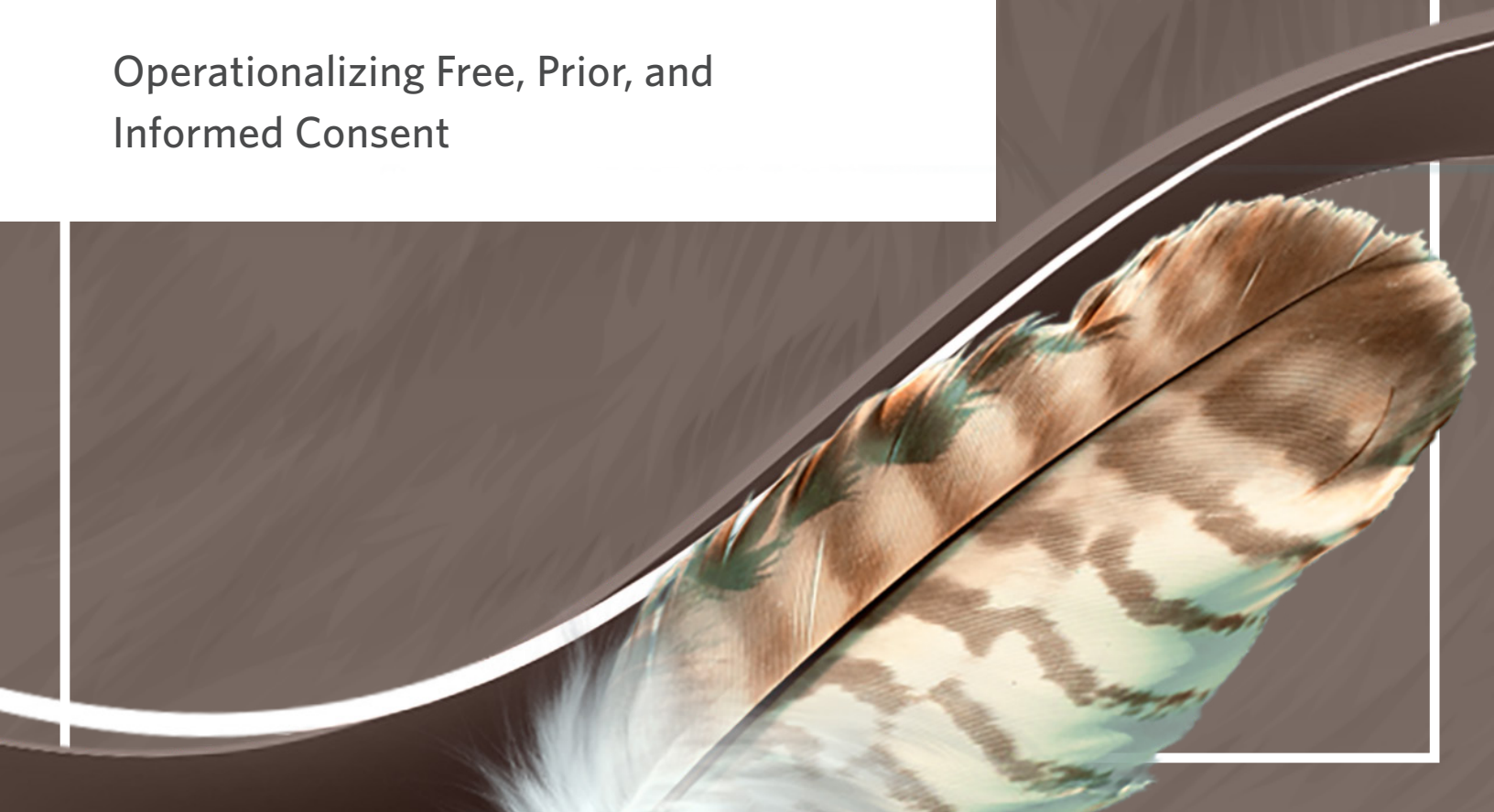
IMPLEMENTING UNDRIP IN BC: A DISCUSSION PAPER SERIES
BY THE RESIDENTIAL SCHOOL HISTORY AND DIALOGUE CENTRE

Operationalizing Free, Prior, and Informed Consent



INTRODUCTION

In 2019 we saw some historic developments with respect to the recognition of the fundamental human rights of Indigenous peoples. In particular, after decades of denial and failed initiatives, we saw some governments beginning to take steps in partnership with Indigenous peoples to change legislation in ways that can assist with the vital work of decolonization. The most notable example of this was the passage of British Columbia's *Declaration on the Rights of Indigenous Peoples Act.*

The *Act,* which was co-developed through a process established with the First Nations Leadership Council of British Columbia, affirms the application of the *United Nations Declaration on the Rights of Indigenous Peoples* to the laws of BC, requires the alignment of British Columbia's laws with the standards of the UN Declaration, and the development of an action plan to meet the objectives of the UN Declaration. The Act is undoubtedly the clearest and most direct effort by a government to date to heed to the Truth and Reconciliation Commissions Call to Action 43 to adopt the UN Declaration as "the framework for reconciliation."

The passage of the *Declaration on the Rights of Indigenous Peoples Act* has understandably placed an even greater focus on public discourse and dialogue about our progress in the work of reconciliation, the actions, roles and responsibilities that we all have, and the ways in which we should understand, respect and implement the UN Declaration. Important questions are being raised, perspectives shared, and ideas about the future developed. One of the features of the *Act* is that it lays a foundation of a future where ever-increasing work must be done together – the types of work, such as reviewing legislation and negotiating new models of decision-making agreements, that we have not done together in the past. As such, it is vital that we do the hard work of developing shared understandings and insights about the developments that are happening, so that we can see increasing success in the work we do into the future.

In order to help inform understandings and dialogue about the *Declaration on the Rights of Indigenous Peoples Act* and the *United Nations Declaration on the Rights of Indigenous Peoples* the Residential School History and Dialogue Centre will be periodically issuing short commentaries on what some of the developments that are taking place mean, issues we may consider when reviewing them, and ideas about the work we must collectively do going forward. These commentaries have been developed in dialogue with leading experts, including those on the front lines of driving forward some of the changes we are seeing. It is hoped that by sharing these perspectives, ever more informed, effective, and co-operative efforts will advance in support of true reconciliation.

Finally, these papers are meant to be a starting point for advancing dialogue – and in particular for encouraging a wide range of perspectives from all backgrounds and viewpoints. In addition to occasional written commentaries, the Centre anticipates hosting on-going dialogues regarding the progress of implementation of the UN Declaration. We welcome your feedback on these commentaries, as well as ideas you may have for other topics that would be helpful for us to focus on in the future.

Free, prior, and informed consent is one of the most discussed standards in the *United Nations Declaration on the Rights of Indigenous Peoples*. Yet, little of this discussion is about how to practically and tangibly implement it on the ground in relations between Indigenous peoples and the Crown.

Section 7 of the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) helps shift this discussion to the implementation of consent by making legislative space for consent-based decision making. Section 7 states:

> 7 (1)For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:
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> (a)the exercise of a statutory power of decision jointly by
>
> (i)the Indigenous governing body, and
> (ii)the government or another decision-maker;
>
> (b)the consent of the Indigenous governing body before the exercise of a statutory power of decision.

What are models of "joint" or "consent" based decision making?

Practically implementing consent-based decision making begins with the understanding that it involves a model of decision making between governments – Indigenous and Crown. This is different from engaging with another party to "consult" or involve them in the decision you are making. This point was emphasized by the former Minister of Justice and Attorney-General of Canada Jody Wilson-Raybould in a speech to the Business Council of British Columbia in 2018:

> *Consent is not simply an extension of existing processes of consultation and accommodation, nor is the law of consultation — being heavily procedural in its orientation — a particularly practical or helpful way for thinking about how to operationalize consent. We need to see consent as part and parcel of the new relationship we seek to build with Indigenous Nations, as proper title and rights holders, who are reconstituting and rebuilding their political, economic, and social structures.*
>
> *In this context there is a better way to think about consent...grounded in the purposes and goals of section 35 and the UN Declaration. Consent is analogous to the types of relations we*

> *typically see, and are familiar with, between governments. In such relations, where governments must work together, there are a range of mechanisms that are used to ensure the authority and autonomy of both governments is respected, and decisions are made in a way that is consistent and coherent, and does not often lead to regular or substantial disagreement.*
>
> *These mechanisms are diverse, and can range from shared bodies and structures, to utilizing the same information and standards, to agreeing on long term plans or arrangements that will give clarity to how all decisions will be made on a certain matter or in a certain area over time. Enacting these mechanisms is achieved through a multiplicity of tools — including legislation, policy, and agreements.*

This important insight is supported by recent dialogue and expert commentary[1] that there are three basic models of implementing consent in relations between governments. Within each of these three models there will be countless variations and diversity. Which models are employed, in what ways, and on which subject-matter, are matters that must be determined by Indigenous Peoples as part of their development and implementation of proper relations with Crown governments.

Models 1 and 2 are ones where consent is implemented "up front" through the arrangements and structures developed by Indigenous Peoples and the Crown.

Model 1 involves establishing clear jurisdictional lines and authorities between those matters that will be solely decided upon by Indigenous governments through their own processes, structures, and laws, and those that will be solely decided upon by the Crown. Where such jurisdictional lines are agreed to, in effect consent is established at the outset through those jurisdictional lines being confirmed. Decisions are then made by the jurisdiction that holds authority.

Of course, such jurisdictional relationships have always been understood to be a purpose of treaty-making historically, and is also reflected in the UN Declaration and the right of self-government. Yet, historic colonialism, as well as the long-standing patterns of Crown denial of Indigenous title and rights, including self-government, have generally led to only very limited

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1 Douglas White III Kwulasultun. 2019. "Consent Paper." Union of BC Indian Chiefs. https://www.ubcic.bc.ca/consent_paper ; Danesh, Roshan, and Robert McPhee. 2019. *Operationalizing Indigenous Consent through Land-Use Planning*. IRPP Insight 29. Montreal: Institute for Research on Public Policy. https://irpp.org/wp-content/uploads/2019/07/Operationalizing-Indigenous-Consent-through-Land-Use-Planning.pdf

examples of such jurisdictional arrangements being implemented.

We are emerging into an era where proper recognition and implementation of Indigenous jurisdictions, and relatedly creating clarity regarding Indigenous and Crown jurisdictions, is increasingly occurring. This is seen in the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* which were adopted by the BC government as the *Draft Principles Respecting the Government of British Columbia's Relationship with Indigenous Peoples. Principle* 4 states:

> *4 The Province of British Columbia recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.*
>
> This principle affirms the inherent right of self-government as an existing Aboriginal right within section 35 of the Constitution Act, 1982. Recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.
>
> As informed by UNDRIP, Indigenous peoples have a unique connection to and constitutionally protected interest in their lands, including decision making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.
>
> Government-to-government relationships, including treaty relationships, therefore include:
>
> 1. developing mechanisms and designing processes which recognize that Indigenous peoples are foundational to Canada's constitutional framework;
>
> 2. involving Indigenous peoples in the effective decision making and governance of our shared home;
>
> 3. putting in place effective mechanisms to support the transition away from colonial systems of administration and governance; and
>
> 4. ensuring, based on recognition of rights, the space for the operation of Indigenous jurisdictions and laws.

Bill C-92 *An Act Respecting Inuit, First Nation, and Métis Children, Youth and Families* also reflects the shifts occurring by affirming a regime where Indigenous laws and jurisdiction over their

children are paramount over federal law.

Model 2 establishes consent-based decision making through the joint structures put in place by Indigenous and Crown governments through which decisions will be considered. In this Model, a joint decision maker is authorized by the Indigenous and Crown governments to make the final and binding decision regarding a matter. For example, a joint board may be established and given authority under the laws of an Indigenous Nation and the Crown to make decisions regarding certain matters. In this Model consent is achieved through the Indigenous and Crown governments jointly designing and establishing the decision-making board, establishing direction for the board and its scope of authority, and the appointment of the board members.

Model 3 is distinct in that it involves consent being achieved at the end of processes, at the decision-making stage. In this model, each of the Indigenous and Crown decision-makers make their respective decisions pursuant to their own governance structures and legal orders, as well as any processes or criteria they have agreed to between them. If the respective decisions of the Indigenous and Crown governments do not align, then there will be established mechanisms to achieve alignment. Critically, such mechanisms must be designed to achieve a final outcome. Examples of such mechanisms may include rules that will be applied which will clarify that in certain contexts the decisions of one or the other decision maker will be paramount, binding forms of dispute resolution, or contexts where the outcome of a non-aligned decision is that matters are held in abeyance pending other processes moving forward.

Section 7 of DRIPA expressly contemplates agreements that implement examples of Model 2 and 3 consent-based decision making. This is evident in its references to decision making being made "jointly" (Model 2) and to where the consent of an Indigenous governing body is required before the exercise of a statutory power of decision (Model 3). As well, the UN Declaration itself expresses foundations for Model 1 approaches, including how the rights of self-determination and self-government are described in articles 3, 4 and 5. It should be expected, however, that broader legislative foundations may also be needed to implement Model 1 arrangements, including through legislation that is specific to confirm jurisdictional arrangements with particular Nations.

As DRIPA is implemented in the upcoming years, we will see an increasing number of examples of how consent is being implemented through a range of models, and a shift in public discussion from the meaning of consent, to how it is pragmatically operating on the ground.