



**Supporting Inclusive Resource Development (SIRD)  
East Africa  
TRAINING PROGRAM  
2019**



THE CANADIAN  
BAR ASSOCIATION



Global Affairs  
Canada    Affaires mondiales  
Canada



LAW SOCIETY OF KENYA



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Law Society



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## International Standards in Community Engagement

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# What you'll learn....

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Overview of some international standards:

- ❖ United Nations Declaration on the Rights of Indigenous Peoples
- ❖ International Finance Corporation
- ❖ International Council on Mining and Metals
- ❖ IPIECA



# United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

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# UNDRIP Articles

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## TERRITORY

Articles 10, 20, 23, 24, 25, 26, 27, 28, 29, 32, and 37.

## JUSTICE

Articles 2, 7, 8, 12, 15, 17, 21, 22, 26, 27, 28, 29, 30, 38, 39, 40, 41, 42, 43, 44, 45, and 46.

## FREEDOMS

Articles 1, 5, 6, 7, 9, 11, 12, 13, 14, 16, 24, 31, 36, 37, and 46.

## GOVERNANCE

Articles 3, 4, 5, 13, 14, 18, 19, 20, 32, 33, 34, and 35.



# Who has adopted UNDRIP?

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Adopted by the United Nations General Assembly on Thursday, September 13, 2007, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

Does not itself constitute international law, but is indicative of international norms which are being recognized and established



# Canada's Reluctance to Support UNDRIP (2007-2015)

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Section 35 of the *Constitution Act, 1982*

**35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.**

- Royal Commission of Aboriginal Peoples in 1995 (several recommendations regarding Aboriginal and treaty rights)
- Charlottetown Accord (self-government) in 1992
- Truth and Reconciliation Commission Report of 2015 – 94 Calls to Action
- UNDRIP is recommended to be the “Reconciliation Framework”
- Present federal government, Prime Minister Trudeau commits to implement UNDRIP and the 94 TRC Calls to Action in 2015

<https://www.youtube.com/watch?v=yOCmEHdgoPc>



# Indigenous Rights are Human Rights

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Excerpts from Preamble of the UNDRIP:

...Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust...

...Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures, and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.





# Land Rights – Article 32

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## *Article 32*

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.



# Land Rights – Article 26

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## *Article 26*

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. ...
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.



# What does Free, Prior and Informed Consent (FPIC) mean?

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**Free** implies that there is no coercion, intimidation or manipulation.

**Prior** implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes.

**Informed** implies that information is provided that covers a range of aspects, including:

- the nature, size, pace, reversibility and scope of any proposed project or activity
- the purpose of the project as well as its duration
- locality and areas affected
- a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks
- personnel likely to be involved in the execution of the project; and
- procedures the project may entail

This process may include the option of withholding consent. Consultation and participation are crucial components of a consent process.



# Extraction Industry Response to Free Prior and Informed Consent

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Industry has historically fought against any requirement for FPIC or Community License.

Rather than spending resources on whether they need to get FPIC, industry should not proceed without FPIC and focus resources on building trust and reaching an agreement

- This is how industry operates in all their other activities with other parties
  - For example, entering into a contract requires two parties to provide FPIC in order for their to be a contract
- Similarly, concept of fair market value underlying business decisions is based on concept of what an informed buyer (under no compulsion to buy) will pay to an informed seller (under no compulsion to sell) – both parties must provide FPIC

Where Indigenous peoples have been granted FPIC, the result has not been denial of consent

- See next slides - in Nunavut, Indigenous peoples have the right to FPIC



# International Finance Corporation (IFC)

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# IFC Performance Standards

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- Performance Standards on Environmental and Social Sustainability
- The Performance Standards are directed towards clients:
  - providing guidance on how to identify risks and impacts,
  - designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way;
  - including stakeholder engagement and disclosure obligations of the client in relation to project-level activities
- IFC requires its clients to apply the Performance Standards to manage environmental and social risks and impacts so that development opportunities are enhanced
- The Performance Standards may also be applied by other financial institutions
- **Has become the benchmark of best practice in the industry and mining companies are looked to align or implement them**
- Eight Performance Standards establish standards



# IFC Performance Standards

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## Overview of Performance Standards on Environmental and Social Sustainability

[PS1: Assessment and Management of Environmental and Social Risks and Impacts](#)

PS 2: Labor and Working Conditions

PS 3: Resource Efficiency and Pollution Prevention

PS 4: Community Health, Safety, and Security

PS 5: Land Acquisition and Involuntary Resettlement

PS 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources

PS 7: Indigenous Peoples

PS 8: Cultural Heritage



# PS #1- Stakeholder Engagement

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- A key objective of PS1 is: “to promote and provide means for adequate engagement with Affected Communities throughout the project cycle on issues that could potentially affect them and to ensure that relevant environmental and social information is disclosed and disseminated”
- Sites that are not located in high-income OECD countries are required to undertake stakeholder engagement throughout the life of the mine
- Further, sites that have identified potentially significant adverse impacts on communities must conduct an Informed Consultation and Participation (ICP)





# PS #1- Stakeholder Engagement

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## Consultation

- When Affected Communities are subject to identified risks and adverse impacts from a project, the client will undertake a process of consultation in a manner that provides the Affected Communities with **opportunities to express their views on project risks, impacts and mitigation measures, and allows the client to consider and respond to them**
- The extent and degree of engagement required by the consultation process should be commensurate with the project's risks and adverse impacts and with the concerns raised by the Affected Communities.



# PS #1- Stakeholder Engagement

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## Effective consultation is a two-way process that should:

- (i) begin early in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise;
- (ii) be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and format and is understandable to Affected Communities; language preferences of the Affected Communities, their decision-making process, and the needs of disadvantaged or vulnerable groups
- (iii) focus inclusive engagement on those directly affected as opposed to those not directly affected;
- (iv) be free of external manipulation, interference, coercion, or intimidation;
- (v) enable meaningful participation, where applicable; and
- (vi) be documented
  - Includes requirements for a Grievance mechanism



# PS #1 Stakeholder Engagement

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## Informed Consultation and Participation

- For projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation (ICP) process that will build upon the steps outlined above in Consultation and will result in the Affected Communities' informed participation
- ICP involves a more in-depth exchange of views and information, and an organized and iterative consultation, leading to the client's incorporating into their decision-making process the views of the Affected Communities on matters that affect them directly, such as the proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues
- **The consultation process should (i) capture both men's and women's views, if necessary through separate forums or engagements, and (ii) reflect men's and women's different concerns and priorities about impacts, mitigation mechanisms, and benefits, where appropriate**
- The client will document the process, in particular the measures taken to avoid or minimize risks to and adverse impacts on the Affected Communities, and will inform those affected about how their concerns have been considered



# PS #1 Stakeholder Engagement

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## Indigenous Peoples

- For projects with adverse impacts to Indigenous Peoples, the client is required to engage them in a process of ICP and in certain circumstances the client is required to obtain their Free, Prior, and Informed Consent (FPIC)
- The requirements related to Indigenous Peoples and the definition of the special circumstances requiring FPIC are described in Performance Standard 7



# International Council on Mining and Metals (ICMM)

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# ICMM

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- An international organization dedicated to a safe, fair and sustainable mining and metals industry
- 27 mining and metals companies and over 30 regional and commodities associations
- Member companies commit to implementing 10 Principles and 8 position statements
- Principles 9 and 10 cover Stakeholder Engagement and Participation
  - Proactively engage key stakeholders on sustainable development challenges and opportunities in an open and transparent manner
  - Provide timely, accurate and relevant information
  - Engage with and respond to stakeholders through open consultation
  - Effectively report and independently verify progress and performance



# IPIECA (Oil and Gas Best Practices)

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# IPIECA

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- Develops, shares and promotes good practice and knowledge to help the industry and improve its environmental and social performance
- Not for profit association that provides a forum for encouraging continuous improvement in industry performance
- Only global association involving both the upstream and downstream oil and gas industry
- Industry's principal channel of communication with the United Nations

Many resources and toolkits: <http://www.iecea.org/our-work/social/indigenous-peoples/>





# Resources

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## **ICMM Toolkits**

Understanding company-community relations toolkit; Community Development Toolkit.

<http://www.icmm.com>

**IFC, Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets**

<http://www.ifc.org>

## **Preventing Conflict in Exploration Tool**

CDA Collaborative Learning Projects, PDAC and Worldvision - some good elements particularly on risk assessments. [http://www.cdainc.com/cdawww/pdf/other/pce\\_tool\\_english\\_final\\_Pdf.pdf](http://www.cdainc.com/cdawww/pdf/other/pce_tool_english_final_Pdf.pdf)

## **Accountability AA1000 Stakeholder Engagement Standard**

<http://www.accountability.org/images/content/3/6/362/AA1000SES%202010%20PRINT.PDF>

