Bucking the Wild West –
Making Free, Prior and Informed Consent Work

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Good morning. I want to begin by commending the organizers of this panel and the Prospector and Developer's Association of Canada for highlighting the critical issue of free, prior and informed consent at this year's convention.

I also want to acknowledge that **the views I will be sharing with you today are grounded in almost 10 years of collaborative work with Indigenous organizations** in Guyana, Suriname, Colombia and Canada participating in The North-South Institute's "Indigenous Perspectives" project. Together, we have been examining what constitutes meaningful consultation and participation of Indigenous and Tribal communities in the minerals sector. One critical conclusion from Phase I of our research back in 2002 is that Indigenous Peoples view themselves not simply as another stakeholder to be consulted in projects taking place on or near their territories. Instead, they are rights-holders whose self-determination, autonomy, cultural identity and responsibilities to future generations are inextricably linked to their right to give – or withhold – their free, prior and informed consent to all projects affecting their lands. And where they do consent to a project going ahead, Indigenous Peoples want to be equal partners rather than mere beneficiaries.[1]

Since 2002, the conclusions from our first phase of research have been bolstered in **international instruments and jurisprudence**. Indeed, the right to free, prior and informed consent is now a universal norm of international law. It is recognized and promoted in:

- the UN Declaration on the Rights of Indigenous Peoples (2007) (as well as the draft OAS Declaration);
- a binding judgment by the Inter-American Court of Human Rights, *Saramaka People* (2007); and
- decisions by the UN Committee for the Elimination of Racial Discrimination.[2]

Other actors also promote and uphold FPIC, including several **official donor agencies**,[3] NGOs, and select **international financial institutions**.[4] The notable exception is the **World Bank Group** which embraces instead the notions of 'free, prior and informed consultation' and 'broad community support.' However, WBG policies were issued prior to the approval of the UN Declaration and *Saramaka People* judgment, and there is ongoing pressure for a review in light of new international standards.

FPIC has also made its way into policy discussions within the **minerals sector,**[5] and at the **national level** several jurisdictions have developed legislation pertaining to FPIC, including Philippines, Northern Australia, Venezuela and Greenland.

And here **in Canada**, FPIC has been enshrined in legislation such as the Yukon Oil and Gas Act (2002),[6] the Nunavut Final Agreement (1993), and in political agreements such as the Kaska-Yukon Government Bilateral Agreement (2003).[7] The Supreme Court of Canada's 1997 *Delgamuukw* decision also provides some protection and guidance, particularly in the case of titled lands, where the court clarified that the governments' duty to consult is in most cases "significantly deeper than mere consultation", ranging a spectrum that includes the requirement of "full consent".[8]

But perhaps most important for our conversation today is that **free, prior and informed consent has become the cornerstone of Indigenous and Tribal Peoples' own protocols and policies.** Indeed, Indigenous and Tribal Peoples increasingly demand that FPIC be recognized, whether or not they have obtained official recognition for their land rights and territories.

Given today's context, where there is increased exploration and mining activity in some of the most remote areas of the world – areas that are the homelands of Indigenous and Tribal Peoples – understanding free, prior and informed consent **is a pre-requisite** for anyone approaching Indigenous or Tribal Peoples with potential projects.

2) What is FPIC?

In order to discuss the topic of this panel – namely, whether FPIC can be operationalized in practice – it is imperative to begin with a common definition. The 2005 UN guidelines on FPIC note that respecting FPIC means that:

- "Indigenous peoples are **not coerced, pressured or intimidated** in their choices of development;
- Their consent is sought **and freely given** prior to the authorization and start of development activities;
- Indigenous peoples **have full information** about the scope and impacts of the proposed development activities on their lands, resources and well-being;
- Their **choice to give or withhold consent** over developments affecting them is respected and upheld."[9]

3) Prevailing Misconceptions

Even though the UN Guidelines have been around since 2005 – and there have also been notes on how to operationalize FPIC that have come earlier than this, for example under the World Commission on Dams[10] – several key misunderstandings prevent FPIC from being fully embraced or implemented appropriately in practice:

Misconception: FPIC is granted by governments. By recognizing FPIC in a country that does not, companies may be violating the sovereignty of that country, and would in effect be granting rights to communities.
Clarification: FPIC is an inherent right, it is not granted by governments, and certainly not by companies. A government's failure to issue domestic legislation is no excuse for

not recognizing and upholding FPIC, or for paving the way for positive precedents. In fact, in countries where the state has not recognized FPIC in legislation, policies or practice, the international courts are ordering that they do so. This is the case with Suriname, where in 2007 the Inter-American Court of Human Rights issued the binding *Saramaka People* judgment in which the court ruled that "the state has a duty, **not only to consult with the Saramakas, but also to obtain their free, prior and informed consent according to their customs and traditions.**"[11] A company failing to ensure FPIC is implemented in such a context may be opening itself and the country's government to a potential court challenge.

Misconception: FPIC is a veto right, and could mean one person could decide the fate of a project

Clarification: FPIC is inextricably linked to a whole range of rights protected by international law, among these: rights to self-determination, development, cultural identity, autonomy and participation. Conflating FPIC simply with a veto right ignores the range of other rights that require the implementation of FPIC in order to be upheld. How FPIC is reached internally within Indigenous and Tribal communities is subject to the norms and traditions of collective decision-making. It is hard to imagine a case where one individual could veto a whole project on behalf of an entire community, if FPIC is undertaken appropriately.

Misconception: FPIC will result in more 'no go' decisions

Clarification: Indigenous Peoples participating in NSI's *Indigenous Perspectives* project **constantly** underscore they are not anti-development. Their reluctance with regards to mining projects on their territories has more to do with unrecognized land rights, the legacies of previous mining projects and lack of evidence they will obtain more benefits than costs. Recognizing and implementing FPIC – together with the willingness to enter into revenue-sharing or benefit-sharing arrangements – may in fact lead to more clarity and certainty with regards to potential projects and investments, and could pave the way for business **if** conditions and mitigation measures are agreeable.[12]

Misconception: FPIC is a one-time event

Clarification: FPIC is an ongoing process that should ideally start before exploration (and ideally prior to the issuing of concessions) and – if there is agreement that a project go ahead – terminate when all potential legacy issues from a closed mine have been addressed.[13] Indeed, to highlight the dynamic rather than static nature of consent processes, Indigenous Peoples use terms such as **'living consent'** and **'maintaining consent'.**[14] Another way of seeing this is that FPIC provides a social license to operate. The power of any license is that it is authorized and can also be revoked if rules are not followed.[15]

Misconception: IBAs are evidence of obtaining free, prior and informed consent

Clarification: Research with Lutsel K'e Dene First Nation in the Northwest Territories has highlighted that Impact Benefit Agreements might actually have very little to do with consent processes. In many instances, **communities feel they have no other option than to negotiate an IBA** in the face of development projects that will go ahead regardless. In

these contexts, far from being cases of FPIC where the right to say 'no' is upheld, Impact Benefit Agreements involve community consent to accrue certain benefits from a development **which they may fundamentally disagree with**, and to try to mitigate impacts.[16]

Misconception: FPIC is new
Clarification: FPIC is an age-old way of making agreements. Research has highlighted that it goes back to agreement-making when Europeans first settled the Americas.[17]

4) Now that we have clarified what FPIC is – and what it is not – How can this right be implemented in practice, particularly with regards to exploration?

In an ideal world, for FPIC to be implemented in practice, among other things, there would be strong governance in the country in question, with clear environmental and Indigenous rights legislation, and means to enforce this regulation through the judicial system and monitor compliance in the field.

Companies would also have clear policies with regards to FPIC and Indigenous and Tribal Peoples, and training and human resources to undertake appropriate FPIC processes in the field. In addition, the company home country would have in place strong policies and mechanisms to hold the companies to account, including appropriate regulation.

And Indigenous Peoples would have well-demarcated and recognized territories, be well organized at the national and local level, be integral participants in any decision-making and land-use planning affecting their territories, have clear policies with regards to development and free, prior and informed consent, and structures developed at the community level to ensure inclusive decision-making – highlighting the voices of women, youth and Elders – and support the leadership in negotiations and decision-making. In addition, Indigenous Peoples would be well-networked nationally and internationally, and well-funded.[18]

For their part, CSOs and NGOs would have resources available to help monitor and strengthen FPIC processes.

But **the true picture in most countries where Canadian explorers are active looks more like the Wild West.**

Many **developing world governments** are extremely weak with inadequate regulations in place with regards to human rights and environmental protection and no funding or capacity to monitor implementation of whatever policies or regulation they do have in place. Most are working hard to attract foreign direct investment at all costs, rather than balancing economic with environmental and social considerations.[19]

Exploration companies for their part may get little or inappropriate guidance from host country governments, as government officials may not even know which territories are

used and occupied by Indigenous and Tribal Peoples. In addition, even though some exploration companies may have progressive policies with regards to ESIA for advanced exploration and Indigenous Peoples, **experience in Suriname with some of the world's largest companies has underscored that the existence of such policies does not mean they are being implemented on the ground.**[20] It is extremely disheartening that even members of ICMM are not implementing their own standards and policies with regards to the environment and human rights. This signals a lack of will to follow through on corporate commitments and a lack of capacity of project teams and subcontractors. It also starkly underscores the failure of voluntary initiatives, particularly in countries where there is such a policy and legislative vacuum as is the case in Suriname.

In terms of **Indigenous Peoples** involvement in decision-making, the norm in developing countries is that Indigenous Peoples know nothing about concessions affecting their lands until exploration teams show up, or they hear something in the media.[21] Indigenous territories more often than not remain officially unrecognized, and Indigenous governance structures ignored and undermined.

Far from being organized to deal with such external pressures as minerals development, most Indigenous Peoples scramble to build their capacities, obtain funding and national and international technical support. The learning curve is extremely steep not only with regards to the type of mining that is being proposed and its impacts, but also with regards to their internationally guaranteed rights, leading edge practices with regards to tri-partite relationships, and recourse. And the time pressures companies try to impose are unbearable.

And I could paint this picture of the Wild West reality with many more details, and anecdotes from experience.

5) So, how can FPIC work in practice given this context?

Clearly, there are some deep systemic issues that need to be addressed, including strengthening host government policies, legislation, monitoring and enforcement capacities with regards to human rights and the environment. But there are also steps explorers can take to 'buck the wild west context' described above, and to make FPIC work in practice. My original list would have put me way over my allotted speaking time, so I will highlight only 4 key steps, leaving the rest to our discussion (and they are also available in my notes – see ANNEX A):

- Use the already rich guidance available on implementing FPIC. This includes: the Akwe:kon guidelines (2004) developed by parties to the Convention on Biological Diversity; the ongoing work of the UN Permanent Forum on Indigenous Issues as it develops its standard-setting exercise on FPIC; guidelines on operationalizing consent developed under the World Commission on Dams; and the ever-growing case study literature.
- Where Indigenous and Tribal Peoples do not have recognized land rights, respect them as if these were recognized. In addition, respect the traditional authorities in

Indigenous communities rather than working only with 'imposed' or self-appointed leaders, and ensure that all members of the communities – particularly women, youth and elders – are integral participants in the process. Use your influence to help further Indigenous rights issues with the host country government.[22]

- Build-in external monitoring and verification of the FPIC process.
- Make the Prospector and Developer's Association of Canada's Framework for Responsible Mining a requirement for members, fleshing out guidance with regards to FPIC. Link this initiative to the Mining Association of Canada's Towards Sustainable Mining initiative, and to the proposed Canadian CSR framework.

In closing, there is no blueprint for operationalizing FPIC, no easy checklist.

At its core it is about building respectful relationships, and recognizing you are a visitor in someone else's homeland. But beyond rights, it's a question of good business practice.[23] A major company that invests in a project where explorers have done proper due diligence and undertaken appropriate consent processes will be in a far better position with regards to the project moving forward and shareholder confidence, among other things. And incentives should exist, with majors providing funding to cover the costs of juniors who can demonstrate they have undertaken rigorous consent processes. Consideration should also be given to how the costs of such processes can be covered even if the result is a 'no go' decision.

In the current economic crisis, and given the reality that prospectors are exploring in territories that are ever more remote, it is more imperative than ever to invest in community relations and implement leading edge practice with regards to FPIC – and in so doing, remain competitive.

Thank you.

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ANNEX A: Key Steps for Explorers to Implement FPIC in Practice

Note: This is a partial list, but draws on some of the key lessons learned and experiences of partners in The North-South Institute's Indigenous Perspectives *project (www.nsi-ins.ca):*

- Never assume that because there are no Indigenous settlements in a given concession area, it is not used or considered traditional territory.
- Do not undertake flyovers without prior consultation and obtaining consent to do so. Indigenous Peoples regard the surface, sub-surface and above-surface areas to be part of their traditional territories, and **not** engaging in appropriate consultations with the local leadership before undertaking a flyover can begin the relationship on a very wrong foot, potentially leading to conflict and opposition.
- Make sure you collect as much information as you can about Indigenous communities in the area you intend to explore, ideally ***before you obtain rights to explore in a concession.*** Besides governmental sources and desk research, consider approaching NGOs and national Indigenous and Tribal organizations for information. Visiting the area and introducing yourself, the company and your interests to the leadership and other members of the community will help you gauge community protocols with regards to obtaining FPIC, and the feasibility of undertaking exploration in the area. Try to obtain an official invitation rather than showing up unannounced.
- Respect the traditional leadership structures and decision-making processes.
- Make sure women and youth are included, as well as other interested community-members, not merely hand-picked, 'imposed' or self-appointed leaders.
- Provide full information on the exploration process and potential social and environmental impacts. You need to also provide information on the type of mining that might take place should the exploration programme prove there are economical deposits. This should all be communicated in the local language and in a format local people can understand.
- Should the communities agree to advanced exploration taking place, conduct ESIAs and enter into binding agreements with communities regarding their participation in the advanced exploration programme and ESIA studies.
- Make sure any consultants you hire for ESIA work have experience working with Indigenous Peoples and are well aware of international standards around FPIC. The same applies to subcontractors.
- Invest in training on Indigenous Peoples and their rights under international law, as well as leading edge practices, not only for direct staff, but also government officials, consultants, sub-contractors and communities.
- Use the Akwe:kon guidelines and other resources, including the ongoing work of the UN Permanent Forum on Indigenous Issues as they develop their standard-setting exercise on FPIC.
- Where Indigenous Peoples do not have recognized land rights, respect them as if these were recognized. In addition, work with Indigenous Peoples and use your influence to help further Indigenous rights issues with the host country government.[24]

- Enlist the help of CSOs in providing independent monitoring and verification, and guidance in strengthening FPIC processes. These organizations should be selected jointly with the affected Indigenous Peoples.
- Make PDAC's Framework for Responsible Mining mandatory for members, fleshing out guidance with regarding to FPIC. Link this initiative to MAC's TSM initiative, and to the proposed Canadian CSR framework.

Endnotes

[1] See www.nsi-ins.ca for the final project reports from Guyana (Colchester, Marcus, Jean La Rose and Kid James. "Mining and Amerindians in Guyana." [Ottawa, ON: The North-South Institute, 2002]), Colombia (Jimeno Santoyo, Gladys. "Documento Final – Colombia. Posibilidades y perspectivas de los Pueblos Indígenas en relación con las consultas y concertaciones en el sector minero en America Latina y el Caribe. Exploración Tematica." [Ottawa, ON: The North-South Institute, 2002]) and the final synthesis report for Phase I (Weitzner, Viviane. "Through Indigenous Eyes: Toward Appropriate Decision-Making processes regarding Mining on or Near Ancestral Lands." [Ottawa, ON: The North-South Institute, 2002]).

[2] ILO Convention 169 (1989) also upholds FPIC in the case of relocation, and Article 6(2) states: "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures." However it is not as far-reaching as recent international jurisprudence, particularly Article 15(2) which requires government only to consult with Indigenous and Tribal Peoples prior to exploration or exploitation "with a view to ascertaining whether and to what degree their interests would be prejudiced" and to ensure participation in the benefits "wherever possible" as well as compensation for any damages that might result from the minerals activities.

[3] Denmark, Spain and the European Commission have included FPIC in their development strategies. (Doyle, Cathal. "Free Prior and Informed Consent – a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector." Paper prepared for OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights. Moscow, 3-4th December, 2008. Available at www2.ohchr.org).

[4] These include the Asian Development Bank, the European Bank for Reconstruction and Development, and arguably the Inter-American Development Bank (the latter explicitly with regards to relocation, but implicitly as IDB policies are subject to international jurisprudence by the Inter-American Court of Human Rights) (Doyle, Cathal. "Free Prior and Informed Consent – a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector." Paper prepared for OHCHR Workshop on Extractive Industries, Indigenous Peoples and Human Rights. Moscow, 3-4th December, 2008. Available at www2.ohchr.org).

[5] The International Council on Mining and Metals has collaborated with the World Conservation Union (IUCN) on roundtable discussions with indigenous peoples regarding FPIC (with roundtables in 2005 and 2008), and also commissioned a review of the issues at stake (see Render, Jo. "Mining and Indigenous Peoples Issues Review," ICMM, 2005. Available at www.icmm.com/page/1161/mining-and-indigenous-peoples-issues-review). In addition, ICMM's May 2008 position statement on Indigenous Peoples and Mining notes that ICMM will continue to follow debates on these issues. For its part, PDAC's Framework for Responsible Exploration now also refers to FPIC, noting that: "Explorers should be aware that, when dealing with indigenous groups, in some countries it is necessary to meet the requirements for 'Free Prior Informed Consent' (FPIC) as defined in national legislation or by the provisions of international treaties such as the Indigenous and Tribal Peoples Convention (ILO 169) and the United Nations Declaration on the Rights of Indigenous Peoples before initiating any exploration activities. Explorers are advised to take all necessary steps to understand the position of the local indigenous or tribal group with respect to their requirements for granting access to conduct exploration activities." ("E3plus A Framework for Responsible Exploration: Principles and Guidelines" (Toronto, ON: Prospector and Developer's Association of Canada, 2009), p. 24.

[6] Article 13: For new dispositions on traditional territory, consent must be secured from the First Nation, but for existing dispositions on traditional lands, the government may issue a license authorizing oil and gas activity without First Nation consent. The Act also requires benefits agreement for any exploration or

development (exceeding 1 million in 12 months) and addresses consultation, training, employment, contracting opportunities.

[7] See the press release "Kaska, Yukon Government sign bi-lateral agreement." May 9, 2003. Available at www.kaskadenacouncil.com/20030509.pdf

[8] Delgamuukw v. British Columbia (1997) 3 S.C.R. 1010 para 186.

[9] Motoc and Tebtebba Foundation. "Standard-Setting: Legal Commentary on the concept of free, prior and informed consent. Expanded working paper submitted by Mrs. Antoanella-iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of implementation of the principle of free, Prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources." E/CN.4/Sub.2/AC.4/2005/2. 21 June. Another definition of FPIC in UN documents is: "Substantively, the right of free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources - a complex of inextricably related and interdependent rights encapsulated in the right to self-determination, to their lands, territories and resources, where applicable, from their treaty-based relationships, and their legitimate authority to require that third parties enter into an equal and respectful relationships with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths" E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005 (para 58).

[10] Mehta, Lyla and Maria Stankovitch. "Operationalization of Free, Prior and Informed Consent." Prepared for Thematic Review 1.2: Dams, Indigenous People and vulnerable ethnic minorities, World Commission on Dams. (2000). Available at: www.dams.org/docs/kbase/contrib/soc209.pdf

[11] Inter-American Court of Human Rights Case of the Saramaka People v. Suriname. Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs) para 134.

[12] See for example "Development without Conflict: The Business Case for Community Consent," a May 2007 publication of the World Resources Institute (Available at www.wri.org/publication/development-without-conflict). That being said, there are communities for whom mining is not part of their vision of development. These communities will no doubt continue to say 'no' to mining on their territories; it is in the best interests of all to know this as early as possible to minimize misspending of funds, human rights violations and likely social conflict.

[13] Companies have argued it is impractical from a business perspective to invest large amounts of funding in a project once consent has been given at one point in time, to then have consent withdrawn at a later date. See for example ICMM's comments regarding the Framework for Responsible Mining: "It is also necessary to comment on the suggestion that consent could be withdrawn at any stage. This would make it virtually impossible to finance any mine development because of the absence of necessary security and it would expose companies and society generally to extortionate claims from those local individuals who would stand to benefit financially." (ICMM Review of Draft Framework for Responsible Mining, 23 March 2005).

[14] Merle Alexander, Personal Communication, December 2008. Merle Alexander is a lawyer representing the Kaska Nation.

[15] If companies are fulfilling their commitments to the communities, and are maintaining high environmental and human rights standards, the likelihood of consent being withdrawn is very slim. It would not be in the best interests of either party to opt out, especially if there are significant benefits accruing to the community. However, if commitments are not being met, and communities and their livelihoods are at risk – then they have the responsibility to act in the best interest of their people and future generations, which may mean withdrawing consent, and the social license to operate.

[16] See Weitzner, Viviane. "Dealing Full Force: Lutsel K'e Dene First Nation's Experience Negotiating with Mining Companies" (Ottawa, ON: The North-South Institute and Lutsel K'e Dene First Nation, 2006). Available at www.nsi-ins.ca. It should be noted that while most Canadian IBAs require Indigenous Peoples to agree to not oppose the mine in the future – clauses which run counter to the nature of FPIC and other rights of Indigenous Peoples protected under international law – there are precedents of IBAs that have included more pro-FPIC language, such as IBAs around Voisey's Bay.

[17] See Marcus Colchester and Fergus MacKay "Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent". Draft paper for the 10th conference of the International

Association for the Study of Common Property, Oaxaca, August 2004. (Morton-in-Marsh: Forest Peoples Programme, 2004)

[18] For more pre-conditions towards equitable dialogue and FPIC, please see Weitzner, Viviane. "Through Indigenous Eyes: Toward Appropriate Decision-Making processes regarding Mining on or Near Ancestral Lands." (Ottawa, ON: The North-South Institute, 2002). Available at www.nsi-ins.ca.

[19] It is astounding that countries such as Peru that have extremely long histories with mining have only just now established Ministries of the Environment.

[20] See Weitzner, Viviane. "Missing Pieces - An Analysis of the Draft Environmental & Social Impact Reports for the Bakhuis Bauxite Project, West Suriname." (Ottawa, ON: The North-South Institute, 2008); Weitzner, Viviane. "Determining our Future, Asserting our Rights: Indigenous Peoples and Mining in West Suriname" (Ottawa, ON: The North-South Institute, 2007); Association of Indigenous Village Leaders in Suriname (VIDS). "Our Indigenous Territory on the Corantijn: Traditional occupation, use, and management of the Lokono People in West-Suriname" (Paramaribo, Suriname: VIDS, 2008); and Association of Indigenous Village Leaders in Suriname (VIDS). "Decision-Making in the Lokono Communities of West Suriname." (Paramaribo, Suriname: VIDS, 2008). All these documents are available at www.nsi-ins.ca.

[21] The free entry system in Canada is similar in this regard.

[22] The commitment to undertake this type of support is articulated in ICMM's 2008 position statement on Indigenous Peoples and Mining. Recently, PDAC has used its influence with the Canadian government to lobby on behalf of the interest of Canada's Indigenous Peoples, including with regards to expediting resolution of outstanding land claims. See "PDAC recommendations to ensure mineral exploration companies survive and contribute to Canada's economic recovery", 19 December 2008. Available at www.pdac.ca

[23] See "Development without Conflict: The Business Case for Community Consent," a May 2007 publication of the World Resources Institute (http://www.wri.org/publication/development-without-conflict).