

Collaborative consent as a path to realizing UNDRIP

The government has committed to implementing UNDRIP. Building consent through collaborative governance is a way it could realize this commitment.

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In recent years, governments at all levels in Canada have stated their commitments to reconciliation and building nation-to-nation approaches with Indigenous peoples. Both the federal government and, more recently, the British Columbia government have committed to implementing the [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP) and the Truth and Reconciliation Commission of Canada's [Calls to Action](#), which reiterate the need to secure consent and ensure Indigenous peoples are full partners in Confederation.

Turning this commitment into reality is perhaps the greatest challenge of the coming decade. It may well define Canada in a global context, and will certainly have significant implications for governance and land and resource development decision-making across the country.

One hundred and fifty years into Confederation, Canada's relationships with Indigenous peoples — and the institutions, laws and policies governing these relationships — remain fraught with challenges. Aspects of overt racism and inequality appear to be firmly entrenched in Canadian governance systems and society more broadly. There is no shortage of evidence of these realities: the 101 First Nation communities currently [living with long-term drinking water advisories](#) and the hundreds of ongoing court battles over government decisions affecting Indigenous territories and communities from coast to coast to coast are examples.

Despite promises made by governments to do things differently, the gap between these commitments and the on-the-ground realities remain stark. Perhaps nowhere can this gap be seen more clearly than in the Supreme Court's [Ktunaxa Nation v. British Columbia decision](#), which (literally) paves the way for development of a major ski resort in an area that is sacred to the Ktunaxa Nation.

What would it take actually to realize UNDRIP commitments in Canada? The conversation about what the declaration truly means and how it will be implemented is complex, [contested](#) and [ongoing](#). Researchers who have [studied](#) the declaration at length have remarked that implementing UNDRIP implies building consent through long-term, ongoing collaborative governance relationships. As Martin Papillon and Thierry Rodon noted in a [recent IRPP paper](#), this relational approach to free, prior and informed consent moves beyond the adversarial debates around veto and focuses instead on processes for Indigenous peoples to be full and equal governing partners in decisions affecting their lands.

The concept of collaborative consent — presented in a recent [report](#) by the Centre for Indigenous Environmental Resources and the University of Victoria's POLIS Project on Ecological Governance — sheds more light on what would be a viable pathway to meaningfully bring UNDRIP to life. That report builds on [earlier articulations](#) of collaborative consent, a term coined to describe processes used by territorial and Indigenous governments in the Northwest Territories to develop key water agreements and legislation.

Collaborative consent is a mutual consent process: it is about governance and changing how decisions are made. With collaborative consent, Indigenous and non-Indigenous governments commit to working together over the long run, each with their asserted authority, and with a goal of achieving each other's consent on decisions, policies and plans. This is in line with the approach described by [Papillon and Rodon](#), who also highlight the importance of linking these government-to-government-level processes with internal community-driven deliberations as a way to ensure that there is free, prior and informed consent.

In Canada's brand of federalism, jurisdictions and responsibilities do not exist in watertight compartments. To the contrary, there is rarely a clean division of power, so there needs to be a continual process of agreeing to work together on matters of common concern. Indeed, cooperative approaches — where federal, territorial and provincial governments work together institutionally on matters of shared importance — are not the exception but a principal mechanism of Canada's constitutional system. Collaborative consent is like cooperative federalism but it goes further, in that it embraces the critical role of Indigenous nations as full partners in building Canada's future. It requires all governments (Crown and Indigenous) to continuously build new, shared spaces, structures and institutions as part of an evolving relationship.

Collaborative consent does not require any government involved to surrender authority. Nor does it mean that all governments are involved in all decisions at all times. The critical thing is that they agree on how to work together: where collaboration is necessary (or not) and how decisions are made. These processes can proceed even with historical game stoppers like unceded territory and resolution of land, title and rights, because each party participates on the basis of their own understanding of their authority, regardless of whether others agree.

Elements of collaborative consent are already present in a variety of efforts between Indigenous and state governments across Canada and internationally. From these examples, we have included several hallmarks of collaborative consent in [our work](#). The following are not prescriptive or exhaustive, but they are conditions that facilitate mutual consent-based decision-making:

- Collaborative consent is fundamentally based on respect, trust and the art of diplomacy between governments.
- All governments recognize each other as legitimate authorities.
- Collaborative consent forums are decision-making forums.
- The scope of issues considered through the process can be extensive and ultimately must be satisfactory to all parties.
- Collaborative consent starts at the beginning, and all governments commit to remaining at the table for the “long haul.”
- Each government’s interests must be dealt with in a manner that is satisfactory from its own point of view.
- The process must generate real outcomes.

As these hallmarks make clear, collaborative consent differs fundamentally from the current consultation and accommodation approach as laid out in [section 35 of the Constitution](#). These constitutional protections would remain intact as a safety net should the diplomatic art of nation-to-nation relationships fail. The intention of seeking collaborative consent, however, would be to build real partnerships and new forms of governance, ones that would do away with courts as a way to resolve disputes or mediate a fraying relationship, which is cumbersome and often ineffective.

Furthermore, consultation and accommodation tends to deal with project-based decisions and is an “end-of-pipe” process, meaning that Indigenous nations are responding to proposed projects, rather than shaping the broad policy and legal foundations upon which such decisions are based. Although consultation and accommodation can (at best) be a process that checks government power and (at worst) be a way for Crown governments to justify infringing on rights and title, it should not be the starting point. Ultimately, this approach does not truly embrace Indigenous governments as partners in Canada’s governance.

In practice, collaborative consent is not an abstract or academic exercise in nation (re)building; it is based on negotiations for lands and waters that are under way. Across Canada and beyond, Indigenous, provincial, and territorial governments are already putting aspects of this consent-based approach into action as they work through the tough governance challenges of the day. While there are many examples of the hallmarks we have listed above (including the [Haida Reconciliation Protocol](#) and the New Zealand [Whanganui River Settlement Agreement](#)), the Northwest Territories has

demonstrated particular leadership in this realm. For years, territorial and Indigenous governments there have been successfully codrafting legislation and undertaking major collaborative negotiations for lands and waters, in particular, innovative and world-class [transboundary water agreements](#).

It is our view that fresh water offers a [rich opportunity](#) around which to start building new relationships and using innovative forms of collaborative, consent-based decision-making. By its nature, water is shared, and we don't have many legal precedents in this area, because the question of who owns water has never been resolved by the courts. Most people realize the answer to the question is that we all own water, so we need to collaborate to protect and govern it. In British Columbia, implementing the province's new *Water Sustainability Act* offers an immediate and compelling [opportunity](#) to put the collaborative consent approach into action.

If Canada's governments are serious about their commitment to reconciliation and building a shared future for the country, demonstrating real action on UNDRIP will be paramount. Collaborative consent is a proven way that they can honour the promises they have made.

Photo:

Photo: Candace Day Neveau addresses the crowd gathered around the "reoccupation" teepee erected on Parliament Hill in June 2017 as Canada celebrated its 150th anniversary. Shutterstock, by Paul McKinnon.

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