

Equator Principles 4: New guidance for Indigenous engagement in project financing





On September 23, 2020, the Equator Principles Association released a series of guidance notes to support the implementation of the updated Equator Principles (EP4), which came into full effect on October 1, 2020.

Among other revisions, one of the key updates that appears in EP4 is the additional guidance it provides regarding stakeholder engagement with Indigenous Peoples (which is a defined term) and the concept of Free, Prior and Informed Consent (FPIC). These changes are something that stakeholders in Designated Countries, including Canada, will want to be aware of and ready for in the context of project financing to which EP4 now applies.

EP4 requires that

- All Projects affecting Indigenous Peoples will be subject to a process of Informed Consultation and Participation (ICP);
- All Projects will need to comply with the rights and protections for Indigenous Peoples contained in relevant national law, including those laws implementing host country obligations under international law; and
- In certain, special circumstances identified in IFC Performance Standard 7, there are enhanced consultation requirements building on ICP towards obtaining FPIC.

In such special circumstances, the Equator Principles Financial Institution (EPFI) will require a qualified independent consultant to evaluate the consultation process and the outcomes of that process, against the requirements of host country law and IFC Performance Standard 7. Where a process of good faith negotiation has occurred that meets the consultation requirements of IFC Performance Standard 7, but it is not clear if FPIC has been achieved, the EPFI will determine, with supporting advice from the consultant, if the circumstances allow for a justified deviation from the requirements of IFC Performance Standard 7.

EP4 therefore brings with it a new focus on the requirements of IFC Performance Standard 7 for project finance within Canada. Implementing EP4 will require an understanding of both the Standard as well as the laws, regulatory approval processes and business practices that exist within Canada and that have developed in relation to consultation and engagement with Canada's Indigenous Peoples.

While each project may require its own full assessment, this publication provides a high-level benchmarking of the requirements of IFC Performance Standard 7 against Canadian law, as it relates to engagement with Indigenous Peoples. This comparative analysis reveals that overall, there is substantial alignment between most of the key elements and goals of IFC Performance Standard 7 and Canada's legal framework, and Canada's legal framework includes mechanisms through which many of the same goals and outcomes of IFC Performance Standard 7 and EP4 can be achieved. The guidance notes can be found [here](#).

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**IFC Performance Standard 7
Elements**
Canada Legal Comparison¹

Policy objectives

Respect of the rights, dignity and culture of Indigenous Peoples.

Mitigate adverse impacts on Indigenous Peoples, or where not possible reduce adverse impacts through compensation.

Foster sustainable relationships with Indigenous Peoples through engagement and consultation, or where necessary, strive to obtain FPIC.

Promote compliance with law. The IFC Performance Standards do not purport to limit or circumscribe the rights of State actors to make decisions concerning the development of resources and, in fact, require compliance with national laws and regulations.

Aboriginal and treaty rights and Aboriginal title are constitutionally-protected in Canada.

First Nations are considered nations within the constitutional democracy of Canada. The concept and structure of Indigenous nationhood and self-governance continues to develop through bilateral negotiations, political changes and judicial decisions.

Canadian jurisprudence has developed a robust legal framework designed to form part of the reconciliation between Indigenous peoples and Canada. Canadian Aboriginal law seeks to reconcile the existence of Indigenous interests in the land, including interests derived from historic use, occupation and treaties, and Crown sovereignty.

Definition of Indigenous Peoples

Indigenous communities are a socially and culturally distinct group characterized by some or all of: (1) self-identification as members of an Indigenous, culturally distinct group; (2) recognition of this identity by others; (3) collective attachment to ancestral territories and natural resources that are found therein; (4) presence of cultural, economic, social or political institutions distinct from those of the dominant society or culture; or (5) a language distinct from the official languages of the country in which the population lives.

Canada's constitution defines the "aboriginal peoples of Canada" as including the Indian (or First Nation), Inuit and Métis peoples of Canada.

The Federal Government maintains a list of all recognized First Nation bands. First Nations can be subdivided further into Status and Non-Status Indians, which reflects whether they are registered under the Federal *Indian Act*².

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Process for identification of Indigenous Peoples affected by project

Project proponents are responsible for undertaking a process for identifying the existence of Indigenous communities within project's area of influence that may be affected by project development.

The government (federal, provincial or territorial) participates in the process of identifying Indigenous communities that need to be consulted.

There may be groups that self-identify as being entitled to consultation that may not be formally recognized by the government.

As a result, in practice, most project proponents will do an independent assessment to identify Indigenous groups within a project impact area, which is generally more expansive than the groups identified by the government.

Additionally, Indigenous organizations (including political organizations) may also assert a right to be consulted on any project. Standard practice in Canada is to consult with all such groups.

Process for identifying impacts on Indigenous Peoples affected by project

Where Indigenous communities exist in the project's zone of influence, project proponents should undertake a process to (1) study the baseline information on the Indigenous community in question; and (2) analyze project impacts, risks and opportunities.

This should be documented in an "Indigenous Peoples' Plan" for the project.

Where the federal or any provincial government has real or constructive knowledge of a potential Aboriginal right, Aboriginal title or treaty right and contemplates conduct that may adversely impact that right (i.e., a project approval), the government has a duty to consult the potentially impacted Indigenous group.

The right/title claim need not be proven; it must simply be a "credible claim." The duty to consult is therefore triggered at a low threshold and at an early stage in project development.

As discussed in more detail below, the content of the duty to consult depends on the strength of the claim and the severity of the potential impact.

Regulatory approval is contingent on an examination of the project's potential adverse environmental impacts, as well as the project's potential impact on areas subject to Indigenous land claims. This is generally conducted by the project proponent and the regulator. Affected communities of Indigenous Peoples are required to participate in this process and will also commonly receive funding from the Crown to facilitate meaningful engagement in the consultation process.

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Project proponents will generally conduct information sharing, mail outs, town halls, and provide environmental assessments, impact benefit agreements, capacity funding, and funding for traditional land use surveys.

There is no legal requirement in Canadian law for a project proponent to prepare an Indigenous Peoples Plan as a single document. The functional equivalent exists generally in the form of consultation protocols or consultation agreements, initial filings submitted to, and conditions imposed by, regulatory bodies, and internal documents of a project proponent (e.g. consultation logs and policy documents).

Process for identifying measures to mitigate adverse impacts of project affected Indigenous Peoples

Where adverse impacts on Indigenous communities by a project are identified, the project proponent should consider measures to avoid, minimize or mitigate those negative impacts or enhance positive ones.

Key issues may include (1) means to ensure continuation of Indigenous Peoples' livelihood; (2) promote conservation and sustainable management of natural resources; (3) measures to enable Indigenous communities to benefit from project; (4) plans for a grievance mechanism; and (5) plans to monitor, evaluate and report on implementation.

This should also be documented in an Indigenous Peoples' Plan for the project.

Project proponents are expected to take all reasonable measures to avoid, minimize or mitigate negative impacts on lands subject to Indigenous interests. These measures are identified through the consultation and regulatory process.

The continuation of Indigenous Peoples' livelihood and traditional customs and practices, as well as the conservation and sustainable management of resources, are central to the consultation process.

While not legally required, it is common for proponents to enter into impact benefit agreements with potentially affected Indigenous groups. The agreements ensure the community receives benefits from the project (e.g. employment, training opportunities, capacity building and, in some instances, profit sharing).

Regulatory approval also frequently comes with conditions relating to ongoing requirements for monitoring, evaluating, and reporting on mitigation obligations. Most regulators have jurisdiction to make directions regarding further consultation and mitigation throughout the life of the project, including in response to any grievances raised by Indigenous groups.

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Process for consultation and engagement of project-affected Indigenous Peoples

Where Indigenous Peoples are affected by a project, the project proponent should undertake the process of “Informed Consultation and Participation.” This includes (1) undertaking an engagement process as early as possible; (2) gaining agreement on an engagement process through a framework document or plan; (3) a voluntary process without external manipulation, interference, coercion or intimidation; (4) access to information about the project; (5) consideration of the social structures and decision-making of Indigenous communities; (6) allowing sufficient time for affected communities to build consensus; and (7) establishing a project-level grievance mechanism as part of the consultation.

Canadian law and best practices have similar expectations for the consultation process.

(1) Courts will expect engagement to begin as early as possible. In practice, project proponents will often begin consultation prior to making an application to the regulator. At early stages, consultation involves the provision of information about the proposed project as well as its potential environmental impact and soliciting feedback on project location.

(2) While there is no legal requirement to gain agreement on an engagement process through a formal framework document, project proponents are receptive to Indigenous groups’ preferred means of consultation. Consultation processes are often formalized and agreed to in some way, often in the form of impact benefit agreements or similar documents, as a means of ensuring that the duty to consult is properly fulfilled.

(3) Consultation processes tainted by external manipulation, interference, coercion or intimidation will not be considered to be in good faith and will not be upheld by the regulator or the courts.

(4) Information sharing is a key component of consultation and will, in certain circumstances, require capacity funding from the government and / or the project proponent to enable the affected Indigenous group to meaningfully engage in the consultation process. This funding often extends to traditional land use or similar studies.

(5) Consideration of social structures and decision-making of Indigenous communities is a key issue in the consultation process. There can be a tension between the authority of traditional hereditary chiefs compared to the authority of elected chiefs and council elected pursuant to the structures created under the *Indian Act*. In those circumstances, best practice may require consultation with both authorities.

(6) When assessing the adequacy of consultation, the court will look to the sufficiency of time provided for consensus building – consultation that involves arbitrarily short deadlines will not be considered adequate.

IFC Performance Standard 7 Elements

Canada Legal Comparison¹

Free, Prior and Informed Consent

The process of Informed Consultation and Participation should be expanded and built upon through good faith negotiations seeking to achieve FPIC, where the project (1) is likely to have an impact on the land and natural resources subject to traditional ownership or use; (2) would result in relocation of Indigenous Peoples from land and natural resources subject to traditional ownership or under customary use; (3) is likely to have a significant impact on the cultural heritage essential to the identity of the Indigenous Peoples; and (4) involves the use of the cultural heritage of the Indigenous Peoples, including knowledge and customs for commercial purposes.

FPIC does not require unanimity, does not confer veto rights on individuals or sub-groups, and does not require the project proponent to agree to aspects not within its control.

EP4 and the associated guidance notes clarify that where a process of good faith negotiations meets the consultation requirements of IFC Performance Standard 7, but it is not clear if FPIC has been achieved, the EPFI may determine whether the circumstances justify a deviation from the requirements of IFC Performance Standard 7.

The level of consultation required exists on a spectrum commensurate with the severity of the potential impact and the strength of the claim. Where the duty to consult is on the higher end of the spectrum, either because the potential impact is severe or because the claim to a right or title is strong, the duty to accommodate is engaged.

The duty to accommodate requires that steps be taken to avoid or mitigate impacts to the asserted right / title.

Some of the circumstances where IFC Performance Standard 7 dictates that FPIC are required are unlikely to occur (they would not likely be sanctioned) in Canada: (1) relocation of Indigenous populations; (2) significant impacts on cultural heritage; and (3) misappropriation of cultural heritage, would rarely, if ever, be seen as reconcilable with the honour of the Crown and the Crown's fiduciary obligations to Canada's Indigenous peoples.

With respect to whether the project is likely to have an impact on the lands subject to traditional ownership and customary usage, the duty to consult considers current use of lands. Where there is a strong claim and/or current customary usage, the duty to accommodate is likely engaged, thereby requiring steps be taken to minimize or avoid any potential impact. Where the potential project is located on Reserve lands, consent of the First Nation is, practically speaking, required.

However, the duty to consult in Canadian law guarantees a process of good faith negotiation and consideration of the Indigenous groups' interests. It does not guarantee an outcome and does not convey a veto right, but its goals and outcomes, particularly in situations the courts have defined as requiring "deep consultation" with potentially impacted Indigenous communities, bear notable resemblance to an FPIC process as described in IFC Performance Standard 7.

While Canada has fully endorsed and supports the United Nations Declaration on the Rights of Indigenous Peoples including FPIC, they have not, as yet, been formally adopted and enacted into Canadian law, with the exception of the province of British Columbia which, in late 2019, did enact legislation to adopt the Declaration. Within Canada's constitutional law framework, the duty to consult continues to be the applicable legal standard by which Indigenous engagement is carried out and assessed.

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Process for mitigation of adverse impacts or enhancement of positive impacts of project on Indigenous Peoples

Project proponents should:

1. Work with Indigenous communities to identify ways to avoid or reduce adverse impacts relating to the project.
2. Consider ways that the project can be modified to avoid or minimize negative impacts. Develop a process for compensation (monetary or in-kind) and/or rehabilitation programs or assistance for vulnerable groups (see also IFC Performance Standard 5 where involuntary resettlement has occurred).

Project proponents, regulators, the Crown, and Indigenous communities work together to identify ways to avoid or reduce adverse impacts relating to a project. Typically, both the Crown and Indigenous groups (as well as other stakeholders, including environmental protection groups) will make submissions about the potential impacts of a project, and the regulator will impose conditions on project approval directing mitigation and avoidance steps the proponent should implement.

Indigenous People should be informed of their legal rights, the nature and the scope of the proposed development, and the eventual consequences of development.

Where impacts are expected on lands and natural resources that are subject to traditional ownership or customary use, project proponents should keep a record of efforts to avoid or reduce the area of lands affected by the project. Indigenous Peoples' claims over land should be considered even if they are not recognized under national law.

If a project results in the loss of access or loss of natural resources, the project proponent should attempt to preserve access to resources for Indigenous Peoples, including possibly through replacement with equivalent resources or (as a last resort) monetary compensation. To the extent possible, Indigenous Peoples should be allowed to access, use and cross lands, subject to health and safety considerations.

Steps should be taken to avoid adverse impacts on cultural heritage, particularly where there will be significant impacts on "critical cultural heritage" or where Indigenous knowledge will be used for commercial purposes.

Compensation is not, strictly speaking, a legal requirement of consultation. It is common, however, for proponents to enter into impact benefit agreements and profit-sharing agreements to ensure that Indigenous groups are sharing in the benefit of the project as part of its engagement efforts.

Regulators may impose conditions on project approval ensuring continued access to resources.

Significant adverse impacts on Indigenous Peoples' critical cultural heritage are unlikely to be approved by the regulators or the courts.

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Private sector responsibilities where government is responsible for managing Indigenous peoples issues

1. Proponents should attempt to comply with IFC Performance Standard 7, including possible adoption of correction measures to fill the gaps in any government-led consultation process, without being in breach of national legislation.
2. When key project decisions (like the acquisition of lands and relocations) are not handled by the project proponent, it is possible the requirements of Performance Standard 7 including FPIC cannot be met. Where this occurs, the project proponent should assess risks of going ahead.

The duty to consult is the Crown's duty and the honour of the Crown cannot be completely delegated to the project proponent, meaning it is the government that is ultimately responsible for safeguarding Indigenous Peoples' interests.

However, Canadian law is clear that procedural aspects of the duty to consult can be delegated to and are often fulfilled by private sector entities, as well as regulatory bodies. Such delegation is entirely proper so long as, at the end of the day, meaningful and good faith consultation has occurred.

¹ In Canada, industry practice informs the legal requirements for consultation. There is no one legislation, document or judicial decision that sets out an exhaustive list of all the steps that need to be completed as part of the consultation process. In part, this is because consultation is recognized to not be a one-size-fits-all process; what is required as part of the duty to consult will vary depending on, among other things, the type of project, the capacity of the Indigenous community, the severity of the impact, and the strength of the claim. Ultimately, the court is concerned with whether the process resulted in a good faith consideration of Indigenous concerns and that reasonable and appropriate efforts were used to accommodate those concerns. Industry interpretations of what amounts to good faith consultation has created a standard industry practice which, itself, then informs the expectations of the court. As such, there is a dialogue and close connection between legal requirements for consultation and standard industry practice.

² RSC, 1985, c I-5.



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