

COLLABORATIVE CONSENT

Advancing a nation-to-nation relationship with Indigenous peoples in Canada

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In the wake of Canada's 150th birthday it is time to consider what is needed to make our federation work better. In an era of conflict around pipelines, new hydropower dams and developments of all sorts in traditional territories of Indigenous governments across the country, we are also poised for a new path forward with the [endorsement by the federal government](#) of United Nations Declaration on the Rights of Indigenous Peoples ([UNDRIP](#)). Implementation of UNDRIP is needed to create a more equitable and just governance relationship between Canada and Indigenous peoples. Trends in the Supreme Court from three important cases originating from British Columbia: Delgamuukw, Haida Nation, and Tsilhqot'in Nation only reinforce this, emphasizing that decision-making without the consent of Indigenous nations comes at a high cost and bears significant risks.

COLLABORATIVE CONSENT AS THE PATH FORWARD

Collaborative consent is a mutual consent process through which Indigenous and non-Indigenous governments commit to working together with a goal of achieving each other's consent to decisions, policies, and plans. It is about governance and changing how decisions are made. Collaborative consent is the missing link in confederation as it provides a way for Indigenous government to have seats at the table. This benefits all Canadians and all governments, at every level, and will be increasingly important as water issues become more complex as the climate changes.

Collaborative consent involves long-term processes requiring all governments to build structures and new institutions to engage and share decision-making. It does not require surrendering jurisdiction or authority; indeed, governments need to bring their authorities to the table and be prepared to implement them after consensus decisions are made.

This [visionary approach](#) has been applied in a number of instances in the Northwest Territories and was used by the NWT in the process of developing the Mackenzie River Basin [Bilateral Water Management Agreements](#) with Alberta and B.C. This experience from Canada's North demonstrates the proof of possibility – and it is now time for governments at all levels to embed this approach in all aspects of water management and governance.

GETTING PAST HISTORICAL BARRIERS TO A TRULY “COOPERATIVE” FEDERATION

As a concept, collaborative consent is distinct from section 35 requirements of the Canadian constitution related to consultation and accommodation of Indigenous peoples. The Supreme Court's interpretation of section 35 provides the framework that, through the avenue of consultation, legitimizes infringements of Indigenous rights. Collaborative consent offers a constructive way to build ongoing relationships among Crown and Indigenous governments, and can avoid rights infringements, litigation and social unrest.

Even with historical game stoppers, like unceded territory, and resolving land, title and rights claims that have been viewed as necessary precursors to any real governance conversation, issues can be addressed through collaborative consent because each party participates based on their own understanding of their authority, regardless of whether others agree. Collaborative consent offers a way to craft solutions that work for all parties through a truly cooperative form of federalism with out needing to resolve the difficult question of who “owns” the land and water.

Collaborative consent already forms the foundation of how Canada is governed, we just haven't called it that, and it hasn't yet involved Indigenous nations. Because our constitution is often unclear regarding areas of jurisdiction, we have a long history of federal, provincial, and territorial governments working together formally and informally at consensus-based governance tables on matters of shared importance and concern. We do this because it results in better – and lasting – decisions.

Intergovernmental relationships matter when governing in a federation: proceeding with a decision unilaterally and without consensus around the table risks significant harm to relationships with other governments.

A forthcoming discussion paper explores the opportunity of collaborative consent in the context of the new B.C. [Water Sustainability Act](#). The paper demonstrates the myriad ways – from water sustainability planning to embedding environmental flow considerations in water management to addressing land-water linkages – that better governance becomes possible with a foundation built on collaborative consent.*

HALLMARKS OF COLLABORATIVE CONSENT

The real world examples and the experience of the authors of this article reveal core hallmarks of collaborative consent, which include:

- Collaborative consent is fundamentally based on respect, trust, and the art of diplomacy between governments.
- Parties recognize each other as legitimate authorities (even if the scope of those authorities are being discussed in other venues).
- Parties engage at multiple sources and levels of governance.
- Parties commit to remaining at the table for the 'long haul'.
- Real outcomes are generated.

FROM CONCEPT TO ACTION

Collaborative consent requires transformation of existing governance systems and ways of thinking in the water context. Improved skills around collaboration and consensus building are also urgently needed to make this approach work in practice. Understanding, support, time, and resourcing are needed for Indigenous Nations' institution (re)building and internal governance processes to engage in ongoing collaborative consent processes. Most importantly, all political leaders must embrace the opportunity of finally honouring Canada's obligation that all levels of governments of the three founding nations that were here in the beginning – and are here to stay – are represented at the table of confederation. **F**

* Phare, M.A., Simms, R., Brandes, O.M. & Miltenberger, M. (2017 forthcoming). Collaborative Consent and BC's Water: Towards Watershed Co-Governance. POLIS Water Sustainability Project & Centre for Indigenous Environmental Resources. www.poliswaterproject.org.