

# UN Declaration on the Rights of Indigenous Peoples and Consent in Impact Assessments

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# Overview

- UN Declaration & Standard of Free, Prior and Informed Consent
- BC Crown Legislative Landscape
- Federal Crown Legislative Landscape
- Domestication of UN Declaration and Consent
- Consent is a Substantive Right
- Next Steps

# UN Declaration

## *UN Declaration on the Rights of Indigenous Peoples*

- Does not create new rights and is not merely “aspirational”
- Reflects pre-existing, binding, international human rights standards and customary international law in an Indigenous context.
- Canada will “fully implement without qualification” and BC “fully adopted”.
- Explicitly affirms cross-cutting standard of Indigenous Peoples’ inherent right to self-determination and self-government and related standard of free, prior and informed consent (“consent”).

# UN Declaration

## *UN Declaration on the Rights of Indigenous Peoples*

- Articles 19 and 32(2) particularly important in context of impact assessments:
  - Art 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain their free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.
  - Art 32(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.

# BC Crown Legislative Landscape

## 1. ***Declaration on the Rights of Indigenous Peoples Act (BC)***

- Passed on November 29, 2019
- Affirms the application of the UN Declaration to the laws of BC, without delay
- Commits BC, with Indigenous peoples in BC, to take all measures necessary to ensure provincial laws are consistent with the Declaration
- New statutory basis for BC to enter into decision-making and consent-based agreements with Indigenous governing bodies
  - Does not make exercise of consent contingent on an agreement with the Crown or limit the scope, applicability or implication of Indigenous consent in any way.

# BC Crown Legislative Landscape Cont'd

## 2.1 *Environmental Assessment Act (BC)*

- Into force December 2018
- No express implementation of UN Declaration
- Instead, a “purpose” of the EA Office to support reconciliation by:
  - supporting implementation of the Declaration,
  - recognizing inherent jurisdiction of Indigenous Nations and their right to participate in decision making matters,
  - collaborating with Indigenous Nations consistent with the Declaration, and
  - acknowledging Indigenous peoples' rights under s.35 in the course of assessments and decision making under the Act.

# BC Crown Legislative Landscape Cont'd

## 2.1 ***Environmental Assessment Act (BC)***

- If an Indigenous Nation provides notice of intention to assess potential effects on the Nation and its rights, then this portion of the assessment will automatically be Indigenous-led (can support Indigenous decision-making and determinations of consent).
- Provides for substitution and cooperation agreements – though ultimate decision to approve project remains with the Minister.

# BC Crown Legislative Landscape Cont'd

## 2.1 ***Environmental Assessment Act Cont'd***

- Establishes two “streams” for consent (*from BC’s perspective*):
  1. Consent required if required by treaty or other agreement with BC.
  2. If no treaty or agreement exists, the so-called “consent-based” process provides opportunities throughout for consensus seeking on decision-points and to express or withhold consent (but the Minister may still approve a project despite lack of consent).
- Dispute Resolution available at various decision-points in the process
- Minister must “offer to meet” with First Nation to “attempt to reach consensus” if ultimate decisions differ and must provide reasons if decision is to approve despite a lack of consent.



# BC Crown Legislative Landscape Cont'd

## 2.2 ***Environmental Assessment Act*** – “**Guide to Consensus Seeking Under the EAA**” (Policy)

- Reinforces notion of “two streams” of consent : implies consent in EA is contingent on a having either a treaty or agreement with BC. Otherwise, BC views consent through its outdated legal approach to consultation and accommodation.
- Strengthens EAO’s consultation record - tracking tools documenting “consensus-seeking” activities and “reasonable efforts” taken to attempt to reach consensus even if consensus not reached.
- Focus on whether consent is free, prior, and informed (process) rather than on whether consent decision is respected (outcome).
- Frames consent as a process that may be fulfilled by “seeking consensus” throughout the EA.

# Federal Crown Legislative Landscape

## 1. ***Bill C-15: An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples (Canada)***

- First Reading: December 3, 2020 (currently in federal legislative process).
- Would:
  - Confirm the application of the UN Declaration without delay to Canadian law.
  - Affirm the UN Declaration as a human rights instrument applicable to Canadian law and as a source for the interpretation of Canadian law.
  - Provides a framework and oversight for implementation of the Declaration.
  - Requires Canada to, in consultation and cooperation with Indigenous peoples take all measures necessary to ensure the laws of Canada are consistent with the Declaration

# Federal Crown Legislative Landscape

## 2.1 *Impact Assessment Act (Canada)*

- Preamble notes commitment to implement the UN Declaration, but otherwise fails to substantively implement.
- “Cooperation” with Indigenous peoples is listed as a “purpose”, but no references to consent in substantive provisions.
- Some “cooperation tools” may support Indigenous decision-making:
  - Planning phase includes opportunity to collaborate on project design and propose alternatives before plans cemented.
  - Indigenous-led assessments, studies and land-use plans “factors” in Assessment Report.
  - Opportunities for delegation of part of assessment or report, Substitution and Joint Review Panels (discretionary and not available for energy projects).

# Federal Crown Legislative Landscape

## 2.1 *Impact Assessment Act Cont'd*

- Joint Review Panels and Substitution limited to those with assessment authority under a treaty, self-government agreement or federal statute (e.g. *FNLMA*). Recognition of Indigenous jurisdiction is otherwise conditional on agreement.
- Final decision-making authority cannot be delegated or substituted,
- **Nothing requires Minister or Cabinet to consider Indigenous Nations' granting or withholding of consent** in the discretionary decision of whether a project is in the “public interest” and should be

# Federal Legislative Landscape Cont'd

## 2.2 ***Impact Assessment Act – Policy and Guidance***

- Interpretation of consent as a process met by opportunities for participation
  - Focus is on process not outcome.
  - Requirements to engage, but Indigenous Nation's consent decision merely a “factor”.
  - Opportunities for consultation, dialogue and identification of mitigation measures characterized as bringing the IAA into alignment with commitment to implement UN Declaration and “aims to secure free, prior and informed consent.”
- Conflates consent with the duty to consult
  - Requires approach to align with 2011 *Guidelines for Federal Officials to Fulfill the Duty to Consult*.
  - Participation in assessments on a spectrum based on factors that inform the duty to consult.
  - Consideration of appropriate accommodation measures based on “strength of claim” analysis.

# Concern: Minimization of Consent through Domestic Interpretation

- BC and Canada claim EAA / IAA are consistent with the UN Declaration.
- Raises concern re: interpretation and domestication of Declaration.
- Acts attempt to diminish and minimize the meaning of consent through interpretations moulded to fit existing Canadian legal concepts (i.e. common law duty to consult, “seek to obtain” consent, and justified infringement).
- This undermines the UN Declaration and point of BC *Declaration Act* and Bill C-15, and causes conflicting standards which will inevitably lead to tension in implementing assessment legislation.

# Consent is a Substantive Right

- UN Declaration affirms rights of self-determination and self-government, which are operationalized through decision-making/consent.
- Canada and BC need to ensure their laws are consistent with the UN Declaration (not the other way around).
- The UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) is clear that:

“The duty of the State to obtain indigenous peoples’ **FPIC entitles indigenous peoples to effectively determine the outcome of decision-making** that affects them, not merely a right to be involved in such processes...Hence, the duty to obtain the FPIC of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples’ rights”

# Next Steps: Legislative Amendment

- Amend EAA to align with UN Declaration, as required under the Declaration Act (BC) s.3.
- Amend IAA to align with UN Declaration (even if Bill C-15 does not pass) as Canada has endorsed the Declaration without qualification.
- Examples:
  - Remove the artificial “two streams” of consent
  - Remove explicit reference in the EAA to exempt or allow a project despite an Indigenous Nation’s explicit withholding of consent
  - Revise IAA definition of “Indigenous Jurisdiction” which makes recognition conditional on having a treaty or other type of agreement with the Crown
  - Revise IAA to require consent as a baseline, to ensure consent not weighed against “public interest” factors such as “economic wellbeing of the people of Canada”
  - De-colonize the *legislative process* (colonial laws will not achieve reconciliation).



# Next Steps: Interpretive Guidance for Applying Standard of Consent

- The spirit, intent, requirements and standards of the UN Declaration must be applied to the interpretation of EAA and IAA regimes to support Nations in self-determination and self-governance, which are operationalized through the mechanisms of decision-making and consent.
- Examples:
  - Amend interpretive policy and guidelines to shift focus of consent from procedural consultation right (with excess discretion to Crown decision-maker) to substantive human right (function of self-determination and self-governance).
  - Issue policy and guidelines for interpretation of legislation in manner consistent with the standard of consent (e.g. interpreting legislation as implicitly requiring consent).

# Discussion and Questions

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