INDIGENOUS AND ABORIGINAL RIGHTS: AN ANALYSIS OF CHALLENGES TO FREE, PRIOR AND INFORMED CONSENT AMIDST THE LEGAL POLITICS OF CANADA

Written by ***Meenakshi Singh*, Prabsimran Singh**, Dilraj Singh*** & Jaideep Singh^***

** 4th Year BA LLB Student, Symbiosis Law School, Noida, India*

*** 5th Year BBA LLB Student, Symbiosis Law School, Noida, India*

**** 5th Year BBA LLB Student, Symbiosis Law School, Noida, India*

^ 2nd Year BBA LLB Student, Symbiosis Law School, Pune, India

ABSTRACT

For decades, the Supreme Court of Canada has redefined Aboriginal law. However, claims that these reforms have only been for the benefit of Indigenous communities ignore the tendency of Canadian courts to reject fundamental categories of legal responsibility regarding Indigenous peoples. In order to clarify the promise and constraints of the newly forming regime of Indigenous participation rights, this research paper encourages intellectual and empirical cross-fertilization. The paper emphasises on moral questions and challenges that extend far the bounds of legislation of Canada while drawing their ideas from the Canadian context. Contributions that exist comparatively reinforce the many parallels that exist across the Americas in discussions on free, prior and informed consent and the difficulties that Indigenous peoples have in implementing the policy into practice. When it comes to Indigenous rights law, Canada is developing more quickly than most other nations. In accordance with the obligation to consult framework, consultation is necessary before making important decisions that might have an impact on still-controversial Aboriginal and treaty rights. A made-in-Canada strategy for Free prior and informed consent adoption in Canada requires further work. But there is cause for optimism given the nation's recent track record. The paper subsequently refutes claims about Free, prior and informed consent that have emerged in various industries, and it raises additional issues that highlight some of the difficulties in putting it into practise. The

objective is to provide the foundation for a new strategy to Free, prior and informed consent that benefits Indigenous people, governments, and business.

INTRODUCTION

In recent years, the idea of obtaining the free, prior, and informed consent (FPIC) of Indigenous communities impacted by resource development before those projects can move forward has resurfaced in Canadian policy circles. For decades, the Supreme Court of Canada has redefined Aboriginal law. However, claims that these reforms have only been for the benefit of Indigenous communities ignore the tendency of Canadian courts to reject fundamental categories of legal responsibility regarding Indigenous peoples. In favour of more adaptable theories, previous legal norms for protecting Indigenous interests have indeed been disregarded or downplayed.

The Supreme court of Canada has established a Crown-Indigenous partnership that sees governments and outside parties acting independently but under judicial control. Nevertheless, this jurisprudential morality of interrelations reserves the freedom to violate Indigenous rights and claim sans their agreement. Greater conceptualizations of unrestricted, prior, and informed consent, especially the ability to rescind and refuse consent, are particularly prone to becoming unreasonable and unwarranted, as encapsulated in the prospect of the "Indigenous veto," now that this framework has been founded as the benchmark for conciliatory tone legal-politics in Canada. The UNDRIP and its contentious, ambiguous concept of consent are hence being sculpted to a "Canadian definition" that elevates more serious concerns regarding how the proclamation is incorporated into the instances of individual states and demonstrates slight sign of exceeding some these commitments already foisted on such governments by the courts. n certain situations, such as situations where the claims are especially valid or even where consent is interchanged for consultation, as through mediations with third parties such as resource developers, Canada has a legal responsibility to consult framework that necessitates something resembling consent. Equally significant is the fact that consultation today covers a considerably broader range of situations than is technically feasible under consent.

Therefore, including consent in legal framework may necessarily undermine Aboriginal and rights for Indigenous people by restricting its reach. No matter how complicated it may be, FPIC offers a valuable symbolic idea. Canada is operating in accordance with global standards in this situation. The FPIC ideal can provide some direction for some process improvements, and Canada must always strive to make improvements to its procedures. If Canada so wishes, it is even permitted to exceed the UNDRIP's requirements. However, even the new Principles are only following and may possibly be restricting the wording of UNDRIP. Regarding any federal government responses to FPIC, there are yet more challenges to come.

CONSENT AND CONSULTATION: CONCEPTIONS ON THE INTERNATIONAL FRONT

As the universal Indigenous rights system gains traction, the idea of free, prior, and informed consent is widely seen as a foundational component. Since its earliest incarnation in the International Labor Organization's Convention 169 of 1989 in the United Nations Declaration on the Rights of Indigenous Peoples of 2007[i]. In particular in the context of managing natural resources, free, prior and informed consent has acquired a crucial role in the interactions among Indigenous peoples and states. Although it is the result of a bilateral settlement, similar to other terms contained in basic laws like constitutional provisions or international treaties, its somewhat unclear formulation is ambiguous[ii].Indigenous and non-Indigenous scholars and practitioners from all over the world are still debating the specifics of its significance today. Vast differences in its operationalization are also suggested by published findings of state policies and procedures, from Australia and Canada to Latin America.[iii] To be fair, it is believed that one barrier to the institutionalisation of Indigenous consciousness is the insufficient conceptual clarification associated with the term. the major question that arises is how the free prior and informed consent's ambiguous legal definition and scope allow for a wide variety of interpretations, which in turn lead to a variety of institutionalized reactions. The gap is wide and the ramifications are serious among interpretations of consent as an ability to say "yes" or "no" to a specific campaign and more substantial/robust notions as a preferred but not essentially required consequence of consultation. However, possibilities can also be created by this ambiguity. Therefore, it is best to approach free, prior, and informed consent as a

contentious concept which will be given convincing force through its involvement as a political resource, most noticeably by the multiple players engaged in the democratic accountability of natural resources, rather than as a legal notion bestowed with impending meaning. Of course, such mobilizations do not take place in a political or institutional void. The legal and institutional framework in which Indigenous and non-Indigenous actors work is inevitably going to have an impact on their ability to motivate free, prior and informed consent for transformational goals, both positively and negatively. One prevalent FPIC claim is that a consent provision is just an extension of Canada's system for government consultation with Indigenous people and can be progressively adopted through that system. it can further be explained as to why the duty to consult structure that Canada's courts have created does not naturally accommodate consent obligations. obviously, the courts would have the authority to change this system. Several people have indeed argued that they do it depending on concepts like FPIC or international agreements like UNDRIP, although with little success so far. The article examines the potential outcomes of the courts seeking to put consent criteria on to current framework in light of the prospect of future modification towards this area of the law, and it makes some suggestions.

Some people may believe that requiring consent is just an expansion of Canada's current responsibility to consult framework. That can't be right. Especially in the context of the idea under Canada's obligation to consult framework, "consultation" is not always intended to get permission. A more different criterion in comparison to consultation is one that calls for consent, or even the pursuit of consent. It is important to consider the legal reality, including both Canada and worldwide, with the FPIC idea in UNDRIP. In certain situations, for instance when the protections in question are especially powerful or when consent is swapped for consultation, such as during negotiations with 3rd parties like resource development companies, Canada has a legal duty to consult framework that necessitates something resembling consent. Equally significant is the fact that consultation today covers a considerably broader range of situations than is technically feasible under consent. Therefore, including consent in to legal framework may actually undermine Aboriginal and treaty rights for Indigenous people by restricting its reach.

A closer examination of UNDRIP reveals that FPIC merely calls for a good faith attempt to gain permission, not approval for the project to move forward. Additionally, it only applies to

ISSN: 2581 4095
VOLUME 8 – 2022

a smaller set of situations involving properties that are possessed by indigenous populations as compared to those for which claims have been made. By implementing the obligation to consult framework of territories over that have claimed rights and by implementing something resembling consent in certain situations, Canada already complies with or surpasses UNDRIP's standards for FPIC. In the current situation, where the obligation to consult invoked many thousands of instances each year, an effort at agreement on every action when the responsibility to consult is activated would not truly make sense. The list of relevant transactions includes everything from choices about significant projects that would have an impact on Indigenous communities to small licences in locations with relatively few linkages to Indigenous people.

OPERATIONILIZING FREE PRIOR AND INFORMED CONSENT (FPIC): AN ANALYSIS OF EXPECTED CHALLENGES

Contextualizing FPIC would provide significant, though sometimes overlooked, hurdles. Initially, it would need to do a lot of groundwork across a variety of sectors to determine how broadly applicable it is to different projects and those whose consent is eventually needed, particularly when there are conflicts within Indigenous communities or when there are numerous communities of standards can be applied. Secondly, Canada has a federal form of government, and several sectors could be impacted by FPIC, such natural resources, are really under the authority of the provinces and territories. Consequently, FPIC operationalization in Canada would need for a decentralised strategy.

Placing reliance on the work of Dwight Newman's, we can analyse that his contribution directly addresses the uncertainty around the nature, purview, and legal interpretation of free, prior, and informed consent, as described in Undrip. He recalls to us that based on the chosen interpretative technique, several among the more controversial passages in Undrip involving free prior and informed consent may have quite different meanings[iv].A literary interpretation that places focus on the Declaration's precise phrasing can result in a rather constrained interpretation of free, prior and informed consent as a continuation of discussions and negotiations. However, a deliberate interpretation of the same portions that takes into account undrip's general economics and its basic tenets may offer a more thorough explanation of consent as a necessary condition. This is not to imply that the FPIc is a pointless endeavour.

After all, the colonial experience is fundamentally a narrative of consent. There are justifiable reasons that Indigenous representatives requested it was prominently featured in undrip, particularly in parts addressing land rights and the use of natural resources. The premise of absolute state sovereignty at the heart of settler-colonialism is directly challenged by the language of consent, a potent legal and political tool. Consent must, however, be favourable to and essential to a different form of connection in order to function as more than an opposing instrument. While none of the scholars who contributed to this special issue had an Indigenous perspective, they all emphasise the need to provide space for Indigenous legal systems, worldviews, and decision-making techniques as a step toward making FPIC a significant and lasting tool. Discussion with Indigenous academics and activists is the only effective approach to address the issue of how this may be accomplished.

Further, the majority of concerns pertaining to natural resources are handled at the provincial level due to both the jurisdiction over such concerns and the fact that the province owns the assets and land, given, obviously, to any Aboriginal ownership interests. There are various significant exemptions to the federal government's authority over uranium development and interprovincial transportation infrastructure, due to the unique concerns regarding national security and international relations related to the nuclear sector. In general, nevertheless, decisions about resource development will be made at the provincial level rather than at the federal level, except from any uncertainty brought on by overreaching federal government announcements. One of the main takeaways from this article is, in a sense, the significance of federal and provincial constitutional obligations. Internationally and at the subnational level, FPIC will be implemented decentralised. Along with indigenous authorities and governments, it will involve both national and regional public administrations. Internationally, several nations will choose various routes to FPIC compliance, with Canada choosing its own route. Furthermore, Canada is progressing more quickly than the majority of other nations. Sub nationally, because of the federalist architecture, various Canadian provinces and territories will put in the effort to implement FPIC in a way that makes sense in various local situations. Although FPIC implementation is fundamentally decentralised, the federal government may be able to give leadership and incentive.

Furthermore, the challenge arises regarding in various other aspects. As the provinces and territories have constitutional authority over many of the current challenges, this suggests that the provinces and territories have new responsibilities, and it could limit the federal government's role to one of symbolic leadership in as well as taking action within its own purview. In order to attempt to facilitate FPIC implementation in various jurisdictions within the context of beneficial interjurisdictional discussions, the federal government should take into consideration holding a conference on FPIC implementation that would bring around each other provincial, territorial, and Indigenous leaders. This strategy would acknowledge the decentralised character of FPIC implementation while emphasising the significance of federal leadership[v].

CONCLUSION AND RECOMMENDATIONS

Despite grave historical injustices, Canada ought not to be viewed as lagging behind but rather as a pioneer in the field of Indigenous rights law today. The Supreme Court of Canada's duty to consult framework mandates consultation on government actions that impact even still-controversial Aboriginal and treaty rights. Canada's system goes above and beyond what is stipulated by international standards in that regard. It extends far beyond domestic politics in the great majority of countries throughout the world have allowed. There are incentives to be satisfied of some of what Canada is accomplishing, even though more could have been done. The acceptance and empowerment of Indigenous communities are necessary to solve some of the major obstacles of eliminating constraints on Indigenous economic growth and tackling social issues inside Indigenous communities. Focused legal work on some of the obstacles to Indigenous communities' prosperity will also help in addressing these issues. In some respects, FPIC might serve as a type of guiding concept, but there is still much vital work to be done on other fronts. FPIC may only be one step in a long and tough journey for Indigenous communities and governments in Canada.

Government decisions or resource initiatives shouldn't be carried out without obtaining agreement in a few specific cases, such as those with the greatest consequences on Indigenous populations. However, in most cases, measures must still be taken in the province's or country's interest when consensus cannot be reached. Without allowing political hyperbole to contribute

to continuous uncertainty and unnecessarily heightened expectations, governments should explicitly state their view that FPIC entails effective processes but not complete control of choices by Indigenous people. Work has to be done to clarify defining consent implies in the context of community procedures connected to agreements and a few of the sorts of complexity on authority structures covered earlier in the paper, where permission does important legally. In order to improve collaboration with governments and industry stakeholders, indigenous communities itself should keep working to make their own governance systems plain and open and consider releasing papers about such governance structures. Communities throughout the nation have released their own manuals on how they want businesses to interact with them. This kind of activity may be beneficial for many Indigenous communities as long as those guides abide by the law because they frequently gain respect and appreciation[vi]. As policy is to be effective, it shouldn't be founded on claims that are unsupported by clear-cut legal rules. An accurate grasp of what FPIC is, how it may be used in the Canadian legal system, and how it cannot be used must be the foundation for FPIC implementation. However, FPIC will be most useful and efficient if it is implemented in a way that considers these legal constraints. FPIC may ultimately have a significant role in how Canada makes decisions. However, acknowledgement of FPIC entails much more than what is typically mentioned and has several facets.

Therefore, FPIC implementation is a continuous process. Building relationships in a multifaceted and diverse Canada involves developing, sustaining, and improving effective systems over time. The chances for growth in the economy in Canada for both Indigenous and non-Indigenous peoples might change significantly with the development of an adequate consultation process that has support from across all forms of government, especially Indigenous communities. It is crucial to Canada's efforts at rapprochement. A solid knowledge, thorough legal work, meaningful involvement, and relationship-building must be the foundation of good policy in this area. These are all enormous problems for Canada in the coming centuries, but evidence from its past shows that it is capable of meeting them.

ISSN: 2581 4095
VOLUME 8 – 2022

ENDNOTES

[i]Convention No. 169 Concerning Indigenous and Tribal People in Independent Countries, 27 June 1989, 1650 unts 383

[ii] *The Transformative Role of Free Prior and Informed Consent* (Routledge, New York, 2015)

[iii] A. Tomaselli and C. Wright, *The Prior Consultation of Indigenous Peoples in Latin America: Inside the Implementation Gap* (Routledge, New York, 2019)

[iv] Newman, Dwight. "Interpreting fpic in undrip." *International Journal on Minority and Group Rights* 27.2 (2020): 233-250.

[v] Newman, Dwight G. "Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior, and Informed Consent in Canada." *Macdonald-Laurier Institute Paper Series* (2017).

[vi] ibid