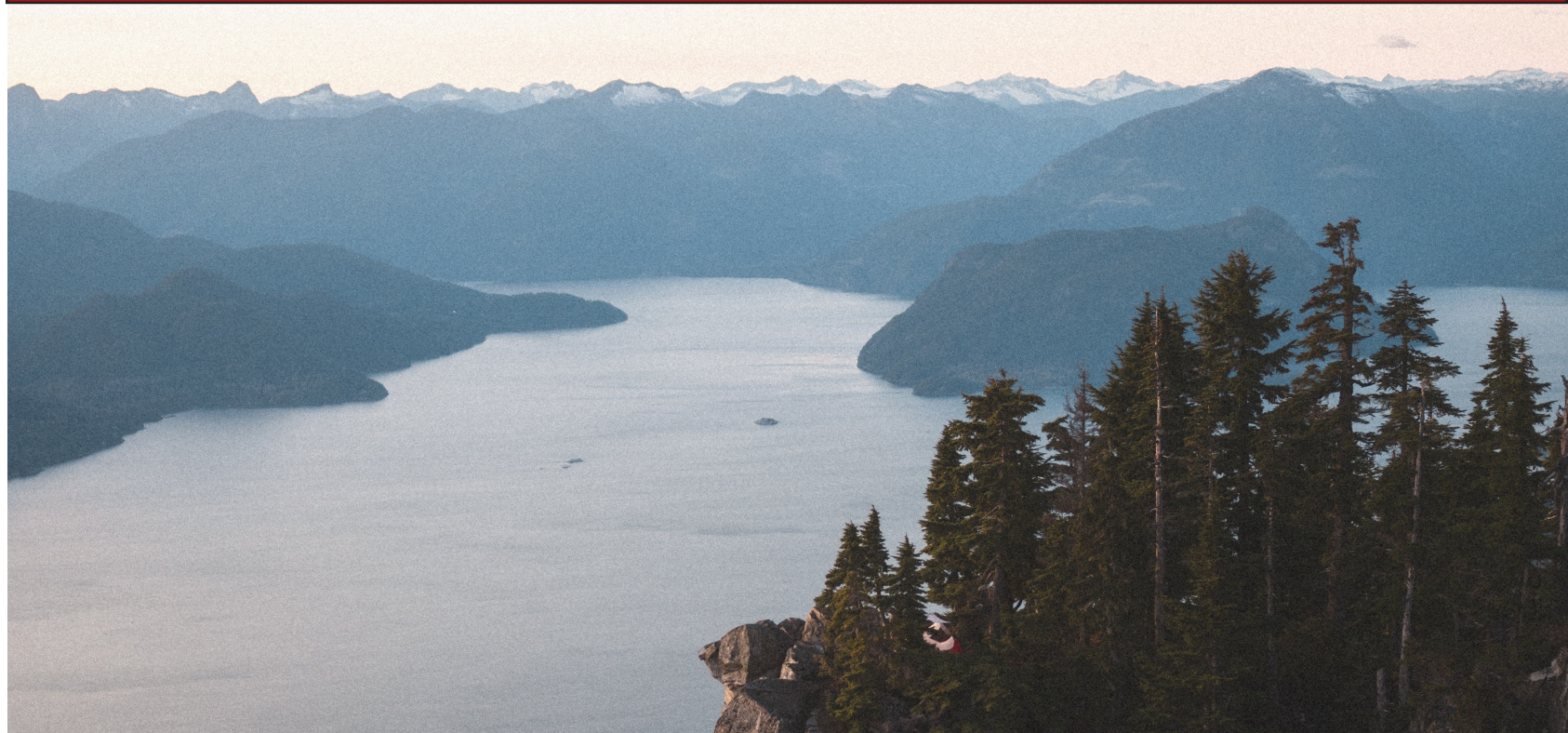




BRITISH COLUMBIA
ASSEMBLY OF FIRST NATIONS

Honouring our Ancestors



**FREE PRIOR AND INFORMED
CONSENT IN BUSINESS**







Index

Part 1:

<i>Introduction</i>	1
---------------------------	---

Part 2:

<i>How We Got Here</i>	2
------------------------------	---

Part 3:

<i>The Current State</i>	4
--------------------------------	---

Part 4:

<i>Discussion and Analysis</i>	7
<i>Creating partnerships and relationships that support operationalizing FPIC</i>	8
<i>Governance and Decision Making</i>	9
<i>Benefits and shared prosperity</i>	10
<i>Free, Prior and Informed Consent and the issue of veto</i>	10

Part 5:

<i>Conclusion</i>	12
-------------------------	----



PART 1: INTRODUCTION

“Consent is about agreement. Consent is a process to achieving and maintaining agreement. Consent is about sharing and respecting our laws, as equals and partners; consent is the trend of court cases, consent is the future and most simply it is about us coming together as governments, as people seeking to find common ground.”

Regional Chief Terry Teegee, BCAFN – speech in the Legislature on October 26th 2019

The British Columbia Assembly of First Nations (BCAFN) is pleased to develop a series of policy papers in support of Indigenous economic development in British Columbia. This paper focuses on the components of the UN Declaration on the Rights of Indigenous People (the Declaration), the associated concept of free, prior and informed consent (FPIC), and application to economic development for Indigenous communities.

The BCAFN’s Regional Chief Terry Teegee, as the Chair of the AFN Chiefs Committee on Economic Development, has been implementing a Sustainable Economic Development and Fiscal Strategy that provides tools and advocacy for the inescapable economic component of Aboriginal title. In addition to the series of policy papers, an example of other tools within the strategy includes the release of the Blackbooks – a toolkit for First Nations economic development.

This paper aims to provide Chiefs, leadership and community members with a foundation to support their understanding of recent developments in law, policy and practice and empower them to leverage these understandings to create meaningful and prosperous business partnerships in their communities that align with their values, now and for seven generations. It is the codification of Indigenous consent as a business norm that will ensure economic and legal certainty as a legacy of our time, and BC AFN is proud to support leadership and community in achieving their potential through the development of such tools.

PART 2: HOW WE GOT HERE

Since time immemorial, the Indigenous people of North America had well-established economies, based on trade and exchange in a complex network of cultural, social, and economic ties. When European settlers established their own economies in North America, these systems were built upon, and were intertwined with those of the local Indigenous communities - creating the historical basis of the Canadian economy.¹ Indigenous people have a long history of creating economic partnerships with Canadians.

As the settler communities grew, access to resources was linked with power and control - leading to policies and actions that stymied and decimated Indigenous economies, cultures, and political structures. Ironically, western, capitalist interventions and approaches have been proposed and implemented as the “solution” to the problem of poverty and socio-economic issues in Indigenous communities. And yet, we have not yet seen the changes required so that Indigenous people can enjoy economic equality with Canadians or exercise their collective right to their own economic institutions and activities.

Indigenous economic systems are a fundamental component of Indigenous self-determination and critical to the social and cultural identity of a Nation.

First Nations have always advocated for their ability to define and implement their

Indigenous economic principles which intertwine economic, social, and cultural development of communities with the creation of material wealth. Indigenous economic systems are a fundamental component of Indigenous self-determination and critical to the social and cultural identity of a Nation. However, conflict between governments, industries, and Indigenous communities have persisted since contact, as colonial policies have prevented Indigenous groups from exercising the economic component of Aboriginal title, their ability to self-determination through decision making, and ultimately economic self-sufficiency. With the recent adoption of the Declaration on the Rights of Indigenous Peoples Act in British Columbia (the Declaration Act), this conversation has been top of mind for many. Free, prior, and informed consent (FPIC), has come to the forefront of discussions of economic development in Canada. First Nations, as rights and title holders, as government equipped with jurisdiction, and as a burgeoning economic and labour force, are poised to foster Indigenous economic systems and shape and grow participation levels in all areas of the Canadian economy.

Supporting the development of Indigenous economies benefits everyone - locally, provincially, nationally and globally. Economic prosperity for these communities will ultimately lead to less reliance on the state, and will positively impact the broader economy through positive outcomes such as increasing jobs for Indigenous and non-Indigenous people, increasing secondary goods and services opportunities, and ultimately increasing GDP.

Chief Clarence Louie, Chairperson of the National Indigenous Economic Development Board (NIEDB), said in 2019 *"Indigenous economic development offers huge potential to improve lives, fuel Canadian economic growth, advance reconciliation, and provide a growing young workforce to Canada's aging labour population; closing this gap would boost Canada's economy by \$27.7 billion annually."*

The link between socio-economic indicators and health, education, and other important indicators is well-known; economic reconciliation plays a key role in ensuring that the right for Indigenous people to enjoy equality with the broader Canadian population can be realized as soon as possible.



Chief Chad Day, Tahltan Central Government

The United Nations Declaration of the rights of Indigenous Peoples was adopted on September 13 2007. The Declaration is a principled framework for achieving reconciliation, redress, and respect.

PART 3: THE CURRENT STATE

The UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, (UN Declaration or Declaration) an international human rights instrument, on September 13 2007 after more than twenty years of negotiations. It is the most comprehensive universal human rights framework of minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world. It elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous Peoples around the globe. The Declaration is helpful in identifying the Indigenous-Crown obligations for specific inclusion of Indigenous Peoples in legislative, policy and administrative reform.

The Declaration is a principled framework for achieving reconciliation, redress, and respect. The Declaration does not create new rights - it elaborates on the inherent or pre-existing rights of Indigenous peoples. The Declaration affirms the human rights of Indigenous peoples; collective and individual rights that are indispensable for existence, well-being and development as peoples.

The Declaration also recognizes FPIC as a prerequisite for any activity that affects Indigenous peoples' ancestral lands, territories and natural resources. As a support to operationalizing FPIC, the UN has developed guideline documents for governments and the corporate sector that outline the requirements, benefits, and specific actions and processes that can be used to achieve FPIC.ⁱⁱ

Globally, there are many international instruments and standards that call on the corporate sector to incorporate consideration of Indigenous rights, in some cases specifically

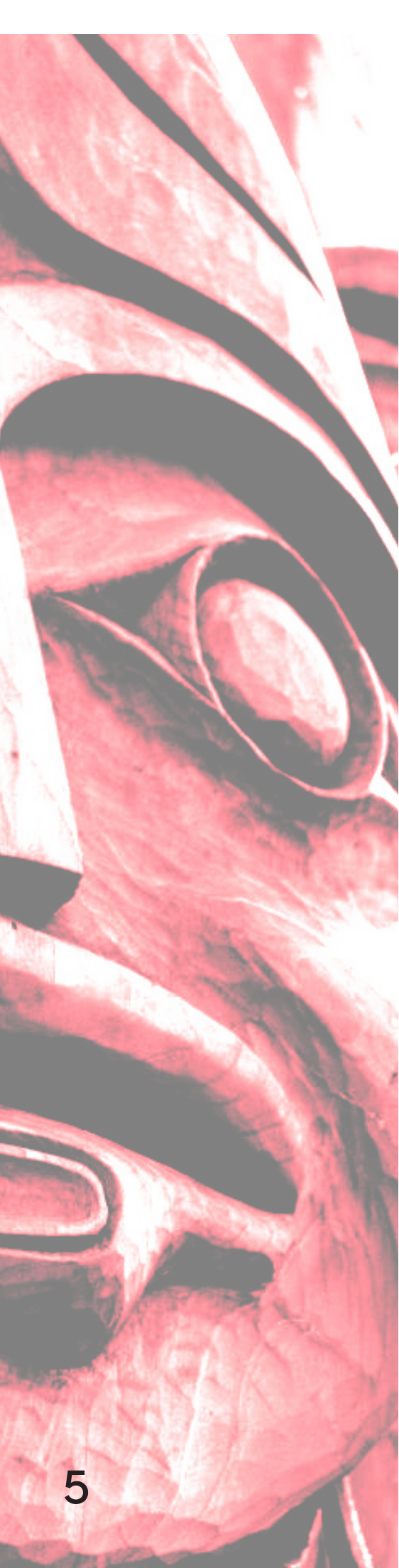
referencing the need to gain FPIC from affected communities. Some *"international financial institutions have incorporated certain aspects of FPIC into their policies that apply to companies;"* these include the World Bank and its sister organization the International Financial Corporation, the Inter-American Development Bank, and the European Bank for Reconstruction and Development.

Generally speaking, each of these organizations had developed policies that require those organizations seeking funding to have met standards around Indigenous engagement, including seeking to obtain consent for projects that would have a significant impact to traditional territories.

British Columbia's NDP government was the first provincial government in Canada to pass legislation to bring the Declaration into Provincial law.

In Canada, the Truth and Reconciliation Commission (TRC) calls for the UN Declaration to be the framework for reconciliation. MP Romeo Saganash's private members Bill C-262 set out to harmonize federal laws in accordance with the Declaration, however it was stymied in the senate and ultimately, was never brought into force. The newly elected Liberal government in October 2019 has committed to bringing forward a new government sponsored Bill to enshrine the Declaration in Canadian law by 2021.

One of the TRC Calls to Action is specifically focused on the corporate sector. In Call to Action 92 Business and Reconciliation, "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:

- Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects;*
- Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects;*
- Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.”*

In November 2019, British Columbia’s NDP government was the first provincial government in Canada to pass legislation to bring the Declaration into Provincial law. This law requires the provincial government to align B.C.’s laws with the UN Declaration, and to develop a provincial action plan that includes consistent public reporting. The legislation allows the Province to enter into agreements with a broader range of Indigenous governments, and creates a mechanism for consent-based decision making opportunities for Indigenous governments on matters that impact their citizens.



In 2014, the British Columbia Business Council (BCBC) developed a series of reports on the state of industry-First Nation relations in BC, with an aim to document and take stock of the economic reconciliation process in BC. These reports provide a useful list of areas that require action on the part of government, the business community and First Nations that will “require action in order to make further progress on economic reconciliation:

- Capacity and resourcing
- Transparency and information sharing
- Resolving tension between collaborative and adversarial approaches to consent
- Dividing the resource rent and meeting accommodation requirements
- Delegating consultation
- Building more robust agreements between industry and First Nations”ⁱⁱⁱ



Networking at BCAFN's event during the AFN Assembly July 2018





PART 4: DISCUSSION

Free, prior and informed consent is fundamentally about processes. It sets an expectation that in all situations where governments or corporations propose actions that could impact their lives and futures, Indigenous peoples have the right to make their own decisions to say 'yes' or 'no'. FPIC empowers Indigenous people in decision-making; the people who will live with the consequences of the decision, and FPIC ensures an equitable role in such processes, where their representatives can meet with government and/or industry as equals. This provides a framework for all parties to work together on the basis of mutual consent, and promotes reconciliation rather than conflict.

When dealing with governments and companies, leaders and community should outline a free, prior and informed consent approach to relationship-building with proponents that can ultimately lead to shared interests being met and community concerns or impacts being mitigated. This is the pathway to negotiated mutual consent.

Although there is still uncertainty related to how Crown and Indigenous governments will develop regulations, policies and operational practices to implement FPIC, it is clear the status quo is no longer acceptable. Indigenous-Crown relations must be driven by consultation and accommodation approaches that meet or exceed the current legal framework, including the requirement that processes ultimately aim to achieve community consent. To date, Crown consultation policy and practice in Canada has not formally sought consent, despite Indigenous consent being a foundational principle of Indigenous-Crown relations as set out in the Royal Proclamation of 1763.

Based on the UN Declaration, it is not appropriate for non-Indigenous governments alone to determine the impact that a project will have on Indigenous title and rights – self-determining First Nations with inherent rights to govern themselves have the full authority, and should be afforded the opportunities and participation in processes required, to define that for themselves. The Courts have, since 1997 in *Delgamuukw*, stated that the only morally and legally justifiable manner to assess Indigenous title and rights, including the potential adverse effects to those rights, is to place equal weight on the Indigenous legal and common law

perspective. Governments can then use this information in their decision-making processes and should, in partnership with communities, determine the appropriate mitigations and accommodations for those impacts.

The application of the UN Declaration into provincial and eventually into federal law demonstrates the trajectory of change in BC and Canada. The Declaration affirms that Indigenous title and right are enshrined in Canadian law, and that processes are the pathway for achieving consent with communities that will allow certainty and prevent conflict. This is a rights-based approach that all industry and governments must respect and adhere to.

Relations with First Nations have moved beyond financial “accommodations” and “benefits sharing” now to equity ownership, partnership, and financial and governance inclusion in every project in the territory.

Creating partnerships to implement FPIC

When the corporate sector prioritizes reconciliation with Indigenous peoples, and respect for Indigenous title and rights, there are benefits for everyone – shareholders, employees, Indigenous and non-Indigenous communities. A first step that can lead to shared success is in bridging worldviews. Indigenous leaders themselves are increasingly embracing and expressing their Indigenous perspectives – oftentimes, that means that success in corporate partnerships requires replacing the current, western-based economic development approach.

As an alternative to framing wealth development on purely economic terms, a more holistic approach is preferred—an approach in which the primary value of economic development is also a vehicle for investing

in the cultural life and social services of the community for the benefit of all. These Indigenous-designed approaches to economic development often emphasize community success over individual success and improving the lives of everyone over enabling economic disparity. This approach encompasses an outlook that is inclusive of community and aligns with Indigenous values.^{iv}

Reconciliation between industry and First Nations in British Columbia can be considered as a way of doing good business – day to day business decisions based on mutual respect of our different rights and worldviews. When considering a partnership, or when approached by a company, Indigenous communities can consider discussing the following things:

- *What kind of training or education does the company do for employees about Indigenous people?*
- *Does the company have any formal statements, in strategic or corporate plans, engagement or human resources policies, about respecting Indigenous rights, or implementing the UN Declaration or the TRC Calls to Action?*
- *What existing experience or relationships does the company have with your, or other Indigenous communities?*
- *What background knowledge or information does the company have about your community, its members, its legal orders or economy (have they done their homework)?*
- *Does this company have the staff and resource requirements to meaningfully engage with your community?*
- *What does success in our partnership look like? How will success be measured?*
- *Are there potential effects upon our Indigenous rights and title resulting from the operations of the company?*

Governance and Decision Making

Indigenous communities have roles and responsibilities to uphold in the context of governments and the business community working with them to achieve FPIC. Governance that is well defined, well implemented and operating effectively in a community is a necessary pre-condition for the development of any economic or business project, as clear, transparent, and stable governance structures and processes allow for clarity and timeliness of decisions. Good governance is the foundation for supporting strong economic prosperity.



BCAFN Regional Chief Terry Teegee, Grand Chief Stewart Phillip, President of UBCIC and Joan Philip

Considerations for Indigenous communities preparing to work with governments and businesses to achieve economic reconciliation:

Do you have clear political governance structures with clearly communicated roles and responsibilities for decisions?

- Is there a Band Council, are there hereditary structures? Who is responsible for what decisions and how do they relate to each other?
- What are the decision-making processes for gaining consent - along the way, not just in the end?
- How do your governance structures communicate with and have accountability to the community - how is consent ensured?
- How is shared territory managed? Are there structures or processes in place for conflicts if they arise?

Do you have clear operational/legislative/regulatory structures and processes?

- Does the community have a land code or land use plan, an economic development plan, a green energy plan etc. with stated values, goals, or do you have relevant regulations or policy that the company should be aware of?
- Are there clear policies in place for consultation and accommodation? What are the expectations of businesses or governments when they approach the community?
- Are there Indigenous legal orders or regulations in place that businesses should be made aware of before coming forward with proposals?
- What legal principles will inform economic development with the territory?

A significant issue for governments and corporations looking to do business with First Nations is identifying the proper rights and title holder(s), and undertaking Indigenous-informed processes and protocols when working with multiple rights-holding groups. Within the context of the Declaration, it is unacceptable for governments alone to determine how “strong” the right is of each First Nation in the context of certain activities within their territories. Nor is it appropriate for industry to undertake such activities.

First Nations can pave the way for good processes by providing clarity around the “where” and “how” when dealing with shared territories. If Indigenous communities can engage each other to set up protocols in advance and implement Indigenous Nation to Nation reconciliation, it will greatly increase the likelihood of successful regulatory and business decisions in the territory. Defining clear, transparent, and dependable rules/processes in relation to identifying proper rights holders and benefits sharing is one of the most powerful things First Nations can do in the context of setting themselves up for successful economic development partnerships.

Benefits and shared prosperity

We are moving forward, from consultation at a low end to a high end, to now engaging in partnership in consent processes to ensure FPIC. Relations with First Nations have moved beyond financial “accommodations” and “benefits sharing” now to equity ownership, partnership, and financial and governance inclusion in every project in the territory. This is the way to have more certainty on the land base in BC, and become an even more economically competitive jurisdiction as a leader in sustainable, human-rights based economic development.

Things to consider within the benefits conversation with industry include:

- IBAs – revenue sharing
- Equity Partnerships/ business arrangements
- Investments in community programs or charities
- Labour – training and employment
- Procurement – prioritizing Indigenous business and entrepreneurship.

Free, Prior and Informed Consent and the issue of veto:

As British Columbia becomes a jurisdiction where free, prior and informed consent processes become the norm, the “how”, “when” and “with and by whom”, are as important as “what” is being proposed. For an FPIC process to be effective and result in consent or lack of it, the way in which the process is conducted is paramount. The time allocated for the discussions among the affected Indigenous peoples, the cultural appropriateness of the way the information is conveyed, and the involvement of the whole community, including key groups like women, the elderly and the youth in the process, are all essential. A thorough and well thought-out FPIC process

helps guarantee everyone's right to self-determination, allowing them to participate in decisions that affect their lives.^v

The term "veto" is not used in the UN Declaration. The term "veto" implies an absolute power, e.g. an Indigenous group could block a proposed development regardless of the facts and law in any given case. However, international and regional human rights bodies have been clear that the standard of FPIC is not absolute, FPIC must be applied on objective grounds, based on consideration of all the rights at stake and the importance of their protection. In other words, the level of impact to rights and title, and the balancing of rights of other parties must all be considered in FPIC processes – similar to the current consultation and accommodation framework in Canada. In respecting the right of FPIC, the UN Declaration calls on states to work with Indigenous peoples to ensure that any disputes over the application of Indigenous peoples' rights are resolved in a fair and timely way through effective procedures.^{vi}



Elsa Berland, Indigenous Services Program Manager.

PART 5: CONCLUSION

“Reconciliation requires transitioning from the colonial system of government imposed on First Nations through the Indian Act, to systems of Indigenous governance that are determined by Indigenous peoples and recognized by others. Indigenous peoples must do this work. We have to deconstruct the colonial reality, identify shared priorities and visions, rebuild governance structures and capacity, determine how to move out of the Indian Act and revitalize legal orders. The Crown also has a role to play in this transition. Governments must transform their conduct to support nation and governance building without imposition or interference.”

Additionally, the business^{viii} community must look at their policies, practices, strategies and actions to ensure they align with FPIC. Responsible, sustainable investments should be grounded in fundamental principles such as do no harm, respect the Indigenous rights and title holders, prevent environmental damage, and respect fundamental human rights.

Free, prior and informed consent has become a business imperative for anyone looking to do business on Indigenous territory in British Columbia. Moving from consultation-accommodation processes to consent-seeking processes provides a framework for sustainable and ethical economic development within the province, which respects and acknowledges the rights of Indigenous communities’ economic component of title. Successful implementation of consent-seeking processes will ultimately lead to more certainty for all parties in major decisions that benefit the economy.

In British Columbia, this is not new. First Nations and industry have been working together to understand and address Indigenous interests in economic development projects for years, and have created a record of successful processes that have ultimately led to durable and lucrative projects. Examples include Snuneymuxw First Nation’s Mid-Island Forestry Initiative with TimberWest, Nanaimo Forest Products, Western Forest Products, and Coastland; Haisla First Nation’s partnership with LNG Canada, and agreements that Tahltan Central Government has with various extractive partners within their territories.

True reconciliation is about respecting each other’s worldviews and authorities, and working together as equals. This is the minimum standard for parties working together in processes that seek to gain free, prior and informed consent. This paper outlines some necessary foundations for ensuring that the structures are in place to support successful FPIC processes. Ensuring clarity and transparency amongst all parties should be a base principle from which businesses and governments undertake shared decision making with First Nations communities, and can help prevent and mitigate conflicts if and when they arise. It is clear that FPIC is not about veto. It’s about respecting each parties’ respective rights, and informing the development of processes based on that respect. Within this framework, economic development projects can be created that leverage strengths, mitigate impacts, and ultimately create prosperity for all British Columbians.

A close-up, vertical image of a wooden carving of a face. The carving is highly detailed, showing the texture of the wood and the features of the face. A feather is visible in the eye area. The image is in a warm, reddish-brown color palette.

**True reconciliation
is about respecting
each other's
worldviews and
authorities, and
working together
as equals.**



CONTACT INFORMATION

For further information please contact:

Maggie Mills, Economic Development Policy Analyst
margaret.mills@bcafn.ca

Jaime Sanchez, Special Advisor to the Regional Chief
jaime.sanchez@bcafn.ca

Derek Hansom, Economic Development Policy Analyst
derek.hansom@bcafn.ca

- ⁱ Indigenous Contributions to the Manitoba Economy | Rural Development Institute. (2019, January). Retrieved October 25, 2019, from <https://www.brandonu.ca/rdi/projects/indigenous-economy/>
- ⁱⁱ <https://www.unredd.net/documents/un-redd-partner-countries-181/templates-forms-and-guidance-89/un-redd-fpic-guidelines-2648/8717-un-redd-fpic-guidelines-working-final-8717.html>
<http://www.fao.org/3/a-i6190e.pdf>
http://www.fao.org/fileadmin/user_upload/partnerships/docs/00000_FPIC_Toolkit_Technical_Guide_FPIC-VGGT-IPs_EN.pdf
- ⁱⁱⁱ <https://bcbc.com/reports-and-research/tag/indigenous-relations-and-reconciliation>
- ^{iv} Peredo, Anna Maria. Indigenous Community Enterprise – Connecting with Indigenous Knowledge & Practices, 2019.
- ^v <http://www.fao.org/3/a-i6190e.pdf>
- ^{vi} https://www.amnesty.ca/sites/default/files/fpic_factsheet_nov_2013.pdf
- ^{vii} Wilson-Raybould, Jody. Who speaks for the Wet'suwet'en people? Making sense of the Coastal GasLink conflict. The Globe and Mail, January 24, 2020.

