

What is FPIC?

- Ambiguity over meaning:
 - A duty to consult in order to seek, but not necessarily obtain consent?
 - A veto right?
- Ambiguity over scope: who can express FPIC, under what circumstances?
- Implementation challenges

Free, Prior and Informed Consent (FPIC) in UNDRIP

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 minerals, water or other resources. (section 32)



Indigenous consent is a right. Will the GreenNDP honour it?

By Jason Tockman in [Opinion](#), [Energy](#), [Politics](#) | June 26th 2017



Deals are not consent on pipeline says First Nations amid split community



LOCAL

by [LASIA KRETZEL AND KURTIS DOERING](#)

Posted Apr 16, 2018 5:47 pm PDT Last Updated Apr 17, 2018 at 6:59 am PDT

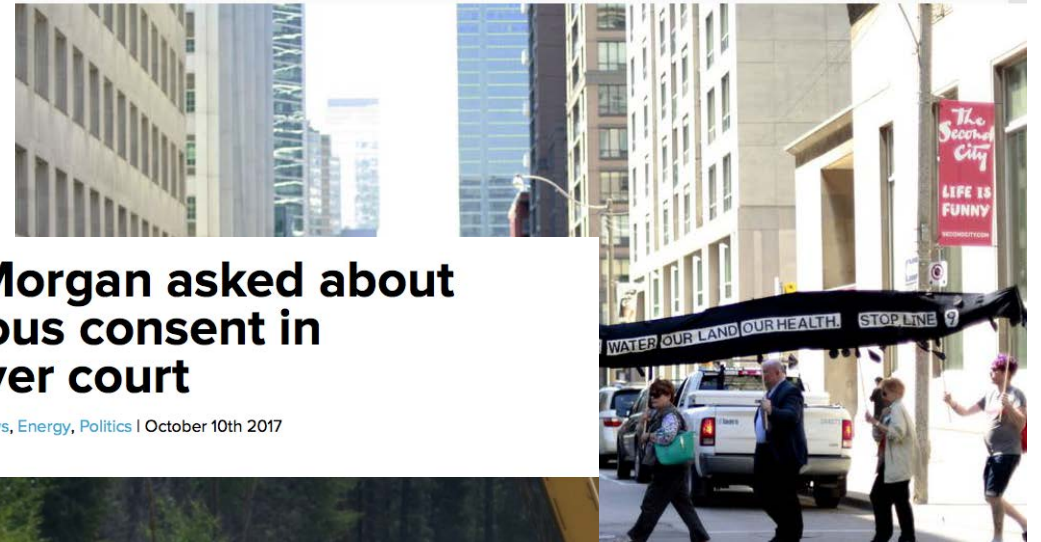


Opinion
· [Commentary](#)

THE STAR

Supreme Court makes it clear. Indigenous peoples can't veto pipelines: Walkom

The government has to consult First Nations over resource projects. But in the end it can still override them.



Kinder Morgan asked about Indigenous consent in Vancouver court

By [Dylan Waisman](#) in [News](#), [Energy](#), [Politics](#) | October 10th 2017



FPIC context in Canada

- Historical legacy
 - Indigenous consent as foundation for legitimacy of Crown sovereignty – treaties
- Duty to consult, accommodate and in some circumstances obtain consent
 - Objective is to “reconcile” Crown sovereignty with Indigenous pre-existing rights/presence
 - Crown still defines process and ultimately decides
 - Nature/scope of duty is circumstantial
 - Creates a lot of uncertainties in practice



Norm Appropriation

- In light of ambiguity actors seek to “make sense” of the norm
 - Unequal – some actors have more resources / authority than others
 - Multiple sites - international, national, local, courts, parliaments, etc.
 - Historically and institutionally contingent
- Many mechanisms / strategies
 - Policy engagement, negotiation, legal challenges, etc.
 - Protest, refusal, etc.
 - Performative / prefigurative politics



Appropriation: industry

- Faced with uncertainty, industry actors are also appropriating indigenous consent through negotiated agreements (IBAs)
 - Private agreements with communities
 - Implicitly or explicitly recognise Indigenous authority
 - Consent (or non-interference) in exchange for compensations / benefits / etc.
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- Consent as a bargain
 - Some advantages for Indigenous communities
 - A costs-benefits analysis
 - Negotiation more than deliberation



Performing FPIC

- Create own mechanism for expressing consent / lack thereof
 - Process itself can vary
- Why it matters?
 - More than symbolic
 - Prefigurative actions can fill an institutional void
 - Produce meaning – ex. FPIC as capacity to decide (self-determination)
 - Force other actors to take position – engage or ignore and risk conflict





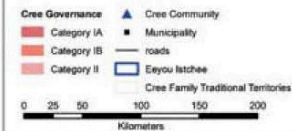
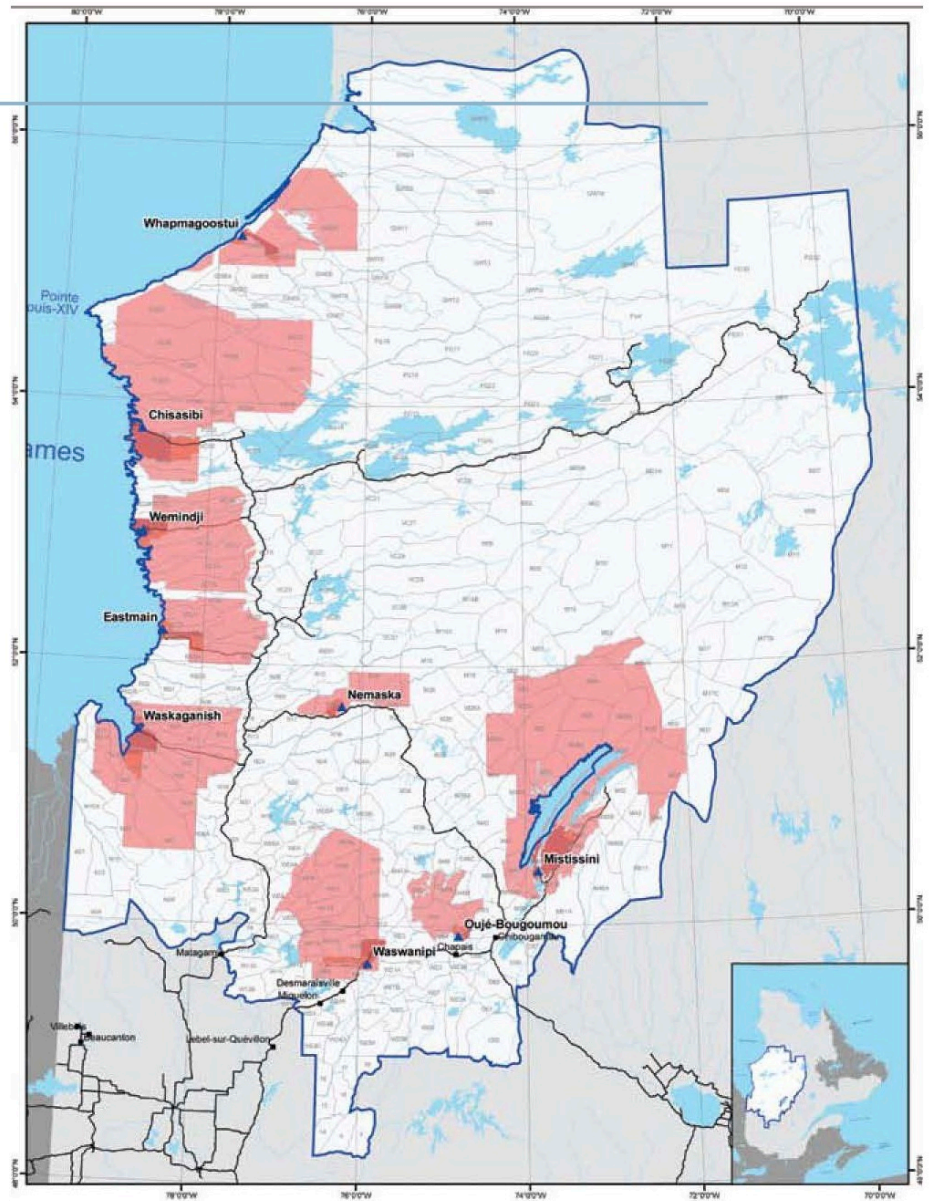
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Appropriation: Cree (Eeyou Istchee)

- JBNQA: no title but participatory rights through co-management IA boards
- Faced with expansion of mining on their traditional territory – limits of JBNQA
- *Cree Mining Policy*: Cree are “not in principle opposed to mining development on their traditional territory ... but ... no mining development will occur within Eeyou Istchee unless there are agreements with our communities.”
- Different strategy of appropriation : set process / conditions for negotiating IBAs
- Not a binding policy – key is to force other actors to react
- Exemples :
 - Wemindji: Mines Éléonore et projet Azimut (Or)
 - Mistissini: Projet Matoush (Uranium) et Mines Renard (Diamant)





Eyou Istchee of Quebec
Grand Council of the Crees /
Cree Regional Authority
CreeFamilyTraditionalTerritories

Publication: UTM Zone 18 NAD 83
 Datum: NAD 83
 Base of Grid: 49°30'N 70°00'W
 Cree Traditional Territories (CTT)
 Cree Regional Authority (CRA)
 Revised from April 2005

Cree Regional Authority
 July 2010



Conclusions

- Performative strategies differ, but same goal : establish substantive and procedural approach to FPIC through practice – common meaning: about authority to decide
- At same time, relational : goal is to communicate consent (or not) to others and have them recognize legitimacy of that decision
- Timing and context are key – political and legal uncertainties create a critical juncture - IP can fill the institutional void

Limits

- 2 examples of “success” ... many failures – why?
- Not accessible to all (resources, expertise)
- Diversity of approaches
- More effective when combined with other appropriation strategies?
- Does not remove concerns over epistemic / idiomatic subjugation

