently, EIAs were one of the few institutional spaces for communities to be engaged on questions related to the potential social and cultural impacts of projects (Papillon and Rodon, 2016), since the duty to consult and accommodate speaks specifically to impacts on Aboriginal rights not broad community well-being. EIA processes have provided a forum for Indigenous communities to apply some leverage and to have some say in how projects are developed on their traditional territories, but some adjustments would have to be made for these processes to truly reflect FPIC. EIAs are but one of the avenues that might be relatively easy to modify in order to achieve some of the goals of FPIC, but are not well suited to being the only mechanism.

5.1.3 Impact Benefit Agreements

The shortcomings with the EIA process are one of the reasons that IBAs are becoming so important for obtaining the support of communities in resource development projects (Papillon and Rodon, 2016). IBAs have become a standard expectation between industry and Indigenous peoples and have become the de facto way in which Indigenous communities provide consent for development projects (Gibson MacDonald, 2015). They help establish the legitimacy of a resource extraction project and address some of the ambiguity surrounding the status of Indigenous peoples in decision-making (Papillon and Rodon, 2017). As papillon and Rodon note "IBAs generally address the adverse impact of the project, notably through mitigation measures, financial compensations, and other economic benefits, such as job guarantees, training programs, and support for Indigenous business creation" (2016, p.5). Bracken (2020) furthermore maintains that duress is inherent in the process of IBAs since Indigenous communities may not actually be able to say no when the financial resources are so desperately needed. There is also often an implied threat that the project can go ahead, with or without consent, so the Indigenous community may feel pressure to take what they can get (Bracken, 2020).

One of the purposes of these agreements is to create certainty and stability for industry by providing a mechanism through which a project obtains social acceptability, or at a minimum tolerance, and in some cases even consent. The company will usually offer certain economic incentives, for instance local hiring and education scholarships. "In exchange, the Indigenous communities involved generally commit to supporting the project, either through an explicit consent clause or an engagement to respect the result of the regulatory approval process" (Papillon and Rodon, 2016, p.5).

Working relationships can be established by IBAs as they can provide a process for industry to engage with Indigenous communities to develop an understanding of their distinct culture and values (Gibson MacDonald, 2015). Papillon and Rodon (2017) suggest that project proponents are beginning to develop a significant expertise in securing Indigenous consent through IBAs though this consent is traded for economic compensation and accommodation. Negotiating directly with companies may provide more opportunities and autonomy for Indigenous communities (Yellowhead Institute, 2019) but may commit them to a certain model of development with narrow priorities usually focused on jobs and revenue. "While IBAs can contribute to the mobilization of Indigenous consent through negotiations, they can also narrow its expression to economic considerations" (Papillon and Rodon, 2016, p.5). Papillon and Rodon (2017) suggest that IBAs are a version of FPIC that undermines its spirit and intent by focusing on certain aspect of the project impacts, particularly economic ones, while not taking into account the broader social and cumulative impacts.

Ensuring that communities are fully engaged in the process and that the agreements are not just negotiated by the elite may be challenging (Owen and Kemp, 2014). Members of the community are often not fully engaged in the process of reaching agreement and participation may be limited to voting on the package negotiated, which is often rejected by residents (Papillon and Rodon, 2016).

5.1.4 Treaty obligations

Treaty obligations may serve as drivers of FPIC practices. Treaties, both historic treaties and modern treaties, are important to the exercise of Indigenous self-determination in Canada (Henderson, 2008). Historic numbered treaties and modern treaties differ in a few substantive ways. The historic numbered treaties are some of the first treaties negotiated between the Indigenous peoples and the Crown during the colonization of North America (Issac, 1999).

They tend to be shorter documents where access to land for settlement is exchanged for guaranteed access to services, such as education, and goods, such as medical supplies. These treaties usually give broad rights to continue traditional livelihoods on the land but give no specific ownership rights to traditional territories (Bone, 2012). In some cases, the historic numbered treaties have led to the creation of reserve for the exclusive use of Indigenous communities but these reserves cover much smaller geographic extent than traditional territories (Bone, 2012).

Modern treaties, by contrast are comprehensive legal documents mostly negotiated after 1972 when the government came under increased pressure to renew formal treaty relationships in more detailed and modern ways (Issac, 1999). These modern agreements describe, among other things, ownership right over certain settlement lands, the Indigenous group's participation in decision making over land and resources in a larger agreement area and financial settlements to begin to address wealth gaps created by years of colonial policies (Issac, 1999).

Treaties provide a legal foundation on which Indigenous peoples assert ownership and rights over land and often set out mechanisms to support Indigenous peoples' participation in resource development (Torys, 2016). Treaties are a legal recognition of this relationship to the land, at least as understood by Western legal traditions, and therefore one of the mechanisms for nation-to-nation relationships (Henderson, 2008). According to Boutilier (2017), the implementation of FPIC is tied to the right to self-determination and not necessarily to land rights and ownership, but the strength of the relationship to land of Indigenous peoples have made the link the between self-determination and land particularly strong (Carmen, 2010).

5.1.5 Courts

The courts provide an alternative route for Indigenous peoples to pursue legal rights over land. There is a right to 'consent' in some cases as described by the courts, notably by the Supreme Court of Canada in the 2014 *Tsilhqot'in* case. The Court declared that where Indigenous title has been proven, or is likely to exist, the Crown can only proceed if it claims an overriding interest (Gibson MacDonald, 2015; Coates and Favel, 2016). The Court also stated that in cases where Indigenous people do not consent, the government may infringe on the title only if it is necessary for the public good, which is a stringent test (Torys, 2016). "Aboriginal title and other rights, once established by the courts or treaty, provide the highest

degree of control over land. An Aboriginal group's consent will generally be required unless certain conditions are met […]" (Torys, 2016, p.24). Relying on court challenges to establish title and the right to consent is an expensive and time-consuming process. It requires certain material evidence that may not be possible for some Indigenous communities

5.2 Case analysis and results

The documented cases were sorted into the five broad categories described above:

- Treaties
- Environmental Impact Assessment
- Impact Benefit Agreements
- Industry Initiatives
- Courts

Some of the cases could fall into more than one category and some categories could be labelled something else, but this proposed classification is a simple way to group for the purposes of analysis. It does not in and of itself imply that approaches to FPIC fall or should fall into distinct categories. Table 1 summarizes how the examples from the literature have been classified for the purposes of the analysis.

I looked for any linkages between the choice of mechanism for obtaining 'consent' from Indigenous peoples and the type of legal relationship to the land that the Indigenous group had over the territory where the project was being proposed. The literature specifically related to FPIC and addressing 'consent' was analyzed for examples of real world 'consent' in relation to natural resource development and these examples were categorized into types of mechanisms as well as whether it was primarily driven by government, industry or Indigenous groups. The treaty status of the Indigenous parties in the examples were identified and the summary of the classification of the examples are laid out in Table 1.

The cases of processes initiated by Indigenous communities cover a full range of approaches including concluding agreements with proponents, initiating Indigenous-led environmental assessment processes, developing guidelines, taking government to court to prove Aboriginal Title and other community-specific approaches. The cases of Indigenous communities operationalizing their right to consent are located on numbered treaty lands and unceded

lands. No examples of primarily Indigenous-led approaches were found in territories covered by modern treaties. Perhaps, as suggested by the example of control over settlement land in the Yukon, the implementation of modern agreement already provides some control over development in traditional territories and the obligations on government to work with Indigenous communities is already quite detailed.

The cases of industry-driven processes are either in obligations arising from modern treaties, where there are obligations to negotiate IBAs or obtain consent for exploration on settlement lands or are guidelines which are voluntary processes set forward by industry. This is a notable range, which shows industry occupies both ends of the spectrum from meeting legal obligations to entering into agreements and relationships on a voluntary basis. This may be an expression of the reality in Canada that business entities are aware of the challenges and mitigating their risks by entering into FPIC-type processes and agreements with Indigenous communities. Obtaining community buy-in can minimize disruption to a project caused by Indigenous communities withholding consent later in the process. This trend suggests that one of the methods that governments might consider to advance the implementation of FPIC is to devote some attention to the development of frameworks and incentives to assist in the negotiations of IBAs. As frequent point of direct contact, positive working relationships between Indigenous communities and industry may be a part of the solution for an effective expression of the principles of FPIC in Canada.

The cases of government-initiated processes found in the literature were limited to British Columbia and territories covered by the Nunavut Land Claim. In the case of the Nisga'a in British Columbia, land claim obligations required the seeking of consent and the process for providing that consent was decided by the Nisga'a themselves according to their own processes. In the case of the Inuit in Nunavut, the obligation for an IBA was met but the federal government ultimately rejected the project after it became clear the process had not obtained the consent of the affected community. The Government of British Columbia voluntarily bought back a lease, allowing the proponent to try reach an agreement for consent, which is an example of government providing the community with the right to withhold consent, consistent with the principle of FPIC.

Examples categorized by mechanism also show no clear patterns. Approaches where agreements were negotiated were present in Indigenous communities with both historic numbered treaties and modern treaties. The only example of a regulatory mechanism used, was on unceded land in British Columbia. Consent as required by law was found most often in the cases where it was required by modern treaty, but consent can also be ordered by the courts when land title is established on unceded lands. The guidelines that were put forward by industry to encourage proponents to obtain consent did not differentiate the requirement based on the treaty status of the Indigenous group. The examples in the literature of Indigenous peoples who chose to set out their own guidelines were both located on lands covered by numbered treaty. Novel innovative approaches were found on unceded lands, where requirements are not already present such as in a modern treaty. The Government of British Columbia, at least from examples detailed in the literature, seems to be one of the more proactive jurisdictions in Canada in the implementation of the UN Declaration.

The preliminary results suggest that, based on this limited set of cases, there is currently no link between the choice of mechanism to seek FPIC and the Aboriginal treaty status over the land. When categorized, the examples of mechanisms described do not seem to have any relationship with the presence or absence of treaties on the land of the proposed project. This suggests the decision about what mechanism to select to seek to obtain consent is independent of the legal relationship the Indigenous community has to the land and that the choice is being made based on factors other than treaty status. The literature suggests that the IBA is the most common approach, since it is encouraged by industry guidelines (Papilon and Rodon, 2016) and can be a requirement in some modern treaties (Nunavut land claim). However, as suggested by Papillon and Rodon (2016) there are limitations for the IBA as the structure of the agreements and the way they are negotiated may not be true to the spirit of FPIC in all cases.

There are Indigenous initiatives and innovations in how FPIC can be expressed at the community level, for example community expectations for consent being developed internally ahead of any development activity (Martin and Bradshaw, 2018) and communities developing their own permitting process (Yellowhead Institute, 2019). The right to FPIC is tied to the right to self-determination not to rights over land. Since self-determination for Indigenous peoples is intimately tied to land (Boutilier, 2017), the right to consent over land is felt to be a

right whether there is a formal legal relationship to the land or not. First Nations in British Columbia without treaties are as likely as Indigenous peoples in the Yukon with settlement lands to require consent, or to develop processes or mechanisms for FPIC, for development projects occurring on their lands.

When consent is sought successfully, it seems to be sought early. In all the mechanisms detailed in the literature (with the exception of court orders), decisions made by Indigenous groups are in regards to whether or not they consent are made during the early stages of the approval process. The instances that seem to have the most positive results also include some kind of ongoing relationship component. The Yellowhead Institute (2019) has suggested that division within and between Indigenous communities and community members not being fully involved in providing consent are among some of the significant challenges experienced when attempting to implement the principles of FPIC. The examples presented in the literature support this statement.

Several of the examples located for the analysis were documented by the Yellowhead Institute (2019) who noted that many of the communities it featured had a very strong title claim. This may make both government and industry more likely to engage in consent negotiations (Yellowhead Institute, 2019). The ambiguity around the requirements for consent may be a driver for government and industry to work with Indigenous communities to obtain FPIC. The variety of options supports the idea that the nature of an FPIC process must remain flexible and fluid to allow for each community to express how the process will work best for them (Martin and Bradshaw, 2018). The range of cases demonstrates that mechanisms can be found through a variety of approaches and there is no single mechanism that is optimal.

Each community must decide what consent looks like and what approach is most consistent with the community's aspirations and needs, while remaining sensitive to the conflicts and diverse perspectives that can be present within the community (Yellowhead Institute, 2019). Askew et al. (2017) even suggests that given the diverse legal traditions of Indigenous peoples, any attempt to create a standardized approach would be inappropriate. Indigenous consent to development projects should not be a yes or no question being asked by governments to Indigenous peoples but rather a process that builds relationships to help to guide the decision-making process.

There is no singular tool for the implementation of FPIC but rather a combination of vehicles that are adapted to the local circumstances (Sadiq, 2017). Indigenous consent is ideally a relations process and not a decision made at a single point in time (Lands, 2016). Adopting a partnership mindset can help Indigenous peoples become a part of the success of a project by focusing on the mutual furthering of long-term interests instead of concluding a one-time transaction (Torys, 2016). FPIC is a process that establishes relationships. "From this perspective, consent is a process or journey, not a destination" (Lands, 2016, p.43).

The differences inherent in the various Indigenous peoples living in Canada make creating a national approach for seeking consent on development projects particularly challenging. Each Indigenous community has its own values and needs, and to attempt to create an approach that could be applied uniformly throughout Canada risks not taking into account important regional and local differences. Currently, some provinces and territories are moving towards implementing the UN Declaration in cooperation with resident Indigenous peoples and are developing approaches in collaboration to reflect their unique needs. Industry may ultimately be the most common point of interaction for seeking to obtain Indigenous consent. The Boreal Leadership Council (2012) suggests that consent in the current Canadian environment may be most successfully when obtained by industry with the support of government frameworks resembling the current consultation guidelines and policies (Gibson MacDonald, 2015). It may not be possible to create a national approach but Martin and Bradshaw (2018) proposed that some kind of larger framework could provide some guidance on regional approaches. Individual community expectations for FPIC may lead to more effective processes that are appropriate to the local circumstances (Martin and Bradshaw, 2018). This study suggests that any framework would benefit from considering some of the key points described above and summarized in Box 1.

Box 1 – Key Considerations in implementing FPIC

- When consent is sought successfully, it seems to be sought early.
- Successful mechanisms can be found through a variety of approaches and there is no single mechanism that is optimal.
- Indigenous consent is ideally a relational process and not a decision made at a single point in time.

6 Conclusion

The objective of this research was to assess whether the treaty status of Indigenous communities is a factor in the choice of approach to express the principle of FPIC in natural resource projects in Canada. Based on the cases found, and in light of their limitations, the answer is no. There does not appear to be any difference in how Indigenous communities or industry choose to implement the principle of FPIC based on the presence or absence of treaties. There was no identifiable trend between and indigenous communities legal relationship to land and the mechanisms used to operationalize FPIC.

The examples from the literature include Indigenous peoples whose lands are covered by historic numbered treaties and those with modern agreements and well as First Nations from British Columbia without treaties. There are industry guidelines that propose processes to obtain consent from Indigenous communities and these processes do not differ when being applied to land covered by treaty or not when consent is to be sought. Improved models of EIA may provide some of the answer in creating an environment where seeking Indigenous consent in relation to projects becomes operationalized. However, these processes are biased towards a 'western' lens where economic benefits are prioritized. Consent, when done in the spirit of FPIC, is not a single point in time in a project but rather an ongoing relationship and a good FPIC process should allow for the wishes of the Indigenous community to influence the outcome of the process.

Most authors suggest that an effective FPIC process is one that requires cooperation and relationship and is not necessarily one that gives Indigenous peoples a right to 'veto' development projects. Stronger models would benefit from improved processes of community engagement and increased reliance on Indigenous laws and worldviews. Any approach to the implementation of FPIC on a national scale must be able to accommodate the different legal relationships to land currently in place nationally. It must also take into account the diversity of interests and perspectives of the many different Indigenous peoples living in what it now Canada.

As with any study, it is important to acknowledge the limitations of the research. The number of cases used in this study is limited; as cases and analyses continue to be published, new trends may emerge. The examples presented here are also limited to published documents that

specifically reference FPIC and Indigenous consent and only those examples with sufficient details were retained for analysis. There may be examples of consent happening within Canada in IBAs and other agreements that are not yet part of the literature or are consent in practice but not in name. Finally, the examples used for the analysis were from the literature and assumed to be representative of the options being explored in various communities across Canada.

Future research would benefit from looking for processes that are creating effective partnerships that do not involve the word 'consent' and yet are implementing the principles of FPIC in spirit. Case studies in Canada looking at the effect of seeking to obtain consent are not yet common and it would be valuable to document the different innovations towards reconciling Indigenous interests in the land with the economic interest of development. This work would provide support to other communities looking to build processes to address their concerns and demands for more partnership in the projects proposed for their traditional territories.

Another area where research would be beneficial involves looking at instances where a project impacts more than one Indigenous community and some consent while others do not. Are there mechanisms or approaches which can reconcile the differing interests over the site of a single project when the differing perspectives are between Indigenous communities? As FPIC is increasingly held up as the standard by which the social license for a project is measured, instances where some Indigenous peoples support while others do not, as in the case of the Wet'suweten, may increasingly surround decisions about projects going forward. Finally, there are some government initiatives to implement the UN Declaration that are at a nascent stage. Future research on the effectiveness of these government initiatives to implement the principle of FPIC will be a valuable addition to the literature.

Tables

Table 2 – Instances of Free Prior and Informed Consent in Canada

	INDIGENOUS INITIATED	INDUSTRY INITIATED	GOVERNMENT INITIATED
AGREEMENTS	The Saugeen Ojibway Nation were able to obtain a commitment from the proponent that OPG would not proceed with project without thier consents." (Lands, 2016, p.43) *Historic Treaty		The Nunavut Land Claim Agreement makes it mandatory for a proponent to sign an IBA with the regional Inuit organization (NLCA art26)." (Papillon and Rodon, 2016, p.7) *Modern Treaty
REGULATORY MECHANISMS	First Nation initiated EIA process-Secwepemc's environmental assessment (Yellowhead Institute, 2019, p.50) *Unceded land		
LEGAL REQUIREMENTS	Tsilhqot'in Supreme Court decision requires consent when Aboriginal title established (Gibson Macdonald, 2015, p.8; Human Rights Council, 2018, p.13) *Originally unceded land now Aboriginal title	Yukon Umbrella Agreement Chapter 18.3 and 18.4 identify that consent of a First Nation is required for access to land for mineral exploration. (Martin and Bradshaw, 2018, p.121). *Modern Treaty	BC hydro transmission line. Consent as requirement of Nisga'a Final Agreement. (Boreal Leadership Council, 2012, 28) *Modern Treaty
GUIDELINES	Sakgeeng's assertion of authority to provide consent. (Yellowhead Institute, 2019, p.54 *Historic treaty Neskantaga First Nation, has developed a consent process for proponents of development in their territory (Yellowhead Institute, 2019, p.52) *Historic Treaty	The international Council of Metals and Mining guidelines. (Gibson MacDonald, 2015, p.9) *Unspecified Forest Stewardship Council (FSC) *released Free Prior Informed Consent in Canada*, (Imai, 2016, p.9) *Unspecified	
OTHER MECHANISMS	Tahltan referendum on whether to provide consent for BC Hydro Transmission Line. (Boreal Leadership Council, 2012, p.28) *Unceded land		The Government of British Columbia bought back licence after Fortune Mineral and Poscan failed to obtain consent from the Tahltan Nation (Gibson MacDonald, 2015, p.7) *Uncede land

Works cited

Askew, H., Snelgrove, C., Wrightson, K.R., Courturier, D., Koebel, A., Nowlan, L. and Bakker, K. (2017). *Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with reference to Fresh Water Resources*. West Coast Environmental Law. 52 pages. Retrieved December 4, 2019 from https://www.wcel.org/publication/between-law-and-action-assessing-state-knowledge-indigenous-law-undrip-and-free-prior

Bone, R. (2008). *The Canadian North: Issues and Challenges*. Fourth Edition. Oxford University Press Canada. 326 pages.

Barelli, M. (2012). Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Rights: Developments and Challenges Ahead. *International Journal of Human Rights*, *16(1*), 1-24. DOI: http://doi.org/10.1080/13642987.2011.597746

Boreal Leadership Council (2012). Free, Prior, and Informed Consent in Canada A summary of key issues, lessons, and case studies towards practical guidance for developers and Aboriginal communities. 38 pages. Retrieved May 1, 2020 from http://borealcouncil.ca/wp-content/uploads/2013/09/FPICReport-English-web.pdf

Boutilier, S. (2017). Free, Prior, and Informed Consent and Reconciliatio in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples. *Western Journal of Legal Studies. Article 4, 7(1).* Retrieved December 4, 2019 from https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5688

Bowen, Glenn. (2009). Document Analysis as a Qualitative Research Method. *Qualitative Research Journal. 9.* 27-40. DOI: http://doi.org/10.3316/QRJ0902027.

Bracken, A. (2020, February 14) The Wet'suwet'en are mote united than pipeline backers want you to think. MacLeans. Retrieved May 3, 2020 from https://www.macleans.ca/opinion/the-wetsuweten-are-more-united-than-pipeline-backers-want-you-to-think/

Breanm J, (2020, February 19) How a local wet'suwet'en pipeline grew into a major crisis for the Trudeau government. *National Post*. Retrieved May 4, 2020 from https://nationalpost.com/news/how-a-local-wetsuweten-protest-grew-into-a-major-crisis-for-the-trudeau-government

Brown, A and Bracken, A. (2020, February 23) No Surrender: After Police Defend a Gas Pipeline over Indigenous Land Rights, Protesters Shut Down Railways Across Canada. The intercept. Retrieved May 3, 2020 from https://theintercept.com/2020/02/23/wetsuweten-protest-coastal-gaslink-pipeline/

Carmen, A. (2010). The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress. In J. Hartley, P. Joffe, & J.

Preston (Eds.), *Realizing the UN Declaration on the rights of Indigenous Peoples; Triumph, Hope and Action*, 124-145. Saskatoon, SK: Purich Publishing Ltd.

Coates, K. (2016). *First Nations Engagement in the Energy Sector in Western Canada*. Retrieved December 4, 2019, from Indian Resource Council https://www.firstpeopleslaw.com/database/files/library/First_Nations_Engagement_in_the_Energy_Sector_in_Western_Canada.pdf

Coates, K. and Favel, B. (2016). *Understanding FPIC: From assertion and assumption on 'free, prior and informed consent' to a new model for Indigenous engagement on resource development.* MacDonald-Laurier Institute. No.9, Aboriginal and the Natural Resource Economy Series. 34 pages. Retrieved December 4, 2019 from https://www.macdonaldlaurier.ca/files/pdf/MLINumber9-FPICCoates-Flavel04-16-WebReadyV3.pdf

Danesh, R. and McPhee, R. (2019). *Operationalizing Indigenous Consent through Land-Use Planning. Institute for Research on Public Policy.* IRPP Insight No.29. Retrieved December 4, 2019 from https://irpp.org/research-studies/operationalizing-indigenous-consent-through-land-use-planning/

FSC (2019). *Free, Prior and Informed Consent Guidance*. Forest Stewardship Council, F000205 Version 1, August 13. Retrieved December 4, 2019 from https://ca.fsc.org/en-ca/standards/new-national-forest-management-standard/free-prior-and-informed-consent

Gibson MacDonald, G and Zezulka G. (2015). *Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada. Part I: Recent Developments and Effective Roles for Government, Industry, and Indigenous Communities.* Boreal Leadership Council. 23 pages. Retrieved December 4, 2019 from http://borealcouncil.ca/wp-content/uploads/2015/09/BLC_FPIC_Successes_Report_Sept_2015_E.pdf

Gilbert, J. (2007). Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples. *International Journal on Minority and Group Rights 14*, 207-230. DOI: https://doi.org/10.1163/138548707X208818

Gunn, B. (2013). Overcoming obstacles to implementing the *UN Declaration on the Rights of Indigenous Peoples* in Canada. *Windsor Yearbook of Access to Justice, 31(1),* 147-174. DOI: https://doi.org/10.22329/wyaj.v31i1.4319

Hamilton, R. (2018). *Uncertainty and Indigenous Consent: What the Trans-mountain decision tells us about the current states of the Duty to Consult*. The University of Calgary Faculty of Law Blog. September 18. Retrieved December 4, 2019 from: https://ablawg.ca/2018/09/10/uncertainty-and-indigenous-consent-what-the-trans-mountain-decision-tells-us-about-the-current-state-of-the-duty-to-consult/

Hanna, P. and Vanclay, F. (2013). Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent. *Impact Assessment and Project Appraisal, 31 (2)*, 146–157. DOI: http://dx.doi.org/10.1080/14615517.2013.780373

Healy, R. (2019). From Individual to Collective Consent: The Case of Indigenous Peoples and UNDRIP. *International Journal on Minority and Group Rights*. *September 13*, 1-19. DOI: https://doi.org/10.1163/15718115-02702006

Henderson, J.Y. (2008). *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition*. Purich Publishing Limited. Saskatoon, SK, Canada. 239 pages.

Human Rights Council (2018). Draft study on Free, Prior and Informed Consent: A human rights based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples, eleventh session. July 9-13. 24 pages. Retrieved May 4, 2020 from https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx t

Imai, S. (2016). Consult, Consent and Veto: International Norms and Canadian Treaties. Osgoode Legal Studies Research Paper Series, 144. Retrieved December 4, 2019 from http://digitalcommons.osgoode.yorku.ca/olsrps/144

International Council of Mining and Metals. (2013). *Indigenous Peoples and Mining Position Statement*, 8 pages. Retrieved April 30, 2020 from https://www.icmm.com/position-statements/indigenous-peoples

Issac, T. (1999). *Aboriginal Law: Cases, Materials and commentary.* Second edition. Purich Publishing, Saskatoon, SK, Canada. 610 pages

Joffe, P. (2018). *"Veto" and "Consent" – Significant Differences*. August 30. 31 pages. Retrieved December 4, 2019 from https://quakerservice.ca/wp-content/uploads/2018/10/Veto-and-Consent-Significant-differences-Joffe.pdf

Lands, L. (2016). Who's afraid of the big, bad FPIC? The evolving integration of the United Nations Declaration on the Rights of Indigenous Peoples into Canadian law and policy. *Northern Public Affairs*, *May*, 42-49. Retrieved December 4, 2019 from https://www.northernpublicaffairs.ca/index/volume-4-issue-2/whos-afraid-of-the-big-bad-fpic-the-evolving-integration-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-into-canadian-law-and-policy/

Maguire, M. and Delahunt, B. (2017). Doing a Thematic Analysis: A Practical, Step-by-Step Guide for Learning and Teaching Scholars. *Ireland Journal of Teaching and Learning in Higher Education (AISHE-J),8(3*). 3351-33514. Retrieved May 11, 2020 from http://ojs.aishe.org/index.php/aishe-j/article/view/335

Martin, E. and Bradshaw, B. (2018). Free, Prior, and Informed Consent (FPIC) in the Yukon: Established Practice or Untravelled Path? *The Northern Review 47*, 113–134. DOI: https://doi.org/10.22584/nr47.2018.006

Mitchell, T., Arseneau, C., Thomas, D., & Smith, P. (2019). Towards an Indigenous-informed relational approach to free, prior, and informed consent (FPIC). *The International Indigenous Policy Journal, 10 (4).* DOI: https://doi.org/10.18584/iipj.2019.10.4.8372

Newman, D. (2017). *Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada. MacDonald-Laurier Institute*. No.13 Aboriginal and the Natural Resource Economy Series. 35 pages. Retrieved December 4, 2019 from https://macdonaldlaurier.ca/files/pdf/MLIAboriginalResources13-NewmanWeb_F.pdf

Nowell, L.S., Norris J.M, White, D.E. and Moules N.J. (2017). Thematic Analysis: Striving to Meet the Trustworthiness Criteria. *International Journal of Qualitative Methods*. *Volume 16:* 1–13. DOI: 10.1177/1609406917733847

Owen, J.R. and Kemp, D. (2014). 'Free prior and informed consent', social complexity and the mining industry: Establishing a knowledge base. *Resources Policy 41*, 91–100. DOI: https://doi.org/10.1016/j.resourpol.2014.03.006

Papillon M. and Rodon T. (2017). Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada. *Environmental Impact Assessment Review, Volume 62*, 216-224. DOI: https://doi.org/10.1016/j.eiar.2016.06.009

Pasternak, S. (2020, February 7) Wet'suwet'en: Why Are Indigenous Rights Being Defined By An Energy Corporation? Yellowhead Institue. Retrieved May 3, 2020 from https://yellowheadinstitute.org/2020/02/07/why-are-indigenous-rights-being-defined-by-an-energy-corporation/

Proctor, J. (2020, February 19) "Pipeline approval record reveals conflict with Wet'suwet'en years in the making". *CBC News*. Retrieved May 26, 2020 from https://www.cbc.ca/news/canada/british-columbia/coastal-gaslink-wet-suwet-en-battle-1.5465049

Sadiq, S. (2017). *Understanding and Implementing Free, Prior, and Informed Consent (FPIC) in the Context of Indigenous Peoples in Canada*. The University of Manitoba. Thesis. 253 pages. Retrieved December 4 from https://umanitoba.ca/institutes/natural_resources/pdf/theses/Sadiq,%20Somia.MNRM%202017.pdf

Smith, M-D and Yousif, N. (2020, May 14) "This historic moment for a divided Wet'suwet'en is just one step in a long journey". *Macleans*. Retrieved May 26 from https://www.macleans.ca/news/canada/this-historic-moment-for-a-divided-wetsuweten-is-just-one-st p-in-a-long-journey/

Torys LLP (2016). *Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples*. 42 pages. Retrieved December 4, 2019 from https://www.torys.com/insights/publications/2016/07/free-prior-and-informed-consent-in-canada-towards-a-new-relationship-with-indigenous-peoples

UN General Assembly (2007). *United Nations Declaration on the Rights of Indigenous Peoples.* Retrieved May 29, 2020 from http://www.unhcr.org/refworld/docid/471355a82.html

Ward, T. (2011). The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law. *Journal of International Human Rights, 10(2),* 54-84. Retrieved December 4, 2019 from http://scholarlycommons.law.northwestern.edu/njihr/vol10/iss2/2

Yellowhead Institute (2019). *Land Back: A Yellowhead Institute Red Paper*. October report. Retrieved December 4, 2019 from https://redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf

Zerehi, S.S.(2016).“Feds say no to Kiggavik uranium mine, back Nunavut Impact Review Board” *CBC news*, July 26. Retrieved January 23, 2020 from https://www.cbc.ca/news/canada/north/kiggavik-uranium-mine-federal-minister-backs-nirb-1.3695851