

# Participation in Decision-Making

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**Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.**

Indigenous peoples have always had governance structures, which included processes for making decisions when their interests were at stake. These structures often respected different roles for Indigenous women and men. As noted by the UN Expert Mechanism on the Rights of Indigenous Peoples, “Within many indigenous societies, women continue to have important decision-making roles, including in cultural and ceremonial events, where interaction, learning and intergenerational transfer of knowledge take place. Through these processes, women have the opportunity to empower themselves and others.”<sup>1</sup>

## Right to Participate in Decision-Making

One of the most critical sets of rights within the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is the right to participate in decision-making. If the right to self-determination is the foundational right from which all other rights flow, then the right to participate in decision making is the key to protecting these rights. The significance of the right to participate in decision making can also be seen by the fact that over 20 articles implicate this right.

The right to participate in decision-making is key to addressing the exclusion and marginalization of Indigenous peoples within mainstream society.<sup>2</sup> As noted by EMRIP, “many indigenous peoples remain vulnerable to top-down State interventions that take



little or no account of their rights and circumstances.”<sup>3</sup> The exclusion from decision making processes has a negative impact on Indigenous peoples’ “ability to determine the direction of their own societies,” which is the crux of self-determination.

Ensuring the full and effective participation of Indigenous peoples in decision making is fundamental to protecting Indigenous peoples’ rights and can therefore address the implementation gap between the legal recognition of rights and protection of rights on the ground. Beyond protecting Indigenous peoples’ broader human rights, the right to participate in decision making also redresses the power imbalance between Indigenous peoples and countries, and can forge new relationships based on justice, human rights and mutual respect.<sup>4</sup>

## Good Practices on the Right to Participate in Decision-Making

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Participation in decision making must include Indigenous women to ensure their knowledges and experiences are considered when determining the impacts of pending decisions. The UNDRIP recognition that all rights apply equally to Indigenous women and men means that Indigenous women have the equal right “to participate in both internal and external decision-making processes and institutions.”<sup>5</sup> It is critical that decision making processes specifically “facilitate the participation of indigenous women in their activities” as “Indigenous women often face exceptional impediments to participation in decision-making.”<sup>6</sup>

- A. EMRIP identified good practices for participation of Indigenous peoples in decision-making. Good practices are those that
- B. Allow and enhance indigenous peoples’ participation in decision-making;
- C. Allow Indigenous peoples to influence the outcome of decisions that affect them;
- D. Realize Indigenous peoples’ right to self-determination;
- E. Include robust procedures and seek Indigenous peoples’ free, prior and informed consent.<sup>7</sup>

The engagement of Indigenous peoples in the decision-making process should over the course of a project: from planning to implementation and follow-up.<sup>8</sup>

One of the main differences between the duty of consultation and accommodation (DTCA) and the right to participate in decision making based on free, prior and informed consent is that the duty to consult is based on the idea that a Canadian government (federal or provincial) has a decision to make, and they should discuss that decision with Indigenous peoples prior to making that decision. The right to participate in decision-making and FPIC focus on Indigenous peoples as decision-makers, sitting at the table influencing the process and the outcome of the decision.



## Understanding Free, Prior and Informed Consent

The duty to obtain Indigenous peoples FPIC is a key component of participation in decision-making. EMRIP provides further guidance on what full and effective participation on the basis of free, prior and informed consent looks like:

- “free” implies no coercion, intimidation or manipulation;
- “prior” implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes;
- “informed” implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples;
- “consent” implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.<sup>9</sup>

Of particular concern to Indigenous women is the requirement that “free” also means that FPIC processes should support “consensus building within the indigenous peoples’ community, and practices that might cause division should be avoided.” This means that governments must avoid any divide and conquer tactics, which include along the lines of gender. A critical element of FPIC, is the right to withhold consent if the people determine that the project is not in their best interests.<sup>10</sup> When considering if consent is provided, a gendered lens should be taken to ensure that Indigenous women and gender diverse people have been engaged in the process and have consented. A critical element of FPIC, is the right to withhold consent if the people determine that the project is not in their best interests.<sup>11</sup> This would apply to Indigenous women as well, as noted in article 44.

When does FPIC arise:

- adoption and implementation of legislative or administrative measures
- any project affecting indigenous peoples’ lands, territories and other resources or cultural resources
- relocation of indigenous peoples from their lands or territories and
- storage of hazardous materials on their lands or territories



FPIC addresses the exclusion of Indigenous peoples from decision-making processes, while also creating opportunities to revitalize Indigenous peoples' decision-making institutions. The UNDRIP articles 5, 27, 34 and 40 affirms the right of Indigenous peoples to maintain and strengthen their own legal systems.<sup>12</sup> For FPIC to be fully implemented, Indigenous women and their concerns must also be included in decision-making processes. This may require addressing the ways in which colonialism has impacted the decision-making role of women within their communities, as well as looking at traditional practices that may not have afforded roles for women in decision making.

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1 United Nations, Human Rights Council. *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, (United Nations, 2011), para 37.

2 EMRIP, *Participation study*, para 1.

3 United Nations, Human Rights Council. *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples, Annex, Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making*, (United Nations, 2021), para 15

4 United Nations, Human Rights Council. *Free, prior and informed consent: a human rights-based approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, (United Nations, 2018), para 11.

5 EMRIP, *Participation study*, para 36.

6 EMRIP, *Participation study annex*, para 32.

7 EMRIP, *Participation study*, para 13.

8 EMRIP, *FPIC study*, para 16.

9 EMRIP, *Participation study annex*, para 25.

10 EMRIP, *FPIC study*, para 26.

11 EMRIP, *FPIC study*, para 26.

12 EMRIP, *Participation study*, para 31.

