Advocating for FPIC standards

Article Summary:

Indigenous nations are advocating for a standard requiring their free, prior, and informed consent (FPIC) for government actions affecting their rights. Despite being part of Canadian and British Columbian law, courts have not enforced FPIC unless Aboriginal title is established.

A leading policy goal of many Indigenous nations and leaders over the last decade is to entrench a standard that government action adversely impacting an Indigenous nation's Aboriginal or Treaty rights may not be taken unless the Indigenous nation has given its free, prior and informed consent. That "FPIC" standard is enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples*.[1] It is one of the legal consequences of Aboriginal title and reflects the nature of Indigenous nations as *governments*, regulating and governing a territory and people.

Despite UNDRIP being enshrined in laws of Canada and British Columbia, to date the courts have not imposed the FPIC standard on government, except where an Indigenous nation has established Aboriginal title. Instead, the Indigenous-specific restraint on Crown decision making has remained the duty to consult, which many courts have applied as if it only amounts to a process for discussion, without imposing limits on the outcome of the decision.

The FPIC standard, however, can be entrenched and made legally enforceable by way of agreement, with either the Crown or an industry proponent. Such "consent agreements" have successfully been negotiated by Indigenous nations in British Columbia, including by the Tahltan Central Government and by the Tŝilhqot'in National Government.

Such agreements present two main challenges.

The first is technical. When legislation grants ministers or other government officials the discretion to make certain decisions (such as mining or forestry authorizations, or the granting of an environmental assessment authorization), it is an implied principle that they cannot fetter that power by agreeing to only make certain decisions if another party consents. While that presumption against fettering can be rebutted by legislation, there are no clear mechanisms for doing so to enable consent agreements within federal legislation or the legislation of most provinces.

The clearest legislative mechanism is s. 7 of British Columbia's *Environmental Assessment Act*, which provides that a project subject to that Act "may not, without the consent of an Indigenous nation, proceed in an area that is the subject of an agreement, between an Indigenous nation and the government, that requires this consent and is prescribed by the Lieutenant Governor in Council." That provision therefore gives statutory force to an FPIC requirement, if set out in an agreement that is prescribed by the government for the purposes of that Act. The Tahltan Central Government and the Tŝilhqot'in National Government have each concluded consent agreements that leverage this provision to prevent mining projects from proceeding without their consent.[2] The result of these agreements is

[1] See Articles 10, 11, 19, 28, 29 and 32.

[2] Two consent agreements between the Tahltan and British Columbia can be found at www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/declaration_act_consent_agreement_for_red_chris_with_tahltan.pdf and

that, regardless of whether or not the provincial government granted an environmental assessment certificate, the project could not proceed if the relevant nation did not consent, and that nation could enforce that prohibition in court if needed.

Another approach to implementing FPIC is to embed it in an agreement with the proponent of a project. Among other things, such industry-side consent agreements set out the proponent's covenant not to undertake certain unless the Indigenous nation has provided its prior consent. Generally, such agreements detail the processes and considerations by which the nation will determine whether or not, and on what conditions, it will consent. While consent agreements with proponents lack the statutory force of consent agreements formed with government, they rely on principles of contract law and equitable remedies to allow for enforcement. For instance, these industry-side agreements generally state, explicitly and emphatically, the parties' agreement that the consent requirement should be enforced by injunction if it is breached.

The Tŝilhqot'in National Government recently concluded such an agreement with Taseko Mines Limited in respect of the latter's project in the Teẑtan Biny area of Tŝilhqot'in territory. The agreement contains a number of "consent gates" at which the Tŝilhqot'in's would be required for mining activities to occur, including exploration and development.[3] That proponent-side agreement complements the consent agreement the Tŝilhqot'in formed with British Columbia, resulting in two layers of protection for its self-determination over the area.

The second challenge in securing a consent agreement is, of course, creating the willingness in the Crown and/or the proponent to enter into such an agreement. British Columbia has entered into a small number of such agreements, each of which was the subject of lengthy negotiations and substantial political fallout. Industry proponents have proved more open to such agreements, understanding that, as a matter of legal and political reality, their project is unlikely to proceed if the centrally impacted Indigenous nation opposes it. In most cases industry-side consent agreements are kept private among the parties.

The Crown and proponents are naturally more willing to enter into consent agreements where the Indigenous nation is generally supportive of the activity, or at least not opposed to it. For instance, while the Tahltan have opposed certain projects in their mineral-rich territory, they have in general proved supportive of mining and have formed beneficial partnerships in respect of mining in their territory.

The Tŝilhqot'in, on the other hand, consistently and strongly opposed Taseko Mines Ltd.'s proposed "New Prosperity" mine for over three decades. The mine was proposed for an area where the Tsilhqot'in did not establish Aboriginal title in their historic litigation, but where they did prove they had Aboriginal rights. Based on those established rights, and the particular cultural importance of the area, they

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www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/declaration_act_consent_decision-making_agreement_for_eskay_creek_project.pdf.
The Tŝilhqot'in's consent agreement is contained at Schedule F of the Teẑtan Biny Agreement, which can be found at: www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/teztan_biny_agreement.pdf.

[3] While the agreement itself if not publicly available, its main terms are described in the summary of the overarching deal among the parties: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/summary_of_teztan_biny_agreement_final_july_23_2025.pdf.

ultimately won a court injunction against further exploration work.[4] That injunction helped drive Taseko and British Columbia to the negotiating table, where the Tŝilhqot'in secured the two consent agreements.

JFK Law represented the Tŝilhqot'in in the injunction proceeding and in the subsequent negotiations, and we have acted for several other Indigenous nations in negotiating consent agreements and other consent-based arrangements.

[4] *Taseko Mines Limited v Tsilhqot'in National Government*, 2019 BCSC 1507.