



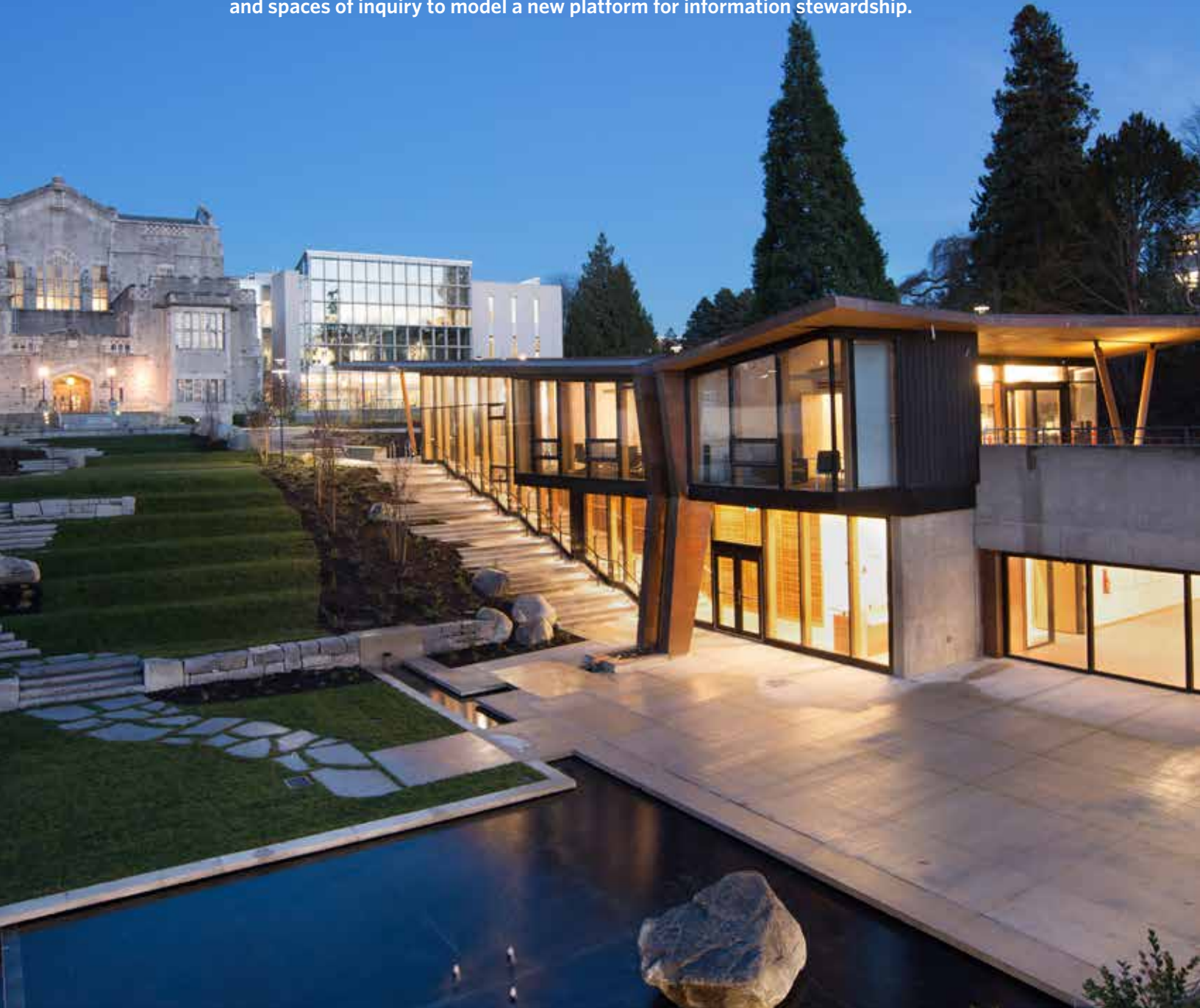
SUMMARY REPORT

Special Dialogue on Bill 41 *Declaration on the Rights of Indigenous Peoples Act* (DRIPA)

**CONVENED BY THE
RESIDENTIAL SCHOOL HISTORY & DIALOGUE CENTRE**

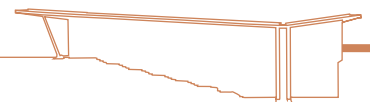
About the Indian Residential School History & Dialogue Centre

Located on the traditional, ancestral, and unceded territory of the hə́nqəmíəh̄m̄-speaking xʷməθkʷəy̓əm (Musqueam) people, the Indian Residential School History & Dialogue Centre (IRSHDC) at the University of British Columbia supports access to Residential School records for survivors, their families, and communities. In support of this mandate, the IRSHDC works to generate inclusive dialogue that is transparent and trauma-informed. This approach to dialogue is essential to the Centre's work building on information practices, research, and education around Residential Schools and related systems. With a framework that privileges respectful, equitable, and Indigenous-informed access to records and information, the IRSHDC is developing digital systems and spaces of inquiry to model a new platform for information stewardship.



Contents

About the Residential School History & Dialogue Centre	2
Introduction	4
Overview Of Dialogue	5
Linkages To Critical UN Declaration Implementation Considerations	8
Conclusion	9
Appendix 1: Special Dialogue Agenda	10
Appendix 2: Bill 41 - <i>Declaration on the Rights of Indigenous Peoples Act</i> Overview	12
Appendix 3: Confronting Myths About Indigenous Consent	17



Introduction

On October 24, 2019, in a historic and unique sitting, Bill 41 *Declaration on the Rights of Indigenous Peoples Act*¹ (DRIPA) was introduced in the British Columbia legislature. DRIPA affirms the application of the *United Nations Declaration on the Rights of Indigenous Peoples*² to the laws of British Columbia, and legal obligations for the co-operative implementation of the UN Declaration. Developed through a joint process implemented by the BC government and the First Nations Leadership Council, DRIPA intends to see the UN Declaration adopted as the “framework for reconciliation” as called for by the Truth and Reconciliation Commission.³

The Indian Residential School History and Dialogue Centre (IRSHDC) at the University of British Columbia is committed to supporting the work of a true and just reconciliation in Canada, including the upholding of the minimum standards for the survival, dignity, and well-being of Indigenous peoples in the UN Declaration, the recognition and implementation of Aboriginal Title and Rights enshrined in the *Constitution Act*, 1982, and the achievement of the Calls to Action.

To this end, in October 2018 the IRSHDC held a *Special Dialogue on Implementing the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia* that brought together a cross-section of Indigenous, government, industry, and civil society leaders and experts to discuss the implementation of the UN Declaration. The Summary Report⁴ on the *Special Dialogue*, identified the following critical UN Declaration implementation considerations:

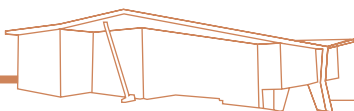
1. A legislative foundation is key, but is only one of many necessary shifts for implementation.
2. Implementation must be aided by a public, coherent, and transparent process in which all actors can play a role.
3. Creating space for relations that enable the standards of the UN Declaration to emerge is critical and can support Indigenous self-determination.
4. Economic reconciliation, predictability, and certainty are shared goals that will be advanced through meeting the UN Declaration’s standards.

1 *Bill 41 - 2019: Declaration on the Rights of Indigenous Peoples Act*. 13 Nov. 2019, <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>. Accessed 19 Nov. 2019.

2 The United Nations. *United Nations Declaration on the Rights of Indigenous Peoples: Adopted by the United Nations General Assembly on 13 September 2007*.

3 See Call to Action 43: “We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.”

4 UBC Residential School History and Dialogue Centre. *Summary Report: Special Dialogue on Implementing the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia*. 2018.



5. Implementation involves imparting an understanding of Indigenous rights as human rights.
6. Implementation represents a renewed opportunity to set a new course and to build upon past efforts that have not been fully realized.

With the tabling of DRIPA, the IRSHDC held a follow-up dialogue on November 4, 2019 to encourage review, understanding, and discussion about the legislation, and the approach it takes to the implementation of the UN Declaration.⁵ The follow-up dialogue was particularly designed as a forum for First Nations leaders and their technical experts, including lawyers, to share their perspectives and views. The session was also open to those working in relevant fields who wished to build an understanding of DRIPA.

As a supplement to the Summary Report of the *Special Dialogue*, this report provides a short overview of what was discussed on November 4, 2019.

Overview Of Dialogue

The dialogue was in three parts: leadership presentations, a technical review of DRIPA, and open discussion.

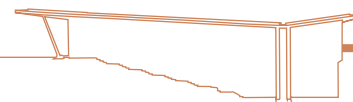
Leadership Presentations

Three short presentations were made by leadership to situate DRIPA in broader relevant contexts.

Grand Chief Ed John, who worked as a champion in the development and drafting of the UN Declaration, situated DRIPA within the extensive advocacy and work by First Nations to secure the human rights of Indigenous peoples.

British Columbia's Minister of Indigenous Relations and Reconciliation Scott Fraser acknowledged how ensuring success in the implementation of the UN Declaration, including through DRIPA, will require concrete action across government ministries, as well as increasingly co-operative and progressive partnerships between government and Indigenous peoples. Minister Fraser acknowledged that the real and necessary work is yet to come, including the achievement of the alignment of laws with the UN Declaration and development of an action plan to meet the objectives of the UN Declaration as required by DRIPA.

⁵ The agenda and description of the dialogue is attached to this report in Appendix 1 - Agenda UNDRIP Dialogue.



Ry Moran, Director of National Centre for Truth and Reconciliation, explained the linkages between upholding the UN Declaration and addressing the legacy of residential schools and other mechanisms of colonialism in Canada. By pointing to specific articles of the UN Declaration, Mr. Moran spoke to the power and opportunity of the UN Declaration to serve as a “framework for reconciliation.”

Technical Review of DRIPA

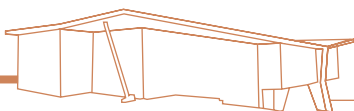
A technical overview of DRIPA was provided by IRSHDC Director Mary Ellen Turpel-Lafond, Aki-kwe, and Advisor, Dr. Roshan Danesh.

The overview highlighted the following:

- DRIPA is based on federal private members bill C-262 but includes additional, novel elements.
- DRIPA includes interpretation and non-derogation provisions in section 1 that ensure protection for section 35 title and rights.
- DRIPA includes a definition of “Indigenous governing bodies” that is designed to respect the right of self-determination, and to make space for agreements to be completed with Indigenous governments that are established under Indigenous laws (as distinct from having to also be an Indian Act Band or recognized society).
- DRIPA imposes three distinct procedural obligations on the provincial government: to align provincial laws with the UN Declaration (s. 3); to establish an action plan to meet the objectives of the UN Declaration (s. 4); and to produce annual reports on progress (s. 5). All of these obligations are to be met in consultation and cooperation with Indigenous peoples.
- DRIPA makes legislative space in section 6 and 7 by providing discretion for new models of agreements, including joint and consent-based decision-making.

It was also emphasized that DRIPA is only one of many forms of legislative change and action that are needed. DRIPA provides one of the building blocks of transformative change that have been long called for – including by the *Royal Commission on Aboriginal Peoples* – but that additional, future, legislative change will be needed. Such change must address issues of accountability and oversight, supports for self-government and Nation re-building, new forms of dispute resolution, and mechanisms for transition out of the Indian Act.

A “Bill Primer” that provides more detail and explanation of Bill 41, and reflects themes discussed at the dialogue, is included in Appendix 2.



Open Discussion

The bulk of the session was an open discussion amongst all assembled. Important challenges, concerns, and perspectives were raised that touched on matters of both process and substance. Some of the main themes of the discussion included the following:

- The definition of “Indigenous governing bodies” and how there are concerns and a legitimate lack of trust that government will respect self-determination regarding how Indigenous peoples rebuild their governments. It was noted that there are certainly historic patterns and reasons for mistrust. It was also identified how the definition was grounded in trying to respect two distinct issues: (1) who is the collective that holds title and rights – which is a matter determined by the intersection of Indigenous legal orders and the common law; and (2) who represents the collective title and rights holder- which is a matter of Indigenous self-determination and not the business of Crown governments. It was also noted that all DRIPA sets out to do is make space for agreements to be made with more types of Indigenous governments as self-determination advances (e.g. not only Indian Act Bands and societies) and is not a prescriptive or limiting approach.
- There was a focus on the issue of consent, and whether DRIPA will make a tangible and real difference regarding consent. It was noted how successful advocacy by Indigenous peoples has moved the work from a situation where the existence of rights was outright denied, through requirements to consultation and accommodation, to the current struggle to give true meaning to free, prior, and informed consent. Indigenous peoples have moved the work to this point, and while there will certainly be struggles to fully implement consent, the baseline continues to move in a progressive and rights-based direction. It was also discussed, and acknowledged, how the full implementation of the standard of consent is intertwined with the on-going work Indigenous peoples are doing to re-build their governments and Nations, including addressing issues of shared territories and overlaps. A commentary, “Confronting Myths about Indigenous Consent” by Dr. Danesh, which was published by IRSHDC, is included in Appendix 3.
- Many shared the perspectives that while there has been much emphasis by politicians in recent years about the recognition and implementation of rights and upholding the standards of the UN Declaration, it is sometimes uncertain what tangible progress is being made. It was noted that there are some new developments and progress, including new agreement models such as the *shishálh Foundation Agreement*⁶, the outcomes of consent-based work in the Broughton Archipelago, some shifts in litigation approaches

6 United States, Congress, Paull, Warren, et al. “shishálh Foundation Agreement.” *shishálh Foundation Agreement*, The Government of British Columbia, 4 Oct. 2018. <https://www2.gov.bc.ca/gov/content/home>.

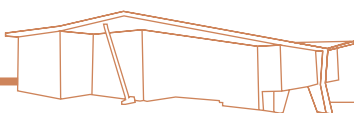
such as *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples*⁷, and new legislative jurisdictional arrangements regarding Indigenous children and families. At the same time, it was emphasised that the changes in rhetoric, intentions, policy, and practice alone will never be enough. A central tool of colonialism has been the imposition of legislative schemes that deny or ignore the existence of Indigenous peoples, Nations, laws, governments and rights. These legislative schemes require legislative change to be undone. DRIPA is an important step in breaking through this legislative scheme.

- There was discussion about moving forward. The development of an action plan is a clear priority, and proper title and rights holders must be in the lead. A sense of urgency was expressed to ensure a proper process is structured for developing the action plan, and which ensures the priorities and visions of Indigenous peoples and governments are driving the work. It was also discussed how the obligation in the statute for the the alignment of laws (s. 3) will require distinct processes and mechanisms for new laws and existing laws. While process may be put in place for the staged review of existing laws, a procedure will need to be put into place for ensuring alignment with proposed laws that move through the legislature in the near future.
- Questions and concerns were raised about what processes might have been utilized to date for the development of DRIPA, and what the process might be going forward including the potential for amendments. Representatives for the provincial government who were present spoke to this matter. It was also noted how the development of DRIPA was pursuant to a multi-year process established under the *Commitment Document*, which had been endorsed by First Nations.

Linkages To Critical UN Declaration Implementation Considerations

It has also become evident through consideration of DRIPA that the proposed law is responsive to and reflects many of the critical UN Declaration implementation considerations that were identified in the *Special Dialogue* in October, 2018. Specifically, the following is noted:

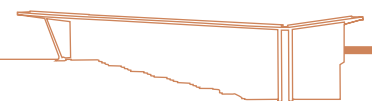
7 Department of Justice. "The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples." *Government of Canada, Department of Justice, Electronic Communications*, The Government of Canada, 11 Jan. 2019, <https://www.justice.gc.ca/eng/cs/sj-c/sj-c/jr-dja/dclip-dlcpa/litigation-litiges.html>.



- DRIPA, as well as the messaging from government and the First Nations Leadership Council around the Bill, evidence a clear understanding that it is only one of many shifts that are necessary, and that the real work is yet to come, including the alignment of laws and development and implementation of an action plan. There also appears to be a clear understanding that future legislative shifts continue to be needed.
- The action plan provides an opportunity to establish a public, coherent, and transparent process for the implementation of the UN Declaration, with Indigenous peoples in the lead, and opportunities for all stakeholders. The action plan can also be an opportunity for on-going education of the public regarding the human rights of Indigenous peoples.
- By creating space for joint and consent-based decision-making, and expanding and accelerating the development of agreements, opportunities are created to bring greater predictability and clarity to the economic and decision-making arrangements.
- As is intended by Call to Action 43, by adopting a “framework for reconciliation,” DRIPA provides an opportunity to bring more coherence to how government advances the work of reconciliation, and achieve greater consistency and progress in efforts.

Conclusion

The implementation of the UN Declaration is work that will carry forward over many years, through ever deepening forms of partnership between governments and Indigenous peoples. DRIPA, if enacted, appears as a first step in laying a legislative foundation for the implementation of the UN Declaration, and based on public reports, one that may soon be followed in other jurisdictions. Potentially, DRIPA stands as a foundation for advancing transformative change that has long been pursued, and may be fundamental to responding to the legacy of colonialism.



APPENDIX 1

Special Dialogue Agenda

Dialogue on the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia

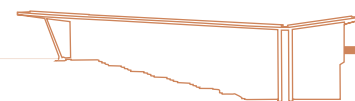
Date: November 4, 2019 **Time:** 9 a.m. to 12 p.m.

Briefing: 8:30-9 a.m. (IRSHDC Staff and Speakers)

Location: Vancouver Convention Centre West, Room 109/110

The Dialogue is particularly targeted for First Nations leaders, and those working with and for First Nations, including lawyers, negotiators, and experts.

Time	Activity
9:00 AM	Opening Territory Welcome – Elder Larry Grant, Musqueam First Nation
9:10 AM	Introduction to the day Mary Ellen Turpel-Lafond, Aki-kwe, UBC Residential School History and Dialogue Centre
9:15 – 9:30 AM	Opening comments <ul style="list-style-type: none"> ▪ Grand Chief Ed John, Akile Ch’oh, First Nations Summit ▪ Honourable Scott Fraser, Ministry of Indigenous Relations and Reconciliation ▪ Ry Moran, National Centre for Truth and Reconciliation
9:30 – 10:15 AM	Technical review of Bill and next steps – Aki-kwe and Dr. Roshan Danesh
10:15 AM	Morning Break
10:30 – 11:30 AM	Dialogue on Bill (individual break-outs at tables)
11:30 – 11:45 AM	Questions and open dialogue from floor <ul style="list-style-type: none"> ▪ Facilitated by Dr. Roshan Danesh and Aki-kwe
11:45 PM	Close and description of next steps – Aki-kwe
12:00 PM	End





APPENDIX 2

Bill 41 - Declaration on the Rights of
Indigenous Peoples Act Overview

Background

On October 24, 2019 the British Columbia government tabled Bill 41 - *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) in the BC legislature.

DRIPA was co-developed by the First Nations Leadership Council and the government pursuant to the Commitment Document, 2018 which stated the goal to: “jointly develop provincial legislation (not dissimilar to federal private members Bill C262) to establish the UN Declaration as the foundation and coherent path for Crown-Indigenous relations and reconciliation in British Columbia, including aligning provincial law and policy with the UN Declaration and Indigenous rights.”

Context

UN Declaration

Completed in 2007 through a lengthy, deliberative process that included States and Indigenous Peoples, the UN Declaration states the minimum standards for the survival, dignity, and well-being of Indigenous peoples. The UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP) does not articulate new human rights, but rather expresses established international human rights norms in the specific context of Indigenous peoples. UNDRIP consists of 46 articles stating both individual and collective human rights of Indigenous peoples including the right of self-determination; the inherent right of self-government; free, prior and informed consent; the right of redress; and cultural, spiritual, social, and linguistic rights. The UN Declaration also re-affirms the importance of the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

In 2015, the Truth and Reconciliation Commission Calls to Action called on governments to adopt the UN Declaration as “the framework for reconciliation:”

43. We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.

Other Calls to Action emphasized the importance of the UN Declaration as a framework for reconciliation for society at large, including industry.

After initially refusing to endorse the UN Declaration in 2007, Canada did endorse in 2010

with reservations. In 2016, Canada finally affirmed its unqualified endorsement of the UN Declaration. In 2017, the British Columbia government's mandate letters to all Ministers stated:

As part of our commitment to true, lasting reconciliation with First Nations in British Columbia our government will be fully adopting and implementing the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Calls to Action of the Truth and Reconciliation Commission. As minister, you are responsible for moving forward on the Calls to Action and reviewing policies, programs, and legislation to determine how to bring the principles of the declaration into action in British Columbia.

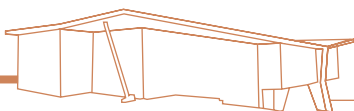
Legislative Background

The UN Declaration has been the subject of some legislative activity in recent years. Most notably, federal private members Bill C-262 *United Nations Declaration on the Rights of Indigenous Peoples Act* was passed by the House of Commons in 2019, but stalled in the Senate. Bill C-262 confirmed the application of the UN Declaration to the laws of Canada, required the alignment of laws with the UN Declaration, and the adoption of an action plan to meet the objectives of the UN Declaration. Annual reporting on progress was required over a 20-year period.

A number of other pieces of legislation reference the UN Declaration. Bill C-91 (the federal Act respecting Indigenous languages), Bill C-92 (the federal Act respecting First Nations, Inuit, and Métis children, youth and families), and Bill C-69 (the federal Impact Assessment Act) reference the UN Declaration in general terms. In addition to referencing the UN Declaration, British Columbia's new Environmental Assessment Act also requires provincial decision-makers to determine whether or not Indigenous consent has been received.

In other jurisdictions there are examples of proposed legislation that in some ways share goals with DRIPA. For example, in Ontario Bill 79, An Act to ensure that the laws of Ontario are in harmony with the *United Nations Declaration on the Rights of Indigenous Peoples*, has been proposed as a private members bill, and is quite similar to federal Bill C-262.

Apart from the UN Declaration, there have been various efforts since the adoption of section 35 of the Constitution in 1982 to advance the recognition and implementation of Indigenous rights through legislation. These efforts include the proposed BC Recognition and Reconciliation Act in 2009, and the Recognition and Implementation of Indigenous Rights Framework in 2018.

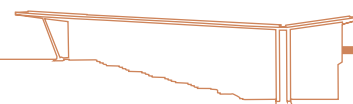


DRIPA Primer

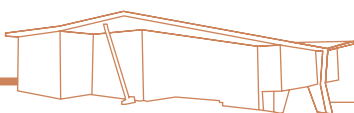
DRIPA is quite similar to Bill C-262, and was drafted based on that Bill. In addition to technical changes that reflect conventions of legislative drafting in BC, such as the absence of a preamble, some of the main differences with Bill C-262 include the presence of a purpose clause (2) as well as sections on agreements and decision-making (6,7). As well, certain language or provisions have been included to reflect the language of the UN Declaration (e.g. “in consultation and cooperation with Indigenous peoples” in section 3, 4, and 5) or the importance of reflecting diversity amongst Indigenous peoples (e.g. the distinctions language in section 1(2)).

The following six observations are offered to inform discussion and understanding of DRIPA:

- 1. Application of the UN Declaration:** DRIPA confirms that nothing in the Bill delays the application of the UN Declaration in the laws of BC (1(4)), and that the Bill has the purpose affirming the application of the Bill (2(a)). Amongst other things, these sections affirm that the UN Declaration must be used as an interpretive standard for the laws of BC.
- 2. Aligning laws with the UN Declaration:** DRIPA places a process obligation on BC to take all measures necessary, in consultation and co-operation with Indigenous peoples, to ensure the laws of BC are consistent with the Declaration (3). Consideration needs to be given to what measures will be taken in relation to new laws, as distinct from existing laws. In relation to new laws it can be expected that a mechanism needs to be created to ensure that laws are being considered through the standards of the UN Declaration. While unique, some learnings may be drawn from how governments currently assess prospective laws for compliance with the Charter of Rights and Freedoms. With respect to existing laws, a process and list of priorities will have to be established. The Commitment Document, 2018 may be considered as identifying certain initial priorities. As well, the priorities for review of existing laws may be considered alongside or as part of the action plan to be developed under the legislation (4).
- 3. Action plan to meet the objectives of the Declaration:** DRIPA places a process obligation on BC to establish, in consultation and co-operation with Indigenous peoples, an action plan to meet the objectives of the UN Declaration (4). The objectives include ensuring the human rights standards in the UN Declaration are upheld, that Indigenous peoples “in the exercise of their rights, should be free from discrimination of any kind”, and that all forms of oppression and discrimination are ended. Such an action plan involves all sectors, and multiple forms of actions. It necessarily includes elements of policy change, social investments, education, public awareness, and other initiatives. Progress on the action plan will be the subject of annual reporting (5).



4. **Agreements with Indigenous Governing Bodies:** DRIPA affirms the discretion of government to enter into Indigenous Governing Bodies defined as entities authorized to act on behalf of Indigenous peoples who hold section 35(1) rights (1(1), 6). The definition of Indigenous governing bodies is influenced by those used in recent federal legislation, including Bill C-92. The definition reflects and affirms the legal principle that Indigenous rights are held by Indigenous collectives. In Tsilhqot'in Nation (BCSC) the idea of a collective was described a people with shared language, traditions, historical experiences, and collective actions. The definition also reflects and affirms the standard of Indigenous self-determination as identified in article 3 of the UN Declaration. Simply stated, only Indigenous peoples can determine their governing systems, political institutions, and who is authorized to represent them. DRIPA makes legislative space for agreements with Indigenous governing bodies as determined by Indigenous peoples, and addresses certain limitations that have existed in provincial law that limited certain forms of agreements to only being possible with Indian Act Bands, non-profit societies, or other entities recognized under provincial statutes.
5. **Decision-making:** DRIPA makes legislative space for agreements that include forms of consent-based decision-making, and the process government must follow to ensure they have mandates to enter into such agreements (7). The legislation contemplates the potential for multiple models of consent-based decision-making including the structuring of true joint decision-making (such as through a joint board or other joint structure with decision-making authority) or processes where consent from an Indigenous Governing Body is required before a provincial decision can be made. Given how limited the space is in BC's current statutory scheme for true consent-based decision-making, it can be expected that in many instances agreements that include such a consent-based model will be accompanied by consequential amendments.
6. **Non-Derogation:** DRIPA confirms that nothing in the Bill, or done under the Bill, abrogates or derogates from section 35(1) rights.



APPENDIX 3

Confronting Myths About Indigenous Consent

WRITTEN BY

ROSHAN DANESH

Indigenous consent is increasingly part of public discourse, particularly around resource development. In British Columbia this focus will continue in upcoming months as it is expected the government – as announced by Premier Horgan in Throne Speech 2019 – may soon introduce legislation to implement the *United Nations Declaration on the Rights of Indigenous Peoples* in British Columbia. Within the UN Declaration, one finds numerous references to obtaining the free, prior, and informed consent of Indigenous peoples.

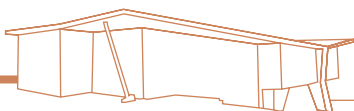
Public discourse about the UN Declaration and Indigenous consent typically includes the repetition of a number of myths. Often these myths are left unchallenged with many, including some political leaders and commentators, simply taking them for granted. It is timely and important to confront some of these myths.

Myth #1 – Indigenous consent is not part of Canadian law.

The fact is that Indigenous consent is part of Canadian law. It is discussed in various ways in decisions of the Supreme Court of Canada including *Haida* and *Tsilhqot'in*. Moreso, it is actually an original, core, foundational principle of the common law understanding of Indigenous-Crown relations. Former Chief Justice Beverly McLachlin explained in a speech that in Canada's history the English acknowledged the "limited prior entitlement of indigenous peoples, which required the Crown to treat with them and obtain their consent before their lands could be occupied. In Canada...this doctrine was cast in legal terms by the Royal Proclamation of 1763, which forbade settlement unless the Crown had first established treaties with the occupants."

Myth #2 – The UN Declaration creates new rights, including Indigenous consent.

The UN Declaration does not create new rights. What the UN Declaration does is affirm and express long-established human rights norms in the context of Indigenous peoples. These are human rights norms that are reflected in the Universal Declaration of Human Rights, and which Canada and Canadians have supported and advocated for over generations. These are the same norms that have influenced progressive human rights regimes across the globe, including our Charter.



Myth #3 – Consent is a veto over resource development.

Consent and veto are not the same thing, and consent is not a veto over resource development. First, no rights are absolute. This is true in our Charter, section 35 of our Constitution, and in the UN Declaration. Article 46(2) of the UN Declaration makes this explicit in stating how the exercise of rights, including consent, may be limited: “The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.” Second, countless officials as well as leading experts have explained in detail and with clarity how ‘consent’ and ‘veto’ are different. For example, James Anaya, the former Special Rapporteur on the Rights of Indigenous peoples, has explained that the free, prior, and informed consent standard is meant to ensure that all parties work together in good faith and make every effort to achieve mutually acceptable arrangements, and that a focus should be on building consensus. This is quite different than a ‘veto.’

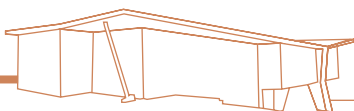
Myth #4 – Consent will lead to uncertainty.

This is perhaps the greatest myth of them all. To assert this myth ignores the massive, and increasing, uncertainty about resource development that British Columbians are confronted with every day. To the degree such uncertainty is a product of relations with Indigenous peoples, the challenge has not arisen from respecting Indigenous rights – including consent – but from denying and ignoring them. The lack of recognition and implementation of Indigenous title and rights – and demanding that they be ‘proved’ in court despite them already being affirmed as existing in section 35 of the Constitution – has resulted in a culture of conflict, with over-reliance on long and expensive court processes, that rarely results in clear outcomes. In such a climate partnerships are hard to forge, the rules are unclear, and the pathways one has to follow murky. Former Minister of Justice and Attorney-General of Canada Jody Wilson-Raybould made this clear in a talk to the Business Council of BC in 2018 where she explained that “the uncertainty that we all experience today — Indigenous peoples, Industry, governments and the Crown — whether...in relation to pipelines or any of a number of projects, has its roots directly in this history of denial and division” and further went on to explain how consent can be a path to certainty.

Undoubtedly the issue of Indigenous consent, and how to implement the UN Declaration, are complicated public policy issues, that have a historical and contemporary context that is often

quite challenging to capture in the soundbite and tweet culture of today's social and political discourses. This does not mean, however, that we should accept myths overruling facts, or allow misunderstandings to be treated as valid information. As these matters continue to be topics of focus in British Columbia, the better path, always, will be to seek out the best, and most informed, understandings possible.

Dr. Roshan Danesh has advised First Nations, the federal government, the British Columbia government, local governments, and industry on reconciliation. He has also advised international organizations, including the United Nations. He completed his doctoral studies in constitutional law at Harvard Law School. He recently published the policy paper "Operationalizing Indigenous Consent through Land-Use Planning" for the Institute for Research on Public Policy (<https://irpp.org/wp-content/uploads/2019/07/Operationalizing-Indigenous-Consent-through-Land-Use-Planning.pdf>)





THE UNIVERSITY OF BRITISH COLUMBIA

Residential School History and Dialogue Centre

Vancouver Campus

1985 Learners' Walk, Vancouver, BC CA V6T 1Z1

irshdc.ubc.ca

Tel: 604.822.6941

Email: irshdc.info@ubc.ca