

SECTION 1

Getting to Consent: UNDRIP, Inherent Jurisdiction and Impact Benefit Agreements

UNDRIP Rights

*The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*¹ is an international document that sets out the minimum standards for the survival, dignity and well-being of Indigenous peoples. Its purpose is to **protect the collective rights of Indigenous peoples** around the world.

UNDRIP was adopted by the UN General Assembly in 2007.² Canada did not officially adopt UNDRIP until 2016.³ While the most well-known UNDRIP

principle is likely **free, prior and informed consent (FPIC)** as outlined in Article 32, there are also other principles in UNDRIP that are useful for First Nations to rely on when dealing with and facing proposed developments that may impact you:

- Right to **self-determination** (Articles 3, 4 and 5);
- Right to **participate in decision making** and maintain institutions (Articles 18, 19, 34 and 40);
- Right to **set own priorities and strategies** (Article 25);

- Right to **make decisions over traditional territory** (Articles 26 and 29)
- Right to **culture** (Articles 8, 11 and 25);
- Right to **financial assistance** (Article 39); and
- Right to **maintain and protect Traditional Knowledge** (Article 31).

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, A Res 61/295, UNDRIP, 2007, Supp No 53 (2007) 1.

² *United Nations Declaration on the Rights of Indigenous Peoples*, A Res 61/295, UNDRIP, 2007, Supp No 53 (2007) 1.

³ Canadian governments and the United Nations Declaration on the Rights of Indigenous Peoples. Crown-Indigenous Relations and Northern Affairs Canada. [Canadian governments and the United Nations Declaration on the Rights of Indigenous Peoples \(rcaanc-cirnac.gc.ca\)](https://www.rcaanc-cirnac.gc.ca)

The Promise of Free, Prior and Informed Consent

If you are facing a development project with potentially significant impacts on your rights, one of the key UNDRIP rights you can exercise to make sure your rights are protected is the right to free, prior and informed consent (FPIC).

FPIC

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1 Free
A consent given voluntarily and without coercion, intimidation or manipulation
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2 Prior
Consent is sought far enough in advance of any authorization or start of activities
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3 Informed
Consent is obtained by providing information about the project and its impacts that is accessible, in a local language, and objective
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4 Consent
Collective decision made by rights holders and reached through a customary decision process of the community

FPIC should, in principle, give you the right to withhold consent from a project that may affect your rights and territory. However, the way in which this is implemented in Canadian law, and particularly in the context of EA, may not always align with that principle. For example, where rights are asserted and not yet proven, governments and proponents (the parties pushing for a project approval at the end of the EA process) may take the position that upon consultation, there is no need to reach consent, and may insist that First Nations do not have a “veto.” This is discussed in more detail in Section 2 on the duty to consult and accommodate.

But FPIC is more than just the right to consent to a project; it is also about the right to a process of meaningful engagement. Such a process takes time. It needs to start early on, ideally in the design phase of the project (prior). It needs to include information sharing and the opportunity for First Nations to do your own information gathering (informed). This meaningful process should enable First Nations to negotiate conditions under which the project will be designed, implemented, monitored and evaluated. Free, prior and informed consent is the goal of a meaningful consultation process.

The EA process can be part of that meaningful engagement leading to free, prior and informed consent, but only if it includes these elements of free, prior and informed so that, at the end of the process, there has been a meaningful engagement between the Crown, the proponent and the affected First Nations so that consent can be given.

The result of the engagement process can be:

- **Consent** from the First Nation;
- **Consent from the First Nation after negotiation and agreed-upon changes made of the conditions** under which the project will be planned, implemented, monitored and evaluated; or
- **Withholding of consent** by the First Nation.

Results of Engagement Process



Consent



Negotiations, changes to project, then consent



Refusal to give consent

In the context of an EA, this could mean one of three things:

1. As a First Nation, you review all of the material, do your own studies and decide to consent to the project as it is being proposed.
2. After studying and gathering information, and talking to the Crown and proponent, you negotiate changes to the project that will minimize impacts to your rights, give you benefits, and provide you with enough comfort that the project will be monitored and amended as needed to protect your rights going forward. After all of this is done, you give your consent.
3. At the end of the meaningful engagement, you decide that you cannot consent to the project: the risks are too high, the mitigation measures are not good enough, or there are not enough benefits coming to your First Nation.

Free, Prior and Informed Consent within Ontario and Federal EAs

FPIC is not that different from what Canadian law already says that the federal and provincial governments have to do when a project may impact Aboriginal or Treaty rights. Canadian law already requires that the consultation process be **fair**, be done **before a decision** is made, must include **sharing information**, and must **not include sharp dealing**, which means that the Crown must not be sneaky or take advantage of oversights made by the First Nation (see Section 2 on the duty to consult and accommodate for more).

Both Canadian law and UNDRIP also require **Indigenous consent in some circumstances**. Where a project may cause serious impacts on proven Aboriginal or treaty rights, consent is required under Canadian law.⁴ However, if the right is unproven, current Canadian law does not require the First Nation's consent before a project can go ahead.

In 2021, Canada passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (**UNDRIP Act**). Section 5 of this legislation commits Canada to “take all measures necessary to ensure that the laws of Canada are consistent

What UNDRIP does is expand the requirement for governments to seek consent in good faith to include all situations where the rights of Indigenous peoples may be affected. You can use UNDRIP to support your assertion that meaningful consultation is not just about checking a box for governments: the objective in all cases needs to be obtaining Indigenous consent. The possibility of a First Nation to withhold consent should always be on the table.

with the Declaration [UNDRIP].” Section 4 of the UNDRIP Act affirms “the Declaration [UNDRIP] as a universal human rights instrument with application in Canadian law.” In *Reference re An Act respecting First Na-*

tions, Inuit and Metis children, youth and families,⁵ the Supreme Court of Canada recently commented what this legislation (the UNDRIP Act) means when it comes to UNDRIP's application in Canadian law – that the legislation incorporated UNDRIP into the country's domestic positive law.⁶ In other words, UNDRIP is now part of Canadian law. How Canadian courts are going to apply these comments and this case is yet to be seen, but regardless of the *UNDRIP Act*, **Canadian courts can and should use UNDRIP to interpret Canadian and Ontario laws now**. Under Canadian law, courts have for some time been able to refer to international law when interpreting statutes. This means that courts can look to UNDRIP when they are deciding what a Canadian or Ontario law means, and they can do this in a few ways:

- If a law has a few possible meanings, the court can and should pick the meaning that is most consistent with UNDRIP;
- The court can consider UNDRIP rights when looking at the context in which the

⁴ [Delgamuukw v British Columbia](#), [1997] 3 SCR 1010 at para 168; [Tsilhqot'in Nation v British Columbia](#), 2014 SCC 44 at paras 76-77.

⁵ [Reference re An Act respecting First Nations, Inuit and Metis children, youth and families](#), 2024 SCC 5.

⁶ [Reference re An Act respecting First Nations, Inuit and Metis children, youth and families](#), 2004 SCC 5 at paras 4 and 15.

law was made, in order to better understand what was meant; and

- The court can look at UNDRIP for values and principles that it should use when deciding what a law means.⁷

UNDRIP is a non-binding international declaration, but **UNDRIP restates principles of binding international law**.⁸ So Canadian courts should give UNDRIP the highest weight when referencing it in order to interpret Canadian and Ontario laws.⁹ Further, to the extent UNDRIP principles are international customary law, **Canadian courts should assume that those principles are domestic common law too** unless the international law is clearly inconsistent with a domestic law.

Canadian judges may be hesitant to refer to UNDRIP in interpreting Canadian law because it is something new for them, but

Canadian courts can and should look to UNDRIP when deciding what federal and provincial laws mean (including s. 35 of the *Constitution Act*), and interpret the laws to comply with UNDRIP unless the law clearly does not comply.

they already do this in other contexts. The idea of Canadian courts using international law to interpret Canadian and provincial laws is not new. Judges look to international human rights laws when interpreting the *Canadian Charter of Rights and Freedoms*.

As of the writing of this Toolkit, Ontario's *Environmental Assessment Act*¹⁰ does not mention UNDRIP or FPIC. The federal *Impact Assessment Act*¹¹ does say, in the preamble to the law, that the Canadian government is committed to implementing UNDRIP. However, regardless of what the laws say or don't say, Canada and Ontario are presumed to follow international law unless they clearly state that they are not following it or pass a law that is clearly inconsistent with international law.¹²

It is also important to note that as of the writing of this Toolkit, the federal government looks to UNDRIP to inform its policy on sharing and protecting

Traditional Knowledge in EAs. UNDRIP recognizes that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.” This speaks to the critical role Traditional Knowledge can play in protecting Indigenous peoples, their lands, water, resources and rights.

There is a lot of **uncertainty** right now about how UNDRIP will be interpreted in Canada. You can **use this uncertainty to your advantage** and advocate for the way you want UNDRIP to be interpreted. FPIC can be a process right and require the provincial and federal governments to engage in a process to seek your consent. But FPIC can also be a right to have the provincial and federal governments recognize your decision-making authority to exercise your jurisdiction to review a project and decide if you want to consent.¹³

⁷ [Baker v Canada](#), [1999] 2 SCR 817 at para 70; [Reference re Public Service Employee Relations Act](#), [1987] 1 SCR 313 at 349-350.

⁸ Inter-Parliamentary Union (IPU). 2014. *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians*, N. 23. <https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf>

⁹ [Quebec \(Attorney General\) v 9147-0732 Québec inc.](#), 2020 SCC 32 at paras 30-38.

¹⁰ [Environmental Assessment Act](#), RSO 1990, c E.18.

¹¹ [Impact Assessment Act](#), SC 2019, c 28, s 1.

¹² Many of the principles in UNDRIP, including FPIC, are customary international laws. Customary international laws are presumed to be domestic common law, unless the government passes a law that clearly conflicts with the customary law.

The legal and political uncertainty about UNDRIP leads to uncertainty over development projects. **Proponents do not like uncertainty. Use this to your advantage to:**

1. Advocate for the federal and provincial governments to include FPIC in the EA process; and
2. Convince proponents that the best way to achieve certainty is to recognize FPIC by agreeing not to go ahead with their project without your consent.

How to Protect UNDRIP Rights and Give FPIC Meaning



Undertake public campaigns to explain UNDRIP and why it applies to a particular project that impacts your rights



Negotiate with proponents and Canada/Ontario to get commitment to not go ahead with project without FPIC



Assert your own EA process which includes a process to get to consent



Take legal action in a Canadian court to challenge a government decision that impacts your rights without FPIC



Join international and national groups working on protecting UNDRIP rights



Take direct action to make your voice heard and pressure proponents and Canada/Ontario to not act without consent



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- 13** Papillon, M., & Rodon, T. 2019. The transformative potential of Indigenous-driven approaches to implementing free, prior and informed consent: Lessons from two Canadian cases. *27 Int'l J on Minority & Grp Rights*, at 314-335 at 317.

Impact Benefit Agreements to Express FPIC

In the absence of federal and provincial governments clearly including FPIC in the EA process, impact benefit agreements (IBAs) have become a common mechanism used to signal Indigenous consent for a project.

In general, IBAs address the impacts to Indigenous rights by requiring specific terms, conditions and measures that are meant to avoid or at least decrease harm (referred to as mitigation measures); and by offering benefits to the affected Indigenous Peoples to offset those impacts that cannot be avoided. IBAs usually then include a clause that the First Nation consents to or supports the project going ahead if the terms of the IBA are met.

IBAs can take many forms. Some of the topics that can be covered by the agreement are:

Defining the project:

- For multi-phased larger projects, does the IBA just cover a step in the project or the whole project?
- Does the IBA cover past and future projects by the proponent?

Financial considerations:

- Financial benefits for the First Nation might include:
 - » Revenue sharing;
 - » An equity share in the project;
 - » Payment upon project approval and at various points in project completion; and
 - » Royalties paid to the First Nation.
- The IBA might also include capacity funding for negotiations, participating in EA and other review processes, and ongoing monitoring work.

Business opportunities for the First Nation can include things like:

- Carving out contract opportunities for First Nation or member-owned businesses;
- The direct award of contracts to First Nation and member-owned businesses;
- A promise to include bid criteria for contracts that will give preference to First Nation and member-owned businesses; and
- Giving First Nation and member-owned businesses a right of first refusal on contracts.

Employment, education and training:

- Set aside jobs for members of the First Nation.

- Fund or provide training programs for members of the First Nation.

Environmental protection:

- The IBA can include promises about how the project will be operated to minimize impacts to the environment.
- Mitigation measures can be included in the IBA to try to reduce some of the impacts on the environment.
- Mitigation measures should be clear and enforceable.
- There should be a commitment from the proponent to change the mitigation measures if it is found that they do not work as anticipated once the project begins.

Archaeological protection:

- The IBA can include steps the proponent needs to take in order to protect archaeological sites.
- This could include setting out how the First Nation will be involved in protecting and monitoring sites.

Social and cultural interests:

- Identify any possible social or cultural impacts of the project, and include enforceable mitigation measures to lessen impacts.

Protection and use of Traditional Knowledge:

- If the First Nation will be sharing Traditional Knowledge with the proponent, the agreement should include rules on how that Traditional Knowledge can be used, shared and protected.

Project certainty:

- The main reason that a proponent enters into an IBA is to resolve the uncertainty that comes from the possibility that a First Nation will oppose a project.
- The proponent will likely require that the First Nation formally consent to the project as part of the IBA.

Monitoring plans:

- It is important that the IBA contain an enforceable monitoring plan so that the proponent monitors how well the mitigation measures work as well as the severity of impacts of the project.
- If mitigation measures do not work as expected or there are impacts that were not anticipated, the agreement should require the proponent to make changes.
- Ongoing communication between the First Nation and the proponent will be key to make the monitoring plan effective.

Future impacts including remediation plans:

- The IBA may also address future impacts of the project or future stages of the project, including remediation once the project is complete.

Dispute resolution:

- If issues arise during the life of the project, the First Nation will want to have a way to address disputes.
- Dispute resolution terms in the IBA may state that the parties will use mediation or arbitration, instead of going to court to fight about issues that may arise.

While IBAs can often be a way to secure FPIC and signal consent to a project or development on certain terms, it is important to keep in mind the following **cautions**:

- There is often a **power imbalance** between the proponent and the First Nation.
- Some First Nations may feel they have **no choice but to consent** to the project because the project will go ahead even without their consent. So, the negotiations become less about impacts of the project and getting to consent, and more about how much money and benefits the First Nation can get from an inevitable project.

- IBA negotiations should include community deliberations in which full information about the project is presented; if an IBA is signed **without full information** about the impacts of the project, there is a risk that it will not adequately deal with mitigation and impacts. As such, Traditional Knowledge studies provide an important source of information to guide IBA negotiations.

Given these cautions, **First Nations should also advocate for FPIC to be included in federal and provincial EA processes in addition to negotiating with the proponent to address impacts to get to consent.**

CASE STUDIES –
Asserting Your Right to FPIC

CASE STUDY

CREE NATION OF JAMES BAY MINING POLICY¹⁴

The Cree Nation of James Bay concluded a treaty with Canada and Quebec in 1975. Often referred to as a modern treaty, it recognizes the Cree Nation's authority to review proposed development projects in their territory through a review board. However, the treaty does not require Cree Nation consent before a project in their territory can go ahead. The review boards are advisory in nature; the federal and Quebec governments keep final decision-making power for projects.

The Cree Nation created their own Mining Policy, which set criteria for expressing consent to a project and made negotiation of an IBA a requirement before the Cree Nation would consent to a project in their territory. The Mining Policy did not have legal authority under Canadian or Quebec law. Its power came from the Cree Nation's ability to use it to influence proponents as

well as the federal and provincial governments. If a proponent failed to follow the Mining Policy, they faced legal uncertainty and public scrutiny.

The Mining Policy was tested with the Matoush Uranium Mine. Many Cree hunters opposed the project. The federal and Quebec review boards recommended that the project go ahead but included as a condition that the proponent obtain social acceptability for the project, which could be shown by the Cree Nation's endorsement or consent to the project. The Cree Nation refused to negotiate an IBA because of the lack of consent over the project, and issued a moratorium on uranium mining for their territory.

In the end, Quebec did not authorize the project, citing lack of social acceptability of the project. The proponent sued Quebec over the refusal to approve, but lost. The Quebec Court of Appeal found that Quebec was allowed to base its refusal to approve the project on the lack of social acceptability of the project.¹⁵

The Cree Nation asserted their jurisdiction and went ahead and established their own process to review and consent to a project. They used political pressure and the threat of legal uncertainty to ensure that the project did not go ahead without their consent.

14 This case study was explained in Papillon, M., & Rodon, T. 2019. The transformative potential of Indigenous-driven approaches to implementing free, prior and informed consent: Lessons from two Canadian cases. *27 Int'l J on Minority & Grp Rights*, at 314-335.

15 [Ressources Strateco Inc. v Quebec \(Procureure Générale\)](#), 2020 QCCA 18 at para 6.

CASE STUDY

SQUAMISH NATION¹⁶

There was a proposed Liquefied Natural Gas project in Sḵwxwú7mesh Úxwumixw (Squamish Nation) territory in British Columbia. Squamish Nation asserted its jurisdiction to make a free and informed decision about the project. Squamish Nation created its own impact assessment process to make its own decision on the value of the project.

Squamish Nation's impact assessment process had not been recognized as valid or enforceable under Canadian or British Columbia law, so there was the risk that the process would be seen as symbolic only. However, Squamish Nation was able to leverage the threat of legal challenge and the uncertainty, costs and delays associated with that to convince the proponent to agree to support and abide by their impact assessment. The federal and

provincial governments were reluctant to recognize that Squamish Nation had the authority to hold its own assessment process. But Squamish Nation moved forward, and the proponent and Squamish Nation entered into an agreement where the proponent would fund the assessment and provide information, and agreed to consider any mitigation measures proposed through the process and to respect the outcome. The parties also agreed that the process would be confidential.

In the end, the proponent eventually accepted all 25 conditions and mitigation measures proposed through Squamish Nation's assessment process, and Squamish Nation then formally endorsed the project and agreed to an IBA.

This example illustrates that, as a First Nation, you do not need to wait for recognition or permission from the federal or provincial government to assert your jurisdiction over assessing projects in your territory. You can try to leverage your rights to persuade the proponent to get onside with your assessment outside of the federal or provincial processes.

16 This case study was explained in Papillon, M., & Rodon, T. 2019. The transformative potential of Indigenous-driven approaches to implementing free, prior and informed consent: Lessons from two Canadian cases. *27 Int'l J on Minority & Grp Rights*, at 314-335.

CASE STUDY

SAUGEEN OJIBWAY NATION – DEEP GEOLOGICAL REPOSITORY¹⁷

The Chippewas of Nawash Unceded First Nation and the Saugeen First Nation (together the Saugeen Ojibway Nation [“SON”]) are both located on the Saugeen (Bruce) Peninsula in Ontario. For over 40 years, there has been a nuclear power plant in their territory. It was built and has been operated without consultation with SON. SON has proven and asserted Aboriginal and treaty rights, including a proven commercial fishing right and active court cases asserting other rights.

The proponent, Ontario Power Generation (OPG), proposed to build a deep geological repository to store nuclear waste in SON’s territory.

The project underwent an EA coordinated jointly by Canada and Ontario (referred to as a joint review panel). In the agreement establishing the joint review panel,

it was noted that SON’s rights might be adversely affected by the project, and one of the purposes of the EA was to gather information on impacts to SON’s rights. SON participated in the EA process but also engaged directly with the proponent about impacts. In 2013, SON was able to secure a commitment from OPG that OPG would not move forward with the construction of the project without SON’s consent.

The joint review panel concluded that the project was not likely to cause significant adverse effects provided that all mitigation measures were implemented. However, the Crown still needed to discharge its duty to consult and accommodate SON, and the OPG still had to honour its commitment to get consent from SON.

In January 2020, SON members voted ‘no’ to the project. OPG honoured its commitment and is not going ahead with the project as proposed. SON exercised its Aboriginal and treaty rights and its right to give free, prior and informed consent, and was able to stop the project from happening in its territory because its members did not consent.

17 Narine, S. February 4, 2020. Overwhelmingly rejected: Deep geological nuclear waste repository a no-go for Saugeen Ojibway Nation. *Windspeaker*. <https://windspeaker.com/index.php/news/windspeaker-news/overwhelmingly-rejected-deep-geological-nuclear-waste-repository-no-go>