Understanding and Implementing Free, Prior, and Informed Consent (FPIC) in the Context of Indigenous Peoples in Canada

By

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To my children: Julia, Keziah, Sam, and Iman for making me whole.

To my husband Donovan, for his boundless love.

To the elders and leaders for their faith in me.

To my teachers for their wisdom.

To mother earth for her resilience.

To Canada, for the freedom to think.

ABSTRACT

Free, Prior, and *Informed Consent* (FPIC) is one of the key emerging concepts that has received notable consideration as Indigenous Peoples continue to establish their participatory rights in the world of natural resource extraction. Using a qualitative study design with the Province of Manitoba as a case study, and a combination of document reviews and participant interviews, this research explores the meaning of each of the components of FPIC, and then identifies optimal approaches for the incorporation of FPIC in decisions related to the mining sector. The meanings of *Free, Prior*, and *Informed* are noted to be consistent with literature findings, with some overlapping elements. *Consent* is discussed in terms of whether or not it implies veto, whose responsibility it is, and how it can be built. In understanding implementation of FPIC, key operational challenges are explored. Based on the findings, the research provides procedural recommendations for implementing FPIC.

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1.0 Introduction

1.1 Background

Canada produces roughly 60 metals and minerals, has 200 active mines and 7,000 sand and gravel pits and stone quarries. In 2015, the mining sector contributed $79 billion (i.e., 4%) to Canada's total nominal Gross Domestic Product (GDP), and accounted for 563,000 jobs throughout the country (Natural Resources Canada, 2016). Mining is the second largest primary resource industry for the Province of Manitoba, contributing roughly $2.3 billion to the Canadian economy (Manitoba, 2017). According to the Province of Manitoba, in 2015 alone, Manitoba produced 33% of Canada's zinc, 6% of Canada's cobalt, 11% of Canada's nickel, 6% of Canada's copper, 2% of Canada's gold, 8 % of Canada's silver, and 100% of Canada's cesium. There are roughly 40 companies that are active in mineral exploration and mining in Manitoba, with two of the companies employing 50% of the mining workforce in the Province. Currently, Manitoba has seven producing mines, one operating smelter and two refineries (Manitoba, 2017). The government of Manitoba also notes "large areas of high mineral potential in remote regions of the province remain underexplored when compared with similar regions elsewhere in Canada" (Manitoba, 2017). It is thus no surprise that an increasing global demand for energy and natural resources is driving expansion of extractive industries to some of the most remote areas of the world (Amazon Watch, 2011). It is estimated that by 2020, about half of all the mined gold and copper will come from territories used or claimed by Indigenous peoples (Sweeting & Clark, 2000). Unfortunately, human rights

violations continue to be reported in the extractive industries (Amazon Watch, 2011; ILO, 2012; ICHRP, 2003; Hanna & Vanclay, 2013; Mining Watch, 2016), and Indigenous communities often bear the worst of the environmental, social, and economic impacts of resource extraction activities (Bass, Parikh, Czebiniak, & Filbey, 2003; Mining Watch, 2012). The resulting conflict has been evident; in some cases the result being withdrawal of corporate interests, as in the recent case of De Beers deciding to not proceed with their mine expansion plans in Ontario (The Globe and Mail, 2017), and in other cases consolidation of opposition to prevent corporate interests from succeeding; as in the case of the Dakota Access Project (eNews Park Forest, 2017; Duluth News Tribune, 2017; Ekklesia, 2017; Fonda, 2017)

With the increase in the global desire to extract, what participatory rights Indigenous peoples have with regard to natural resource extraction has thus been the subject of much debate over the years (e.g. Linde, 2009; Ernest, 2013). One of the concepts emerging from this debate that is meant to recognize Indigenous participatory rights and their application in the natural resources sector is that of *Free*, *Prior*, and *Informed Consent* (FPIC).

FPIC refers to the right of Indigenous peoples to participate in decisions affecting their lands and resources, especially in the context of natural resources development (BLC, 2012). The International Labour Organization (ILO) introduced FPIC formally in 1989, in an effort to protect the rights of Indigenous peoples around the world who were being subjected to involuntary displacement (ILO, 1989). In 2007, the United Nations

Declaration on the Rights of Indigenous Peoples (UNDRIP) broadened the principle to also include: a broader range of development activities; the right to redress for territories adversely affected; and a commitment by the state to seek FPIC before development projects are approved (UN General Assembly, 2007). Over the years, FPIC has made its way into policies that govern international donor institutions such as the World Bank, the Inter American Bank, the European Bank for Reconstruction and Development, and the Asian Development Bank (Doyle, 2008). FPIC has also seen varying levels of discussion and attention from multi-stakeholder groups such as the Forest Stewardship Council, the International Council of Mining and Metals, the World Commission on Dams, the Roundtable on Sustainable Palm Oil and the International Petroleum Industry Environmental Conservation Association. Lastly, and probably most importantly, FPIC has received considerable attention from Indigenous people as they have consistently requested respect for and inclusion of FPIC on national and international fronts[1].

FPIC is understood to have four key components. *Free* essentially implies "no coercion, intimidation, or manipulation" in the course of coming to a decision (United Nations, 2005; Vanclay & Esteves, 2011). *Prior* means that *Consent* is given before the government grants permits for or approves developments (BLC, 2012; Goodland, 2004; Lehr & Smith, 2010). *Informed* means that the Indigenous community understands their own rights (Goodland, 2004), is fully informed about project plans (Vanclay & Esteves, 2011), and understands the likely positive and negative impacts of the development (Lehr

[1] Appendix B provides a sample list of press statements and news releases between 2014 and 2017.

& Smith, 2010). And finally, *Consent,* which is the most contentious of the four components, but is essentially the "formalized and documented social license to operate" (BLC, 2012; Lehr & Smith, 2010).

1.2 The Canadian Context

Mining companies operating in Canada are subject to a combination of federal[2] and provincial legislation[3], and are informally accountable to local and international multi-stakeholder associations. In particular, environmental assessment (EA) and permitting processes are often the primary stage where developer-community conflicts are played out and contentious development decisions are made (Prno & Slocombe, 2012). The EA process continues to grow in scope and importance in Canada (Prno & Slocombe, 2012) and has evolved to be used earlier in project planning phases, is widely applied, and closely monitored (Gibson R. , 2002). From the industry's perspective, numerous projects experience significant delays in securing approvals during the EA phase due to community conflict and disapproval (Berger, 1977; Bone, 2009; Federal Review Panel, 2010; Joint Review Panel, 2007; Poelzer, 2002; White, 2009), which further highlights the importance of EA for resource development, and the importance of incorporating FPIC into this process.

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[2] Applicable federal pieces of legislation are: The *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52, the *Migratory Birds Convention Act*, 1994, SC 1994, c 22and the *Fisheries Act*, RSC 1985, c F-14 in the context of environmental management and *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11, which allows each of the 13 provinces to have separate natural resource legislation (with the exception of Nunavut, which is regulated by the Department of Indian Affairs and Northern Development) (Government of Canada, 2013).

[3] In Manitoba, this is the *Mines and Minerals Act*, CCSM c M162 and associated regulations, and *The Environment Act*, CCSM c E125 and the associated regulations.

When the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was first adopted by the United Nations General Assembly on September 13, 2007, Canada, New Zealand, Australia, and the United States, all voted against adopting it. Three years later, in November of 2010, the Government of Canada announced its endorsement of the UNDRIP, indicating that it would take steps to endorse the UNDRIP in a manner that is consistent with the Canadian Constitution and laws (CBC News, 2010). This endorsement established Canada's commitment to 'promoting and protecting the rights of Indigenous people across Canada as well as its commitments to contribute to international efforts that improve lives of Indigenous people across the world' (Nunatsiaq News, 2014). Then, in September of 2014, at the World Conference on Indigenous People, the Government of Canada rejected the Outcome Document on FPIC saying agreeing to it would give Indigenous people with a power to veto, which the government asserted would conflict with the current Canadian laws (Government of Canada, 2014). At the time, the Government of Canada maintained that FPIC is already managed through existing decision-making frameworks, for example, the Nunavut Land Claims Agreement (Government of Canada, 2014; INAC, 1993) or other similar agreements like letters of intent, exploration agreements, impact and benefits agreements, participation agreements, socio-economic agreements, or surface lease agreeements (Natural Resources Canada, 2013), or yet still perhaps through the mechanisms established under section 35 of *The Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11. Despite the mechanisms in place through agreements or as a result of section 35 consultations (and subsequent accommodations, as applicable), there continued to be a

difference of opinion between the Crown and Indigenous people with respect to the nature, extent, and scope of Indigenous rights and interests in decisions made about resource development in Indigenous territories and specifically how FPIC is applied, or not applied in Canada (BLC, 2012). In May of 2016, following the election of a new Liberal federal government, the Government of Canada announced that it is "now a full supporter, without qualification, of the United Nations Declaration of Rights of Indigenous Peoples", reaffirming "Canada's commitment to adopt and implement the Declaration in accordance with the Canadian Constitution" (Government of Canada, 2016).

Internationally, Philippines, Malaysia, Australia, Venezuela, and Peru have national legislation on FPIC. In Philippines, the Indigenous Peoples Rights Act (1997) recognizes the right of FPIC of Indigenous peoples for all activities affecting their lands. In Malaysia, the Sarawak State passed the Sarawak Biodiversity Centre Ordinance in in 1977. In 2004, a framework was established to incorporate Indigenous communities within the rules set out by the Ordinance. Amongst other things, this policy ensures that Indigenous Peoples "shall all times and in perpetuity, be legitimate creators, users and custodians of traditional knowledge, and shall collectively benefit from the use of such knowledge" (United Nations, 2005). In Australia, the Aboriginal Land Rights Act (1976) establishes detailed procedures for the negotiations of mining agreements on Indigenous lands (Rumler, 2011). Venezuela adopted legislation on Biodiversity in May 2000. Article 39 of this piece of legislation provides for conservation of cultural diversity through recognition and promotion of traditional knowledge, and Article 44 stipulates

that communities can oppose granting access to activities they fear might affect their cultural heritage and biological diversity (United Nations, 2005). In Peru, the Law on the Right of Consultation of Indigenous Peoples, passed in 2011, gives Indigenous communities the right to be consulted in regards to "any activity, plan, administrative or legal measure, or development or project that would involve, affect, or take place in their ancestral territories" (Library of Congress, 2011).

1.3 Purpose and Objectives

The primary purpose of this research is to identify the substance and procedural elements of FPIC, and relate these to decisions in the mining sector in Manitoba. The objectives and related research questions addressed through this research are:

1. Develop an understanding of the substance of FPIC, i.e., what each of the components of FPIC (i.e., *Free, Prior, Informed*, and *Consent*) mean.
    - Who are the key players in a mine development?
    - What does each of the components of FPIC mean to communities, to industry, to regulators, to other stakeholders?
    - Is FPIC perceived along a spectrum or as an absolute?
2. Identify the procedural aspects of FPIC; i.e., tools and mechanisms that federal, provincial, and territorial governments, and non-governmental institutions are using to implement FPIC.

- Are there opportunities for FPIC in the Crown Consultation (i.e., section 35 of *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11) process?
- What other existing processes (or combination of existing processes) can create opportunities for FPIC?
- Do non-governmental organizations have formal policy statements on FPIC?

3. Identify the substance and procedural barriers that prevent the realization of FPIC as understood (or gauged) under Objective 1.
    - What are the legal/regulatory barriers?
    - What are the institutional/operational barriers?
4. Make recommendations to improve incorporation of FPIC for future mining developments.
    - What new mechanisms can be introduced to improve realization of FPIC?

1.4 Research Design and Methods

In order to meet the objectives of this research, I utilized a qualitative research design, with a case study approach as a strategy of inquiry (Yin, 2009). A qualitative research design is inductive (Crotty, 1998), with the researcher deriving meaning from data collected in the field; it allows for formation of a holistic view incorporating multiple perspectives, and use of multiple sources of data (such as literature reviews, document reviews and semi-structured interviews) (Creswell, 2009); primarily uses constructivist

perspectives to make knowledge claims (i.e., multiple meanings of experiences, and meanings constructed socially and historically, with the purpose of identifying patterns) (Creswell, 2009); and allows for the researcher to recognize their own background in shaping their interpretation of data (Creswell, 2009; Creswell, 2014).

I used the case study strategy of inquiry, which is characterized by an in-depth analysis of a case or phenomenon (Merriam, 1998; Creswell, 2014). My case is focused on FPIC as it relates to the mining sector approvals (EA and other similar vehicles in the approvals process). The boundaries of my case are bound both geographically (i.e., Manitoba), and temporally (since the time that formal approval processes like *The Environment Act*, CCSM c E125 in Manitoba came into force).

Data collection involved two components. The first component comprised literature and document reviews. The literature and document review then informed semi-structured interviews that I subsequently conducted. As outlined in Chapter 3, I interviewed Indigenous leaders from mining affected communities and other leaders who have issued statements on FPIC, regulators in Manitoba, representatives from multi-stakeholder associations, and other FPIC researchers.

1.5 Research Contribution

International laws and declarations, multi-stakeholder initiatives, statements made by organizations representing Indigenous peoples, and emerging policies adopted by

resource development industries increasingly suggest that *Consent* should be sought when development activities impact Indigenous peoples (Lehr & Smith, 2010). The research was significant in this context in several ways. Firstly, it contributes to the overall discourse on FPIC in the mining sector in Canada in general, and Manitoba in particular. Given that the International Council on Mining and Metals (ICMM) was one of the last multi-stakeholder associations to adopt an FPIC policy, and is still adopting approaches to implementation, the research findings are timely. Secondly, the findings allow for an in-depth comparison of what FPIC really means to different players, which is an important first step before one can start identifying the optimal ways to implement the FPIC process. This will also shed some light on whether FPIC is an absolute set of requirements or on a spectrum of requirements for different parties. Thirdly, through providing recommendations at the regulatory level as well as an industry-operational level, this research attempts to create practical solutions for a more respectful and inclusive approach to natural resources development on Indigenous lands. Fourthly, the Government of Manitoba and the Manitoba Law Reform Commission have both recently undertaken reviews of *The Environment Act*, CCSM c E125. My research will contribute to these processes of EA reform in the province by providing insight on aspects of Indigenous engagement and the incorporation of the principles of FPIC.

1.6 Thesis Organization

This thesis is organized into seven chapters. Following this introductory chapter, Chapter Two provides a literature review on FPIC, looking at: the origin, meaning of each of the

FPIC components; advantages of and challenges associated with FPIC; international law and voluntary FPIC initiatives; the Canadian context for FPIC; and the regulatory landscape for FPIC. Chapter Three outlines my approach to the research, including research design and methods. Chapter Four presents perspectives on the meaning of FPIC based on this research. Chapter Five presents procedural perspectives on FPIC. Chapter six presents perspectives on how FPIC could be delivered. Chapter Seven concludes this thesis by drawing conclusions and presenting a set of recommendations related to the defined objectives and research questions.

2.0 Indigenous Peoples and Mining

2.1 Indigenous Peoples

Given the overlap of interest in land between Indigenous people and the mining industry, the relationship between the industry and Indigenous people is central the concept of FPIC. According to the ILO, Indigenous and tribal people constitute at least 5,000 distinct peoples with a population of more than 370 million people, living in 70 different countries (ILO, 2009), making up one third of the world's poor and accounting for most of the world's cultural diversity (5,000 different cultures) (Swiderska, et al., 2012).

In Canada, the terms 'Indigenous' and 'Aboriginal' are often used synonymously. The Canadian Constitution of 1982 defines Aboriginal people as those to include the Indian, Inuit and Metis peoples of Canada. For the purposes of this thesis, I decided to use the term 'Indigenous'. The term "Aboriginal" is used when referring specifically to an organization or entity that has chosen to or is legally required to use the term.

The Indigenous population in Manitoba is comprised of the Metis, First Nation (which is a term that substituted the term "Indian" in the 1970s, which includes both Status and Non-Status Indians), and Inuit:

- A Metis is a person who "self-identifies as Metis, is of historic Metis Nation ancestry, is distinct from other Indigenous peoples and is accepted by the Metis Nation (MNC, 2014).

- "Status Indian" refers to a person who is registered under the *Indian Act.* Treaty Indian refers to a person who is registered under the Indian Act and can provide proof of descent from an Indian Band that signed a treaty. Roughly two-thirds of the Indigenous people in Manitoba are Status Indians.
- A "Non-Status Indian" refers to a person who identifies as Indian but is not registered under the *Indian Act* (GoM, 2014).

First Nations groups that are Indigenous to Manitoba include the Ojibway, Cree, Oji-Cree, Dakota and Dene. When the Europeans came to lands that comprise present-day Canada, it was the Indigenous people who inhabited this land. In present day Canada, 1,172,790 people identify themselves as Indigenous. In 2006, Manitoba was home to 175,395 Indigenous people, accounting for 15.5% of the total Indigenous population in Canada (Statistics Canada, 2006). Manitoba is home of 63 First Nation communities (GoM, 2014).

2.2 Free, Prior, and Informed Consent (FPIC)

2.2.1 Origin of FPIC

The International Labour Organization (ILO) formally introduced FPIC in 1989 in an effort to protect the rights of Indigenous peoples subjected to involuntary displacement; the relevant articles of the Convention being articles 15 and 16 (ILO, 1989):

> **Article 15.1:** The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights

include the right of these peoples to participate in the use, management and conservation of these resources.

Article 15.2: In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16.1: Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

Article 16.2: Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

> **Article 16.3:** Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
>
> **Article 16.4:** When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
>
> **Article 16.5.** Persons thus relocated shall be fully compensated for any resulting loss or injury.

Canada did not ratify the ILO Convention 169. Years later, the ILO Convention 169 paved the way for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (Hanson, 2009). UNDRIP broadened the principle of FPIC that was represented in the ILO Convention 169, Article 16.2 to also include: a broader range of development activities; the right to redress for territories adversely affected; and a commitment by the state to seek FPIC before projects are approved (UN General Assembly, 2007).

Accordingly, FPIC is one of the fundamental aspects of the UNDRIP and is included in six articles. The most relevant of these six articles (to this thesis) is Article 32.1:

> **Article 32.1**: 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 (United Nations, 2008).

In the Canadian context, while all six articles are significant, Article 32.1 is of particular interest to the federal government and extractive industries in Canada, primarily because the resource extractive sector derives much of its materials from traditional lands of Indigenous peoples (Joseph, 2014).

In some cases, FPIC is also seen as a mechanism to protect the intellectual property of and traditional knowledge held by a community. For instance, the principles of FPIC can offer protection such that any acquisition of intellectual property rights over traditional knowledge, without the *Prior Consent* of the community can be avoided (United Nations, 2005). Similarly, a community would have the right to authorize any use or commercialization of its knowledge (United Nations, 2005) and hence exercise greater control over dissemination and use of this knowledge.

The United Nations Permanent Forum on Indigenous Issues (United Nations, 2005) identified the following key areas where FPIC is relevant:

- In relation to Indigenous lands and territories, including sacred sites (may include exploration, development and use).
- In relation to treaties, agreements and other constructive arrangements between States and Indigenous people.
- In relation to extractive industries, conservation, hydro-development, other development and tourism activities.
- In relation to access to natural resources, including biological, genetic and/or traditional knowledge of Indigenous people.
- In relation to development projects encompassing the full project cycle, including the assessment, planning, implementation, monitoring, evaluation and closure (whether the projects are directed towards them or may impact them).
- In relation to organizations that undertake studies on the impact of projects to be implemented in Indigenous territories.
- In relation to policies and legislation that relate to or may affect Indigenous people.
- In relation to policies or programs that may cause their removal or that of their children, displacement or relocation from their territories.

More recently, FPIC has been on the forefront on conversations related to Truth and Reconciliation in Canada. From before Confederation, Canada operated a system of Indian Residential Schools, which forcibly took Indigenous children away from their parents in an effort to assimilate the Indigenous people into Canadian society. Thousands of children died in the process, and were often subjected to severe abuse (TRC, 2015). This part of Canadian history has been described as a "cultural genocide" (TRC, 2015) and "the most disgraceful, harmful, racist experiment ever conducted in our history" (National Post, 2013). In the 1990s, the Indian Residential Schools became a public issue with survivors beginning to share their stories, with roughly 15,000 survivors filing law suits against the federal government and the churches that ran the schools. As a response to this, the Canadian government initiated a process of resolution, including providing financial compensation and settlement of legal claims. As a part of the settlement, the Canadian government established a Truth and Reconciliation Commission (TRC) to educate Canadians about the residential school legacy and its repercussions, and encourage efforts to reconciliation (Torys LLP, 2016). In 2015, the TRC issued a detailed report, which presented 94 "Calls to Action". Under recommendation for the Canadian government, the following two calls are particularly noteworthy:

> *"43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation; and*
>
> *44. We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the*

United Nations Declaration on the Rights of Indigenous Peoples"(TRC, 2012)

In speaking to calls to action pertaining to business and reconciliation, the following excerpts are particularly relevant:

> *92. We call upon the corporate sector in Canada to adopt the United Nations Declaration on the Rights of Indigenous Peoples as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following: (i) commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects"* (TRC, 2012)

Given Canada's commitment to reconciliation, and to implement the UNDRIP, it can be expected that FPIC will continue to gain more attention locally and internationally. In that context, it then becomes important to understand what FPIC means.

2.2.2 Understanding FPIC

FPIC has four key components: *Free*, *Prior*, *Informed* and *Consent. Consent* is the most contentious element of FPIC. Several aspects of *Consent* are discussed in the literature. While some focus on the substance of *Consent* (which essentially reflects principles of

Free, Prior, and *Informed*, discussed in **Sections 2.2.3** to **2.2.5** below), others discuss the procedural aspects (i.e., how *Consent* can be achieved).

2.2.2.1 Consent: Is it Absolute?

The first key aspect with respect to *Consent* is whether or not *Consent* is absolute. Some authors suggest that FPIC does not demand absolute consent (i.e., a significant majority suffices) (ELI, 2004) (Goodland, 2004). Goodland (2004) suggests using the concept of majority as used in democratic elections, where 51% suffices, however, what precise fraction of the community agrees is less important than discussing important issues together as a community until the spirit of consensus is achieved.

2.2.2.2 Who Consents?

Several authors point to the lack of clarity in terms of who can give *Consent*, whether it is an established institution (United Nations, 2005), the band council, elders, on-reserve community members only or off-reserve members as well (BLC, 2012). In other cases, the consenting entity may be a combination of entities (MacKay, 2004). Further, in determining *Consent*, it may be unclear how views of marginalized groups (such as women and youth) are incorporated (BLC, 2012; Goodland, 2004). Yet another consideration for *Consent* is to understand the relative power of each stakeholder within a community to prevent one stakeholder group from overriding the majority (Asmus, 2009).

2.2.2.3 Mechanism for Consent

Another important aspect of *Consent* is the mechanism used to achieve consent. For example, *Consent* may be achieved through: referenda (BLC, 2012; Goodland, 2004), band resolutions or endorsement of an impact-benefit agreement (BLC, 2012), plebiscites (direct single issue votes) (Goodland, 2004), or through a formal memorandum of agreement (MacKay, 2004). Which mechanism is used depends on the particular circumstances of the community and the proponent.

2.2.2.4 Consent at Different Stages

Another aspect of *Consent* is what it means at different stages of a project. For example, *Consent* at the exploration stage of mine development might mean consent to explore, but not to extract. This approach would imply that *Consent* is an ongoing process. So once a company transitions from exploration into mining, they would need to ensure they had buy-in from the affected communities to do so. Similarly, if *Consent* were obtained for production of a mine, any changes to the operation through the life of a mine would warrant *Consent*. Moving through the subsequent stages of mining, *Consent* would need to be sought on plans to decommission the mine.

2.2.2.5 Consent as Veto Power

Whether *Consent* means *veto power* is an important discussion in the context of FPIC. The answer varies depending on who one asks. The understanding of *Consent* in particular is interesting, as it lies somewhere between national and international law and

policy. At the time of drafting of the UN Declaration, some governments argued that such a right to give or withhold *Consent* would grant extensive powers to a particular group of the population over common interest of the nation, and therefore be discriminatory against non-Indigenous people (Linde, 2009). At the time, Canada shared this particular concern and argued that by endorsing the document, Canada would be suggesting that the only rights that are important are the rights of Indigenous people, which would be inconsistent with the section 35 of the Canadian Constitution (Robert, 2007). This is an important concern, especially where the legal system clearly indicates that ownership of and sovereignty over natural resources belongs to the state. If Indigenous people are granted veto power, is this unequal treatment of Indigenous versus non-Indigenous people justified?

Over the decades, Canadian case law has been somewhat shy in discussing the issue of *Consent*, whilst wrestling with the understanding of 'consultation'. However, *Consent* has been raised in several cases over the years. In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010[4], the courts clarified the extent of consultation expected to truly satisfy the Crown's fiduciary duty owed by the Crown to the Indigenous Peoples in the cases where there may be an impact on Indigenous rights:

> *"when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare*

[4] See paragraphs 23, 34, 35, 121, and 168.

cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands." – paragraph 168.

In *Haida Nation v. British Columbia* (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 735, the Province of British Columbia has issued a "Tree Farm License" to a forestry firm in 1961, which allowed the company to harvest trees in an area that the Haida people had claimed title to. The Haida people challenged that these transfers were made without their consent. And while in this case, Indigenous title had not been established, the courts referenced the *Delgamuukw* case and said that the words with respect to consent apply "as much to unresolved claims as to intrusions on settled claims" (para. 24), but the process of consultation "does not give Indigenous groups a veto over what can be done with land pending final proof of the claim" (para. 48).

Earlier in 2014, the *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256[6] drew significant attention to the topic of holding an Indigenous title (or

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[5] See paragraphs 4, 24, 30, 40, 48, 55, and 65.

[6] See paragraphs 5, 9, 76, 88, 90-92, 97, and 124.

having initiated the claim to title). While the nuances of the ruling are fairly complex, the key piece relevant to the topic of FPIC comes in paragraph 2: "Once Aboriginal title is established, s. 35 of *The Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 permits incursions on it only with the *Consent* of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group*"* .

In September of 2014, the UN held a World Conference on Indigenous People. One of the items discussed was the application of *Free*, *Prior*, and *Informed Consent*. Following the conference, the UN released an outcome document, which stated that "We recognize commitments made by States, with regard to the United Nations Declaration on the Rights of Indigenous Peoples, to consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain free and informed consent prior to the approval of any project affecting their lands or territories and other resources" (United Nations, 2014). The same day, the Government of Canada released a statement dissociating itself with the FPIC elements related to the Outcome document, stating:

> *"Canada does not interpret FPIC as providing Indigenous peoples with a veto. Domestically, Canada consults with Aboriginal communities and organizations on matters that may impact their interests or rights. This is important for good governance, sound policy development and decision-making. Canada has strong consultation processes in place, and our courts have reinforced the need for such processes as a matter of*

law. Agreeing to paragraph 20 would negate this important aspect of Canadian law and policy". (Government of Canada, 2014).

In May of 2016, following the election of a new Liberal federal government, the Government of Canada announced that it is "now a full supporter, without qualification, of the United Nations Declaration of Rights of Indigenous Peoples", reaffirming "Canada's commitment to adopt and implement the Declaration in accordance with the Canadian Constitution" (Government of Canada, 2016). This triggered the dialogue on whether or not *Consent* means veto. In response to the dialogue, Minister Carolyn Bennett said in late June 2016 that there are a number of authorities that do not believe that "this is an outright veto". Amongst the authorities she references, the notables ones are the Assembly of First Nations Grand Chief Perry Bellegarde, the Supreme Court of Canada and James Anaya, one of the authors of the UNDRIP (O'Neil, 2016). Therefore, Canada's position on *Consent* is thus far rather clear – *Consent* according to the Government of Canada does not mean veto. One of the things this research will explore will be what *Consent* means to other parties involved in the mining process.

2.2.3 Free

It is a general principle of law that to be valid, *Consent* cannot be obtained through coercion or manipulation (MacKay, 2004), and must be made on Indigenous peoples' own time, in their own ways, in languages of their choosing and subject to their own norms and customary laws (Amazon Watch, 2011; Colchester & Ferrari, 2007).

In the Philippines, the National Commission of Indigenous Peoples is charged with verifying that the *Consent* of Indigenous peoples/communities is *Free*. Despite mechanisms being in place, *Consent* is still often coerced through various means, including controlling information, misrepresentation of issues in national and international media (for example, in support of corporate claims), and use of bribery to influence local opinion (Carino, 2005). Use of such coercive methods has been noted in complaints of coercion raised by Indigenous people in Australia (Goldzimer, 2000; Triggs, 2002).

Goldzimer (2000) proposes that one way to ensure that FPIC is *Free* is to ensure that the proponent is not the entity responsible for seeking *Consent*. Instead, Goldzimer argues, the responsibility should be nested in constitutionally recognized, politically and financially independent, centralized bodies directly elected by Indigenous peoples. Two examples of such bodies are noted. The first example is from Australia - a Lands Council established in the Northern Territory that has worked well, and the second is from Guyana, where the National Toshaos Council (a body that represents all the elected village chiefs) is involved in certifying or obtaining FPIC (Government of Guyana, 1997).

2.2.4 Prior

To be meaningful, *Consent* should be sought sufficiently in advance of any final authorization or commencement of activities occurs, and before a project becomes an economic inevitability (MacKay, 2004). The participation and *Consent* process should continue through the design and implementation phases of the project (Amazon Watch, 2011). Mining, for example, begins with exploration and continues through to closure, decommissioning and reclamation (Thomson, Joyce 2000). Due to the recent changes in the socio-political environment into which the industry has moved, the point of contact and potential conflict between communities and companies on social, environmental and economic issues has shifted in many cases from the mine development phase to the mine exploration phase (i.e., earlier in the mine life-cycle) (Thomson, Joyce, 2000). For mine exploration activities, companies are typically required to secure land tenure, and obtain exploration permits. This thus implies that, in order to be meaningful, *Consent* would have to be initiated before companies are granted land tenure and associated permits for exploration.

Secondly, the *Consent* process should be time-bound to ensure potentially affected parties have sufficient time to understand the information presented, are able to request additional information as needed, and can seek clarification and advice as needed, to allow them to determine or negotiate conditions for *Consent*. However, the timing should be of an appropriate length such that the process does not become an undue impediment for the company seeking *Consent* (MacKay, 2004).

Thirdly, FPIC should be incorporated as an ongoing process throughout the life of the project. This would ensure that proponents do not see *Consent* as a one-time signing-off of a document. Further, making FPIC an ongoing process recognizes the fact that FPIC issues may vary during exploration, construction, operation and eventual closure (BLC, 2012).

2.2.5 Informed

Access to information rights are well established in international human rights law (IACHR, 1997)[7] and international environmental law (Pring & Noe, 2002). According to the United Nations Permanent Forum for Indigenous Issues (United Nations, 2005), and the UN Development Group (UNDG 2008: p28), use of the word '*Informed*' should imply that the information provided covers at least the following aspects:

- The nature, size, pace, reversibility and scope of the proposed activity.
- The reason(s) and purpose(s) for the proposed activity.
- Duration.
- Spatial extent of the activity.
- A preliminary assessment of the likely economic, social, cultural and environmental impact, an identification of potential risks, and fair and equitable benefit-sharing.
- Personnel likely to be involved in the proposed project.

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[7] See General Comment No. 23 Article 27, adopted by the Human Rights Committee at its 1314th meeting, 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5, para. 3; ILO 169, Articles 4(1), 7 and 15; and *Ogoni* Case, paragraph 67.

The United Nations Permanent forum on Indigenous Issues (UNPFII) further adds that the information provided should be accurate, in a form that is accessible, in a language that is understandable, and can be disseminated in a format that takes into consideration oral and cultural traditions (ELI, 2004). For example, if communities have limited experience with mining developments, they cannot be expected to draw upon their own experiential knowledge base to understand those developments (ELI, 2004). The World Commission on Dams suggests that stakeholders should also have access to legal tools to enhance their participation in the decision-making process (WCD, 2000). If the information provided is unclear, highly technical or missing key pieces, it places communities in a poor position for contemplating their *Consent*. Essentially, information should be presented in a manner that equips Indigenous people to make informed choices and decisions (Amazon Watch, 2011).

2.3 Advantages of FPIC

There are several advantages of applying FPIC, both for resource developers and communities involved. Companies that apply FPIC are likely to benefit from an improved social image (Vanclay & Esteves, 2011) and an improved social license to operate (Hanna & Vanclay, 2013). The concept of social license to operate is particularly important because the extent to which an activity is deemed socially acceptable will affect how it is experienced, and that may in turn affect what impact it will have (Williams & Schirmer, 2012).

Application of FPIC can also allow companies to: reduce project delays, avoid increased expenses that may be incurred as a result of conflict (such as litigation) (BLC, 2012; Davis & Franks, 2011), manage corporate financing risk (Amazon Watch, 2011), and maintain healthy investor relations (Prno & Slocombe, 2012) by demonstrating that its operations and the organization processes underpinning them meet stakeholder expectation and satisfy societal norms (Gunningham, Kagan, & Thornton, 2004; Siltaoja & Vehkapera, 2010; Thomson & Boutilier, 2011). For communities, enjoying FPIC as a right can raise their confidence by recognizing them as an important stakeholder, and acknowledging their control on the overall outcome (Hanna & Vanclay, 2013).

Another advantage of FPIC is that in order to obtain *Consent*, proponents have to bring multiple stakeholders to a shared vision, a kind of cohesion that is often absent from communities, and therefore needs to be built in some fashion. That is to say; FPIC requires some form community building, which in turn facilitates community cohesion, allowing a community to better understand the implications of a development and hence build its ability to *Consent* (Wilburn & Wilburn, 2011). Similarly, community engagement activities as a part of FPIC provide greater opportunity for trust building. Achieving trust through direct involvement could potentially help mend past legacy and activities (Cornwall, 2004; Vanclay, 2012), especially in cases where this legacy is negative (Dare, Schirmer, & Vanclay , 2014).

2.4 Challenges Associated with FPIC

Several authors have noted challenges associated with FPIC. These include challenges with respect to understanding what FPIC means as well as practice and implementation of FPIC.

Swiderska et al (2012) note that the extent to which FPIC processes are recognized in practice greatly depends on the degree of devolution of decision-making authority to communities. Therefore, while a process that incorporates the principles of FPIC may provide tools for communities to advocate for their customary rights, it may not achieve their objectives until more national-level changes occur in the legal, governance and political processes. While FPIC has been incorporated in a few national laws over the years (such as in the Philipines, Austrailia ,Peru and Malaysia), and adopted by some institutions (such as the International Council on Mining and Metals, Buxton, etc.), many countries still do not legally require it. An incorporation of FPIC in national level processes will help communities attain their customary rights.

Another major challenge associated with FPIC is the balance between community rights and the national interest, i.e., how do we recognize the rights of communities to dictate the terms of mining development, but still ensure that sufficient development can occur to serve the national interest (ELI, 2004; Asmus, 2009). Indigenous communities may perceive that governments favour companies rather than fulfilling their obligations to Indigenous people (Weitzner, 2002). ELI (2004) suggests that the governments can manage this perception in a few ways. For instance, governments can level the playing

field through funding support to communities to participate in the negotiations. This is particularly important where there is significant power imbalance between a company and a community (Amazon, 2011). In addition to providing funding, governments can also enter into agreements with communities and/or the mining companies to protect community rights. For example, in the case of the Diavik Diamond Mine in the Northwest Territories, the territorial government entered into a Socio-Economic Monitoring Agreement with the mining company. Governments can also encourage companies to enter into agreements directly with the communities (for example, under the *Aboriginal Land Rights Act*, the Australian government requires mining companies to negotiate agreements with communities obtaining their *Consent* to mining on their lands). In cases where there is a lack of government support for FPIC, companies can consider funding FPIC-related initiaves voluntarily, but this has the risk of co-opting the process (Swiderska, et al., 2012).

Wilburn and Wilburn (2011) note that another challenge in securing FPIC, is the broad range of stakeholders whose interests and expectations may be extremely diverse and possibly conflicting, making it impossible to obtain *Consent*. This may be further complicated with stakeholders having varying abilities to express their voices (ELI, 2004). For example, women who often face disproportionate adverse impacts (MMSD, 2002) may have a weaker voice and hence not be represented in community organizations. Similarly, Asmus (2009) notes that one of the challenges of FPIC is in the definition of “the community” itself, and being able to accurately define which people may be affected (Amazon Watch, 2011).

Asmus (2009) notes that another challenge with FPIC is establishing the validity of the decision-making process in the absence of consensus in a given community, and determining what represents adequate consensus in the absence of a political process. This can get particularly challenging in cases where Indigenous communities have different forms of governance and political procedures than what the companies may be familiar with. In order for FPIC to be realized then, companies would need to understand that customary laws in a community may require a dedication of substantial time to understand all the issues (Pimbert, 2012), and resources, whether it is in the form of facilitation costs, costs of legal support, or representation for communities (even if the communities themselves are not directly being paid) (Ritter, 2012). With that extent of investment (in terms of time and resources, one can expect that FPIC requires an unhurried process and a flexible design (Swiderska, et al., 2012). The time and resources required may further increase if communities involved in the FPIC process have different opinions, and hence more time may be required to build some form of consensus (Swiderska, et al., 2012).

2.5 International Law and Voluntary FPIC Initiatives

The participatory rights of Indigenous people in relation to their lands have developed over decades in several international instruments, in jurisprudence of international courts, and practices of international institutions. Judicial and monitoring bodies have also facilitated the recognition of these rights through broad interpretation of existing

provisions (Linde, 2009). However, continuing conflict among communities, industry, and governments suggests that there is still more to be done with respect to Indigenous participation.

FPIC was first contemplated in international law through the ILO Convention 169 in regards to resettlement of Indigenous Peoples in independent countries as a way to support existing law and policy, as well as a framework to revisit existing law and policy to allow it to better address Indigenous Peoples. FPIC received a boost in 2007, with its inclusion in the UN General Assembly's adoption of UNDRIP, with 143 votes in favour, 4 in opposition and 11 abstentions[8]. It is expected that over time, this so-called 'soft law' will eventually "harden", as it is used as the foundation for legal decisions (Lehr & Smith, 2010). Further, even though the law is by many to be 'soft law', in the area of business and human rights, such standards can have important implications (Lehr & Smith, 2010), primarily because these 'laws' start to affect the domestic legal framework and social expectations within which companies operate. For example, in *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, it is stated,

> *"The Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation such as the Canadian Human Rights Act. The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one*

[8] Refer to Sections 1.2 and 2.2.2 for Canada's current position on FPIC.

possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional"[9].

Similarly, in *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al*., (Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al, 2012), Wahgoshia First Nation (WFN) sought a notice of motion to prohibit the mining company Solid Gold from conducting any mineral exploration activities unless it had WFN's consent. However, WFN later agreed that since "this was not the law of Canada" they instead sought to prohibit Solid Gold from undertaking mineral exploration due to failure to consult and accommodate"[10]. While in this case *Consent* was not an explicit expectation, it certainly formed the backdrop of the proceedings. This case in particular sheds light on the ongoing tension between Consultation under section 35 and *Consent* as understood under the UNDRIP.

Globally, Philippines, Australia, Venezuela and Greenland have enacted legislation requiring *Consent Prior* to the approval of activities in traditional territories. Bolivia incorporated the UNDRIP into its national legislation in 2007 (Doyle, 2015).

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[9] See paragraphs 350-353 of *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445

[10] Paragraph 20.

Several international bodies have also given FPIC a push. For example, in the Case of *Saramaka People v. Suriname* IHRL 3058, 2008[11] (IACHR, 2007) the Inter-American Court of Human Rights clearly concluded that States were not meeting their obligations to obtain FPIC. Similar statements have emerged from UN Treaty Bodies such as the Committee on the Elimination of Racial Discrimination (CERD) (CERD, 1997). Lehr and Smith (2010) note that these international conventions, declarations, legal decisions, or recommendations apply to the State before developments proceed and not directly to companies. However, companies have increasingly seen the implications of receiving concessions without the FPIC of communities, such as social outrage, and consequential reputational or financial damage (Gunningham, Kagan, & Thornton, 2004), increased security requirements, legal and conflict expertise, lost productivity, material damage, and loss in personnel directly or indirectly due a poor reputation (Davis & Franks, 2014). Davis and Franks (2011) also note that the time taken for companies to get start production has doubled in the last decade, that half the risks associated with company operations were non-technical in nature, and that a vast majority of these non-technical risks were stakeholder related.

Over the years, FPIC has also made its way into standards set by organizations that apply directly to companies. These include: the Secretariat of the Convention on Biological Diversity (The Akwe Kon Guidelines in 2004) (Lehr & Smith, 2010); the International Finance Corporation (IFC)'s Performance Standards and the World Bank's Safeguard

[11] The Court stated that "Until said delimitation, demarcation, and titling of the Saramaka territory has been carried out, Suriname must abstain from acts which might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent of the Saramaka people".

Policies in 2006 (Lehr & Smith, 2010); the Inter American Development Bank (IADB)'s Operational Policy on Indigenous Peoples (IADB, 2006) in 2006; the European Bank for Reconstruction and Development's Environmental and Social Policy in 2008 (Doyle, 2008); and the Asian Development Bank (ADB) in 2008 (ADB, 2008).

Further, there are a growing number of statements emerging from multi-stakeholder bodies on FPIC. These include: The World Commission on Dams in 2000[12] (WCD, 2000); the Forest Stewardship Council in 2014[13] (Wawatay News, 2014; Pulp & Paper Canada, 2014); the Roundtable on Sustainable Palm Oil in 2008 (RSPO)[14] (RSPO, 2008); the International Council on Mining & Metals (ICMM)[15] in 2013 (ICMM, 2013); and the International Petroleum Industry Environmental Conservation Association (IPIECA) in 2013 and then in 2015[16] (IPIECA, 2013; IPIECA, 2015).

Lastly, FPIC has seen a major recognition of Indigenous communities globally, including locally in Canada. Between January 2014 and January 2017 alone, there had been over 300 independent instances across the world where communities, Indigenous leaders and organizations have expressed concern over a certain development due to the absence of

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[12] The WCD was established in 1999 and is an independent, international multi-stakeholder that addresses controversial issues associated with large dams. WCD was one of the first multi-stakeholder bodies to address FPIC in 2000.
[13] The FSC was established in 1993 and is an international certification and labeling system that promotes sound management (socially, economically and environmentally) of the world's forests.
[14] The RSPO was established in 2004 and is an international multi-stakeholder organization and certification scheme for sustainable palm oil.
[15] The ICMM was founded in 2001 with the goal to improve sustainable development performance in the mining sector.

FPIC[17]. Thus, with the steady-paced increase in the spotlight its receiving FPIC warrants attention from all those involved in the extraction of natural resources in Canada.

2.6 Canadian Context for FPIC

Canada has a unique constitutional relationship with Indigenous Peoples, which gives rise to the importance of reconciling pre-existing rights of Indigenous Peoples and providing clarity with respect to current and future resource development decisions that may occur on lands claimed by Indigenous Peoples. This becomes even more important when considering the following:

1. The Canadian Economy is heavily dependent on Natural Resource Development[18].
2. Indigenous Rights are protected under section 35 of *The Constitution Act, 1982*[19], being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
3. Determination of Indigenous rights is evolving rapidly through the settlement of land claims and a growing body of case law[20].
4. In 2016, Canada endorsed UNDRIP and the courts have recognized that Canada's international obligations should be taken into account for domestic decision-making[21].

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[17] For a comprehensive listing of News Releases compiled, please see Appendix A.
[18] In 2015, the mining sector contributed $79 billion (i.e., 4%) to Canada's total nominal Gross Domestic Product (GDP), and accounted for 563,000 jobs throughout the country (Natural Resources Canada, 2016). Mining is the second largest primary resource industry for the Province of Manitoba, contributing roughly $2.3 billion to the Canadian economy (Manitoba, 2017). According to Amnesty, approximately three-quarters of the world's mining and mineral exploration companies are headquartered in Canada, and Canada's national Economic Action Plan is intended to facilitate development of approximately 600 new large-scale resource extraction projects in the next decade (Amnesty , 2013).
[19] See Section 2.9.1
[20] See Sections 2.9.1

5. Other sectors are starting to incorporate FPIC in their performance standards (for example, in January 2014, the Forest Stewardship Council (FSC) announced a landmark initiative to by applying FPIC to FSC's Forest Management Standards (FSC, 2014)).

The above observations suggest that that over the years there is increased national-level support for FPIC, but there are still operational challenges. For instance, a combination of national laws and policies, willingness of governments and companies to voluntarily go beyond the minimum requirements of consultation and engagement to seek FPIC, and so on; that are likely preventing realization of FPIC. FSC's initiative suggests the possibility of FPIC becoming a reality in other natural resource sectors as well.

2.7 The Mining Sector

Canada produces roughly 60 metals and minerals, has 200 active mines and 7,000 sand and gravel pits and stone quarries. In 2015, the mining sector contributed $79 billion (i.e., 4%) to Canada's total nominal Gross Domestic Product (GDP), and accounted for 563,000 jobs throughout the country (Natural Resources Canada, 2016). Canada ranks in the top five countries in the global production of potash, uranium, aluminum, cobalt, titanium, tungsten, cadmium, diamonds, platinum, sulphur and nickel (MAC, 2013).

Given its significance to the Canadian economy and its extractive nature, which in most cases requires access to Indigenous lands; the mining industry has often been embroiled

[21] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 SCR 471

in conflict with Indigenous Peoples across Canada. In this regard, it becomes important to understand what the industry's approach to FPIC currently is (for example, individual mining companies operating in Manitoba, the Mining Association of Canada (MAC), the International Council on Mining and Metals (ICMM), the Prospectors and Developers Association of Canada (PDAC), the Canadian Aboriginal Minerals Association (CAMA) and so on).

2.8 Regulatory Scenario for the Mining Sector

2.8.1.1 Federal

Historically in Canada, up until early 1900s, all land purchases included both surface and mineral rights. However, since that time in most cases, mineral rights are government-owned and can only be leased by either individuals or companies. This means that the government currently owns mineral rights on more than 90% of Canada's land (Government of Canada, 2013). According to the Canadian Constitution, regulation of mining activities on these publicly owned mineral leases falls under provincial and/or territorial jurisdiction, resulting in varying mineral rights legislation for each of the thirteen Canadian jurisdictions.

2.8.1.2 Provincial

In Manitoba, Mineral Resources (hereafter referred to as "Mines Branch"), which falls under Manitoba Growth, Enterprise and Trade, is typically the first point of contact for

companies seeking to explore for mineral resources in Manitoba. The Mines Branch administers the *Mines and Minerals Act,* CCSM c M162 and works collaboratively with other departments when additional permits and licenses are required and administered by other Government of Manitoba departments (such as the Department of Sustainable Development which administers *The Environment Act,* CCSM cE125). The *Mines and Minerals Act,* CCSM c M162 requires proponents to apply for advanced exploration permits. No proponent-led Indigenous engagement is required for this stage of the licensing process. The Mines Branch does recognize its Duty to Consult and therefore undertakes consultation activities when a proposed mineral exploration or mine development activity may potentially infringe upon Indigenous or treaty rights. In 2007, the Mines Branch developed a framework for its consultation activities for both mineral exploration and mine development (Government of Manitoba, 2007). The guidelines are currently in Draft format and do not make reference to FPIC[22].

In addition to the Mines Branch's consultation activities, once a proponent wishes to transition from advanced exploration into mining, the proponent is subject to licensing under *The Environment Act,* CCSM c E125. The licensing process typically, requires proponents to engage all interested parties and potential stakeholders, which then results in some level of Indigenous engagement through the Environmental Assessment (EA) process. Proponent-led engagement activities (through the EA process), and the Crown

[22] Why this policy document is still in Draft format was the subject of conversation with one of the research participants. Please refer to Section 5.4 for more information.

consultation processes led by the Mines Branch, typically occur concurrently without much overlap.

2.8.1.3 Professional Membership

Several mining companies are members of international organizations that commit them to some form of social responsibility that requires Indigenous considerations. One example is the 'Voluntary Principles on Security and Human Rights' (VPs), a multi-stakeholder initiative involving governments, companies and non-governmental organizations. The Voluntary Principles guide companies in undertaking comprehensive human rights risk assessments in dealing with the public and security providers to ensure that human rights are respected in the protection of company's facilities (DOS-USA, 2012). As evident, the focus of these principles is primarily the protection of a company's assets, with indirect respect of human rights in doing so. While the indirect benefit of protection of human rights is a good thing, a more direct focus would go even further in protecting human rights.

The International Council on Mining & Metals (ICMM) is another example of a multi-stakeholder association that contributes towards building a greater degree of social responsibility with Indigenous considerations. All member companies implement the ICMM Sustainable Development Framework as a condition of membership, which also includes commitments to implement 10 core principles and any related position statements. According to a Position Statement issued by ICMM in 2013, all member

companies are expected to commit to ICMM's principles on FPIC in dealings with Indigenous Peoples, one of which requires members to "work to obtain the consent of Indigenous Peoples for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use by Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples, including where relocation of Indigenous Peoples and/or significant adverse impact on critical cultural heritage are likely to occur" (ICMM, 2013).

The Canadian Aboriginal Minerals Association (CAMA) is another organization "which seeks to increase the understanding of the minerals industry, Aboriginal mining and Aboriginal communities' paramount interests in lands and resources" (CAMA, 2017). The organization was founded in 1991, and since then has organized an annual conference that brings together industry, associations, Indigenous communities, governments, practitioners and other players in the mining sector. By providing a forum for dialogue and exchange of ideas, CAMA plays an important role in creating awareness on the topics of Indigenous community economic development, resource management and environmental protection (CAMA, 2017).

2.9 Indigenous Engagement and FPIC

2.9.1 Section 35

In Canada, Indigenous rights are recognized and affirmed by s. 35 of *The Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11. The Supreme Court of Canada has held that this provision protects four general categories of rights: generic, specific, exclusive, and non-exclusive rights. Generic rights are rights that are broadly held by all Indigenous Peoples and can include Indigenous title or self-government. Specific rights are rights held by a particular community and emerge from unique traditions and historic practices (Foth, 2011). Exclusive rights are rights linked directly to Indigenous title or treaty and pertain to management of land and resources as they see fit. Non-exclusive rights are rights that overlap with the rest of the Canadian society, and typically fall in the realm of public ownership (Slattery, 2000). While the Duty to Consult itself is rights-based, the intent is reconciliation of the shared colonial history and the need to accommodate Indigenous interests.

According to the Government of Manitoba's Interim Provincial Policy for Crown Consultations with First Nations, Metis Communities and Other Aboriginal Communities,

> *"Consultation is required with First nations, Metis communities and other aboriginal communities where it appears, or where the government is uncertain as to whether, a proposed government decision or action*

might infringe upon or adversely affect the exercise of an aboriginal or treaty right." (Manitoba, 2017)

What is noteworthy in the above characterization of when consultation is required is that there has to be some possibility of an infringement of a right, which means that in the case of a proposed development, enough should be known about potential impacts of a project to determine whether or not there may be an infringement. And unless that is done, the Crown Consultation process typically does not commence. If there is a likelihood of an infringement, or an uncertainty if there could be, the process of consultation unfolds to determine the nature of infringement. If it is determined that there is in infringement, the project may still proceed, provided that appropriate accommodation (or compensation) can be provided. Currently, in Canada, FPIC does not factor into this discussion.

Over the years, the Supreme Court of Canada has continued to define and clarify the extent of the Crown's Duty to Consult based on the relative strength of the right in question and the degree of potential impact (Foth, 2011) as well as the timing of the duty to come into effect. In *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, the Yukon Court of appeal ruled that the Yukon government has a Duty to Consult with the Ross River Dena Council when recording a mineral claim in its claimed territory. In paragraph 32, the Court stated that:

> *"There can also be no doubt that the third element of the Haida test is made out where the Crown registers a quartz mining claim within the plaintiff's claimed territory. Aboriginal title includes mineral rights (see*

> *Delgamuukw v. British Columbia, [1997] 3 SCR 1010, at para. 122). In transferring mineral rights to quartz mining claim holders, the Crown engages in conduct that is inconsistent with the recognition of Aboriginal title."*

The court then went on to establish that the provision of notice to the Ross River Dena Council did not amount to sufficient consultation. It further noted that where Class 1 exploration activities will impact asserted aboriginal rights, consultation should occur before such activities. This case is significant, as it sheds some light on how early in the process of mineral exploration the Duty to Consult applies.

In *Halalt First Nation v. British Columbia*, 2012 BCCA 472, The British Columbia (BC) Court of Appeal overturned the decision of a chambers Judge on the BC EA Office's Duty to Consult and accommodate the First Nation on a water well project. Amongst other things, this case clarified that the government has the ability to engage proponents and aboriginal groups separately (and in whatever order it deems appropriate), provided all parties are given relevant materials and an opportunity to comment.

The *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 was another landmark ruling that shed light on the direction the courts are heading towards as it pertains to Indigenous rights in Canada. Two key things were established through this ruling; firstly, whether Indigenous Peoples can advance Aboriginal title claims on a territorial basis, and if aboriginal title exists, would provincial legislation apply to lands

where Indigineous title has been established. The court declared that the *Tsilhqot'in* Nation hold Aboriginal title over approximately 1900 square kilometers of land in central British Columbia, putting to rest "the dots-on-a-map theory of Aboriginal title" (McIvor, 2015) (i.e., regular use of a defined tract of land for traditional resource use is sufficient to establish Aboriginal title). More importantly, when Indigenous title is established, the Crown must either obtain the consent of Indigenous Peoples to use Aboriginal title lands or meet the legal requirements justifying an infringment on Aboriginal and treaty rights.

The cases presented above shed light on different aspects of the Duty to Consult; the timing, the scope, and the practical aspects of the process itself, to name a few. These decisions have certainly shaped the discourse on Indigenous engagement and Indigenous rights within the context of mining. Indigenous rights thus become front and center to environmental projects that involve potential impacts to natural resources. In an effort to address legal obligations to consult with Indigenous groups, all provinces across Canada have developed consultation guidelines and policies. In May 2016, the Fraser Insitute published a report outlining the patchwork of these polciies across Canada on Duty to Consult (Bains & Ishkanian, 2016). As illustrated in Figure 1 below, these policies are in various stages of development across the nation.

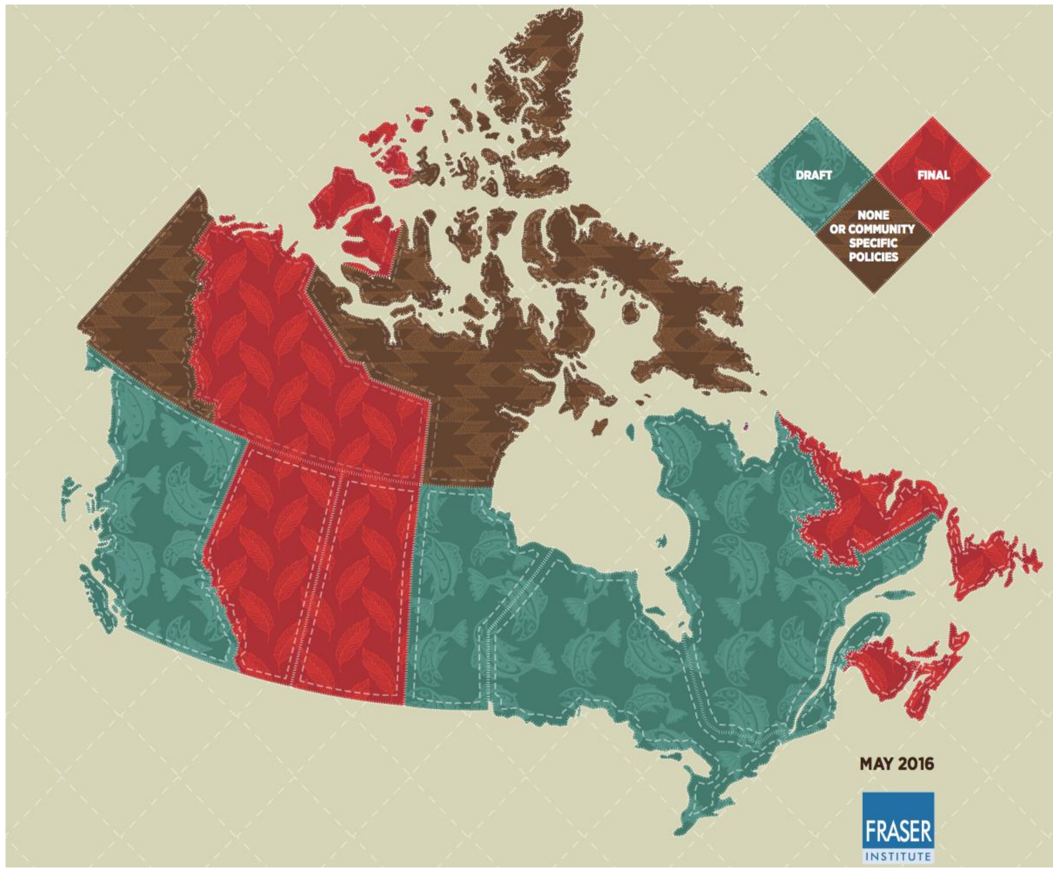

Figure 1: Status of Canadian policies on Duty to Consult. Reproduced with permission from the Fraser Institute.

In addition to the Crown's Duty to Consult, mining proponents typically enter into discussions with Indigenous communities on a spectrum of participatory involvement that ranges from informing to partnering. This may sometimes happen within the framework of an Environmental Assessment (EA). Generally speaking, the Crown-Indigenous consultation process is separate from Indigenous engagement undertaken as a part of an EA process, but the two can certainly be synergistic. Typically, a substantial amount of legwork for Crown consultations can be accomplished as a part of the environmental approvals process for a project, which typically initiates well before the Crown consultation process begins. The proponent can engage communities, inform them about

the technical aspects of the project, and discuss potential project-specific impacts – all of which can factor into a community's view on whether or not a proposed activity will cause an infringement on their Indigenous and/or treaty rights. In that context, the Crown consultation process could be a suitable placeholder for FPIC. Prno & Slocombe (2012) advocate for this approach, saying that FPIC is primarily a duty of the state. In general, state-led environmental regulation has been somewhat successful in getting industry to work with communities, especially when there is strong enforcement (Gibson, 1999; CIELAP, 2000; Winfield, 2009). Since both the Crown consultation process and the environmental regulation process are important to mining, ideally both could facilitate realization of FPIC.

2.9.2 Environmental Assessment Process

The Environmental Assessment (EA) process can provide an important avenue for Indigenous involvement and hence an opportunity for FPIC to be realized, especially given the participatory nature of EA processes (e.g., Sinclair and Diduck 2009; Morgan, 2012). There is general agreement on the need for public and Indigenous participation in EA (Foth, 2011; Booth & Skelton, 2011; Whitelawet al, 2009; Galbraith et al, 2007; O'Faircheallaigh & Corbett, 2005). The Supreme Court of Canada's decisions over the last few decades have clarified a duty that exists upon the Crown to meaningfully consult with Indigenous communities that may be potentially affected by natural resource developments as defined in s. 35 of *The Constitution Act, 1982*, being Schedule B to the

Canada Act 1982 (UK), 1982, c. 11 (Natcher, 2001; Isaac & Knox, 2003; Isaac & Knox, 2004; Isaac, Knox, & Bird, 2005).

In addition to the Crown's Duty to Consult, the EA process in Manitoba expects proponents to undertake some level of public engagement and consultation when undertaking development that may impact Indigenous Peoples as well as other Manitobans. Provisions under the current legislation include: giving public adequate notice, providing access to information, providing funding, providing opportunities for written input, and holding public hearings (Sinclair & Diduck, 2009).

2.10 Summary

Until the late 20th century, Indigenous Peoples were excluded from any significant involvement in management of resource development on their traditional lands (Prokhorov, 1989; Albert, 1992; Borrows, 1997; Wilson, 2002). Over the decades, Indigenous Peoples have continued to fight to establish their involvement in resource decisions, arguing that it is critical to allow them to fulfil their obligation to protect their lands, and therefore their cultural identity, and that protection of their territories cannot be entrusted to governments or industry (Akpan, 2000; Banks & Ballard, 1997; Borrows, 1997; Harper & Israel, 1999; O'Faircheallaigh & Corbett, 2005). While obligations to consult and engage and do so in a meaningful way have evolved through various mechanisms in Canada through section 35 of *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11 and subsequently through case law, there

continues to be escalated conflict between Indigenous communities over resource development projects (Baker & McLelland, 2003; Mulvihill & Baker, 2001; Paci, Tobin, & Robb, 2002; Natcher, 2001; Thomson & Boutilier, 2011; Prno & Slocombe, 2012; The Globe and Mail, 2017). A number of reasons can be attributed to this increase in the conflict; lack of commitment from states to protect Indigenous interests, lack of clarity in the regulatory framework, and mismatched expectations of the community and the industry, among others.

FPIC is promoted as an approach to ensuring a higher level of Indigenous involvement in decision-making when it comes to natural resource management and resolving some of these challenges. As outlined in the review of the literature, there are a number of questions in the Canadian context related to what various governments, industry, stakeholders, NGOs and members of the public think FPIC is and how it should be implemented. Even though the Government of Canada has endorsed FPIC, it rejects the idea of FPIC giving communities the power to veto (Government of Canada, 2014). Canada maintains that it already balances the interests of all Canadians with its unique section 35 framework, that ensures that consultation and accommodation with Indigenous Peoples happen when appropriate (Nunatsiaq News, 2014). According to the Canadian Constitution, regulation of mining activities falls under provincial and/or territorial jurisdiction, which then implies that provincial legislation could potentially be a placeholder for seeking FPIC, so long as it does not contradict with federal legislation. Over the decades, Canadian courts have continued to provide some clarity to various aspects of Indigenous involvement in resource development that can help contextualize

FPIC and gauge the possibility of operationalization of FPIC in the Canadian context in general and in the provincial regulatory context in particular (for example, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 and *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al*., 2011 ONSC 7708. The real extent to which the current federal and provincial jurisdiction enables the fulsome application of FPIC remains, however, unclear.

The literature (BLC, 2012; DOS-USA, 2012; ICMM, 2013) also indicates that another possible placeholder for making FPIC a reality in Canada is professional membership in existing international industry associations that require adherence to certain professional standards; FPIC potentially being one such standard. For example, in 2014, the Forest Stewardship Council Canada announced a requirement for members to adhere to principles of FPIC (FSC, 2014).

Overall, my consideration of the literature indicates that the extent to which FPIC has and continues to make its way into existing mechanisms (regulatory or voluntary) in relation to the mining industry in Canada warrants much further exploration. The next Chapter outlines how I started out to explore these topics.

3.0 Research Methods

This chapter outlines the research design and the strategy of inquiry implemented in this study. It also demonstrates how the research met the standards of ethical research, and presents a rationalization of the data collection methods and techniques used in analyzing the data, validating it, and disseminating the results.

3.1 Introduction

In order to satisfy the purpose and objectives of this research, I used a qualitative research design, with a case study approach as a strategy of inquiry (Yin, 2009). A qualitative research design is inductive (Crotty, 1998), with the researcher deriving meaning from data collected in the field. For this research I relied on data related to my participants' experience with and perspectives on FPIC.

Secondly, a qualitative design allows for formation of a holistic view incorporating multiple perspectives (Creswell, 2009; Creswell, 2014). For any mining initiative, there is normally a broad range of participants (and hence views) ranging from the Indigenous community themselves, the companies, leaders and regulators. Each of the participants has unique interests and therefore has varying perspectives that likely stem from their particular role in any given initiative or development. I believe that being able to understand multiple perspectives on FPIC from multiple sources has added immense value to this research.

Thirdly, qualitative design primarily uses constructivist perspectives to make knowledge claims as identified in Chapter 1, and allows the researcher to recognize their own background in shaping their interpretation of data (Creswell, 2009). This has been very relevant to this research for two main reasons. Firstly, it kept me cognizant of the origin of different perspectives that my participants have shared with me (for example, their unique social construct). Secondly, since I am a practicing EA practitioner, my own background and interactions with different projects, different communities and my own understanding of the processes to date have informed this research. Having been immersed in this discipline, it has therefore been important for me to recognize my own potential biases as they may relate to the conduct of this research.

3.2 Case Selection

As outlined in Chapter 1, I employed a case study approach to this research, the case being FPIC as it relates to environmental approvals, with a focus on the legal framework in Manitoba. In identifying mining approvals in Manitoba as my case, the following key points factored into selection:

- Familiarity and experience working with the mining sector and the approvals/regulatory framework that applies to it in Manitoba (exploration through to mine development).
- Familiarity and experience with the mining sector in other provinces, which allowed me to draw upon relevant pieces of information from elsewhere.

- EA is primarily where company-community conflict manifests itself and so it seemed like a logical first place to examine the applicability of FPIC.

By choosing Manitoba, my case study becomes spatially bound. Manitoba is a good choice for the case study for a few reasons:

- Since 1995, Manitoba government has offered over $38 million in direct financial assistance for mineral exploration in the province.
- 2013 saw two major mines receive environmental licenses despite strong opposition from an Indigenous Community (Mathias Colomb Cree Nation) (MCCN, 2013; WFP, 2013).
- As of March 2014, 7% of the total self-government and treaty negotiations are based in the prairies region (AANDC, 2014).
- In Manitoba, only approximately 50% of the total Treaty Land Entitlement land has been converted to reserve land, the rest being outstanding claims that are still being negotiated (TLEC Manitoba Inc., 2014).

By choosing approvals as the topic within which to examine FPIC, my case study becomes largely bound to the *The Environment Act*, CCSM c E125, which came into effect in 1988. Lastly, limiting my focus on the mining sector also binds this research to one particular sector. This is particularly important as the types of issues and potential impacts in other sectors (such as forestry, or textiles, or oil and gas) may be different, resulting in different types of interactions between communities and industry.

3.3 Data Collection and Sources

Data collection for this research involved two components. The first component entailed conducting literature and document reviews, including:

- Materials to formulate a deeper understanding of each of the components of FPIC (journal articles, reports, news and media releases, etc.).
- Canada and Manitoba Government's position with respect to Indigenous engagement and Consultation (such as statutes, policies, guidance documents, and position statements on FPIC).
- FPIC policies from various standards organizations (such as the ICMM) that apply to Canada/Manitoba.
- FPIC policies and or statements from Indigenous organizations that apply to Canada/Manitoba.
- FPIC policies from other industry sectors in Canada (for example, the Forestry Standards Council which recently announced an initiative to apply FPIC to Forestry Management Standards).
- FPIC policies or position statements for mining companies operating in Canada.

I then used the information obtained from my review of the literature and documents to design a semi-structured interview schedule. Semi-structured interviews are conducted within a relatively open framework, which allows for a focused, and conversational two-way dialogue. The questions developed ahead of time serve as an interview guide, which allows the interviewer and interviewee the flexibility to probe for details or discuss

certain issues (FAO, 1990; Merriam, 1998; Foddy, 1993). The flexibility allowed by semi-structured interviews was particularly helpful as it allowed me to probe into topics that a participant was more knowledgeable about, which may or may not have been covered off in the interview guideline. This meant adjusting the wording to allow for a more naturally flowing interview, more representative of a conversation, as opposed to a 'question-answer' session.

The key focus of my interviews was guided by the research questions I set in relation to each of the objectives as outlined in Chapter 1. An interview guideline is provided in Appendix B. To ensure best results, I tested the interview guideline for effectiveness before conducting official interviews. I conducted a majority of the interviews in-person, some over phone and some over *Skype*. Where participants consented, interviews were recorded using a digital recorder. Interviews lasted between 45 minutes and 80 minutes, with most interviews approximately 60 minutes long.

3.4 Participant Selection

To select participants for semi-structured interviews, I used purposive sampling, which is also known as judgmental sampling (Berg, 2010). This technique involves selecting participants to represent the views and interests of larger groups or entities. For the purposes of this research, I chose participants from the following categories:

- Indigenous leadership.
- Government Representatives (Federal/Provincial).

- Industry.
- Practitioners.
- Advocacy Groups

In total, I conducted 23 interviews. **Table 1** presents the number of individuals within each category. It should be noted that some participants that I interviewed represented multiple categories. This was a result of participants having undertaken a different role in the past, or having served multiple functions in their current capacity. Eventually, participants were categorized based on their current or most recent function, as applicable. Snowball sampling was also employed, with participants identifying and making suggestions for additional people they felt I should interview. This added to the thoroughness of selection of the interview group.

Table 1: Number of Participants Interviewed within each Category

Category	Number of Participants
Indigenous Leaders	5
Government	4
Industry	4
Practitioners	5
Advocacy Groups	5
Total Interviews	23

Figure 2 illustrates the percentage of participants representing each of the above-noted categories.

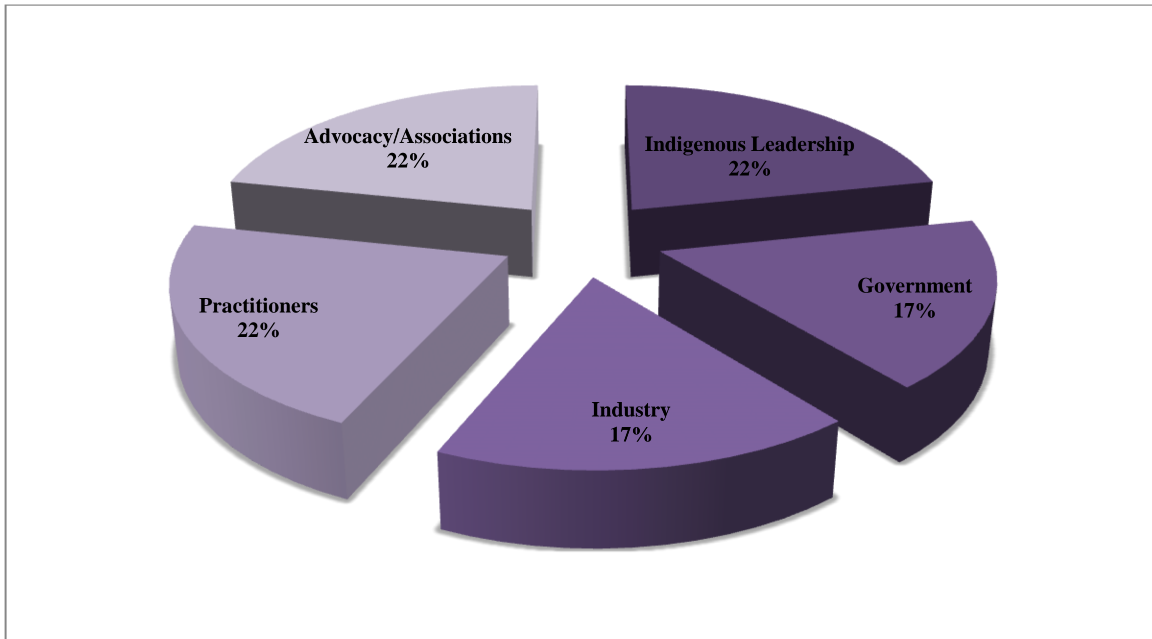

Figure 2: Participant distribution for Interviews conducted

3.5 Data Analysis

The first step in data analysis was interview transcription. Once transcribed, the transcriptions were coded. Coding was done using the MAXQDA12 software. The software is very helpful in organizing large volumes of qualitative data, including primary data (such as digital interview recordings and MSWord files) and secondary data (articles, documents, literature references, etc.).

Once the interviews were transcribed, I then conducted a ‘content analysis’ on the data; which basically entailed identifying terms, phrases, or actions that appear in the

document/transcripts (Cope, 2008). I used a combination of descriptive and category codes as well as analytic codes and themes. Descriptive codes are codes that reflect themes or patterns and answer questions like 'who, where, what, when and how'. Analytic codes are codes that 'dig deeper' into the context of the phrase (Cope, 2008). The codes I used for the data are presented below. These codes emerged both from the literature, and from the interviews themselves; representative of how FPIC was being described.

Descriptive Code(s):

1. Categories
    a. Indigenous Leadership
    b. Government
    c. Industry
    d. Practitioner
    e. Advocacy Groups

Analytical Code(s):

1. Meaning of FPIC
    a. Application in Canada
    b. Meaning
2. Consent
    a. What it Means
    b. Format of Expression
    c. What it Needs
    d. Challenges

    e. Who Consents
    f. Who Seeks Consent
3. Free
4. Prior
    a. Pre-Exploration
    b. Exploration
    c. During EA
5. Informed
6. Placeholders for FPIC
    a. Corporate Social Responsibility
    b. Environmental Assessment
    c. Other
    d. Policy
    e. Section 35
7. Path Forward
    a. Challenges
    b. Dialogue
    c. Education/Resources
    d. Legal Reform
    e. Lessons from Other Jurisdictions
    f. Role of Associations
    g. Role of Communities
    h. Role of Governments

i. Role of Industry

j. Role of Practitioners

Responses on the different topics were collated as a whole, instead of sub-groupings of opinions per stakeholder group represented in Figure 2 above. This fits with the qualitative approach to the research and also it protects the anonymity of the participants within each stakeholder group (maximum of 5 people in each group), as required by my ethics approval.

3.6 Validity and Reliability

Validity and reliability of the data collected are important factors in ensuring credibility of the research. According to Creswell (2003), validity reflects efforts made by the researcher to build accuracy and establish sufficient justification for theme development. Reliability refers to consistency, reproducibility and dependability of the results (Singleton & Straits, 2005).

The first step for building validity and reliability of the data is built into the research design through triangulation. By using a combination of document reviews, interviews and a broad range of data sources, I was able to confirm that findings using one method were consistent with findings through other means. I also shared a summary of my interviews with selected interviewees to ensure accuracy of representation of their perspectives. While coding the transcripts, I double-checked all the codes applied.

Understanding any other potential biases, including my own, has been important for ensuring reliability of the research findings. While an objective analysis is important, I needed to be cognizant at all times of my own beliefs and expectations as an EA practitioner. Understanding my biases and how they could potentially influence the findings or my interpretation of the findings has been an important exercise of this research. I did this by sharing my interpretations with my advisor and my research committee members.

3.7 Research Ethics

Prior to conducting any interviews, the project was subject to an Ethics review process at the University of Manitoba through the Joint-Faculty Research Ethics Board. Participation in the research was entirely voluntary and confidential. Participants were informed about the research and invited to participate. Every participant was provided a copy of the Consent form that covered the following topics:

- Researcher's name and contact information.
- Research supervisors' name and contact information.
- Purpose of the research.
- Research procedure.
- Confidentiality.
- Voluntary participation.
- Feedback.
- Dissemination.

- Risks and Benefits.
- Participant consent.

Participants indicated on the form if they consented to having the interview recorded, if they wished to receive a copy of the transcript, if they wished to be quoted and if so, whether they wanted their name to me mentioned or wished to be anonymous. Participants had the option to completely withdraw from the research at any time and without any consequences. At the time of presenting this research, none of the participants expressed the desire to withdraw from the research. To protect the confidentiality of the participants, consent forms obtained as hardcopies have been stored in a locked office and will be destroyed in 2021 (in five years from the time the interview was conducted). All consent forms obtained as electronic files, audio recordings and audio transcriptions have been saved in a password-protected folder on a computer, and will be destroyed in 2021 as well. Appendix C contains the Approval Certificate from Research Ethics and Compliance, University of Manitoba.

In the presentation of the data below codes are used to protect the confidentiality of the participants unless they wanted their names used. Also, in describing the number of responses received in the chapters that follow, unless the exact number is specified, the following terminology applies:

- ***Most*** refers to more 13 or more of the participants
- ***Several*** refers to 6-12 of the participants
- ***Some*** refers to less 3-5 participants

3.8 Dissemination

The results and findings of the research have been presented in this thesis document. A summary of the key findings will be sent to all participants. I will also be presenting the findings at national and international conferences. I also intend to publish a summary of the research in an applicable academic journal such as the *Impact Assessment and Project Appraisal*, and other professional publications such as *Plan Canada*, and the *Canadian Institute of Mining Journal*.

4.0 Meaning of FPIC in Action

4.1 Introduction

In August of 1966, Canada became a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination ("the Convention") (United Nations Treaty Collection, 2016). The Committee on the Elimination of Racial Discrimination (CERD) monitors implementation of the Convention by its member states. All States that are signatories are required to submit regular reports to the committee on how the rights are being implemented. From time to time, CERD publishes its interpretation of the content of human rights provisions referred to as "general recommendations" or "general comments" (UNHRC, 2016). In 1997, CERD issued a general recommendation (number 23) on the rights of Indigenous Peoples, affirming the requirement for FPIC under human rights and environmental regimes, other normative frameworks, and voluntary standards. This particular recommendation can be credited for FPIC to become a "seat-holder" in the context of resource extraction and Indigenous Peoples (Doyle C. M., 2015, p. 126). The trend has continued strongly since the adopted of the UNDRIP in 2007.

The sections that follow discuss some of the key perspectives on the substance of FPIC from the perspective of the research participants. The discussion pulls in relevant information from the interviews conducted, which are supplemented with appropriate references from literature and documents reviewed as a part of the research. The chapter first provides a general understanding of what FPIC means, and then deconstructs each of

the components: *Free, Prior, Informed*, and *Consent*. Key themes within each of the components are presented and discussed.

4.2 Meaning of FPIC as a Whole

In its most general sense, the right to self-determination drives the primary foundation of the requirement of FPIC (Doyle C. M., 2015; ICMM, 2010). Self-determination was certainly one of the key themes that emerged in discussions with participants on the meaning of FPIC as a whole. FPIC as self-determination has been affirmed by the Human Rights Committee (HRC), the Committee on Economic Social and Cultural Rights (CESCR), the CERD, and the UN General Assembly at the time of adoption of the UNDRIP in 2007. The right to FPIC is intended to protect a series of human rights, including the rights to self-determination, property, health, development, and cultural life. While human rights courts have laid out varying parameters for when FPIC should occur, they have all emphasized the need for *Consent* as intended to protect a series of rights, including the right to self-determination (Lehr A. K., 2014). The UN Global Compact Principles published a business guide in 2013. In it, businesses are encouraged to take voluntary actions, "guided by the principles of Indigenous Peoples' rights, including self-determination and FPIC, as well as full and effective participation in decision-making" (United Nations Global Compact, 2013). The guide also encourages businesses to respect Indigenous rights even if the State in which the business is operating does not recognize Indigenous Peoples' self-determination or land rights (page 19). One participant shared this notion of FPIC being about self-determination:

"I mean, to me, [FPIC] is primarily about empowerment; it's about the rights of Indigenous Peoples. It's about self-determination and it's about … about how Indigenous Peoples, themselves, want to use it and as a tool towards their own self-determination" – Participant No. 16

The literature noted that some key advantages of FPIC are that application of FPIC can allow companies to reduce project delays, avoid conflict-related expenses (BLC, 2012; Davis & Franks, 2011), manage financial risks (Amazon Watch, 2011), maintain healthy investor relations (Prno & Slocombe, 2012) by demonstrating that they meet societal norms (Gunningham, Kagan, & Thornton, 2004; Siltaoja & Vehkapera, 2010; Thomson & Boutilier, 2011) and respect Indigenous Peoples' rights (Greenspan, 2014). In this way, FPIC represents a new approach to thinking about business, a view that was iterated by one participant, who said:

"FPIC to me is a fundamentally different way of doing business. It is a process, not an outcome. Its not something you just do as regulatory requirements, which means that you need to have a system in place, you need to review your processes, in a way that allows you to demonstrate that at any moment in time, you had Consent." – Participant No. 8

4.3 Free

At its core, *Free* means Indigenous Peoples are, in that situation, able to exercise the freedom to make a decision, freely express their views, and free to exercise control over

their territories. These were three of the strongest themes that emerged in interview discussions. One participant stated:

> *"The Free aspect guarantees Indigenous Peoples stronger controls over the use of their lands over which there is an Aboriginal Title. The federal government has to be able to demonstrate much stronger cause in order to approve projects in the traditional territories"* – Participant No. 3

Another theme that emerged on the meaning of *Free* is absence of coercion. Several authors have expressed *Free* as meaning *Consent* is given without coercion, intimidation, manipulation, or pressure (Lehr A. K., 2014; United Nations Global Compact, 2013; ICMM, 2013). It means that *Consent* is obtained without psychological or physical tactics to coerce or pressure (United Nations Global Compact, 2013, p. 26).

Another theme that emerged was of *Free* as meaning that Indigenous Peoples have sufficient time *to engage* in the project, and not feel rushed (Lehr A. K., 2014). One participant stated in this regard:

> *"…"Free" means … that they are not being forced into agreeing to something that they don't want. However, there are layers to these words, because within the Indigenous nations, I think, there is an expectation that … citizens are engaging and freely supporting their leaders and making a decision without coercion. That is not to say that there is no pressure in the system. I think that a lot of difficult situations arise because there is pressure; people need to make a decision and something is happening fast*

… At the end of the day, if they are agreeing because they are being forced to because [of] some other a fear of punishment or a withdrawal of services or threats of some kind, then that is not freely given Consent."– Participant No. 4

In addition to coercion and manipulation, another interesting theme that emerged was the need for consideration of past issues in order for current decision-making to be considered Free. One participant noted:

"Free process means the community is not being coerced. They are entering into some sort of negotiation on FPIC under their own free will. They're not being pressured or bribed or anything like that. So putting pressure on the community, to sign on the dotted line, without unpacking the social issues that have existed for the last 150 years is advancing the negotiations too quickly " – Participant No. 9.

Another theme that emerged was the ability to understand what was being consented to. One participant said:

"Free [means that] it's your decision, you haven't been coerced in any way … and you know you Consent to that whatever it may be…it also means that you have all the facts, how and what [is being] proposed to do, [understand] the impacts, benefits whatever the case may be, and based on that you are either going to Consent or not." – Participant No. 5

Political non-influence was another theme that emerged in the course of discussions. In highlighting the duty of States to their populations against business-related human rights violations, the United Nations Guiding Principles on Human Rights emphasize the need to ensure that any procedures undertaken to protect human rights are free from political and other attempts to influence the outcome (United Nations, 2011). Some participants spoke about the need for a process to be free of political influence.

Another theme that emerged was for Free to mean consistency with Indigenous Peoples' own participatory methods. Referring to the structured and somewhat intimidating nature of Clean Environmental Commission hearings for large-scale projects in Manitoba, one participant stated that:

> *"Free means not costing participants anything, but it does costs proponents a lot, and proponents are probably the right party to bear any cost of consultation…a Free process would be one that removes these barriers [language, tradition, structure] and allows participants to participate in a manner that he or she or their organization is most comfortable with, rather than being forced to follow strict rules and strict guidelines"* – Participant No. 10

4.3.1 Key Themes for Free

The key themes that emerged in talking to participants on *Free* (and which are supplemented and supported by literature) are: freedom to make a decision; freedom to freely express views; freedom to exercise control over Indigenous territories; absence of coercion; having sufficient time to engage (which overlaps with the meaning of *Prior* discussed in Section 4.4 below); encompassing consideration of past issues; ability to understand what was being consented; limiting and being aware of any political non-influence; and consistency with Indigenous Peoples' own participatory methods.

4.4 Prior

Prior refers to seeking *Consent* sufficiently in advance of authorization or commencement of activities (UN-REDD & UNDP, 2013; Prno & Slocombe, 2012; United Nations, 2013) and before any impacts can occur (ICMM, 2010; United Nations Global Compact, 2013). One participant said:

> *"Prior means Consent is given before a project approval is given by the regulator or the government…probably be best done in the project planning stage, so proponents can address the issues before something irreplaceable or unrecoverable happens."* – Participant No. 10

Another participant stated:

> *"… [Prior is] before the provincial or local or federal government decision is reached, before project approvals from other governments are*

given … before irreversible steps are taken by other governments…certainly before the shovel hits the ground, but I think, even before that!" – Participant No 1

Using section 35 of *The Constitution Act, 1982*, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 as a framework of reference, once participant indicated that Indigenous communities are often at a disadvantage because they do not get involved early enough:

> *"[Prior is] before the train leaves the station on making [the] decision. That's what's very important. A lot of times Indigenous Peoples end up in a disadvantaged position, because the decision making process has already progressed quite a way down the track before the Crown comes and seriously engages with them. And so Prior means you need to start at the very outset, when the possibility first arises, you need to go out and seriously engage with Indigenous Peoples. And that includes, not just on the ground activities … it means strategic decisions also"* – Participant No. 14.

Another theme that emerged from the data was Prior meaning that discussions occur in a manner that allows for adequate time for "traditional decision-making" (Oxfam, 2016), so that the Indigenous communities have sufficient time to review all the relevant factors (BLC, 2012) and understand the information being shared:

> *"[If the company is] going to want to get on to the property in the spring or summer time … [they should start notification] possibly in the fall*

[Prior] ...that is there is going to be people wanting to get on to the territory for line cutting and who knows what. You wouldn't want to do it two days before."- Participant No. 9

Another participant echoed this view to respect the intent of the FPIC process:

> *"You can't buy FPIC. You have to earn it'. And that means you can't show up on a Saturday afternoon and say 'lets have a discussion'. It is something that needs to be taken care of with the same level of rigor; it has to be part of your planning process ... You need to really put this right at the start of your exploration process."* – Participant No. 8

Another theme that was noted in the literature was *Prior* meaning that the decision-making timeline established by Indigenous communities is respected and in accordance with their own customs and traditions (UN-REDD & UNDP, 2013). While several participants spoke about the need for an FPIC process to follow and respect Indigenous customs and traditions in general, no specific references to timelines were made.

One important theme that emerged both in literature and in discussions with participants was that *Prior* means that *Consent* is sought before every significant stage in project development and continually throughout the planning and implementation stages (BLC, 2012). In its Excellence in Social Responsibility e-toolkit (PDAC, 2009), the Prospectors & Developers Association of Canada (PDAC) recommends that exploration companies undertake active community engagement prior to "commencement of exploration

activities and throughout the life of the exploration process". Two participants shared this view that FPIC does not stop in time, and occurs on a continuum, and in sync with the nature of mining projects, i.e., multi-staged:

> *"… When you look at the negotiating process of a mine, there are thousands … of decisions that have to be made before you get to the actual approval of a mine. And even before you get to the actual Consent or acknowledgement that this is going to be a good project for the band. So, in reality, people have been practicing FPIC without calling it that; because it's a staged process."* – Participant No. 9

Some legal interpretations of the UNDRIP suggest that States should seek *Consent* before authorizing activities that may have a "major" impact on Indigenous communities (Lehr & Smith, 2010), which leaves room to argue that impacts during the staking and exploration stage of mining are not "major" and hence FPIC may become relevant only during the operational stages of a project. This view, Lehr & Smith (2010) note is contested, and recommend that *Consent* be obtained before any exploration occurs. Another challenge with this view is that typically impacts are determined through conducting an environmental assessment, but under *The Environment Act*, CCSM c E125, EAs typically do not get triggered until there is a project, i.e., an EA would only initiate when the proponent has determined that a mine is feasible, which could mean several years of exploration activity may precede the need for an EA, which according to most participants would be too late.

Several participants also noted the importance of *Consent* to go all the way back to the stage that sets the tone for subsequent decisions to be made:

> *"Prior is … before the decision is made. The question becomes how much prior? In my view, and this is supported by the Supreme Court, I think of it as…where does the first decision domino fall? When you think of the trail of the decisions, the dominos, where one flows to the next to the next and then creates the series of the events or decisions that lead to the possible impact on rights; the Supreme Court talk about the strategic-level of decision-making, that's where the 'Consent' must be focused." –*
> Participant No. 4

According to some participants, this 'first domino' can be interpreted as the stage where mine claims are staked or even as early as the stage where businesses are authorized to operate in Canada. Participants were asked to think about *Prior* in the context of specific stages of mine development; staking a claim all the way through to remediation and reclamation, and then comment what stage of mining does *Prior* suggest. Several participants spoke to the need for *Consent* to occur through all the stages of the project, including pre-exploration, exploration, mine development, closure and remediation. All participants indicated that discussions needed to start during or before the exploration stage. Several participants spoke about the need to obtain *Consent* specifically before staking claims on Indigenous territories:

> *"There is debate [at the staking stage] on whether or not there is an effect on Aboriginal rights. Granting a permit to explore before some form of*

communication between the community and the territorial government presumes an authority that doesn't really make sense. There should be some participation at this stage; suggesting there needs to be a re-thinking old the free-entry process. Especially since the process is now online. There was much more involved previously, but now its as easy as opening a website" – Participant No. 6

Another participant indicated that:

> *"[Prior is] as soon as they're aware that there's a potential for a project, that's [when] you need to contact us. Even if they say "well there's a potential for a project here 5 years out the road we're just doing some preliminary planning and testing whereas 10 years down the road or further we're coming to you to let you know to put it on your radar; it may or may not ever happen but it's on your radar"* – Participant No. 18.

Participants iterated that it does not make sense "to do consultation" when there already has been active exploration on the land. The approach is seen as disrespectful. Three participants highlighted how common it was for communities to not have prior knowledge of exploration activities. One of the Indigenous leaders stated that:

> *"Community members often call [us] in frustration advising [us] of someone who is out on the land, drilling and taking samples, and when we investigates, that is when we [as leadership] typically realize what is going on"* – Participant No. 11

All Indigenous leaders expressed the need for discussions to occur before any activity on the land. While they recognize the multiple challenges associated with those early discussions (discussed in Section 6.1), the conversation in their view can entail sharing with the community and leadership news that the company intends to "look around", and if they find something that seems to have potential for extraction, then further discussions can occur. While the content of the conversation is important, what is more noteworthy is the commitment to discuss, as more information becomes available.

Another participant noted that *Prior* is not about impacts or the potential for impacts to occur, but about respecting that one must seek permission before they go on someone else's land:

> *" Especially amongst the Indigenous groups, it goes to the essence of it; this is not about the impact you're going to have. This is about setting foot on my land"* – Participant No. 8

Using the example of one's own backyard, one participant reflected on how 'inappropriate' it would feel if they had no knowledge that someone had been in their backyard for a while:

> *"If [someone] came and knocked on my door and [said] – by the way I have been in your yard [for] like a week … the authorities would be notified. Words will be exchanged. I might escort him off my property, which doesn't sound a lot different that the response that [industry] gets*

sometimes, right? ... by the way it is less likely to let you be back on my property. You hurt the relationship and now I don't really trust you because you jumped over the fence and came into my yard ... I feel very territorial about my property ... I have a neighbor who knows that we share a lawn, there is no fence and he knows where that line is. If I were over there, picking dandelions on his side of the lawn, there would be a problem there! That is how territorial non-Indigenous Peoples are about [their] swath, [which] is collectively held by them for [generations] ... If it really were that Prior, then it would have to be Prior really meaningfully"
– Participant No. 19

Several participants also pointed to some key challenges with initiating FPIC early in order to action the notions of *Prior* shared. One participant pointed to the concern that initiating discussions before staking a claim is not a statutory obligation in Manitoba. This view is supported by a policy document available through the Mines Branch (Manitoba) titled *Procedures or Crown Consultation with Aboriginal Communities on Mine Development Projects*, a document that has been in a draft format since 2007. According to the *Aboriginal Engagement Handbook* (MAC, 2016), proponents are encouraged to engage "before applications are made that may trigger the Crown Duty to Consult" (page 11). One key challenge of engaging before staking a claim from industry's perspective is their potential loss of competitive advantage. This was echoed in one of the participant's views on *Prior*:

> *"This seems highly impractical from a mining company perspective, particularly because the intent behind staking is to secure legal rights over an area to retain control over the land and keeping other competitors out. Typically though, the company would have done some exploration, done some work, and when deemed commercially viable, they would initiate the approval process, start dealing with Indigenous communities seriously, seek their Consent, and start negotiating a benefits agreement."* – Participant No. 3

Another participant shared this concern with respect losing the competitive advantage not just to other companies but also to communities themselves:

> *"My competitive advantage is knowing where I am going to put that stake in the ground. So if I give that away, I have given it all away ... you will lose the competitive advantage and it ... [it could also mean that communities] would be doing that work themselves"* – Participant No. 19

Another challenge associated with early discussions is managing community expectations. Two participants spoke to this and highlighted the importance of knowing what it is that needs to be talked if discussions begin pre-exploration:

> *"While Prior may represent early, and early may suggest exploration, a mining company that involves at the exploration stage has to manage the expectations of the communities. One way to overcome that challenge of*

inflated expectations is to maintain an open process and share. Sharing helps build trust. " – Participant no. 13

One of the key challenges with the notion of *Prior* pointed out by one of the participants is the principle of free-entry in Manitoba. In Canada, there are two main approaches to acquiring mineral rights: the "free-entry" system and the "Crown discretion" system. Under the free-entry system, companies can obtain mineral rights by staking claims on a parcel of land and down the line acquire Crown leases if they want to continue to explore on that parcel (Government of Canada, 2016). In practice, if a company has staked a claim (with or without the *Consent* of the Indigenous community whose territory the claim may be in), and the community down the line wishes to claim that piece of land for Aboriginal title, they cannot easily do so, potentially sterilizing that land from traditional use. This in essence, suggests that *Consent* should be obtained before a company is allowed to stake a claim.

4.4.1 Key Themes for Prior

One of the strongest themes that emerged in conversations with the research participants was that *Prior* should be pre-exploration, which would by default make it pre-development. The second key theme was that *Prior* means giving communities sufficient time to understand relevant issues so they can formulate their views on the activities that may in the future impact their lands. Thirdly, *Prior* means continually through the life of a project. Some challenges were noted with initiating discussions 'too early' (i.e. pre-

exploration), including potential challenges managing community expectations and not knowing what should really be talked about.

4.5 Informed

In general, the understanding of *Informed* in the literature was congruent with participants' understanding and interpretation of *Informed*. In the literature, *Informed* refers to all parties having complete, understandable, and relevant information on the full range of issues and potential impacts that may arise from the activity of decision in question (BLC, 2012), their rights and obligations (ICMM, 2010; Lehr A. K., 2014); and implications should Consent be withheld (UN-REDD & UNDP, 2013). It is also important to speak about both positive as well as adverse impacts (including how adverse impacts may be reduced and positive impacts enhanced), as a balanced representation will reduce the risk of Indigenous Peoples feeling that they are being deceived or being treated unfairly (Lehr & Smith, 2010). In providing a sense of impacts, it is important to note both the short term and long-term impacts, and discuss how these might change through the life of the project (PDAC, 2009), as noted by one of the research participants:

> *"[Communities should know] whether there is a reasonable trade-off and if there is a constant revenue stream for an ongoing compensation. The ongoing piece is important because the traditional territory is a collective right; so one cannot assume that by providing a short-term benefit, the company has sufficiently mitigated."* – Participant No. 6

One interesting theme that emerged in discussions with the participants, and was supported by literature, was to give communities an opportunity to hear the views of other stakeholders in the process so they can contribute to an overall greater understanding of the potential implications of the project (ICMM, 2010). This may include information like the nature, size, pace, reversibility, and scope, purpose, duration of desired activity, a preliminary assessment of effects (United Nations Global Compact, 2013), and personnel likely to be involved in the execution of the project (UN Economic & Social Council, 2005). One participant resonated with this view and said:

> *"[Informed mean that the communities] have been provided the opportunity to be informed what the proposal is … They need to have an understanding of that and so we try to do some consultations such that they can properly and with a level of comfort assess what the impacts are and then have that level of comfort that the government has made sincere effort to mitigate or accommodate for them."* – Participant No. 2

Another participant also resonated with the view and also spoke about being aware of the worldview being applied in understanding the activities being proposed:

> *"Informed is about having all of the relevant information that is necessary to make a decision. There is a huge cost, one could ask how much is relevant, is the information existing or not, if it is only from one worldview … Is it limited to scientific, financial or engineering information or is it also social data, community-level information, historical and traditional knowledge? There is a problem or issue with what is considered relevant*

> *and what is considered as not. [Another relevant one in] environmental assessment processes [is] … is this issue around what is "proprietary" …where people don't want to share for legitimate business reasons, the critical information regarding the profitability of the project or the scope of it or other things like that could weigh heavily on the decision about whether this project is good enough given the impact is or the benefits that are predicted."*– Participant No. 4

Another theme that emerged was that of the timing of the conversations as being critical to how well informed a community may feel about a project. Starting the process early allows proponents and host communities so they can together establish the key issues that the community would expect to be informed about. This view in particular overlaps with the notion of *Prior*. Several participants resonated with this view. One participant expressed it as:

> *"[Proponents argue that] we are providing all this information and doing all these environmental baseline studies [to] show how we are going to do is to have a minimal impact. [But communities might feel], that [the] information is faulty or there are these other risks that haven't [been] considered or these are [additional] reasons why not a project should be done but then the project gets approved and then it becomes for these groups to invest a hell lot of time and energy and an emotional energy and sometimes for years."* – Participant No 1

For a process to be *Informed*, the right people need to be in the room; i.e., whoever needs to be informed should be informed (PDAC, 2009; UN-REDD & UNDP, 2013). This description of *Informed* also ties in with the idea of who seeks Consent (which is explored further in Section 4.6.3). Several participants agreed with this benchmark of Consent as relating to making sure that all the right people are in the room. One participant in particular, said:

> *"[Informed is] whether meaningful consultation has taken place; whether crown consultation has occurred to supplement [proponent led engagement], and whether everyone who should be informed has been informed." – Participant N0 6.*

Another participant stated:

> *"They might want everything upfront, which can be challenging as companies may feel that there is nothing to talk about. I believe both parties should realize what it is that can in fact be talked about." –* Participant No. 12

Some authors advise that companies should not assume that community elders or community leaders will always transmit information back to the community, and therefore recommend using an approach that is a combination of leadership meetings and larger community events (Lehr & Smith, 2010). This was another theme that came up during the course of discussions with the participants. While some participants resonated with this concern, and pointed out some practical challenges and opportunities, others

called for industry to respect Indigenous leadership and governance structures. This is further explored in Section 5 on Challenges to Implementation of FPIC.

Another important theme that emerged in the course of discussions, and is supported by literature is that *Informed* also means that the information is provided in such a way that Indigenous Peoples understand (in their language and with proper access to it) (United Nations Global Compact, 2013; Herz, Vina, & Sohn, 2007; UN-REDD & UNDP, 2013), and more importantly in a manner that "strengthens and not erodes Indigenous of local cultures" (UN-REDD & UNDP, 2013, p. 19). Most participants expressed this view. One participant highlighted spoke about the mechanism this could be achieved by, and the need to build that information together:

> *"[It is important to consider] who is generating the data; … it feels like the best way to interpret [Informed] would be that the information … is possibly generated together; [so] it's not just being informed by others, … [but about] about building capacities by informing oneself so the people, who are going forward or wanting to go forward on an initiative, work together to generate the data that they both trust, the information that they both trust and build their capacity in each others' sets of knowledge or data so that you know you get something where you are not just informed by the outside but you actually become informed*" – Participant No. 4

Another theme that emerged was that communities be given sufficient time to synthesize this information. In addition to giving communities time, one participant indicated that this time is important for a community's healing:

> *"There needs to be time for the communities to understand what this project could do ... to get to some of the healing issues to be addressed; because a residential school is a white institution, a company is a white institution; they are both foreign, and they both have possibility of doing damage, and there are two generations on each community, at least, in Canada, that views the residential school system as a catalyst for causing all these problems. So why should we believe that another white institution is going solve all our problems? We're still living through the negative effects of a white institution called the residential school system. Its not as cut and dry as that, but there is that aspect of healing that needs to be addressed."* – Participant No. 9

This emphasizes the possible breath of FPIC as an application beyond just natural resource development projects, if taken into consideration as an important tool for reconciliation and healing, consistent with the calls to action put forth by the TRC as outlined in Chapter 2 (TRC, 2014).

Given the expectation that companies must engage pre-exploration, it becomes important to understand what information can be shared. Several participants point to the concern or perception of industry possibly losing their competitive advantage in the market if they start discussing their potential pursuits with communities:

"Yeah, and also one of the big [issues], when it comes to the environmental processes of the resource development [is sharing of the business proprietary information], where [companies] don't want to share for legitimate business reasons … the critical information regarding the profitability of the project or the scope of or … if this project is good enough given the impact or the benefits …[so the information], is private or sort of private." – Participant No. 4

In response to this challenge, Indigenous leader participants iterated the need to be mindful of the intent of the process; to respect communities. Indigenous leader participants encourage companies to maintain transparency, say they are simply exploring, what they are hoping to find, and should something be found, what timeframes the community could expect in terms of moving into production, and what permits and approvals they will need. Once that interaction has been established, leaders encourage companies to keep returning with regular updates on what they are finding or not finding. One participant articulated this really well:

"…If there is a mine being planned in a community and it's the very first meeting, no one in the right mind at that point is going to say it's on or off. It's a staged, phased process; where timelines are established, and issues are brought to the table and issues are explored over time, studies are done, … and then someone at some point has to decide; is this a reasonable project?" Participant No. 6

One Indigenous leader urged to focus on the intent of the process, which is respect:

> *"…all First nations want is respect from corporations, where they can come to the community, to the leadership and tell them what it is that they are doing or want to do, and asking how the process in working with the First nations would work. This would demonstrate respect and accountability. That open process would allow the community to assess the economic value of the proposition but weigh it against the environmental implications."* – Participant No. 11

4.5.1 Key Themes for Informed

Some of the key themes that emerged in the research are: *Informed* means to have the relevant information pertaining to the project (what, when, how, long term and short term impacts and other relevant data); to ensure the host community has the capacity to be informed; build the information together, to allow for true learning and capacity-building; ensure information-sharing is done so in culturally appropriate ways; ensure information is being shared on an ongoing basis (early and through all phases of mine development), establishing a clear understanding of what there is to talk about at each stage; be mindful of the true intent of the discussions in the first place; i.e., build respect and accountability with the host community.

4.6 Consent

There is much discussion on the meaning of Consent; what it represents, how to build it, who seeks it, who gives it, and some of the major challenges associated with it. The sections that follow explore some of these topics in more detail, starting with the 'hot potato topic' – is Consent a right to veto?

4.6.1 Is Consent Veto?

Whether or not Consent is veto is probably the single most debated aspect of FPIC. Globally, a number of governments have expressed their concern that Consent is an invasion of national sovereignty. Companies globally continue to be concerned about communities interpreting Consent as the ability to veto projects. (Lehr A. K., 2014). The meaning of Consent continues to evolve in Canada. Despite Canada's ongoing commitment to UNDRIP, there is continued debate on how it can be interpreted in a manner that is consistent with the Constitution and other applicable legislation. While Canada made a commitment to "implement" UNDRIP in May 2016, what this implementation means in terms of the Consent aspect of FPIC is yet to unfold.

In 2014, during an International Indigenous Peoples Workshop co-hosted by the UNGC and the ICMM, of the key challenges associated with FPIC the central one was in relation to Consent, whereby it was noted that one of the biggest challenges with Consent is whether or not it grants an effective right to veto over a project. In most countries governments have "retained the right to eminent domain, claim ownership over sub-soil

resources or else are reluctant to recognize indigeneity, which even for companies who wish to advance FPIC, can become a real dilemma" (UNGC & ICMM, 2014). Across Canada, several Indigenous communities continue to cite the UNDRIP as evidence of a formal veto on projects in their territories (Hazlewood, 2016), interpreting UNDRIP as formal Canadian law as opposed to being aspirational (Coates, 2016). However, this view is contested by Grand Chief Edward John, a lawyer and member of the BC First Nations Summit executive, who indicated, using a legal analysis by Paul Joffe, that 'it is not a coincidence that the UNDRIP does not use the term veto, which could imply "complete and arbitrary power, with no balancing of rights". Instead the UNDRIP uses the term Consent, the goal of which, according to Chief John, is to "comprehensively balance all interests as a result of intensive and sincere government and industry efforts to consult and seek consent" (O'Neil, 2016).

This analysis is in sync with the understanding presented by Indigenous Affairs. The Special Rapporteur[23] emphasized the importance of meaningful consultation in "good faith…in order to obtain their *Free Prior* and *Informed Consent*", not to be regarded as a "veto power", but focusing on the fact that the Declaration establishes "consent as the objective of consultations with Indigenous Peoples", and not a free-standing right applied in all circumstances (HRC, 2009; Torys LLP, 2016).

[23] Refers to an expert appointed by the UN Human Rights Council. The individual comes from the field of Indigenous rights and their role is to examine obstacles to protecting Indigenous rights and make recommendations when the rights seem to have been violated. The first Special Rapporteur was James Anaya, who served in this capacity till 2014.

Participants also had a lot to say about Consent and some expressed in this regard that Consent does represent “veto power”. One participant (Participant No. 11) highlighted that in Manitoba, there continues to be significant concern amongst policy makers with adding the word ‘Consent’ into documents that provide guidance to industry on how to deal with Indigenous communities. This reluctance, Participant No. 11, suggests that “Consent is a game-changer, it represents a right to veto”. Another participant echoed this interpretation of FPIC, and said:

> *“FPIC represents the next stage in strengthening Indigenous rights over Indigenous territories. From a practical point of view, FPIC suggests that we are moving closer to a situation where Indigenous communities have the veto over development within their traditional territory. This has not historically been the case. In the past, even if communities objected to a project, the Consultation and Accommodation process allowed for governments to proceed under certain circumstances. However, from a legal perspective in Canada, we have evolved from Consultations and Accommodations on projects, to now recognizing Aboriginal Title. The idea of FPIC then is for Indigenous communities to have substantial control over traditional territories, and hence have the power to explicit Consent.”* – Participant No. 3

Reflecting on their understanding of the current status of jurisprudence in Canada, another participant spoke about the need for a word different from Consent, indicating it should mean something different from Yes or No:

"I don't think that the courts really yet are supporting a veto. I don't think, I am seeing it yet … It's about exercising rights, so where there is an encroachment on those rights, then there needs to be some kind of accommodation but what I have seen so far in terms of the law and its interpretation is that still just because your rights are being infringed that's up to the Crown to weigh those accommodations appropriately, so that's a big answer to the Free Prior Informed Consent … I don't know if the UN ever defined the word … if it's going to mean something different than the Yes or No, then we need another word, like consensus may be … it's really hard for me to wrap my head around as [someone] from the 21st century that it's debatable what Consent means. - Participant No. 19

Some other participants suggested that the discussion on Consent being veto or not veto is a distraction from the main issue; that of respecting and advancing how Indigenous rights get represented in practice in the world of natural resource extraction. One participant urged a re-direction of the discussion that could allow for a more effective dialogue with greater potential for real outcomes:

"… with Consent, everybody is getting hung up on the veto issue of Consent, and its scaring people away. [Consent] is basically about how you can approach healing of the community. If you take it from that perspective, I think companies and communities will have a far more warm and possibly beneficial relationship; if it is looked at from a perspective of healing; and not just economical development and jobs; because just

about every community in Canada, every First nation community needs healing". – Participant No. 9

4.6.2 Consent as Agreement

Consent is also explained as involving "clear and compelling demonstration by the Indigenous Peoples concerned of their agreement to the proposal under consideration" (Carmen, 2010). Carmen (2010) goes on to explain that, the mechanism for agreement must be agreed upon by the Indigenous Peoples concerned, must be consistent with their decision-making structures and criteria, and with participation of their own representative decision-making authorities.

Most of the participants spoke about Consent as a form of agreement. One participant presented this agreement as a very fluid concept; one that could evolve over the course of time:

"…Consent means that you agree, but that doesn't mean that you agree in the exact way, but you come up with a solution that you would agree to, it doesn't have to mean that you necessarily have to like it all; it's ... very different [from] 100% support ...[It is] a subtle difference but it, I think, it allows for the broader interpretation of the concerns. It allows for Indigenous communities to not have to be forced into a black or white choice, where it's like if we give our Consent then we love … it just means that you are willing to allow it to proceed, however, you may have many things that need to happen in order for that to go ahead, like there might

be a whole deal associated with it in terms of the changes [to] accommodate this, accommodate that " – Participant No. 4

Different people, not surprisingly, have defined Consent, in different ways. The UN Global Compact explains Consent, when obtained in a manner that is *Free, Prior* and *Informed* to represent a formal, documented social license to operate (United Nations Global Compact, 2013). Several participants resonated with this view, and spoke about Consent as an expression of ongoing acceptance and approval, something they emphasized was imperative for any project to proceed, and something that proponents are already accustomed to, due to the permitting processes already in place. This introduced an interesting perspective and one that is perhaps an important challenge to take into consideration, as Consent is unwrapped over the months and years to come. One participant said:

> *"Most [Indigenous communities] take the position that they're speaking to … not because proponents need [the] so called "social license", they don't accept that. [Communities] take the position that the proponents need their authorization. It's their territory, the proponent wants to come in and do something in their territory, regardless of what their crowns regulatory processes are, [Indigenous communities] take the position that the proponent needs authorization from them. And that's what the agreement represents. The agreement represents that the Indigenous Peoples authorize the proponent to operate within their territory on*

certain terms. No, it's not a veto, it's an agreement. They're getting their Consent."– Participant No. 14

One participant pointed out that equating Consent to an approval can be problematic, particularly because for industry, there would then be two parties who can potentially say No to a project - the government body administering the applicable legislation and the Indigenous communities whose territory overlaps with industry's area of interest. Consent in essence, could provide Indigenous Peoples with an equal decision-making power:

> *"[Consent represents] equal decision-making and equal governance over decisions related to shared territory or the business territories. Everyone can have a veto power in that sense to me. To me, it's an expression of co-governance and decision-making power."* – Participant No. 1

Another participant spoke about Consent as a spectrum of sorts; with non-objection at one end, and support at the other:

> *"Consent at one end of the spectrum talks about non-objection, where Indigenous communities say that we are not going to get in the way of this development. At the other end of the spectrum, it is more like support, acceptance, and recognition that this is something that they want to have happen in the community's traditional territory. The assumption in this is that there are actual tangible and intangible benefits from the development*." – Participant No. 6

Several participants highlighted the importance of recognizing that Consent was about relationship building[24], about ongoing social acceptance, and something that could evolve over time. One participant stated:

> *"Consent, as in social acceptance. I think ongoing social acceptance. Consent also means at any moment, the community can basically hold you accountable in a meaningful way, and they can't, then you don't have FPIC. Companies are aware that at any moment in time, the community can pull the plug. So that's how I see it. Its not rocket science. Its not about yay or nay, or votes or 51% or you don't go ahead. But approach is much more as a process of relationship building"* – Participant No. 8

One participant (Participant No. 12) shared a YouTube video on consensual sex, which is used as a tool to educate youth on the topic, as an illustration of the meaning of Consent (Blue Seat Studios, 2015). The video offers some key messages on Consent: One: if you offer someone a cup of tea, and they say No, you do not force them to drink it. Two: if someone agrees to a cup of tea one day, it does not suggest that they have agreed to drink that cup of tea in perpetuity. Three: if someone agrees to drink a cup of tea, and in the time it takes you to prepare it, they change their mind, it does not mean you force them to drink it because they agreed when you first offered. Using this video as an example,

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[24] This is highlighted later in the document as a part of the discussion on 'how to build *Consent*'

Participant No. 12 emphasized that simply informing people does not entitle anyone to proceed, and the need to respect the fact that people can change their minds, based on new information, or based on their own understanding of potential implications of the project on the health of the community or the economic status of the community, which they may not have noted before.

Other participants spoke about the need for Consent to balance interests; those of the communities, governments, industry and all others who make have a ‘stake’. It was also pointed out that the meaning of Consent could vary from one jurisdiction to the other (much like the variability of the definition and understanding of Consent in other jurisdictions globally). Similarly, it was also noted that Consent could be interpreted in different ways from one Indigenous community to the other (contiguous to the non-homogeneity across communities just within each province and within Canada).

4.6.3 Who Seeks Consent

Who seeks Consent was also an issue important to the participants and that has been raised in the literature. In fact, the evolution in the Canadian jurisprudence on Indigenous rights has resulted in swift reactions from both Indigenous Peoples and industry on this topic. While Duty to Consult and accommodate are seen as the responsibilities of the Crown, there is widespread understanding and agreement that industry needs to do their share of engaging, informing and doing the legwork for Duty to Consult (TRC, 2015; Torys LLP, 2016; Haida Nation v. British Columbia (Minister of Forests), 2004).

Specifically in the context of the UNDRIP and FPIC though, some participants expressed that it is a responsibility that falls upon the governments, and not the proponent. One participant expressed this as:

> *"Ultimately, it is [the] Crown's responsibility to ensure that its honor is maintained, and if FPIC starts being implemented then the responsibility falls on governments. Governments may try to delegate the responsibility to the companies, which can create problems because companies and governments may not have the same interests. The responsibility cannot lie entirely with companies, because even though the companies know the project best, and have a sense of the potential impacts, if there is any breakdown in communication through the process, of if there are questions about whether or not Consent was given freely; the responsibility to resolve the issue will lie with the government."* – Participant No. 3

Another participant echoed this view:

> *"It is the Crown that is the signatory to UNDRIP and not the proponent, so you have to put that in some kind of a federal or provincial [law] and both the jurisdictions require the proponent to get the Consent of the Nations in the territories ...It depends on ... what degree you consider the Nations to be governments. If they are governments, then the proponents would need their approval just like in the areas of shared federal and provincial jurisdictions ...The proponents are the ones that need to get the authorization Consent. But on the other hand, the obligation would lie on*

> *the Crown then. UNDRIP is much more [about] the relationship between the Crown and the Indigenous Peoples"* – Participant No. 1

Several participants echoed this view of "shared responsibility". One participant noted that:

> *"There is nothing stopping the companies from engaging the communities. So while consultation is largely our responsibility, an obligation for the government; engagement is what the companies can do. And when they don't, it is a challenge for me as a geologist, as a government geologist, because invariably if the company doesn't choose to participate, then I am the only technical person involved in this process. And I end up having to present and trying to educate the community on the nature of the project and then I am kind of compromised."* – Participant No. 2

One participant pointed out that in seeking Consent, one must be mindful of who within the community is giving Consent. In some instances, a proposed project may be in the traditional territory of several Indigenous groups:

> *"[in seeking Consent] one needs to be mindful of the fact that Consent will evolve through the different stages of mining; it depends on who is giving Consent within the community, and which community within the Indigenous landscape is giving Consent."* – Participant No. 13

4.6.4 How to Build Consent

There is a significant volume of literature on what an engagement process should look like and what some key principles and objectives should be. Several international bodies (like the International Association of Impact Assessment, and International Association for Public Participation) have published guidance books on what to do, what not to do, how to do it, etc. Therefore, I merely present, what I believe is a reiteration of what has already been said about key attributes of a good process. Having said that and more specifically related to mining and in the context of Indigenous relations, in recent years, government bodies and industry associations have continued to take steps to ensure that industry has access to resources to facilitate community-industry relationship building (Coates, 2016). Examples of these include the Aboriginal Engagement Handbook produced by The Mining Association of Manitoba (MAMI) in 2015, the Good Practice Guide produced by the ICMM in 2010 (ICMM, 2010), and the Mineral Exploration Guidelines for Saskatchewan produced by the Saskatchewan Mining Association (SMA, 2012).

> *"Like two cities; two neighborhoods in the same city. And I think if companies can just break this thing down in the form that's more imaginable; like how would you approach a neighbor to do something; well, you make a relationship, you knock on the door, you get to know each other a little bit. Because you are knocking on someone's door.*" – Participant No. 9

Most participants spoke specifically about the need for a process that demonstrates mutual respect, trust, understanding, accountability, and patience. One of these participants said that it is important for those who seek Consent to recognize that Consent can come on a spectrum, 'with non-objection being at one end of the spectrum, and support and acceptance at the other end of the spectrum'. Other participants spoke about the need for the process of building Consent to be constant, transparent, and respectful and the need for the process to be authentic, create an opportunity for dialogue, and an opportunity to build long-term relationships. One participant spoke about the important of treating people respectfully (which was also noted by other participants) and knowing where the community's line in the sand is; whether its wanting a community center or wanting long-term partnership in a resource development project. Another key point raised by a few participants was for the process to be continuous, and reflective of a staged-approach, quite similar to how mining evolves (i.e., exploration being one stage, development being a subsequent stage). They stated:

> *"if there is a mine being planned in a community and it's the very first meeting, no one in the right mind at that point is going to say it's on or off. It's a staged, phased process; where timelines are established, and issues are brought to the table and issues are explored over time, studies are done, [etc.], and then someone at some point has to decide; is this a reasonable project? So FPIC is actually part of that all the way along"* – Participant No. 9

Another participant said that communities must feel like they are being heard, and that they can trust the process, and trust the message. This, the participant indicated, can be achieved by following a through process; i.e., “meeting, the *Free*, the *Prior*, and the *Informed*”.

A few participants spoke about a process that involves building Consent collaboratively:

> *“Early on, Crown governments should insist that Indigenous governments are part of the early project discussions between the proponent and the Crown. The provincial, territorial or federal government could also be having those discussions one-on-one government-to-government with Indigenous nations. They don’t necessarily have to have the proponent in the room. But what you don’t want is the proponent going to the Crown government, basically predetermining the scope of the project and approval and then the mining company being the main point of the contact back to the Indigenous community. The problem with this is the perception that the proponent is showing up into the community with the implicit weight of the Crown behind them. The perception in many Indigenous communities is that it’s the proponent is the one making the decisions”* – Participant No. 4.

Some participants spoke about the need for a Consent-building process to take into account historical grievances. This, they suggested, would allow for issues to be addressed in a more holistic manner. One participant indicated one of the things that they have noted in impact-benefit agreements negotiated in recent history, which they believe

could suggest an effective way to build Consent, are measures like building healing centers and measures to build social capacity in communities. A key difference, as pointed out by one of the participants, between engagement and FPIC is that FPIC is not merely a two-way exchange of information. FPIC, by its nature 'represents that there is a clear decision that comes out of the engagement process'. Another participant listed key elements that would be required to build Consent:

> *"…in order to have Consent you need to have the people … giving in fact a license to the corporations to operate and that includes being full partners from the beginning, from the planning, environmental accommodation, the monitoring and the revenue and equity sharing."* – Participant No. 18

In reflecting comments made by an Indigenous chief at some point, one of the participants stated:

> *"[In reflecting on how we should be working], the Chief made a really good point. He was saying, "I expect non Indigenous Peoples," and he was referring specifically to government officials, "when they come to see me, to have a blank piece of paper. I don't want them coming with a plan, I don't want them coming with a proposal. I want them coming to sit down and let's talk about what the issues are, and we'll make up the plan together."* – Participant No. 14

4.6.5 Key Themes for Consent

Some of the key themes that emerged in talking to participants about Consent are: while Consent is perceived by some as veto and by others as not veto, yet others think the discussion in the context of veto is distracting. Several participants see Consent as agreement of some form. Participants provides their perspectives on who seeks Consent; while some believe it is the responsibility of the Crown, most agree that it cannot be done without the participation of industry. Participants also provided several perspectives on how to build Consent by focusing on trust, respect and recognizing that building Consent is a multi-staged process.

4.6.6 Concluding Remarks

Deconstructing FPIC to understand each of the components; i.e., *Free, Prior, Informed* and *Consent*, was a very enlightening process. Participant views for the most part were congruent with how each of the components is represented in the literature on the topic. The meaning of each of the components also overlapped at times, illustrating that what these components mean is not universal, and can be subjective. In particular, it is noteworthy how meanings evolve when talking to different players in the mining cycle. While there are nuances in how participants make sense of FPIC, there is significant overlap in their general understanding of these components. Understanding what FPIC means to different players is critical to the next logical step of understanding how and where FPIC can be applied in the context of mining in Canada. The next chapter looks at some of these vehicles.

5.0 Key Challenges for FPIC

Over the last few months, there has been a notable increase in the number of times FPIC and UNDRIP have been used in discussions related to opposition to natural resource development projects in Canada; suggesting that adherence to the principles of FPIC can provide Indigenous communities with leverage they may need to successfully negotiate projects on their territories (The World Weekly, 2016; The Canadian Press, 2016; Roker, 2016; Edmonton Journal, 2016).

On September 7, 2016, the Federal Minister of Justice, Jody Wilson-Raybould advised that implementation of UNDRIP in Canada will need to take into account specific constitutional and legal contexts, wishes of Indigenous groups, and a thorough determination of what pieces of legislation need to be amended. The path forward for implementing UNDRIP and subsequently FPIC in Canada is thus to be determined.

During one of the several dozen conversations that I had with research participants, through my journey to explore FPIC, one of them said that 'the biggest contribution I could make on this topic was to talk about some of the issues that were not necessarily being talked about'. I hope that the sections that follow can offer some value and be taken into consideration as Canada and Manitoba determine the path forward for FPIC. The views expressed by research participants have been collated below:

5.1 System of Free-Entry

The system of free-entry in Canada grants mineral industries privileged access to Crown land. In order to explore in the area, the prospective miner would typically need a permit to have access to the land (one of the participants noted that in some cases, this can simply be done online). Most land ownership does not include sub-surface rights, and therefore staking a claim for a mineral right does not involve getting Consent from the land or property owner, which results in significant tension between junior mining companies wishing to explore and Indigenous communities (Robinson, H.E., 2007). Several participants spoke about the disadvantages of a free-entry system, which while allowing Indigenous communities to continue to exercise their traditional rights to hunting, fishing and trapping in the area, gives preference to mineral extraction, and precludes communities from pursuing that land for their own uses, including establishing Reservations ("Reserves"). Two participants noted that FPIC would represent a fundamental challenge to the system of free-entry, because, in order for FPIC to be truly implemented, companies will need to engage communities before staking claims. In essence, another participant noted, 'mining and resource extraction will no longer be the preferred use of the land in question'.

5.2 Lack of legal clarity

There continues to be significant debate over the role of section 35, Duty to Consult and proponent-led project specific activities. Lack of clarity on Indigenous issues continues to deter mining companies from various geographies across the country (Jackson & Green,

2015; Lehr & Smith, 2010). A majority of the participants spoke the lack of clarity on FPIC from a legal point of view. One participant suggested that there is a tendency in industry to use of lack of legal clarity as “an excuse” to not undertake community industry relations seriously. What complicates matters further, as one participant pointed out, is that there is a significant difference in expectations on degree of community involvement in mine development projects from one province to the other; with some jurisdictions being weaker than others and thus creating a great degree of uncertainty for companies. In the absence of legal clarity, one participant noted, companies would continue to risk their investments; due to escalated uncertainty about process and community expectations. Legal certainty is paramount to the success of any investment in the natural resource sector. One participant noted that was while the new federal government in Canada has committed to implementing UNDRIP, it is not clear if implementation will entail implementing all articles of the Declaration or if only certain articles will be selected. Depending on what articles becomes the focus; different pieces of legislation will need to be reviewed and reconciled. For example, two participants noted that should FPIC become “the law”, it would ‘essentially carry the weight of the *Natural Resources Transfer Act* (NRTA), which would subsequently make it important to clarify which piece of legislation supersedes which; for example, would operational aspects of FPIC fall under the Indigenous and Northern Affairs (INAC) or under mineral development processes for each province? While UNDRIP is a national commitment, natural resource management is a provincial responsibility. Reconciling some of these issues will be paramount to any success on the FPIC front.

Along a similar vein, one participant noted that in Manitoba, before undertaking any exploratory activity on the land, proponents do seek *Consent*, in the form of licenses and permits, from the Province of Manitoba. Introducing FPIC would imply that proponents now have to seek Consent from communities as well. In the absence of legal clarity on whose permission supersedes or how a proponent would seek this "three-way" Consent procedurally can pose significant uncertainty, which is 'not healthy from an investment standpoint'.

Reflecting on the need for FPIC as something that should come through legal reform, several participants pointed out that legal reform takes a significant amount of time. Plus, it would be important to also assess comprehensively what pieces of legislation need to be looked at to ensure any reform covers all the aspects of natural resource development across the country.

Another participant pointed out that currently FPIC is not a legal requirement, which in a way offers companies with the flexibility to build collaborative relationships directly with communities, and companies that do well with communities, do well overall (i.e., have a strong competitive advantage). Making FPIC a legal requirement would mean companies lose that competitive advantage. Further, if FPIC were to become a legal requirement, this could potentially pose a risk for it to be misused; i.e., if companies knew that the only way they can develop their projects is if they have Consent from communities, it could make the process subject to coercion and pressure. Participants pointed out that some

examples of this have been noted in other jurisdictions, such as Philippines and Brazil, both of which have legislated FPIC.

5.3 Environmental Assessment legislation in the province

Several participants spoke about EA being one avenue that can be used to 'build and maintain' FPIC. However, several challenges were noted in this regard.

Some participants spoke about the poor quality of environmental assessments as one of the reasons for failure to recognize Indigenous rights. One participant noted that while FPIC makes most sense within an EA framework, EAs are typically "so sloppily done", that FPIC cannot be trusted to be in an EA framework.

One participant spoke about the change in environmental regulation of mining projects in Manitoba as one of the causes of the lack of Indigenous involvement in projects. In reflecting on EA practice through the course of their career, the participant said that the EA process is "broken". Projects that have the potential to have significant environmental impact are subject to public hearings administered by the Clean Environment Commission (CEC). These hearings are "intimidating", and 'do not accommodate alternative worldviews'. The structure is noted to be very formal, "mainly driven by lawyers and not the general public", which prevents people from 'freely expressing their views'. Another critical observation made by another participant was that in their experience from attending CEC hearings for major projects in Manitoba in the recent

past, participation from the Environmental Approvals branch of the DSD (which is the department that administers *The Environment Act*, CCSM c E125) has been limited, which is believed to negatively impact public trust in the ability of the Province to allow for responsible development in the province; i.e., if the Department does not attend CEC hearings where projects are subject to public scrutiny, it suggests that they have in essence already approved the project.

Another participant spoke about the lack of initiative on behalf of the Province of Manitoba to make changes to the current legislation, which the participant believes is outdated. In particular they pointed to two recent processes that were initiated to review *The Environment Act*, CCSM c E125. One process was initiated by the Manitoba Law Reform Commission, which resulted in one public event to solicit comments from the public, followed by an online feedback collection process and a subsequent report. The second process of legal review was initiated in July 2014 by the Department of Sustainable Development, which was then called Manitoba Conservation and Water Stewardship. Through this process, comments were solicited through online feedback forums. While all the comments submitted by various parties have been posted online, there is no indication since the last comments were posted (February 4, 2015) on next steps, status of the review, or when any change may be forthcoming. It is noteworthy that the two processes overlapped to some degree, which in some way undermines the process, and the lack of any further communication on the matter suggests a lack of interest in legal reform (Participant No. 10).

5.4 Lack of Government Mobilization

Some participants expressed concerns over ‘lack of mobilization’ on part of both the federal government and provincial and territorial governments, specifically on the topic of FPIC. Two participants indicated that one indicator of this lack of mobilization has been the ‘historic tendency of both levels of government to place the onus of relationship building on proponents as opposed to taking charge of it’. One participant noted that ‘while in some cases, companies have been able to successfully build collaborative and mutually beneficial relationships with communities, in other cases things have not worked out as well, and the outcome is that communities then expect provincial and/or federal governments to step in to remedy the issues’. Another participant noted that in such instances that could have benefited from government intervention, “governments typically have remained disconnected with the process, and are therefore not able to act as effective mediators”.

Another participant pointed out that while the newly elected Federal government has committed to implementing the UNDRIP; it is unclear to date what their approach is going to be. This also suggests a possible lack of communication from the federal government on the topic. In the absence of updates on the status of the conversation, or direction, there are concerns with lack of transparency on the issue.

A few participants pointed out that historically FPIC has been ‘the elephant in the room’. While most people recognized that it would need to be addressed, there was limited dialogue on ‘why, what, where, how, and when’. Two participants specifically noted that

historically FPIC would be put on the agenda for discussion, but mostly, it was felt there was not much to say on the topic. This may be attributed to lack of federal commitment on the topic, the belief that the issue is a substantially complicated one, and would require significant thinking, lack of expertise to understand the legal implications, less mining activity in Manitoba compared to other provinces across Canada, or simply a reluctance to shift from status quo. Whatever the reasons, it was noted that more recently, given the TRC Calls to Action and the federal commitment, FPIC 'is back on the table for discussion'.

5.5 Non-homogeneity across Indigenous groups

Several participants pointed out that one of the challenges in effective implementation of FPIC will be the non-homogeneity of Indigenous groups across Canada. One participant noted:

> *"We need to consider the fact that there are so many Indigenous groups in Canada. There is no one-size-fits-all, so it is a huge challenge with designing a process that connects, that will be able to accommodate the different Indigenous groups and their laws and their needs, their capacities. Assuming that appointing for example a couple of First Nations people [as] some sort of governing body is not gonna be enough"*
>
> \- Participant No. 1

This becomes particularly important when taking into account that any dialogue on implementation of FPIC will require full participation of Indigenous leadership; including the Metis leadership. Thus, the key questions to ask will be: who represents the Indigenous voice in the FPIC dialogue? Industry is often faced with this dilemma of whether to deal directly with community membership, community leadership, tribal councils, or Indigenous associations that communities are members of. While some communities may expect one pathway for communications, another community might have different views on who represents them.

On a similar note, some participants also highlighted that different Indigenous communities are at different stages of setting out expectations with respect to engagement; while some communities have established comprehensive consultation and engagement protocols for any development on their territories, other have not. Another challenge noted in this context was that of non-Indigenous groups whose interests also need to be taken into consideration for any natural resource development. One participant spoke about the non-homogeneity getting even more complicated when one starts realizing that the interests of communities may be at odds with each other and at odds with other non-Indigenous groups.

5.6 Historical Grievances

A majority of the participants pointed out that in their experience when discussions with communities do occur, historical grievances can risk derailing the process. Many

Indigenous communities across Canada are ‘still experiencing legacy issues related to residential schools, irresponsible or unmonitored natural resource development’. In situations where communities have had limited opportunity to dialogue on these historical issues, the result is increased frustration, which then causes them to table these issues whenever an opportunity to share does arise. In the absence of an official platform to discuss historical grievances, the only opportunity then is when companies approach them about specific projects. From a company’s perspective, as noted by one of the participants, while the issues raised by the communities are absolutely essential, typically, they are not something companies can provide any remedy for.

5.7 Lack of Trust in Government

A few participants spoke about the lack of trust in provincial and federal governments as an ongoing challenge to desirable resource extraction in Manitoba. One participant expressed that in their view, communities simply do not see the provincial regulators, especially in the Environmental Approvals Branch (now Environmental Approvals in the Department of Sustainable Development) and the Mines Department (now Mineral Resources) as effectively able to regulate the natural resource sector. Another participant indicated that this lack of trust sometimes prevents communities from participating in any proponent-led engagement activities because communities are concerned that any participation may be construed as “fulfilling the consultation obligation”. In the past, the Province of Manitoba has attempted to disseminate information on mining in general, in an effort to educate the communities on the overall approach to mineral development in

the province, in an effort to make the project-specific processes smoother. This, however, has been seen as "government propaganda" by the communities and therefore been ineffective.

5.8 Capacity, Ability and Resources

The ability to understand the information raises an important challenge; that of lack of capacity within Indigenous communities (United Nations Global Compact, 2013). Companies are encouraged to consider facilitating that capacity building (United Nations Global Compact, 2013). Several participants indicated that limited capacity and resources would be a major challenge in implementing FPIC in some shape of form. Capacity was raised in the context of communities, government agencies and departments at all levels, and junior mining companies. One participant expressed this as:

> *"The biggest challenge the most [Indigenous] communities have … is that they lack the capacity to deal with the whole process. The average person on the street I don't think appreciates just how under-resourced these communities are. We try to provide some, but in a perfect world with the unlimited resources, [the process] would look different. So we try to make the best of …[the] situations … and [then there is the challenge] … of [lack of] resources …[on our] front as well."* – Participant No. 2

Another participant said:

> *"…How could you possibly be informed without any capacity to comprehend [what] is being put [in front of] you? So historically it's not a*

pretty fair fight. ... I work with engineers, we have some of the best lawyers that you could ever imagine… twenty of the most informed people [putting together an agreement, a training proposal]. [So we are] informed from [our] perspective, may be not from the aboriginal perspective, ...[we] were going to hand [the agreement] to people and say – we would like to know by the end of the next week, so how could they possibly be Consent *in an informed manner in that situation... How do we build capacity? How do we make sure that it has ethical integrity? We hear ... all the time [that] 'you guys have geologists and engineers, houseful of experts as does the province. We don't have any of that so you are handing us a survey and you are indicating some areas on the map and you have these results and we even don't know how to read that stuff and by the way it's in your language and not in ours'!"*– Participant No. 19.

Three participants spoke about the lack of skill within industry and governments to communicate effectively and therefore build long-term relationships. A majority of the conflict that occurs starts at the exploration stage of mining, which also happens to be the stage that is typically carried out by junior miners, who lack the resources that large mining companies have. This presents a significant challenge, as companies often find themselves not having enough resources to extensively engage with Indigenous communities. One participant expressed this challenge as:

“ … the major mining companies; the BHP, the Vales; they’ve got large exposure on their stock front through conflict issues, so they’ve implemented FPIC policies. Many companies have done that. It’s the junior companies that have the problem; because they’re the ones that develop the prospects and then sell the interest to the large companies to produce, and they don’t have staff for it.” – Participant No. 9

5.9 Change in Mindset

Some participants indicated that one of the key challenges in implementing FPIC would be that it represents a “fundamental shift” in how natural resource extraction has occurred in Canada. And thus any changes to the current thinking represents a ‘fundamental shift towards development in the country’. Elaborating on this, one participant said:

“ For years there had been this sense of entitlement, right, in the industry that they would get to shovel the grounds because they spend so many dollars and so many jobs in the economy” – Participant No. 1

Another participant echoed this sentiment:

“there are certain companies that are… they have a corporate culture, you know, they have done some things in the same way, but we all are stubborn like that in our lives. We like doing this in certain way, change is not easy and I get that, but also see what makes them anxious, and that’s what my belief is, what makes them anxious is the uncertainty and not having a

framework. It's like, they like to have a framework that they can look at and be assured of certain things and I think that is one of the pieces that's missing, in Manitoba specially, is that clear defined path of how to navigate all these different aspects." – Participant No. 5

Another participant added:

"The first challenge will be opposition from the mining community itself. The mining community is likely to resist implementation of FPIC mainly because FPIC will be perceived as a fundamental challenge to their ability to do what they have always done. FPIC represents a fundamental blow against free entry." – Participant No. 3

Another participant emphasized that the issue lies with middle management:

"[I] think the problem is not the entry-level or the top level; the problem if the middle managers. That's where the gap is; as these are decision makers in the company. But I think, we also have to look in a mirror. As a discipline of practitioners, we are terrible in; we haven't been able to make a strong enough case. We are still waffling when it comes to project management language. We don't know how to make the case during the project development decision-making process. If I'm part of a project approval committee, I need to be able to understand the business principles that they used to say, 'are we going to give the 200 million or not?'" – Participant No. 8

Perhaps the most important change in mindset will be for industry to start *seeing Indigenous communities as Indigenous governments*. As one participant pointed out:

> *"Industry often doesn't think communities are governments; they think of communities as communities. They actually said there are three different governments we have to deal with. The federal government, depending on the project, the provincial government [and maybe the] municipal government, but they are delegated governments from the province. There are least three levels of government that you must engage with as governments. But then there are Indigenous governments, the fourth category. But engaging with Indigenous governments is separate thing than the requirements in the EA process or than any other statutory requirement. The collaborative process should be about recognizing that Indigenous governments are governments and talking with them at the earliest possible opportunity at the same time you talk to the other governments. So, four governments at the table."*- Participant No. 4

Uncertainty is another key theme that may help in understanding how the mining industry operates (Jackson & Green, 2015). A few participants indicated that one of biggest reasons for the reluctance from industry to actively embrace FPIC is likely related to the uncertainty associated with seeking Consent. One participant said:

> *"People like frameworks and people like structures and for me personally, the practice of Indigenous engagement, there is so much uncertainty*

involved, I can't ever give any sort of guarantees to my clients about how the process will go. I can make my best guesses and inform them about risks but that's as good as it gets. So the industry could benefit from the framework that shows step one is establishing a protocol of engagement for each Indigenous Nation and doing that as a matter of business for every project and every new First Nation that you deal with." – Participant No. 1

Another participant spoke about the definition (or lack thereof) of Consent as a key contributor to uncertainty:

"It's ironic because if we adhere to Free, Prior, and Informed Consent and then if we said the Prior is really Prior, prior to doing anything is Prior, informed is to give people time to build the capacity really understanding what you are presenting them and then the Consent is a veto – Yes or No. If you are really gonna do that, then that would be fairly certain. It would lead to something that was very certain. You would take a hell lot of a longer, like I said it will be a generation and that we will have the same level of development but when you eventually get there, it will be remarkably certain. It will be a process that you can understand and it will be meaningful and yet we are the ones that seem to be arguing for ambiguity and then the interpretation, so it's a little bit hypocritical and ironic to me that we are introducing uncertainty to the phrase [which] is quite clear based on the definitions" – Participant No. 19.

Another contributors to uncertainty are uncertainty of the legal validity of FPIC (discussed in Section 5.1.2) short Indigenous governance cycles (discussed below in Section 5.1.10).

5.10 Short Governance Cycles

Two participants spoke about political stability within Indigenous governance systems as a critical prerequisite to advance implementation of FPIC. Indigenous governments are comprised of a chief and councillors, who make decisions on behalf of their communities. These members are elected through one of four mechanisms: by following the procedures outlined in the *Indian Act,* RSC 1985, c I-5 and the *Indian Band Election Regulations*; under a community band custom; in accordance with a community's constitution contained in their self-government agreement; or under the new and optional *First Nations Elections Act*, SC 2014, c 5. As of July 2015, 235 Indigenous nations across Canada were holding elections under the Indian Act, 38 were self-governing, and the remaining were selecting leaders according to their band customs (INAC, 2015). Since the *First Nations Elections Act* is new, only a handful of communities have considered it thus far. Under the *Indian Act*, elections are held every two years. As one of the participants noted, this creates for significant political instability, as it does not give an elected government sufficient time to get acquainted with key issues, or build sustainable relationships with industry and provincial and federal governments. From an industry's perspective, given the long-term nature of projects, changes in political leadership means

‘starting at ground zero’ with information sharing every time the new government is elected; which contributes to uncertainty with respect to the role of a community in the life of a project. Three participants noted that governing under the *First Nations Elections Act* would be a positive step in building some degree of political stability.

5.11 Proprietary Information

Reflecting on challenges associated with the timing of FPIC within the context of a mine development, two participants spoke about the type of information to be shared. In particular, to meet the *Prior* aspect of FPIC, proponents would need to share information on exploration activities, what metals or minerals they are looking for, and if they find something, the nature of the find and the likelihood of it being developed. This, for some companies becomes a challenge they see it as potentially affecting their competitive advantage in the mining market.

5.12 Inter-Governmental Coordination

One participant spoke about the ‘jurisdictional nature of FPIC’ and the challenge that dimension poses. The commitment to implement UNDRIP is a federal commitment. Natural resources are, for the most part, a provincial/territorial responsibility. In this context it becomes important to understand how effectively the federal and provincial authorities work together when it becomes to Indigenous affairs. Within each province, several departments assume responsibility for different aspects of natural resource development and yet others assume responsibility for managing Indigenous relations.

Again, how well the different departments work together becomes critical for any idea to gain traction. Several participants commented on the nature of this relationship; between the provinces and the federal government and internally within the Province of Manitoba. In particular, the participant pointed out that years ago, “there was a federal-provincial environmental assessment agreement in place which addressed consultation and well as other environmental assessment issues, but the agreement is another document that has gone missing in the current environmental assessment department that administers The Environment Act” (Participant No. 10).

Another inter-governmental challenge noted was lack of consideration to seemingly contradictory roles. For example, one participant pointed out that in Manitoba, the Mineral Resources Division administers the *Mines and Minerals Act,* CCSM c M162 (and thus issues permits for exploration), and also acts as a promotional entity for mineral development in the province. At best, this prevents the public from believing that any permitting through the Mineral Resources Division is fair and unbiased. At worst, these two functions (i.e., permitting and promoting mineral development) seem contradictory in nature.

5.13 Difference in Perception of Impact

A few participants expressed that one of challenges with initiating early engagement is that companies do not feel the need to engage unless they expect to have an impact on the environment. In their minds, exploration essentially entails ‘sending some geologists with

backpacks going around some streams, taking some samples, and augering, all of which might be “a zero impact” activity” (Participant No. 8). On the other hand, from the community’s point of view, any physical activity on the land, irrespective of the size or the nature of disturbance, may represent intent to do more, which is ‘worthy of a conversation’. This difference in perception of impacts and hence when to initiate a conversation is problematic. One of the reasons for companies to typically initiate engagement activities only later in the mine development stage may be the result of the current regulatory regime, which triggers an environmental assessment only at the mine development stage (as opposed to the exploration and advanced exploration stages).

Along the vein of perception and subsequent communication of potential impacts, several participants spoke about the inability of companies to effectively communicate. While some participants focused on the lack of proper messaging and the right content, others pointed out that some representatives do not know how to communicate. In some cases, participants went as far as saying the language used by companies was disrespectful and did not allow for trust building to occur. One participant stated:

> *“…we are typically sloppy, late, talk about activities, rather than outcomes, we’re not very good in bridging the gap between languages, mindsets, between tools, and so, I think that, yes, we all have to move forward, but I’m often shocked by the level of rigour that we think we can get away with, and then find it very surprising that no one else takes us seriously.”* – Participant No. 8

5.14 A Good Process Takes Time

Building a positive relationship between companies and communities takes time, takes patience, care, and corporate commitment (Thomson & Joyce, 2000). One of the challenges noted with respect to FPIC was that it would be time-consuming. Some participants pointed to the fact that, in their view, sometimes the process of getting a project approved and all consultation and accommodation obligations met is "so long and so onerous" that it "makes the economics of the projects not feasible" (Participant No. 2). The Fraser Institute's report on the status of Duty to Consult across Canada sets out a series of recommendations to improve the implementation of the Duty to Consult (Bains & Ishkanian, 2016). One recommendation the authors make is that to ensure timely implementation of the Duty to Consult process, jurisdictions should consider putting some timelines around the process. This, the authors believe, will help in two ways; guide proponents who are conducting the procedural elements of the Duty to Consult, and help communities get a clearer picture in terms of how long they have to engage in the process. One participant (Participant No. 4) opposed this view and said that this would suggest a unilateral approach to decision making, which goes against the spirit of UNDRIP and the TRC Calls to Action. Timelines, in the participant's view, should be tied to two things: one; the capacity of the communities to carry out meaningful studies, and two; to the degree of impact; greater the level of impact, greater the amount of time to be devoted to the process.

Given these barriers to implementing FPIC, participants were asked to share their thoughts on possible vehicles to implement FPIC; whether there were existing

mechanisms in place, and if so, how they could be utilized effectively. The views shared by the participants on this are presented in the next Chapter (Chapter 6).

6.0 Vehicles for Implementing FPIC

6.1 Introduction

As noted in **Section 1.2**, Canada, in May of 2016, announced that its commitment to adopt and implement the Declaration in accordance with the Canadian Constitution. Since then, a lot has been expressed on the topic, in terms of what this means for Canada, what it means for the current regulatory framework, what it means for Indigenous rights and where this may all head. In other words the vehicle(s) that might be best used to implement and apply FPIC are not at all clear, especially given overlapping jurisdictions in terms of decisions that may impacts the rights of aboriginal people.

In discussing the application of FPIC in Canada, some participants noted that while taking the international application of FPIC into account, and learning from other jurisdictions is important, that learning should be based on a thorough understanding of the status of Indigenous rights in Canada. One participant stated:

> *"In my opinion, the context is different [in Canada], where there is a constitutional obligation to consult with the aboriginal communities as opposed to [other jurisdictions] where governments routinely displace people for mining projects, where there is a different standard of engagement for aboriginal communities"* – Participant No. 2

Other participants indicated that in the absence of formal process for implementation of FPIC, decisions are informed through consultative processes, such as environmental

assessment, section 35 of the Constitution, government policies and other mechanisms. Other potential vehicles for implementation of FPIC that were noted were Corporate social responsibility frameworks and policy frameworks set forth by multi-stakeholder associations for mining. Views expressed by the participants on these potential vehicles that can be considered for FPIC are presented in the sections that follow.

6.2 Corporate Social Responsibility

A few participants spoke about possibly embedding FPIC into CSR frameworks. One participant spoke about how this could offer industry a competitive advantage, as it would demonstrate that the company is being a leader in 'Corporate social investment'.

Another participant, while agreed that CSR could be a vehicle, spoke about the challenges of doing so, and said that in most cases there is a disconnect between CSR at the corporate level within a company, and community engagement activities that occur at the project level. This is an important consideration because, as the participant pointed out, a majority of the conflict that occurs between industry and communities occurs at the project level first, later turning into a corporate issue, if not appropriately addressed. At the project level, projects are typically managed by people whose are mine production experts, i.e., technical aspects of mineral extraction and production (more importantly not the right skills needed to manage community conflict) with minimal involvement from individuals responsible for stakeholder relations. This presents disconnect between the two areas of a company's business. With that backdrop, establishing CSR frameworks

that explicitly speak to FPIC can only be of real value if CSR teams and project teams work together more effectively than what is generally seen. This view suggests that CSR then could be a vehicle for implementing FPIC in combination with project-level community relations activities.

Another participant spoke about corporate culture in a company and the perception of CSR. The participant noted that typically companies do not see the value of CSR initiatives in direct dollar terms as they would for ore extraction and processing. In the absence of that long-term vision, when a company faces financial challenges (due to a drop in metal prices for example), one of the first areas to make cuts is its CSR group. Therefore, one of the risks of limited FPIC to CSR only would be to risk losing expertise in CSR when a company is under financial crisis.

> *"[Projects and CSR] just don't gel at all …there's this massive difference between the high level and what's happening on the ground level and it's weird … just problems of dysfunction or larger organizations. [Another challenge is economic cycles] … prices were going down, and they were forces to make these savings, and, I think, that, to me, proves more than ever, and that blows it over that it's a social aspect as well. You know, when they have to make cuts, it's CSR"* – Participant No. 16

Adding to the dialogue on corporate culture, one participant spoke about the importance of turning policies into practice:

"… If your policies don't translate into practice, then there's a corporate culture issue. Because if you want to, its very easy to tackle. It means your assurance piece is out of place. Or you don't follow through. FPIC is not going to change that. If you don't believe in FPIC, or if you don't believe in the value of FPIC; sorry; if you don't believe in the value of the policies you say you are going to implement, then FPIC is not going to make a change."- Participant No. 8

Another participant highlighted that if CSR frameworks that incorporate FPIC were to be established, it would be important to measure the success of those policies by developing indicators specific to measuring FPIC. This was noted as an area requiring further research. The participant noted that an area of research that could be adapted would be the literature on indicators for social license to operate.

6.3 Environmental Assessment

Several participants recognized EA as a vehicle for implementing FPIC. However, a lot of the comments expressed revolved around challenges associated with the EA process, which deter it from being an effective vehicle. For instance, one of the themes that emerged in the discussion on EA and FPIC was that of most of the important decision are being made before an EA is even required. One participant stated:

"Under the Mineral Tenure Act, the exploratory activities are permitted without needing any environmental assessment or any kind of permit,

> *right? It is just you go online, stake a claim for 5 bucks or whatever it is and then there you can go and explore and all the mines have a certain threshold like only the actual development of mines with a certain threshold are required to undergo an EA. So any work done before that or even on mines that have that threshold need an EA or a permit really, so all that exploratory work can be done without a permit." –*
> *Participant No. 1*

Another participant echoed this view, reflecting on the disconnect between section 35 Consultation and EA processes in Manitoba:

> *"While the section 35 process is meant to be in parallel to the environmental assessment process, he believes it almost always lags behind, which means several important decisions are made before the* section 35 *process is completed. To him, this seems illogical." –*
> *Participant No. 10*

Another participant indicated that it would be more valuable for proponents to undertake a process that incorporates FPIC before an EA is initiated. Typically, as noted by this participant, by the time a proponent gets to an EA stage, a significant amount of effort has already been expended in the project, which may suggest that if the proponent has not done a good job of engaging the communities, a significant amount of conflict also exists; which essentially makes FPIC redundant if initiated at the EA stage. Thinking about FPIC at the exploration stage would be far more advantageous to proponents than waiting

for the EA stage, as if Consent in some form has been secured already; it will make the EA process go more smoothly. Adding yet another dimension to this dialogue, another participant indicated that EA is the stage where proponents start thinking about project impacts, mitigation measures, long term measures to manage both the positive and negative implications; all pieces of information which communities need to be informed about a potential development. This suggests that while FPIC could be initiated in the pre-EA stage, some form of FPIC would continue into the EA stage, which makes sense given that it will become clearer how rights may be impacted as the EA proceeds. This ties into the notion of FPIC being a multi-staged process, to continue to occur throughout all stages of a mine development.

Upon reflecting on the licensing aspect of EA, some participants suggested that a license under *The Environment Act*, CCSM c E125 could be a useful tool to document Consent; for example, the conditions on which Consent was provided could be built into the license. One of the participants articulated this as:

> *"[You can have FPIC] in the consultation phase of EA; because every EA has a consultation phase. Consultation; that terminology is probably antiquated today. Because we went through a phase with the International Finance Corporation and the World Bank where they said FPIC to us means Free, Prior, and Informed Consultation. They actually had guidance on that. You can have a formal Consent that's conditional. You can tie the Consent to the mitigation measures of the environmental assessment or the Impact Benefit Agreement or a Partnership Agreement,*

or an Economic Development Plan; whatever you want to bring in as a condition for the Consent." – Participant No. 9

Echoing this view, another participant said:

"FPIC could be built into an environmental license, but it doesn't have to. If we are advocating for separate independent governments, the smart move would be for provinces to integrate all the FPIC responsibilities with all of the Indigenous communities, so as there is one-stop shopping for the company that satisfies both the provincial and Indigenous government's FPIC responsibility. Consolidating and integrating responsibility in this way can be challenging for the larger provinces that have more Indigenous communities." – Participant No. 3

Participants were asked to reflect on whether there were other forms of EA that FPIC could be incorporated in; for example Strategic EAs. One participant said:

"… the application [within SEA] would be limited. This is mainly because Consent is required when there is some development on the ground that would prejudice the Indigenous communities' use of their traditional territories. Even if there were Consent of the Indigenous communities with at the strategic assessment level, it is unlikely that the Indigenous communities would forego their ability to require FPIC for specific mining projects. Even if there were financial benefits to giving Consent at the

strategic level, they would likely want to see the rights protected at all stages; strategic and project specific." – Participant no. 3

One participant indicated that the responsibility of ensuring that principles of FPIC have been incorporated into the process lies with regulators who issue environmental licenses, primarily because it is these permits that allow for proponents to extract ore and sell it to markets.

As discussed in **Section 5.1.12** above, several participants spoke about the disconnect between the Mineral Resources department and the Environmental Approvals department in Manitoba as being the greatest challenge in incorporating FPIC into the EA process.

Some participants indicated that in order for the EA process to represent some form of Consent, the process would have to be undertaken as a harmonization between the Indigenous communities involved and the proponent; where both parties contribute to establishing an understanding of the project itself, potential impacts (both positive and adverse), mitigation measures and ongoing measures to monitor the project throughout its life. This would allow for the communities to understand impacts in their own ways.

Harmonization was highlighted in the context of harmonizing the federal and provincial environmental assessment processes. One participant indicated that the federal government is in process of reviewing the federal environmental legislation; fisheries for example, and other pieces of legislation to determine whether it is consistent with

implementation of UNDRIP and FPIC. It would then be incumbent upon the federal government to ensure that the environmental assessment process (be it through substitution, harmonization, or other processes under CEAA 2012), is carried out in a manner that is consistent with UNDRIP. The environmental assessment at a provincial level (due to the harmonization process) by default would then become consistent with UNDRIP and FPIC. The harmonization process is starting to work in the areas of climate change. And while harmonization and conciliation with UNDRIP and FPIC for both federal and provincial assessments might make it difficult to get developments approved, this will likely be a short term delay, leading to longer term benefits.

6.4 Section 35

Several participants expressed that they view FPIC as an extension of the section 35 Consultations aimed at addressing rights and obligations that the Crown has towards Indigenous Peoples. One of the participants said that, in their view, this is because ultimately figuring out *Consent* is the responsibility of the existing regulatory authority; federal government or provincial government; so before they provide a permit or environmental authorization, they have to ensure that a process that allows for FPIC has taken place. It is not up to the proponent to obtain that *Consent*; it is the responsibility of the federal and provincial governments. While section 35 does this partially, there may be differences in interpretation of *Consent* between federal and provincial governments. The other issue is the widely divergent understanding of what meaningful consultation is from the perspective of an Indigenous community. From a corporate perspective, while seeking

Consent may be expensive, they certainly have an important part to play in consultation. Ultimately, 'it is the Crown's responsibility to carry most of the weight'.

Another participant said that the current framework of section 35 Consultation does have some of the key elements needed to make FPIC practical. However, in their experience with mining in Manitoba, the section 35 Consultation process in some cases starts after an *Environmental Act* proposal has been filed with the environmental approvals branch. As noted above in Section 2.9.1, Consultation is required "where it appears, or where the government is uncertain as to whether, a proposed Federal government decision or action might infringe upon or adversely affect the exercise of an aboriginal or treaty right." In most cases then, the results of an Environmental Assessment (in particular the commentary on the potential environmental effects resulting from the project) do help the Crown Consultation team to assess whether or not section 35 Consultation is even required, and if so, what the potential infringements may be upon Aboriginal and Treaty Rights. Typically, the Department of Sustainable Development does not issue a license under *The Environment Act*, CCSM c E125 till the Crown Consultation process has been completed. However, given that this Consultation process may possibly only commence during the EA stage, and the EA stage does not start till the proponent actually determines that building a mine is feasible, this does mean that the proponent has likely already been undertaking extensive investigations at mine site, likely has advanced exploration infrastructure already established, has already extracted a bulk sample to determine feasibility of mine development, etc. (permitted under *The Mines and Minerals Act,* CCSM c M162). In most cases, the proponents do engage with communities during

the EA process, but those conversations are in relation to project-specific impacts and if done poorly, may not address community concerns. At a basic level then, given everything that has already happened before the EA stage, the section 35 Consultation process in its current form does not pass the *Prior* test.

Some participants indicated that section 35 should be viewed as a 'safety net', as an obligation of the Crown that must always be met, and so while section 35 can offer that safety, it should not be the only platform for FPIC. One participant echoed this view as:

> *"The federal government has to deal with the Consent issue and provide clarity. There are concerns, unfounded, among some industry folks and the politicians who speak for or represent them. Even in some quarters of the NWT [northwest territories] it's still an issue. Government lawyers are advising that* section 35 *is the only way to deal with Indigenous Governments, that Consent, collaboration and the principles of FPIC are very problematic and detrimental to the NWT and Canada"- Participant No. 22*

6.5 Policy

Some participants spoke about policy initiatives as possible vehicles for implementing FPIC. Several participants expressed that legal reform, while important for FPIC, will likely take a long time. In the interim, policy and internal guidelines can go a long way to fill legislative gaps. One participant said:

> *"Well, I would work through the association of mining; the provincial mining association. Regulatory reform is going to take years on this stuff. Lets forget the regulation aspect of this, because that's just bringing in lawyers and all kinds of problems. Lets just talk about how does a junior company in Manitoba work more effectively around this issue of FPIC? What do they need to do? Let's clean this in the form of a guidebook, and training courses and site visits, and working with chiefs and councils and regional councils. Help the companies understand what the issues are on the ground from a community perspective. And that way you build a relationship.*" – Participant No. 9

The government of Manitoba provides a policy document that offers some guidance to companies when entering into discussions with Indigenous communities. The document has been in a Draft format since 2007. In discussions with one of the participants (Participant No. 5), I asked them why the document was never finalized. They responded by saying that the document is in fact "interim", not Draft, and was intentionally kept interim to emphasize that the policy is "flexible and not fixed, is non-prescriptive and accommodatingly broad". When asked if the document will be updated to specifically address FPIC, another participant expressed that the Manitoba provincial intends to develop a policy on FPIC, particularly given the federal commitment to implement UNDRIP, which the participant believed requires full support and participation of the provinces. This cooperation between the provincial and federal governments becomes

particularly important given that managing mineral resources are the responsibility of the provinces.

One participant advised that it would be critical for any policy development process to be a co-development process; i.e., the process of drafting policy has to be together between provincial, federal and Indigenous governments. The process may seem long and tedious, but will mean that all the relevant parties have their representatives and advisors, making key decisions together, and walking out of the room with everyone knowing where the other party's 'line in the sand' is. More importantly, it will mean that people start talking about FPIC more explicitly. Further, binging all parties to the table to initiate these early pre-legal review conversations will represent a truly *Prior* and *Informed* process. These discussions can go a long way to contribute to Canadian jurisprudence on the topic.

The Mining Association of Canada (MAC) was approached to inquire on whether or not the organization had a specific policy that addresses UNDRIP or FPIC. A representative responded by advising that while MAC does not have a policy specifically in that regard, both MAC and its members have, over the years, adopted engagement frameworks that extend beyond legal requirements. The organization recognizes the importance of mutually beneficial relationships with Indigenous communities, both as a means to enhance opportunities for the communities themselves and as a business advantage for companies. MAC also recognizes that building relationships takes time, the process has to be systematic and continuous, and "embedded in corporate practices and culture". MAC pointed out that there are over 300 active agreements in place between companies

and communities, which demonstrates that relationships are “maturing and working” (MAC, 2016).

7.0 Conclusions and Recommendations

7.1 Overview

The primary purpose of this research was to identify optimal approaches for the incorporation of FPIC in decisions related to the mining sector in Manitoba. The objectives of the research were to: develop an understanding of what each of the components of FPIC mean to affected parties, determine the approach of non-governmental entities towards FPIC, identify the tools and mechanisms that national and local institutions are using to implement FPIC, identify procedural barriers that prevent the realization of FPIC, and make recommendations to improve incorporation of FPIC for future mining developments. The research was undertaken using a qualitative study design, relying on document and literature reviews, and participant interviews. In total, 23 individuals were interviewed. This Chapter outlines key conclusions as they relate to the objectives of the research. The recommendations presented in this Chapter are made for Manitoba specifically, but may also have relevance to other provinces and jurisdictions.

7.2 Conclusions

7.2.1 Understandings of FPIC

This research found that the key players in a mine development include: Indigenous communities and governments, companies that pursue natural resource development, provincial, federal, and territorial governments, multi-stakeholder associations and the

interested and engaged public, and practitioners who facilitate the environmental permitting and licensing processes. This research highlighted that FPIC means different things to different people. To some participants, FPIC is about empowerment and self-determination, which has been highlighted by several authors including Doyle (2015), Lehr (2014), and (UNGC, 2013). To some participants, FPIC is about a new way of doing business that respects Indigenous rights, a view that is consistent with literature by Vanclay & Esteves (2011), Prno & Slocombe (2012) and Greenspan (2014). To others, FPIC suggests uncertainty (regarding both FPIC related processes as well as outcomes), unknowns and lack of clarity – an interpretation of FPIC that was not noted in the literature. FPIC was also noted to be an important vehicle for reconciliation and healing, a view that is shared by the TRC's calls to action for reconciliation (numbers 43, 44, and 92). By following a process that is respectful, builds trust, is done so patiently, and in a manner that respects the participatory methods of Indigenous Peoples, there can be an opportunity to provide an environment for healing. In general, FPIC is seen as representing a spectrum of potential requirements, yet warranting an end result – a finding that can be inferred through literature by MacKay (2004) and BLC (2012), who talk about mechanisms such as band resolutions and formal *Memoranda of Agreement* to demonstrate FPIC.

Key themes that emerged in talking to participants on what *Free* means: freedom to make a decision; freedom to freely express views; freedom to exercise control over Indigenous territories, and absence of coercion, views which are consistent with the literature by Carino (2005), MacKay (2004), Colchester & Ferrari (2007), to note a few. Participants

also indicated that *Free* means having sufficient time to engage, which interestingly in the literature is noted also as criteria for *Prior* (MacKay, 2004). Participants also noted *Free* as being encompassing of past issues, which is similarly noted by Cornwall (2004); Dare, Schirmer, & Vanclay (2014), and Vanclay (2012). Finally, participants noted *Free* to mean having the ability to understand what was being consented to; limiting and being aware of any political non-influence; and, consistency with Indigenous Peoples' own participatory methods, findings that also supplemented by literature by MacKay (2004) and Colchester & Ferrari (2007). Overall, the views expressed by participants on the topic of *Free* were consistent with findings in the literature, whilst overlapping with what the literature may have categorized as the meaning of *Prior* or *Informed*.

With respect to *Prior,* the key themes that emerged in conversations with the research participants was that *Prior* means pre-exploration and giving communities sufficient time to understand relevant issues so that they can formulate their views on the activities that may in the future impact their lands, which are both reflected in the literature by MacKay (2004). Participants also noted *Prior* to mean continually through the life of a project, consistent with the views expressed by BLC (2012). Overall, the views expressed by participants on *Prior* were consistent with findings in the literature, with some overlap with the meaning of *Informed* and *Free* (for example 'having sufficient time to engage' was seen as representing a process that was both *Informed* and *Free.*).

With respect to *Informed*, participants expressed *Informed* to mean having the relevant information pertaining to the project, which is consistent with the meaning described by

UNDG (2008). Participants also noted *Informed* to mean that the host community has the capacity to be informed, which is a theme evident in a much of the FPIC literature (such as Pimbert (2012), Ritter (2012), and United Nations Global Compact (2013), to note a few). Consistent with literature, participants also noted *Informed* to mean sharing in a matter that is culturally appropriate (ELI, 2004). Participants also noted *Informed* to mean that information is shared on an ongoing basis (which as noted above, ties in with the meaning of *Prior*). To some participants, *Informed* meant to build respect and accountability with the host community. Some of the views expressed on *Informed* that were not noted in the literature specific to FPIC were: the idea that *Informed* means where information is built together, where a process allows for 'true learning', and where a process is mindful of the true intent of the discussions. The views of the participants, supplemented by the literature, on the meaning of *Informed* certainly provide a more comprehensive picture of what *Informed* may mean in the context of FPIC.

Lastly, and perhaps most importantly, participants had a diverse set of opinions about the meaning of *Consent* – a finding that is quite consistent with the diversity of the meaning of *Consent* in the literature. *Consent* was perceived by some to mean veto, and by others not to mean veto. To yet others, the discussion in the context of veto is found to be distracting, which is a view that I did not note in the literature on FPIC. Several participants saw *Consent* as agreement of some form, similar to what is noted by BLC (2012) and MacKay (2004). While some participants believed that seeking *Consent* is the responsibility of the Crown, most felt that *Consent* could not be done without the participation of industry, a nuance that was also not noted in the literature specific to

FPIC. Participants also provided several perspectives on *how* to build *Consent* by focusing on trust, respect and recognizing that building *Consent* is a multi-staged process, which were all views consistent with the literature by Doyle (2014), MacKay (2004), BLC (2012), and ELI (2004). Overall, this research highlighted that *Consent* is perhaps the single most important aspect of FPIC, and reaching some form of consensus at the outset on what *Consent* would mean within a given process is critical to successful application of FPIC in Manitoba. Without such consensus, each party is likely to expect something different out of the process.

7.2.2 Barriers to Implementation of FPIC

This research has identified several barriers to implementation of FPIC in Manitoba. These barriers include: Canada's free-entry system in the mining context, lack of discussion on the topic of FPIC in Manitoba, lack of overall legal clarity which results in uncertainty, weak environmental assessment legislation in Manitoba, non-homogeneity across Indigenous communities, lack of resources in the Provincial government, proponents' concerns on sharing proprietary information, short governance cycles in Indigenous communities, historical grievances, lack of trust in provincial and federal governments, and inadequate inter-governmental coordination (between departments within Manitoba and also between Manitoba and Canada). Being somewhat specific to Manitoba, these barriers were generally not noted in literature specific to FPIC. Perhaps the most important barrier that needs to be addressed in the Manitoba context is simply the lack of discussion on the topic.

One of the more general barriers noted in this research is the lack of capacity in communities, which is consistent with what some literature notes as being important to successful implementation of FPIC (Pimbert, 2012; Swiderska, et al., 2012). Participants noted one of the barriers as corporate culture or mindset that does not readily allow for changes, which was generally not noted in the literature specific to FPIC. Participants also noted one of the barriers is the fundamental difference in how impacts are perceived by proponents versus Indigenous Peoples, which is somewhat consistent with the literature that advocates for FPIC to be sought in a manner that is consistent with Indigenous ways (Colchester & Ferrari, 2007; MacKay, 2004). Lastly, participants expressed that a thorough process would take a lot of time, which sometimes proponents may not have, and a lack of time can serve as a significant barrier to FPIC – a view that is supplemented by literature that recognizes that FPIC should be unhurried and allow for a flexible design (Swiderska, et al., 2012).

The barriers noted in this research are, not surprisingly, unique to Manitoba, as they take into account the particular regulatory framework in Manitoba, as well as the particular relationships that Manitoba has with Indigenous communities. These identified barriers provide important insight into some of the ongoing challenges in the realm of environmental legislation in Manitoba and the extent to which the regulatory framework contributes (or does no contribute as the case may be) to protecting Indigenous interests. These barriers are important to understand, and thoughtfully overcome in order for Manitoba to make progress on the FPIC front.

7.2.3 Mechanisms to Implement FPIC

The third objective of the research was to identify the tools and mechanisms that national and local institutions are using to implement FPIC while noting opportunities for FPIC in the Crown Consultation process, or other existing processes. This research established that FPIC is not a legal requirement in Canada yet. While the federal government in Canada has made a commitment to implement UNDRIP, the process of implementation, the nuances of the legal review process, as well as what pieces of legislation (federal or provincial) will be reviewed is yet to be determined. Although there is an increasing amount of dialogue on what FPIC means, and how it can make its way into Canada, to date there is no consensus on the topic. That said, there *was* general agreement amongst participants that several vehicles can be used to implement FPIC; including corporate social responsibility, environmental assessment processes, improvements to how and when the Crown Consultation process is undertaken, as well as through policy development. No single tool was noted as being the singular key to implementing FPIC; in fact, the general agreement was that a combination of vehicles was needed, while taking into consideration some weaknesses of the existing vehicles in how they are interpreted or applied in Manitoba. By the same token, this research has also shed light on some ideas for how FPIC could fit within either the existing frameworks.

7.3 Recommendations

The fourth objective of the research was to make recommendations to improve incorporation of FPIC specifically for future mining developments, including identifying any new mechanisms that can be introduced to improve realization of FPIC. The recommendations made here are based on an understanding of the literature on FPIC, an understanding of current practice, and consideration of the views of participants. The recommendations are (details of each recommendations are provided in the sections that follow):

1. There should be organized dialogue on FPIC.
2. There should be a review of the section 35 *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11, and *The Environment Act*, CCSM c E125, specifically in light of FPIC.
3. There should be targeted effort to building Indigenous capacity.
4. Industry should play a more proactive role.
5. Multi-stakeholder associations should push for policy changes in the absence of legal requirements for FPIC.

7.3.1 Recommendation 1: Conduct Organized Dialogue

To address the issue of an existing lack of dialogue on FPIC, the first recommendation pertains to initiating organized dialogue. The Government of Canada (including all the relevant departments that administer federal legislation that pertains to environmental matters that overlap with Indigenous rights) in collaboration with the provincial

governments and Indigenous communities should convene a targeted process to initiate dialogue on FPIC. The dialogue can focus on how each of the FPIC components are understood, explained and agreed upon. The process should allow for participation of all relevant parties including governments (for Manitoba this would include but not be limited to the ministries of: Indigenous and Municipal Relations; Growth, Energy, and Trade; Mineral Resources; and Department of Sustainable Development), industry, practitioners; and multi-stakeholder associations.

7.3.2 Recommendation 2: Review section 35 and Provincial EA Legislation

The recent consultation process initiated by the Federal Government of Canada to look at the CEAA 2012 included specific attention on FPIC. While the results of this consultation process are still emerging, it is recommended that the federal government of Canada, as a signatory to the UNDRIP, initiate a similar consultation process to focus on FPIC and section 35 of *The Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11.

It is further recommended that a consultation process specifically focused on FPIC be initiated for environmental assessment legislation in Manitoba. This legal review should involve entities responsible for administering the various relevant sections of legislation as well as environmental assessment and legal practitioners. This will allow for a proactive assessment of potential challenges and identification of measures to appropriately manage those challenges as the implementation of FPIC gains traction. On

an operational level, capacity issues within departments responsible for administering different pieces of legislation should also be taken into consideration as an important factor for successful implementation of FPIC.

As an interim measure, and while legal review is in process, it is recommended that Manitoba develop policies and guidelines that can serve an interim role in facilitating the incorporation of the key principles of FPIC. The existing resources on the topics are inadequate. Manitoba should shift its focus away from interpreting the current legislation and rather establish and implement more practical policies to improve the standard of Indigenous engagement in environmental assessment so that the assessment practice is better aligned with the principles of FPIC. The policy development process should include Indigenous governments, and should include the Departments of Justice, Sustainable Development, and Indigenous and Municipal Affairs.

7.3.3 Recommendation 3: Build Indigenous Capacity

To address the issue of lack of capacity in Indigenous communities, it is recommended that a more consolidated effort be made by the Province of Manitoba so that communities can better understand the technical aspects of mining, the potential impacts that could result from each stage, the established regulatory mechanisms, and the mechanisms for communities to participate at different stages of the mining process. To help ensure that knowledge creation and knowledge sharing occurs in a manner that is aligned with principles of Indigenous learning, it is recommended that Manitoba develop learning

goals, provide adequate funding, and invite communities to develop their own programs to achieve those goals.

Companies also need to understand how mining is perceived in communities. This should include and understanding of perception of impacts through all stages of mining starting with staking claims. It is recommended that Manitoba, in collaboration with Indigenous representatives, develop an Indigenous awareness program, and that all mining companies operating in the province be required to participate in such a program. Education for companies should include all mining companies, with a specific effort to engage junior mining companies, who are typically on the front-end of exploration.

7.3.4 Recommendation 4: Industry needs to Play a Bigger Role

It is recommended that mining companies adopt FPIC as one of their core principles of operation. Some companies have taken a more active approach towards endorsing and embracing FPIC (through memberships of the ICMM), or directly issuing a statement on their position, which when deconstructed represents a certain degree of adoption of FPIC. Making this endorsement a core foundation embedded within the business model of companies with an explicit adherence to FPIC would create a strong demonstration of willingness to work with Indigenous Peoples.

It is further recommended that companies incorporate FPIC into their Corporate Social Responsibility (CSR) standards, and subsequently monitor the success or failure of the

extent to which CSR helps achieve principles of FPIC. Results of these application and monitoring efforts can become an important measure of the overall evolution of FPIC in Canada moving forward.

7.3.5 Recommendation 5: Increase the role of multi-stakeholder entities

It is recognized that associations and multi-stakeholder organizations like the Canadian Aboriginal Minerals Association (CAMA), the Mining Association of Manitoba (MAMI), the Mining Association of Canada (MAC), the Canadian Institute of Mining, Metallurgy and Petroleum (CIM), Mining Watch, the UN Global Compact and the Prospectors & Developers Association of Canada (PDAC), have each played an important role to advance Indigenous relations in the mining sector through various mechanisms. It is therefore recommended that these and other similar associations develop a policy statement specific to FPIC, followed by guidance on how to incorporate the principles of FPIC on a practical level. For associations that have already developed a policy on FPIC and subsequently a guidance document on implementation (such as The International Council on Mining and Metals (ICMM)), it may be beneficial to develop a mechanism to monitor the effectiveness of the policy among its members and share those findings broadly. Lessons that emerge from this monitoring process can then serve as an important tool for other associations as they each develop their own policies. Ongoing research in this area will prove invaluable to aid in maintaining a thorough understanding of how community-industry relations are evolving in light of FPIC.

Over the past three years, the Ministers Mining Advisory Council in Manitoba has acted as an advisory body with representation from nine Indigenous communities from across Manitoba. The Council was noted by the research participants from Manitoba to serve as an important forum for discussing issues of concern to mining companies, to Indigenous communities, as well as to potential investors. The Council has operated with the mindset that the current social challenges to development (i.e. primarily opposition to mining operations) can be managed. The Council through this unique position acts as a sounding board for both companies and communities, and can play a pivotal role in understanding, defining, and explaining FPIC. It is uncertain what the role of the Council will be in the years to come. It is therefore recommended that the mandate of this Council be made public, the Council be formalized, and its role clarified.

Associations such as the MAMI and MAC could, and likely should, adopt a more active role in training junior mining companies on matters of FPIC. In order for this to occur, the associations should first be explicit about their position on the matter of FPIC. Several participants noted the challenge in discussing the word *Consent* when developing the Aboriginal Engagement handbook. It is recommended that there be targeted dialogue on the matter and a position statement developed.

7.4 Areas for Further Research

One of my favorite quotes is from Albert Einstein, who said, "*The more I learn, the more I realize how much I don't know*". I am very grateful for this research, as it has taught me a lot of things that I did not know. But much like Mr. Einstein, I have also realized there is a lot more work to be done. The following are my thoughts as they relate to further research:

- As I started talking to individuals who participated in this research, one of them said this research would not be complete until I spoke to elders from Indigenous communities. While the chiefs that I spoke to are held in high regard and are in some personal way, elders to me, I acknowledge this gap in my research; i.e., I did not speak to an elder. Their wisdom will certainly add a depth to this knowledge base that I have not been able to provide and should be considered a critical element of further research and in future work.
- It would be interesting to look at how the application of FPIC may change if the proponent is an Indigenous corporation.
- One of the findings of this research was the idea that one of the meanings of *Informed* is 'building the information together'. In some ways, this represents Traditional Knowledge. With that in mind, it would be it would be valuable to look at the specific role Traditional Knowledge within the context of environmental assessment can play in building FPIC.
- Through the course of this research ICMM issued two policy statements and subsequently developed a guidebook on FPIC for companies. It is too early to

assess whether this policy and the subsequent guidance documentation has been of any real value. This guide is certainly expected to be considerable value to the dialogue on FPIC. Assessing the effectiveness of the documents would make for a valuable research topic.

- During the relatively brief time period that passed during the course of this research, I noted a significant shift in the pace, nature, and content of discussion on the topic of FPIC through the federal elections of 2015. It would be interesting to research the role of political leadership in bringing human rights into mainstream politics. Within that framework, it would be useful to examine the role played by preceding political parties in advancing or deterring human rights issues.
- I was just able to scratch the surface when discussing and exploring the role historical grievances play in understanding the importance of FPIC. It would be enlightening to the FPIC discussion to see how historical grievances (inability to address them) impacts policy development and legal reform to implement FPIC.
- It would be helpful to look at the role of media in conceptualizing FPIC in Canada in general and Manitoba in particular, particularly if it explores how people conceptualize, understand, and perhaps contribute to discussions that advance principles such as FPIC.
- One of the research participants suggested that it would be important to establish indicators for measuring FPIC, and then compare those indicators to other emerging indicators that attempt to measure social license to operate.

- Lastly, through the course of my career, I have had the privilege of listening to stories from elders. They have always moved me, and make me conceptualize things differently. With that context, I think it would be really valuable to look at FPIC from the lens of Conflict Transformation and within that look at the role storytelling could play in building FPIC. As an additional angle, it would be important to also look at how storytelling within FPIC may contribute to reconciliation and healing.

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Appendix A: News Releases on FPIC (2014 to 2017)

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Appendix B: Sample Interview Guide

Note: The purpose of this sample interview guide is to consider some general questions for each of the research objectives, as applicable. The guide will be refined upon completion of the document review. Words/Questions in round brackets are prompts.

General Description questions:

1. What is your current role in development of a mineral resource?
    a. Through your life, have you played a different role at any point?
2. [For MSIs] What does your organization do?

    Objective 1: Develop an understanding of what each of the components of FPIC means?

3. What comes to mind when you hear the phrase *Free, Prior,* and *Informed Consent* (FPIC)
4. What does FPIC mean to you?
    a. What does *Free* mean to you?
    b. What does *Prior* mean to you?
    c. What does *Informed* mean to you?
    d. What does *Consent* mean to you?
        i. Who should give *Consent*?

ii. What would *Consent* look like? (a written agreement, MOU, form, license)

5. What could/should the ultimate goal of FPIC be?

    a. Do you believe FPIC to be a good approach to involving Aboriginal people and communities in mining approval decisions?

Objectives 2 & 4: Understand how law and policy such as in EA are incorporating FPIC; and identify barriers that prevent realization of FPIC

Note: For this objective, questions for the regulators will be more specific to pieces of legislation the regulators are responsible for administering. These questions will be developed upon completion of the document review.

6. What role can/should FPIC play in a mining approval decision-making process?
7. Is there potential to incorporate FPIC within Environmental Assessment processes?
    a. [Yes] Explain why and can you think of an example of a project where you felt that FPIC was realized?
    b. [No] Why not?
8. Which of the components of FPIC could EA most easily satisfy? (*Free, Prior*, *Informed* or *Consent*?)
    a. Can you think of an example where this was achieved? Explain?
9. Which of the components of FPIC would be the most difficult to satisfy within EA?

10. Can you think of example Could EA allow for the involvement of Aboriginal people to be *Free*?
    a. [Yes] Explain. Can you think of an example where you felt that Aboriginal involvement was *Free*?
    b. [No] Why not?
11. Could EA allow for the process to be *Prior*?
    a. [Yes] Explain. Would FPIC be triggered at the appropriate point? Can you think of an example where you felt the process felt *Prior*?
    b. [No] Why not?
12. Could EA allow for Aboriginal involvement process be *Informed*?
    a. [Yes] Explain. (What information was provided? What format was the information in?). Can you think of an example where you felt the process was *Informed*?
    b. [No] Why not?
13. Could EA provide for an opportunity for *Consent*?
    a. [Yes]Explain. (How was *Consent* given and at what stage of the project approvals process? Who consented) Can you think of an example where you felt the process allowed for *Consent*?
    b. [No] Why not?
14. What other regulatory or approval mechanisms (other than EA) do you think FPIC could be built into? (Prompts: Crown consultation process, mineral exploration, etc.)
    a. [yes] how? at what stage?

b. [no] why not?

Objective 2b: Understand how non-governmental entities are incorporating FPIC

15. What is your organization's approach to FPIC?
    a. Who does the policy apply to?
    b. How has it been applied – examples?
    c. What have been the successes of its implementation?
16. Why is FPIC important to you?
17. What were some of the key drivers for adopting a policy on FPIC?
18. What were some of the key challenges in adopting a policy on FPIC?
19. What are some of the challenges you foresee in implementing this policy?
20. How do you see the policy evolving in the near future?
21. How do you foresee measuring the degree of success for the policy?
22. Do you foresee your organizations adoption of FPIC to benefit the industry at large? (I.e., non-member companies)
    a. [Yes] How?
    b. [No] Why?

Objective 5: Make recommendations to improve incorporation of FPIC for future mining developments

23. What are the key drivers necessary for the implementation of FPIC in the mining sector?
24. What do you think would make Aboriginal involvement in mining development better? So for example:

c. More *Free*?

d. More *Informed*?

e. More *Prior*?

f. More *Consensual*?

25. Are there ways to make FPIC more likely to be adopted in pre-approval decision processes for resources?
26. Do you have any other thoughts about FPIC or this interview?

Appendix C: Research Ethics Materials

UNIVERSITY OF MANITOBA | Research Ethics and Compliance
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APPROVAL CERTIFICATE

December 21, 2015

TO: Somia Sadiq (Supervisor: John Sinclair)
Principal Investigator

FROM: Lorna Guse, Chair
Joint-Faculty Research Ethics Board (JFREB)

Re: Protocol #J2015:133
"The Evolution and Implementation of Free, Prior, and Informed Consent (FPIC), for Aboriginal People in the Mining Sector in Manitoba"

Please be advised that your above-referenced protocol has received human ethics approval by the **Joint-Faculty Research Ethics Board**, which is organized and operates according to the Tri-Council Policy Statement (2). **This approval is valid for one year only.**

Any significant changes of the protocol and/or informed consent form should be reported to the Human Ethics Secretariat in advance of implementation of such changes.

Please note:

- **If you have funds pending human ethics approval, please mail/e-mail/fax (261-0325) a copy of this Approval (identifying the related UM Project Number) to the Research Grants Officer in ORS in order to initiate fund setup. (How to find your UM Project Number: http://umanitoba.ca/research/ors/mrt-faq.html#pr0)**

- **If you have received multi-year funding for this research, responsibility lies with you to apply for and obtain Renewal Approval at the expiry of the initial one-year approval; otherwise the account will be locked.**

The Research Quality Management Office may request to review research documentation from this project to demonstrate compliance with this approved protocol and the University of Manitoba *Ethics of Research Involving Humans*.

The Research Ethics Board requests a final report for your study (available at: http://umanitoba.ca/research/orec/ethics/human_ethics_REB_forms_guidelines.html) **in order to be in compliance with Tri-Council Guidelines.**

umanitoba.ca/research

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RENEWAL APPROVAL

Date: December 9, 2016 **New Expiry:** December 20, 2017

TO: **Somia Sadiq** (Advisor: John Sinclair)
Principal Investigator

FROM: **Kevin Russell, Chair**
Joint-Faculty Research Ethics Board (JFREB)

Re: **Protocol #J2015:133 (HS19109)**
"The Evolution and Implementation of Free, Prior, and Informed Consent (FPIC), for Aboriginal People in the Mining Sector in Manitoba"

Joint-Faculty Research Ethics Board (JFREB) has reviewed and renewed the above research. JFREB is constituted and operates in accordance with the current *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans.*

This approval is subject to the following conditions:

1. Any modification to the research must be submitted to JFREB for approval before implementation.
2. Any deviations to the research or adverse events must be submitted to JFREB as soon as possible.
3. This renewal is valid for one year only and a Renewal Request must be submitted and approved by the above expiry date.
4. A Study Closure form must be submitted to JFREB when the research is complete or terminated.

Funded Protocols:

- **Please mail/e-mail a copy of this Renewal Approval, identifying the related UM Project Number, to the Research Grants Officer in ORS.**

Research Ethics and Compliance is a part of the Office of the Vice-President (Research and International)
umanitoba.ca/research

PANEL ON
RESEARCH ETHICS
Navigating the ethics of human research

TCPS 2: CORE

Certificate of Completion

This document certifies that

Somia Sadiq

has completed the Tri-Council Policy Statement:
Ethical Conduct for Research Involving Humans
Course on Research Ethics (TCPS 2: CORE)

Date of Issue: **15 January, 2014**