



Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada



Martin Papillon^{a,*}, Thierry Rodon^b

^a *Département de science politique, Université de Montréal, Pavillon Lionel-Groulx, C. P. 6128, succ. Centre-ville, Montréal, Québec H3C 3J7, Canada*

^b *Département de science politique, Pavillon Charles-De Koninck, 1030, avenue des Sciences-Humaines, local 4433, Université Laval, Québec, Québec G1V 0A6, Canada*

ARTICLE INFO

Article history:

Received 16 October 2015

Received in revised form 10 March 2016

Accepted 28 June 2016

Available online 21 July 2016

Keywords:

Indigenous peoples

Project proponents

Free, prior, and informed consent

Impact and Benefit Agreements

Environmental impact assessment

Canada

ABSTRACT

Indigenous peoples have gained considerable agency in shaping decisions regarding resource development on their traditional lands. This growing agency is reflected in the emergence of the right to free, prior, and informed consent (FPIC) when Indigenous rights may be adversely affected by major resource development projects. While many governments remain non-committal toward FPIC, corporate actors are more proactive at engaging with Indigenous peoples in seeking their consent to resource extraction projects through negotiated Impact and Benefit Agreements. Focusing on the Canadian context, this article discusses the roots and implications of a proponent-driven model for seeking Indigenous consent to natural resource extraction on their traditional lands. Building on two case studies, the paper argues that negotiated consent through IBAs offers a truncated version of FPIC from the perspective of the communities involved. The deliberative ethic at the core of FPIC is often undermined in the negotiation process associated with proponent-led IBAs.

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In Canada as elsewhere around the world, Indigenous peoples have gained considerable agency in shaping decisions regarding resource development on their traditional lands. This growing agency is reflected in the emergence of the right to free, prior, and informed consent (FPIC) when Indigenous peoples and their traditional lands may be adversely affected by major resource development projects. The right to FPIC is at the heart of the United Nations Declaration on the Rights of Indigenous Peoples and while its interpretation varies considerably, it is increasingly recognized as a new international standard for relations between Indigenous peoples and extractive industries (Buxton and Wilson, 2013; Hanna and Vanclay, 2013; ICMM, 2013; IFC, 2012; OXFAM, 2015). Free, prior, and informed consent is rooted in the recognition that Indigenous peoples, as self-determining collective actors, should be empowered to make decisions over their future and that of their traditional lands. They must therefore consent to economic development projects that may have a major impact on their lands and communities (Page, 2004).

While Indigenous peoples have made significant strides in the international arena toward the recognition of their right to FPIC, its implementation remains highly contentious. Governments and private corporations around the world are reluctant to establish formal requirements concerning FPIC. Those who do endorse FPIC tend to interpret it more as an aspirational norm than a strict obligation (Bellier, 2015;

Hanna and Vanclay, 2013; Oxfam, 2015). There are also still significant ambiguities as to the exact nature and scope of the required consent, when such consent is required and, most significantly, how consent is to be achieved and by whom (Anaya, 2012; Barelli, 2012; Farget and Fullum-Lavery, 2014; Hanna and Vanclay, 2013).

Interestingly, while many governments remain non-committal toward FPIC, corporate actors in the natural resource sectors have recently been more proactive at engaging with Indigenous peoples in seeking their consent to resource extraction and infrastructure projects. The language of FPIC is increasingly integrated into the corporate social responsibility guidelines of major players in the extractive industry.¹ In Canada as elsewhere, project proponents have developed a significant expertise at securing Indigenous consent through the negotiation of Impact and Benefit Agreements (IBAs), under which Indigenous peoples trade their support for a project in exchange for compensations and mitigation measures. While there is a growing literature on IBAs (Fidler and Hitch, 2007; Prno and Bradshaw, 2008; O'Faircheallaigh, 2015), there are still very few analyses of their role in, and potential impact for, the implementation the Indigenous right to FPIC (but see Hanna and Vanclay, 2013; O'Faircheallaigh, 2012).

¹ In 2012, the International Council on Metals and Mining released a revised position statement endorsing a "soft" version of FPIC as an obligation to seek consent through consultation (Hanna and Vanclay, 2013, ICMM, 2013). The International Financial Corporation, a division of the World Bank that establishes standards for good corporate practices in the global financial sector similarly adopted a general statement concerning the right of Indigenous peoples to FPIC through consultation mechanisms (IFC 2012).

* Corresponding author.

E-mail addresses: martin.papillon@umontreal.ca (M. Papillon), thierry.rodon@pol.ulaval.ca (T. Rodon).

Focusing on the Canadian context, this paper discusses the roots and implications of a proponent-driven model for seeking Indigenous consent to natural resource extraction on their traditional lands. IBAs have emerged as a core mechanism to establish the legitimacy of resource extraction projects largely in response to the ambiguity of Canadian law and jurisprudence pertaining to the role and status of Indigenous peoples in resource extraction decision-making. While the Canadian government has so far stopped short of incorporating the right to FPIC in domestic law, the Supreme Court of Canada has developed a fairly extensive jurisprudence on the duty to consult and, when required, accommodate Indigenous peoples when government decisions could affect their rights. The duty to consult is an evolving target in Canada, with many grey areas left to the discretion of the parties involved (Newman, 2014). For project proponents, securing Indigenous consent through private agreements has become a mean to circumvent this legal uncertainty.

Proponents' interest in securing Indigenous consent through private agreements is compounded by existing regulatory mechanisms to implement the duty to consult. In the context of major projects, consultations are for the most part undertaken within environmental impact assessment (EIA) processes, where the proponents play a key role. EIAs create space for debating with proponents the environmental and social impacts of a project, but they offer limited opportunities for Indigenous peoples to shape the decision-making process in light of these debates. IBAs have emerged largely to compensate for the limitations of EIA processes in this respect.

A proponent-driven process for securing Indigenous consent has its advantages. It facilitates stable, substantial relationships between proponents and communities. In the context of projects that may have potential impacts over time, this relationship is essential. But negotiated consent through IBAs also offers a truncated version of FPIC from the perspective of the communities involved. The exercise of free, prior, and informed consent, we argue, is a collective right that requires substantive Indigenous participation in decision-making anchored both in community deliberations and the reconciliation of interests through negotiations. The deliberative ethic of FPIC is often undermined in the negotiation process associated with IBAs. IBA negotiations also lead to a focus on certain issues, such as economic incentives and impact mitigation, but tend to circumvent broader, more complex questions about the social acceptability of projects and their cultural, social, and economic cumulative impact.

After a discussion of the normative foundations and political implications of FPIC as a double process of deliberation and negotiation, we map out the institutional context under which a proponent-driven model for obtaining consent has emerged in Canada. We then illustrate how the negotiation of IBAs structure the politics of Indigenous consent with recent examples. We offer in conclusion some avenues for strengthening the deliberative component of Indigenous participation in land and resource development decision-making.

1. The right to free, prior, and informed consent

The principle that Indigenous peoples are entitled to a certain degree of control over resource extraction on their traditional lands has gained growing international recognition following decades of advocacy and mobilizations by Indigenous organizations from around the world (Bellier, 2015; Daes, 2000; Niezen, 2003). The general principle that Indigenous peoples should be *consulted* is now acknowledged in a number of international documents, notably in the 1989 International Labour Organization's Convention 169 on the Rights of Tribal and Indigenous Peoples. However, it is with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the UN General Assembly in September 2007 that the principle of free, prior, and informed *consent* truly emerged as an international norm that ought to guide relations between Indigenous peoples, states, and extractive industries.

While it is a non-binding instrument, the UNDRIP establishes an international standard against which states' practices are measured in their relation with Indigenous peoples (Anaya, 2012; Stavenhagen, 2009). There are a number of references to FPIC in the UNDRIP, notably in articles 10, 11, 19, 28, and 29, but it is in section 32(2) that its clearest articulation in the context of land and resources development can be found:

“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.”

In essence, the right to free, prior, and informed consent requires that Indigenous peoples be empowered to make autonomous decisions regarding the appropriateness of a development project that could have an impact on their traditional lands. This consent must be expressed freely and in possession of all relevant information regarding the proposed activity and its potential impact (Anaya, 2012).

While FPIC is increasingly recognized as an international norm, its implications for governments' policies and practices remain somewhat ambiguous. Many states that have endorsed the UNDRIP consider section 32(2) as an aspirational text that invites authorities to “seek consent” rather than formally obtain it (Barelli, 2012; Gilbert and Doyle, 2011; Hanna and Vanclay, 2013; Ward, 2011). The few substantive legal interpretations of the emerging norm in the international arena so far have moved back and forth between a strong interpretation of FPIC as a requirement to obtain Indigenous consent and a more limited view suggesting states must consult in order to seek (but not necessarily obtain) Indigenous consent (Barelli, 2012; Farget and Fullum-Lavery, 2014; Ward 2011). A similar ambiguity is found in most documents endorsing FPIC emanating from private corporations or associations promoting good corporate practices in relations with Indigenous peoples (Boreal Leadership Council, 2015; ICMM 2013; IFC, 2012).

Ambiguities also subsist as to the mechanisms through which this consent must be expressed. While the notion of consent suggests that a form of exchange or negotiation should take place between the concerned community, the project proponent, and relevant decision-making authorities, it also suggests that the said community be empowered to define its priorities *freely* and *prior* to the decision-making process. FPIC is rooted in the principle that Indigenous peoples are self-determining agents, free to collectively control their own social, economic, and political future and empowered to make decisions over their traditional lands (Anaya, 2012; Hanna and Vanclay, 2013; Page, 2004). The exercise of FPIC therefore suggests more than a negotiated settlement among elites or through representatives. It suggests a collective decision-making process rooted in transparent community-based deliberations.

This is not to say that negotiations with governments and proponents should be excluded, but rather that the latter should be informed by and intimately connected to a community-based deliberative process that allows for the free and transparent expression of a community's diverse perspectives, worries, and interests. In a 2005 report on the meaning and implementation of FPIC, the UN Permanent Forum on Indigenous Issues similarly suggests the expression of free, prior, and informed consent should ideally “be rooted in discussions and debates *within* the affected community” in order to establish a collective position regarding the project (UN, 2016, our emphasis. See also Anaya, 2012).

From principle to practice, the gap can be considerable. Despite significant advances in recent years, FPIC remains a contested norm. In settler societies that are built on a long legacy of colonial practices that have undermined Indigenous cultures, governing institutions, and relations to the land, the implementation of a norm like FPIC remains an uphill battle. FPIC has nonetheless become a significant political and legal tool that Indigenous peoples increasingly mobilize in order to establish

some degree of agency in relations with promoters and governments. As O'Faircheallaigh (2015) rightly points out, their success in this respect largely depends on their organizational capacity and resources.

But how FPIC is defined and operationalized on the ground also depends on the broader institutional context. 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. We look next at the implication of Canada's legal and regulatory environment for the implementation of FPIC.

2. The politics of indigenous consent in Canada

To what extent, and if so how, has the principle of FPIC translated into the Canadian legal and political landscape? To be sure, Indigenous peoples in Canada are increasingly using the language of FPIC to claim greater control over economic activities on their traditional lands (Deer, 2011). Environmental and Indigenous solidarity groups have also endorsed FPIC.² However, the federal government and provinces are clearly reluctant to formally endorse a norm that remains admittedly vague and potentially constraining on their jurisdictional authority over land and natural resource development. Given the importance of natural resource extraction to the Canadian economy,³ any new rules or measures that can be interpreted as a limit on extractive activities are bound to encounter a good level of resistance from governments and industrial actors.

The Canadian government initially refused to endorse the UNDRIP and only gave it a qualified support in 2010, following its late endorsement by Australia, New Zealand, and the United States. Canada clearly indicated at the time that it did not adhere to some of the dispositions that could contradict existing Canadian constitutional rules:

Canada's unique constitutional framework recognizes and affirms Aboriginal and Treaty rights. Thus, in Canada, governments have a legal duty to consult Aboriginal Peoples and, where appropriate, accommodate Aboriginal peoples, when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. Canada interprets the principles expressed in the Declaration in a manner that is consistent with our constitution. Free, prior and informed consent, as it is considered in paragraphs 3 and 20 of the WCIP Outcome Document, could be interpreted as providing a veto to Aboriginal groups and in that regard, cannot be reconciled with Canadian law, as it exists (Canada, 2014).

While a full endorsement by Canadian authorities of an Indigenous right to veto resource extraction projects is unlikely, recent developments suggest a growing recognition of the general principle underpinning FPIC. Shortly after her election victory in 2015, the new Premier of the Province of Alberta sent a mandate letter to her cabinet concerning the intention of the government to revise its Aboriginal policies in light of the UNDRIP, including the principle of FPIC (Notley, 2015). Eager to break with the previous administration's confrontational approach with Indigenous peoples, the new federal government of Prime Minister Justin Trudeau is also committed to reviewing all federal laws, regulations, and policies in light of the UNDRIP (Smith, 2015). On May 10 2016, the new Minister of Indigenous Affairs committed her government to the full implementation of the UNDRIP in a statement to the United Nation's Permanent Forum on Indigenous Issues (Canada, 2016). The Minister took extra steps to note that this endorsement includes the right to FPIC, to which Canada now adheres unconditionally.

² See for example the collective press release of eleven organizations following the approval of the Northern Gateway pipeline project in British Columbia (Amnesty International Canada et al., 2014).

³ According to Natural Resource Canada, renewable and non-renewable resource extraction activities accounted for 19% of Canada's GDP and generated \$30 billions (CAD) in revenues for Canadian governments between 2008 and 2012 (Canada, 2015).

A careful read of the Minister's statement, however, suggest there is also some continuity in Canada's position. While endorsing FPIC, the Minister also insists that it must be interpreted within Canada's legal and constitutional framework: "through section 35 of our Constitution, the Minister sates, Canada [already] has a robust framework for the protection of indigenous rights (...). Canada believes that our constitutional obligations serve to fulfill all of the principle of the declaration, including free, prior and informed consent" (Canada, 2016). FPIC, in other words, must be understood in a manner that is consistent with existing practices in Canada.

Recent political developments aside, Indigenous peoples face a unique legal environment in Canada that shapes how FPIC is interpreted and, ultimately, translated in governance practices. Successive court interpretations of Aboriginal and treaty rights, as recognized under section 35(2) of the *Constitution Act, 1982*, have provided Indigenous peoples with significant institutional levers to influence (without controlling) decision-making in land and resources development (Panagos and Grant, 2013; Newman, 2014). Chief among these levers is the constitutional doctrine of the duty to consult, which mandates consultation with Indigenous peoples as part of the regulatory approval process for resource extraction projects with a potential impact on their rights.

2.1. The duty to consult: A weak version of FPIC?

In a series of decisions in the past 10 years, the Supreme Court of Canada established the Crown's (the executive branch of federal and provincial governments) obligation to consult and, if necessary, accommodate Indigenous peoples before making a decision that could unduly affect the exercise of their rights recognized in the Canadian Constitution.⁴ The extent of the required consultation and possible accommodation, the Court specified, vary along a spectrum depending on the strength of the Indigenous claim and the potential impact of the proposed measure or activity. At one end of the spectrum, the duty to consult may be limited to an obligation to notify the affected community that, for example, exploration activities will take place on their traditional territories. In cases where the impact is major, the Supreme Court specifies that consultations must be "substantial" and accommodation measures should be "aimed at finding a satisfactory solution" for the parties involved (see *Haida*, 43).

In its jurisprudence on the duty to consult, the Court is very clear that it does not establish an Indigenous veto on government decision-making processes (*Haida*, 42 and 48). It has nonetheless acknowledged that in some cases when the impact on Aboriginal rights is major, the Crown should consult with the objective of seeking Indigenous consent before proceeding with a decision (*Delgamuukw*, 168; *Haida*, 24). The Supreme Court went further in a recent decision and recognized that seeking consent is required when the proposed action or measure potentially infringes on a recognized Aboriginal title. Governments can bypass Indigenous consent in such cases only if they demonstrate substantive engagement with the concerned communities and a "compelling and substantial" public purpose that justifies an infringement of the Aboriginal title (*Tsilhqot'in*, 77).

The duty to consult, accommodate, and in some case, obtain consent is at best a weak version of FPIC, but it has nonetheless a profound structuring effect on relations between Indigenous peoples, regulatory authorities, and project proponents. It essentially forces the latter to engage with Indigenous peoples in the decision-making process. Failure to do so adequately is subject to court sanctions that can have a direct

⁴ See in particular *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 ("Delgamuukw"); *Haida Nation v. British Columbia* [2004] 3 SCR 511 ("Haida"); *Taku River Tlingit First Nation v. British Columbia* [2004] 3 SCR 550 ("Taku River"); *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] SCC 43 ("Rio Tinto"); *Tsilhqot'in Nation v. British Columbia* [2014] 2 SCR 256 ("Tsilhqot'in").

impact on the viability and costs of a project (*Rio Tinto* 59). In *Tsilhqot'in*, the court further reinforced the potential uncertainty by giving retroactive implications to the recognition of an Aboriginal title:

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if a project is authorised without consent prior to Aboriginal title being established, the Crown may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title (92).

The duty to consult, accommodate, and in some cases, seek consent therefore instills a degree of legal uncertainty in the regulatory approval process of resource extraction projects. This uncertainty is compounded by the fuzzy nature of the duty, as there are little criteria to clearly establish the scope and intensity of required consultation and accommodation (Newman, 2014). The recent extension of the duty to consult in the territory of consent further adds to this uncertainty in the context of Aboriginal title claims. What is an adequate consultation in this context? Who should consult and when? If consent is required, how should it be expressed?

2.2. The role of the proponents in consultation processes

Faced with a high degree of legal uncertainty, project proponents have become more proactive at engaging directly with Indigenous peoples in order to mobilize their support for development projects that could potentially impact their rights. This direct engagement is in fact supported and encouraged, not only by governments but also by the Supreme Court. The objective of the duty to consult, the Supreme Court stated, is to foster compromise and reconciliation between Aboriginal rights and the interests of the broader society, notably economic interests (*Delgamuukw*, 162; *Haida*, 49). Ultimately, the Court argues, this reconciliation should be achieved through dialogue and negotiation.

The Court further confirmed that while the Crown is ultimately and solely responsible for fulfilling the duty to consult or seek consent, it can delegate “procedural aspects” to third parties, including project proponents (*Haida* para.53). As we discuss next, this is largely consistent with the manner in which environmental impact assessments are in practice carried out in Canada. In most cases, project proponents are responsible for gathering evidences and establishing consultation mechanisms with the relevant population. The Canadian government also made it clear that while it remains ultimately responsible for the duty, the proponent is a key player not only in the consultation process but also in seeking accommodation and adopting mitigation measures:

Industry’s overall relationship with Aboriginal groups, including its business practices, can assist the Crown’s overall consultation and accommodation efforts. Industry proponents are often in the best position to accommodate an Aboriginal group for any adverse impacts on its potential or established Aboriginal or Treaty rights, for example, by modifying the design or routing of a project. Canada will seek to benefit from the outcomes of a third-party consultation process and any accommodation measures undertaken by third parties. However, the ultimate responsibility for consultation and accommodation rests with the Crown as the Honour of the Crown cannot be delegated (*Canada*, 2011: 19).

Most provincial consultation guidelines have adopted similar approaches and recognize the central role of proponents in consultation processes and some go as far as making proponent-led consultations the default model for implementing the duty to consult (Newman, 2014).

2.3. Implementing the duty to consult: The limits of EIA consultations

Canadian jurisprudence and government policies on the duty to consult therefore encourage, and sometimes mandate, a central role for proponents in the implementation of the duty to consult, accommodate, and in some case, seek the consent of Indigenous peoples. In the context of large projects such as a mining development or a pipeline proposal, consultations will generally occur through the environmental impact assessment process (EIA). The Supreme Court recognized that EIA and other existing consultation mechanisms available to the broader population are generally adequate in fulfilling the duty to consult Indigenous peoples (*Taku River*, 2).

The legislative and regulatory framework supporting EIA processes is quite complex in Canada. The federal government adopted its first environmental impact assessment legislation in 1973 but it was (and still is) limited to regulatory decisions in areas of federal jurisdiction (for example navigable waters, migratory species and fishes, and national parks). Provinces have followed and established their own distinctive EIA processes for projects that fall under their jurisdiction. Contemporary treaties with Indigenous people have also led to the creation of specific EIA processes in some areas of the country. Therefore, the nature and procedural requirements of EIAs in Canada vary significantly depending on who has jurisdiction and whether the concerned area is covered by a modern treaty. In most cases, however, the processes of gathering the relevant information and producing the required reports are delegated to project proponent (*Delisle and Revéret*, 2004). With the exceptions of EIAs processes established by treaties, where a specific process is established for affected Indigenous communities, the latter are generally invited to express their concerns as part of a public process open to all interested parties.

As is the case in many parts of the world, EIAs were originally designed to mitigate the environmental impacts of resource development projects, but they are now increasingly taking into account the social and health impacts of these projects (*Haley et al.*, 2011; *Vanclay and Esteves*, 2011). It is important to add, however, that the practice in Canada is to incorporate these concerns into existing EIA rather than to establish distinctive Social Impact Assessment (SIA) processes. EIAs are therefore often the only institutional space for community engagement and debates about the potential social and cultural impacts of a given project. In this respect, as *Hanna and Vanclay* (2013) suggest referring to both EIAs and SIAs, they potentially constitute learning exercises for Indigenous communities and contribute to foster direct relationships with proponents toward the formulation of their free and informed consent to a given project or government measure.

In practice, however, there are many limitations to EIAs as spaces for expressing free and informed consent to a given project. For one, the status of Indigenous peoples in such process can be problematic. They are often (but not always) considered stakeholders on par with other interest groups seeking to influence the decision-making process. Even in cases where their unique status and rights are considered, consultations as part of EIAs remain relatively passive participatory exercises. While most EIAs in Canada today are required to incorporate relevant Indigenous concerns and knowledge, there is no guarantee they will succeed in shaping the actual decision-making process, which remains firmly in the hands of regulatory authorities (*O’Faircheallaigh*, 2007). Furthermore, EIAs are often ill adapted to Indigenous cultures because of their very formal and often adversarial nature, as well as the dominance of scientific expertise and the lack of translation during hearing processes (*Dokis*, 2015; *Nadasdy*, 2003; *Wismer*, 1996; *Fletcher*, n.d.). EIAs consultations also tend to be one-time processes informing decision-making at a specific moment in the life of a project (*Galbraith et al.*, 2007). In the absence of specific institutional mechanisms to maintain communication channels with the community, follow-up may be difficult as the project evolves and its impacts become more concrete.

As a result, consultative processes undertaken within the context of EIAs often fall short in facilitating dialogue and building trust between Indigenous communities, governments, and project proponents (Galbraith et al., 2007; Dokis, 2015). Indigenous communities regularly challenge the conclusions of EIA processes and increasingly deny their legitimacy as participatory decision-making processes. The result is a significant growth in the number of court cases where Indigenous peoples seek remedy for what they consider inadequate consultation processes.⁵

2.4. Negotiated consent through IBAs

While EIAs do create a relationship between Indigenous peoples and project proponents, they do not constitute an adequate process to secure Indigenous support for a project. In fact, both Indigenous and industry actors tend to consider EIAs as a limited and insufficient mechanism to establish the legitimacy of a project (Galbraith et al., 2007; Fidler and Hitch, 2007). Impact and Benefits Agreements have progressively gained prominence as an alternative mechanism to mobilize Indigenous consent. Such agreements are now a standard business practice in the extractive sector in Canada, Australia, and in a growing number of industrialized and developing nations (O'Faircheallaigh, 2015; Bradshaw and Wright, 2013; Hanna and Vanclay, 2013). IBAs are private, and often confidential, agreements negotiated between corporations and Indigenous representative organizations without direct government intervention (Caine and Krogman, 2010; Gibson and O'Faircheallaigh, 2010).

Their primary purpose from a promoter's perspective is to create a direct and ongoing relationship with the community in order to gain trust and, ultimately, social acceptability for a given project. 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. More recent IBAs also often include environmental protection and monitoring measures for the entire lifecycle of the project (Bradshaw and Wright, 2013; Fidler and Hitch, 2007). More rarely, they also include measures to promote social and cultural development in the communities (O'Faircheallaigh, 2015). 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. For industry actors, IBAs are therefore first and foremost a legally binding means to secure Indigenous consent for the project and ensure greater legal stability and certainty.

For Indigenous peoples, IBAs are attractive as they allow for a more direct engagement with project proponents in order to influence how the development of their traditional lands will take place, minimize its negative impact, and maximize its potential benefits. IBAs are especially attractive for Indigenous peoples in the absence of clear recognition of their authority in decision-making processes, notably under EIA consultations. IBAs are a practical recognition, by private interests, of Indigenous peoples' right to have a say in the future of their traditional lands (O'Faircheallaigh, 2010; Prno et al., 2010).

In the Canadian context, the negotiation of an IBA cannot in itself fulfill the Crown's duty to consult, but it demonstrates concrete engagement with Indigenous peoples, shows a willingness to accommodate their rights and interests, and, more importantly, confirms Indigenous support for the project. Even in the absence of clear legal obligation to that effect, proponents therefore have clear incentives to seek explicit Indigenous consent to their project through IBAs. Financial concerns also contribute to the negotiation of IBAs. The uncertainty created by the Canadian jurisprudence and the strong opposition to development

from some Indigenous groups can lead to lengthy and costly court challenges that can frighten investors. Obtaining consent through an IBA means that a proponent will increase its chance of securing funding for the project. Industry-based organizations such as the [International Council on Mining and Metals \(ICMM, 2013\)](#) and the [Boreal Leadership Council \(2015\)](#) recognize the important role of IBAs in this respect. This is especially true for junior resource development companies that have less financial clout and need to rely on external sources in order to fund the different stages of a project. IBAs are therefore increasingly considered sound business investments for industry actors (Lapierre and Bradshaw, 2008; Fidler and Hitch, 2007).

In Canada as elsewhere, IBAs therefore provide a concrete mechanism for mobilizing Indigenous consent in the absence of state-mandated process to that effect (Hanna and Vanclay, 2013). According to Bradshaw and Wright (2013, 9), IBAs are a "convenient and practical way of addressing the duty to consult and accommodate legislation (sic) as well as supporting FPIC principles." The negotiation of an IBA arguably goes further than consultation processes in creating a venue for Indigenous peoples to directly shape a project and ensure some benefits will flow to the communities. In the process of negotiating such agreements, industry actors also recognize implicitly, and sometimes explicitly, that Indigenous peoples have some decision-making authority on their traditional lands. IBAs are also generally negotiated voluntarily and foster the development of early and ongoing relationships between Indigenous organizations and project proponents.

That being said, there are important limits to this form of proponent-led consent. A number of authors point to the fact that IBAs are negotiated agreements that first and foremost follow an economic logic (Prno et al., 2010; Fidler and Hitch, 2007; Caine and Krogman, 2010; Knotsch et al., 2010; Peterson St-Laurent and Billon, 2015). They involve trade-offs and bargaining between the parties over the distribution of the costs and benefits of a project. While this trade-off can be beneficial to Indigenous peoples, it structures the debate over the acceptability of the project in a certain way. It focuses the discussion on the tangible costs and benefits to the detriment of broader and perhaps less tangible implications, notably over the cumulative impacts of the project from cultural and social perspectives and the choice of development models. By negotiating IBAs, Indigenous leaders commit their community to a specific model of development and to a certain set of priorities (notably jobs and revenues) that can have profound implications for the future. While IBAs can contribute to the mobilization of Indigenous consent through negotiations, they can also narrow its expression to economic considerations.

More importantly, as they engage in this type of bargaining, Indigenous communities agree to put the exercise of their right to FPIC on the table, as an integral part of the negotiation process. They are in essence expected to trade their potential right to say no to a project in exchange for some tangible benefits. The problem is that this trade-off occurs through elite negotiations, often with very little input from the community. Like all contractual negotiations, IBA negotiations are relatively close processes shielded from external influences. The negotiators, often lawyers and consultants, and the elected leaders involved in the process can easily become divorced from the community's actual preoccupations. Communities are in fact rarely engaged in the process until after an agreement is reached. If and when their approval is required, often through a referendum, they are presented with a package, which they are either invited to support or oppose. There is little room for community deliberations in this type of process.

This, we suggest, is not consistent with the spirit and intent of FPIC, which, as argued, requires both negotiations and deliberation at the community level in order to clearly establish the legitimacy of the project prior to its approval. It is worth noting in this respect that IBAs, when submitted to a community referendum, are often rejected by the population. This was the case of the recent agreement between Petronas and the Lax Kw'alaams First Nation in British Columbia for the construction of a LNG terminal (CBC News, 2015). The Innu

⁵ Between 2010 and 2014, Canadian appeal tribunals (federal, provincial, and territorial) heard 35% more cases on the duty to consult than between 2005 and 2009 (authors' compilation).

community of Uashat also rejected an agreement with Hydro-Québec in three successive referendums (Lévesque, 2014). This disjuncture between the community and its representatives reinforces the importance of community deliberations throughout the process in order to clearly establish the project's legitimacy in conjunction with the negotiation of agreement over its impacts and potential benefits.

This distancing from the community is also compounded by the confidential nature of many IBAs. Paradoxically, both parties to IBAs often seek confidentiality clauses. For project proponents, confidentiality limits the risk that sensitive information about the project and its financial architecture will become public while for the Indigenous party, it reduces the risk that governments will clamp down their transfer payments to the community in light of this additional revenue source (O'Faircheallaigh, 2010; Fidler and Hitch, 2007). However, these confidentiality clauses create additional obstacles for the creation of an open dialogue with and within the community and ultimately limit the possibility of free, open and informed deliberations on the content of the agreement.

IBAs and EIAs could complement each other in this respect. While IBAs are a formal expression of negotiated consent, EIAs could provide a deliberative space for community to engage in a reflexive process that fosters social acceptability. This, however, is difficult to achieve in a context where both processes are driven by the same project proponent, whose clear interest is in securing quick, stable, and binding Indigenous support for the project. In this respect, both project proponents and Indigenous peoples tend to see IBAs as a more valuable process to secure their interests. IBAs are simply more effective. They are private business agreements that involve few actors and little government oversight and regulations. They tend to focus on a specific set of substantive, quantifiable issues and tend to follow a fairly standard model in their structure and content (O'Faircheallaigh, 2015). In contrast, EIAs are very complex, heavily regulated, and lengthy processes. The proponent has to prepare an Environmental Impact Statement (EIS) that is followed by public hearings organized in all the impacted communities, then the proponent has to answer all the concerns raised during the consultations, including concerns over potential social, cultural, and cumulative impacts. Finally, a report is prepared by the organization in charge of the EIA process, which is then submitted to the relevant decision-making authority. Not surprisingly under the circumstances, IBAs are frequently signed even before the EIA process is completed. Such practice is problematic as it further undermines the deliberative value of EIAs but it also raises serious concerns regarding the nature of the expressed consent, most notably its free and *informed* nature. In the next section, we use two recent cases to illustrate the limits of proponent-led EIAs and IBAs in mobilizing Indigenous consent in the Canadian context.

3. The politics of proponent-led consent: Two examples

We have argued that the interplay of a weak EIA consultation process and the negotiation of IBAs structures relations between Indigenous peoples and project proponents in a way that favours negotiation over deliberation and immediate, quantifiable benefits over a more complex process for establishing the social acceptability of the projects. The result is a truncated version of consent that does not truly allow for the realization of the principle of FPIC. We briefly illustrate the argument developed here with two examples.

3.1. Hydro-Quebec and Waskaganish (Eeyou Istchee, Québec)

The Rupert River diversion is a good example of the complexity of the politics of consent when multiple mechanisms interact without complementing each other. The Rupert River is located in the James Bay Cree territory of Eeyou Istchee, a territory covered by the James Bay and Northern Quebec Agreement (JBNQA) signed in 1975. The project, proposed by Hydro-Québec, a government-owned public utility

corporation, was affecting directly three Cree communities: Waskaganish, Nemaska, and Mistissini. Under section 22 of the JBNQA, the environmental assessment process in Cree territory obeys distinctive rules. Cree representatives are involved at all levels and sit on the evaluating committee that conducts the public hearing in the Cree communities. One would therefore expect the process to have a certain degree of legitimacy from a community perspective.

However, in the Rupert River Diversion case, a series of negotiated agreements between the Cree, the Québec government, and Hydro-Québec undermined the impact assessment process and its deliberative potential. The Grand Council of the Crees, the main regional political organization representing Cree interest, signed an agreement with Québec in 2002 in which it gave its consent to the project on behalf of the communities before the EIA process even started. The agreement, the Paix des Braves (Gouvernement du Québec and Grand Council of the Crees, 2002), is a very comprehensive agreement that intended to settle all the disputes regarding the implementation and the interpretation of the JBNQA between the two parties. It includes revenue-sharing provisions, a new forestry regime, and a number of clarifications regarding the respective role of the parties in implementing the JBNQA. In exchange, the Grand Council of the Crees gave its consent to the Rupert River diversion, pending a positive EIA. The Paix des Braves was subsequently approved by a referendum conducted in all Cree communities, however, Waskaganish, the most impacted community, voted last, when all the other Cree communities had already approved the Paix des Braves (Oblin, 2007). In addition to the Paix des Braves, Hydro-Québec signed an agreement with the Crees in 2002 known as the Boumhounan Agreement (Hydro-Québec and Grand Council of the Crees, 2002). This IBA-style agreement provides a share of the profit, employment guarantees for the Cree, and a mitigation fund.

The EIA public hearings for the project were held in the three impacted Cree communities and in Montreal in 2006, 4 long years after the signing of the Paix des Braves and the signing of the subsequent IBA. In Waskaganish, the public hearings revealed deep divisions regarding the project, its impact, and potential benefits. The project did provide for environmental mitigation measures (notably with a system of weir designed to maintain water levels in some sections) but many opposed the project out of broader concerns for its impact on the well-being of the community. It was also clear that many community members were aware that by signing the Paix des Braves and the Boumhounan agreement, the Grand Council of the Crees had already consented to the project. The Waskaganish community was very divided on the project and the local chief decided to voice its opposition in spite of the agreements. During our stay in the community many individuals stated that they did not see why they should participate to the public hearing since the decision was already made.

As soon as the public hearings were completed, the Eastmain 1A Rupert River Diversion Project was quickly approved by the Québec government on November 24, 2006. The Québec government decision was based on the positive recommendation of the committee responsible for the EIA, where two Cree representatives sit. Its conclusions were supported by the Grand Council of the Crees; however, the chiefs of the three communities most affected, faced with growing discontent, decided to organize a second referendum, specifically on the project. Participation was admittedly low, but 80% of the 1054 voters opposed the Diversion (Gazette, 2006). This referendum, organized at the last minute, was not legally binding and the project, being already approved by Québec, went ahead in spite of the opposition.

This case illustrates the tension that can exist between EIA and IBA processes as mechanisms for mobilizing Indigenous consent. In this case, in spite of the fact that the Cree leadership had signed two agreements (the Paix des Braves and the Boumhounan Agreement), the project was not well accepted by the local population. The signing of the two agreements prior to any substantive consultation with the communities reduced the process of expressing consent to a negotiation exercise with the project proponent, where support for the project was

given in exchange for economic benefits. The communities most affected did not have the chance to voice their concerns and debate the value of this trade-off in a distinctive deliberative process prior to its de facto approval. The consent of the communities was in effect manufactured from above through elite negotiations, with little limited input legitimacy resulting from deliberations. Despite the negotiation of two very substantive agreements by a political organization that legitimately represents the Cree, we are hard pressed to conclude that the principle of FPIC was respected in this case.

The actual diversion took place in 2009. One of the authors of this paper was invited in 2012 by the local band council in Waskaganish to conduct a follow-up study of the Rupert diversion. After meeting key informants, it appeared clearly that the community was quite bitter about the real impacts and the lack of local benefits stemming from the project. That led Hydro-Québec and the Cree leadership to propose a re-appropriation agreement to the community (*Grand Council of the Crees, 2013*), which is in fact a socio-economic package designed to foster a posteriori legitimacy for the project. This new attempt at once again negotiating consent testifies to the fact that previous agreements failed to achieve the necessary conditions for to be considered legitimate expression of consent.

3.2. *Areva and Qamani'tuaq (Nunavut)*

Qamani'tuaq (formerly known as Baker Lake) is the only inland Inuit community of Nunavut. It is located in the Kivalliq region (Western Hudson Bay). It is a fairly big community for Nunavut with a mostly Inuit population of 1872 (in 2011). Opposition to uranium mining has a long history in Qamani'tuaq. It was the landmark Baker Lake Court case of 1980 that helped establish Inuit rights in the region and paved the way for the signing of the Nunavut Land Claim Final Agreement (NLCA) in 1993, which preceded the creation of the Nunavut Territory and the Government of Nunavut in 1999. Another uranium project proposed in the 1990s was widely rejected in a local referendum and by all the Inuit organizations (*Nunavummiut Makitagunarningit, 2013*).

Like the JBNQA, the NLCA establishes a specific environmental review process (art. 12) that is supervised by the Nunavut Impact Review Board (NIRB), a co-management institution where half the members are appointed by Inuit organizations and the other half by the federal government and the Government of Nunavut. The EIA is nonetheless primarily conducted by the project proponent. Significantly, the NLCA makes it mandatory for a proponent to sign an IBA with the regional Inuit organization (NLCA art. 26).

The settlement of Inuit claims under the NLCA contributed to establish a relatively high level of legal certainty in the region. It also established a clear and legitimate regulatory process for project approval. Uranium companies therefore resumed their exploration activities. In 2008, the AREVA Corporation asked for a permit to operate the Kiggavik uranium mine near Qamani'tuaq. The local council gave its conditional support to the project, followed by the Regional Inuit organization, Kivalliq Inuit Association (KIA). Nunavut Tunngavik Inc. (NTI), the organization representing the Inuit of all of Nunavut adopted an uranium policy allowing uranium mining under two main conditions: it had to be used only for peaceful purpose and the Inuit get significant benefits. NTI also entered in a partnership with Kaminak Gold Corporation, a Vancouver-based company, giving them the rights to explore for uranium (*CBC North, 2008*).

The Kiggavik project was submitted to the Nunavut Impact Review Board in 2008. An environmental assessment process was established in 2010 and the impact study was conducted by AREVA, the project proponent. At the same time, the regional Inuit organization KIA agreed to negotiate an IBA with AREVA. The same year, the Government of Nunavut adopted a uranium policy that mirrored the policy adopted earlier by NTI. This meant that all the regional and territorial Inuit and public organizations of Nunavut were supporting uranium mining.

However, the community of Qamani'tuaq itself was quite divided about the project (*Bernauer, 2010*) and a grassroots movement, Nunavummiut Makitagunarningit, emerged to oppose uranium mining in Qamani'tuaq. The group asked for more time for deliberation and criticized the lack of meaningful consultation and independent information on the project. In essence, the group challenged the legitimacy of the IBA and the existing EIA process, both led by the proponent and supported by regional bodies. Their campaign did not affect the position of the main Inuit organizations that were backing uranium development nor the Nunavut government. The group decided to submit a brief to United Nations' Special Rapporteur on the Rights of Indigenous Peoples on extractive and energy industries in and near Indigenous territories. In the said brief, they clearly challenge the democratic character of the process created under the NLCA:

All these decisions were taken by institutions created by settlement of the NLCA, but all the key decisions have been made behind closed doors. These institutions have avoided the issue of democratic consent at all costs, opting instead for carefully controlled “consultations” with no real mandate to assess community consent in any meaningful way. The mining industry has been overrepresented in these “consultations”, to the point that both NTI and the GN relied on industry consultants for supposedly unbiased and impartial policy “advice” (*Nunavummiut Makitagunarningit, 2013, p. 22*).

The Kiggavik case yet again illustrates the tension between two modes of consent: one based on the consent of organizations obtained through a negotiation process between the proponent and elite organizations and one based on community deliberations designed to establish the legitimacy of the project among those most concerned. In the absence of the latter, the negotiation of consent bears little legitimacy as an expression of FPIC.

4. Conclusion

Focusing on Canada, this paper discussed the implications of a negotiated, proponent-driven, model for seeking Indigenous consent to natural resource extraction activities on their traditional lands, and whether this type of process is consistent with the principle of FPIC. While the Canadian government and Canadian courts do not formally endorse FPIC, project proponents are in practice increasingly seeking Indigenous consent to resource development as a mean to ensure the financial, legal, and political viability of projects.

However, as the two examples discussed illustrate, proponent-driven mechanisms to engage Indigenous peoples in the governance of resource extraction, namely, EIA consultations and the negotiation of IBAs, do not always create an institutional environment conducive to the expression of FPIC. The two cases are set in distinctive EIA process, where Indigenous participation is guaranteed by legally binding treaties. In the Kiggavik case, half of members of the regulatory agency are appointed by Inuit organizations and in the Rupert Diversion, two members out of five are appointed by the Grand Council of the Crees. Furthermore, both the JBNQA and the NLCA specify that Indigenous knowledge and interests have to be considered by the proponent. One could therefore expect a process that would pay more attention to local Indigenous community's interests. However, as we have seen in both cases, those processes offer limited opportunities for deliberation. The participation of Indigenous communities to the governance of natural resource extraction occurs instead essentially through negotiated agreements between Indigenous organizations and proponents that lead to a reified form of consent that offers little space for the expression of local preoccupations and has little to do with FPIC. If anything, community deliberation often stems from dissenting voices expressed by local grassroots movement.

The legal and political context in Canada is conducive to Indigenous engagement in land and resource management. Combined with

proponents need for economic stability and legal certainty, this context has created strong incentives for governments and proponents to privilege negotiations as a mean to achieve Indigenous consent. While negotiations with the proponents are an important component of FPIC, the lack of adequate institutional mechanism to foster deliberations leave the process incomplete at best. IBAs are clearly part of the solution, but they need to be informed by a more democratic and transparent process. A stronger model of EIA that mandates community engagement before negotiated consent can occur and that takes the notion of free and prior deliberations seriously could go a long way in creating an environment more conducive to the application of FPIC. The Indigenous leadership also has a role in fostering this type of deliberative ethics. A single focus on negotiations on behalf of the community not only risks a backlash, it also weakens the very principle of free, prior, and informed consent. Creating conditions for community deliberations is essential to ensure the legitimacy of their position in negotiation processes.

Acknowledgments

The authors would like to thank Ciaran O'Faircheallaigh and the participants to the Indigenous Politics in Comparative Perspective workshop held during the ECPR General Conference in Montreal, August 2015, for their insightful comments on a previous version of this paper. This research was funded in part by the Canadian Social Sciences and Humanities Research Council (grant number 890-2012-0111).

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Martin Papillon is director of the Centre de recherche sur les politiques et le développement social and associate professor in the Department of Political Science, Université de Montréal.

Thierry Rodon is director of the Centre interuniversitaire d'études et de recherches autochtones, chair in Northern Sustainable Development, and associate professor in the Department of Political Science, Université Laval