First Nations $95 Billion proposed lawsuit could have sweeping implications for the mining industry

written by Melissa (Mel) Sanderson | April 30, 2023

A consequential battle is shaping up in a place you may not know (Thunder Bay, Canada) over an issue you may never have heard of – Free, Prior, Informed Consent. (FPIC for short). The parties to the conflict are 10 of the Treaty 9 First Nations on one side and the Canadian Government on the other.

Why should you care? Here's what's at stake: $95 billion dollars that the indigenous nations say they will claim as compensation for past wrongs – and potentially much, much more because the argument essentially is about how mines will be approved in Canada going forward.

This fight has been brewing for a long time but now, with the urgent necessity of producing more critical minerals to transform economies and hopefully slow the current environmental decline, the outcome of this case could have consequences reaching far beyond Canada's Great North.

Common understanding of the terms of an agreement is fundamental to its successful implementation. Shared values, when they exist, make for a stronger and more durable agreement that can be implemented consensually.

From its adoption in 2007 by the United Nations General Assembly the Declaration on the Rights of Indigenous Peoples, in which the concept of Free, Prior, Informed Consent (FPIC) is embedded,

has been fraught with differing interpretations leading to misunderstandings. The Declaration itself is a statement of principles identifying and supporting fundamental human rights, with particular reference to Indigenous groups, and does not carry the force of law. Even so, it took decades for many States to acknowledge and accept the Declaration in their national context: for instance, only in 2016 did Canada announce its "full and unqualified support" for the Declaration and its commitment to implement it domestically.

What does FPIC really mean? Is it really so unclear? The FPIC's comparatively vague definitions embody the difficulties in trying to achieve a document that could be accepted by the Member States of the UN.

"Free" – The consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.

"Prior" – The consent is sought sufficiently in advance of any authorization or commencement of activities.

"Informed" – The engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.

"Consent" – A collective decision made by the right holders and reached through a customary decision-making process of the communities.

Implementation also has a wide range of possible interpretations and related actions. Nations can adopt the fundamental elements into their constitutions (as was done in Peru and Chile), national laws, structures or behaviors, with decreasing weight

of law in that scale. This wide variation – and the basic unenforceability of FPIC – underscores the fundamental differences in interpretation of the concept.

In 2017, the Canadian Government established "Principles Respecting Canada's Relationship with Indigenous Peoples." The implementing commentary around Principle 6 includes the following language:

"The importance of free, prior and informed consent as identified in the United Nations Declaration, **extends beyond title lands** (author's emphasis). To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that indigenous rights, interests and aspirations are recognized in decision-making." *

In contrast, the Australian Government position is that "Australia notes, however, that the FPIC is a concept unique to the Declaration. As FPIC is not defined in the Declaration**, its scope and content remains unsettled**." (authors' emphasis) The Australian submission goes on to say that "The Australian Government is of the view that legal frameworks, policies and practices in Australia are consistent with the aims of the Declaration."*

The United States likewise notes in its 2010 statement adopting the Declaration that as regards FPIC "**there is no universally accepted definition of Free, Prior and Informed Consent**." (authors' emphasis) The US goes on to say: The United States recognizes the significance of the Declaration's provisions on

free, prior and informed consent, **which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken**." (authors' emphasis)*

Even those Nations where the Principles have been constitutionally enshrined have grappled with the actual implementation on the ground of trying to facilitate dialog between Indigenous communities, mining companies and the government itself. Some of that difficulty lies in time: the majority of Indigenous communities have a consensual model of governance, and reaching a consensus agreement on complex issues is a time-consuming process which by its nature is too unwieldy for modern business practices.

A potentially very important thing in terms of FPIC and mining projects happened yesterday, April 26. Although press articles quote tribal leaders as saying the 1905 governing Treaty with the federal government of Canada is the basis for the legal challenge to mining permits granted by local and national governments, the lawsuit is fundamentally connected to the principles of FPIC. The 10 Treaty 9 First Nations party to the suit say they will be claiming $95 billion in damages from projects authorized by the Canadian government in their lands but without their consent. They will also be seeking injunctions prohibiting the government from regulating or enforcing regulations in treaty lands without their consent – aimed at blocking issuance of new mining permits or continuation of mines already in development.

As is the case with FIPC, the fundamental issue is the absence of a shared understanding of a document, in this case the Treaty. The plaintiffs in the lawsuit argue they never agreed to cede, release, surrender or yield up their jurisdiction to

govern and care for the lands, as it says in the Treaty, entered into in 1905. Consequently, their demand is there must be co-jurisdiction where the province and Ottawa cannot move forward on land development without their consent.**

Here is the essence of the problem – the word 'consent.' From the inception of the FPIC, Indigenous peoples have interpreted the word to mean that they can say 'no' to a mining project and that project cannot proceed. This absolute rejection is not-withstanding any economic compensation offered, which conflicts with the interpretation of most mining companies, who believe that 'no' is the beginning of a negotiation to ensure the Indigenous communities affected benefit financially from the mines' operations. It also conflicts with the interpretation of governments such as Australia and the US, whose emphasis is on the right of the Indigenous to be informed and consulted – but not to prevent the project from taking place.

Treaty 9 First Nations have decided to push for full implementation of FPIC principles in Canada, with sweeping implications for the mining industry. Everyone should pay close attention to how this legal action evolves, particularly given the urgency of developing new critical minerals projects not only in Canada but around the world.

Sources cited:

- * August 10, 2018, report by the Expert Mechanism on the Rights of Indigenous Peoples
- ** CBC article on Thunder Bay legal suit