



Unpacking Self- Government & Indigenous Law for **First Nations, Métis and Inuit Governments**

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Harnessing the Power of DRIPA in the Resource Sector

- Self-Government has many paths in BC: (1) Modern-day treaties, (2) Reconciliation G2G agreements; (3) Sechelt/West Bank Interim Self-Govt; and (4) FN-Industry Project specific
- Obligation to obtain FPIC may be strictly the Crown's, but pragmatic industry will negotiate consent since their life of project success is dependent upon legal certainty
- Nations advocate for consent as emerging standard for IBAs and G2Gs in BC, refusing to settle for consultation game
- FN-Industry negotiations will likely witness the most concrete implementation of UNDRIP:
 - FPIC for development projects affecting Indigenous territory (Articles 26 and 32 of UNDRIP);
 - Project agreements reflecting Indigenous legal orders as the **source** of Indigenous rights + title = inherent rights;
 - FPIC is an **expression of Indigenous jurisdiction and law**;
 - FPIC and consent in general is a relational, on-going process, not a one-time “yes” or “no”: and,
 - Nations and project proponents looking to implement consent-based decision-making models.

Breathing Consent into Resource Decision-Making

- Moving from a consultation standard to a consent standard means



Meaningful application of Nation laws to the Project - living and evolving set of standards that recognize Nations' laws and legal institutions and inform consent decision



Consent-based decision-making in Core Areas - dynamic process and criteria for maintaining consent must keep pace with developments in law

Breathing Consent into Resource Decision-Making

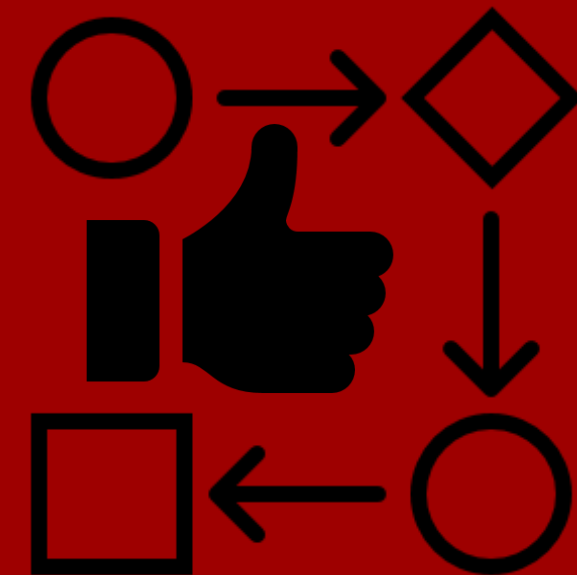
- Moving from a consultation standard to a consent standard means



Exercising Nation jurisdiction and governmental authority - project agreements reflect legal plural reality



Less resource-wasting, focusing on decisions that matter



Project proponent must continue to earn Nation's support of the Project by following agreed process

Case Study - Consent Standard

- To be consistent with the DRIPA and international human rights standard, Proponents must secure **AND maintain** Nation consent to the Project throughout **all Project Phases**
- Consent as a dynamic and living obligation - not absolute and may be withdrawn if Nation conditions are not met
- IBA practice of "non-derogation clause" seeking to bind Nation in a one-time expression of support is outdated, as it:



Consent Mechanics

- Core Areas for Consent-based Decision-Making Standard could include:

- Water Management and Protection

- Tailings Storage Facility Management

- Cultural Heritage Preservation and Restoration

- Fish and Fish Habitat Protection and Restoration

- Closure, Reclamation and End Land Use Requirements

- Other Nation priority?

- Where consent cannot be provided, parties will re-engage in the process until they: (1) reach consent and the applicable Nation conditions; or (2) the activity/decision does not proceed; or (3) dispute resolution process is triggered
- Clear processes create mutual degree of certainty

Project Certainty

Is there anything that can be done to protect the current relationship from a change in leadership?

- First, the question highlights an important universal requirements of all IBAs - they must provide a degree of legacy and equality that outlast the election cycle
 - If there is inequity, the deal will be scrutinized
- Second, IBAs are no different than any contract, they must be dynamic in their implementation. The words are only skeletal, it is the implementation where life is breathed into the agreement.
- Develop clear review mechanisms that generally match election cycles to ensure that everyone remains on board, if not, allow a process of co-management of the IBA to adapt and amend, if necessary
- Having clear reporting requirements to community for ratification, ongoing engagement and annual public meetings can also allow disenfranchised to be heard and concerns addressed.

Project Certainty

- Consent is the penultimate of legal certainty for a deal that has legacy
- Need to reframe FPIC as mutual consent in the IBA or JV context
 - Reality is that First Nations are gaining legal footing on consent as a safe harbour
 - Indigenous legal orders resurgence; UNDRIP Implementation; Tsilhqot'in consent requirement for title holders and just the general view of seeing Indigenous Peoples as partners all trend towards a mutual consent environment
 - Important to think it through... do not think of consent as a simple one-off, it is a consent maintained and possibly withdrawn
 - Another opportunity is to further explore graduated consent on a spectrum of:

Non-opposition - Conditional support - Support - Conditional consent - Consent

Q&A



Thank you.

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