

## **Government of Canada input to the United Nations Expert Mechanism on the Rights of Indigenous Peoples – Call for submissions on free, prior and informed consent**

The Government of Canada welcomes the opportunity to respond to the call for submissions dated 30 November 2017 from the Expert Mechanism on the Rights of Indigenous Peoples and is pleased to provide this report on free, prior, and informed consent in the Canadian context. While the report primarily focuses on initiatives by Canada's federal government with respect to free, prior and informed consent, it is noted that provinces and territories also play an important role in the implementation of free, prior and informed consent in Canada.

The Government of Canada has committed to a renewed relationship with Indigenous peoples based on the recognition of rights, respect, co-operation, and partnership. In 2016, Canada announced its full and unqualified support for the Declaration on the Rights of Indigenous Peoples as well as a commitment to implement it domestically. While the Declaration is not a treaty to which Canada becomes legally bound as a party, this announcement signalled a clear commitment by Canada to abide by the Declaration both domestically and internationally. In this regard, it is noted that there are existing protections for Aboriginal and treaty rights in Canada, most notably as provided by section 35 of the *Constitution Act, 1982* and the Canadian law on the duty to consult.

Since this announcement, Canada has taken a number of steps to advance reconciliation and support implementation of the Declaration, including the principle of free, prior and informed consent.

The Government of Canada has established permanent bilateral mechanisms with First Nations, Inuit and Métis leaders, the three Indigenous peoples recognized under section 35 of Canada's *Constitution Act, 1982*. These mechanisms include annual meetings with the Prime Minister to identify joint priorities, co-develop policy and monitor progress.

A Working Group of Ministers has been established and is responsible for undertaking a review of federal laws, policies and operational practices that impact Indigenous peoples and their rights and interests to seek to ensure that the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the Declaration; and supporting the implementation of the 94 Calls to Action of Canada's Truth and Reconciliation Commission, one of which calls for the adoption and implementation of the Declaration.

In July 2017, the Government of Canada established the *Principles Respecting Canada's Relationship with Indigenous Peoples*. These principles are based on the recognition of Indigenous peoples, governments, laws, and rights, including the right to self-determination and the inherent right of self-government and form the

foundation for shifting Canada's approach to partnering with Indigenous peoples and governments. Principle 6 states that "The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources". The commentary which is intended to guide federal officials in implementing Principle 6 includes the following:

*The importance of free, prior, and informed consent, as identified in the United Nations Declaration, extends beyond title lands. To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.*

In addition, the Government of Canada has been engaging in rights and self-determination discussions with Indigenous groups across Canada. These discussions provide an opportunity for Canada and Indigenous groups to collaboratively identify and advance shared priorities, foster and advance self-government and self-determination, build capacity, and work towards closing socio-economic gaps between Indigenous peoples and the rest of Canada. The goal is to have these collaborative negotiation processes ultimately inform decision-making and lead to the co-development of mandates and policies. It is recognized that this is not a "one size fits all" approach and that flexible approaches and understandings of the unique nature of each Indigenous group are required. These discussions are founded on the recognition of the rights of Indigenous peoples and guided by the *Principles Respecting Canada's Relationship with Indigenous Peoples*.

In February 2018, in support of its commitment to renewing its relationship with Indigenous Peoples, Canada launched a national engagement to help develop a [Recognition and Implementation of Rights Framework](#). This work will culminate with legislation supported by new policies. The recognition and implementation of Indigenous rights is central to Canada's relationship with First Nation, Inuit and Métis peoples and to advance the vital work of reconciliation. Canada will hold engagement sessions with First Nations, Inuit and Métis partners, provinces and territories and other interested parties to discuss the path towards recognizing and implementing rights. While section 35 of the Constitution Act, 1982, recognizes and affirms existing Aboriginal and Treaty rights, Canada has never adopted an approach to rights recognition. Working with Indigenous Peoples to create federal laws and policies needed to fully and clearly put those rights into practice, Canada is

helping to advance and support the rebuilding of Indigenous nations and governments, and to overcome the legacy of colonization.

In further support of its commitment to implement the Declaration, the Government has announced that it will support a private member's bill known as Bill C-262 - *United Nations Declaration on the Rights of Indigenous Peoples Act*. This Bill which is currently before Canada's Parliament, calls for the government of Canada to take all measures necessary, in consultation and cooperation with Indigenous peoples, to ensure that the laws of Canada are consistent with the Declaration, as well as developing a national action plan and reporting mechanisms to ensure its implementation.

In February 2018, the Government of Canada introduced changes to the federal environmental and regulatory process. The proposed new environmental impact assessment process provides for the engagement of Indigenous peoples early in the planning phase of any natural resource project to which the legislation will apply, improved engagement between the Crown and Indigenous peoples aiming to secure their free, prior and informed consent, enhancing overall process transparency and participation opportunities, incorporating Indigenous knowledge along with other evidence sources, and consideration of impacts on Indigenous peoples in the assessment process.

Canada already has significant experience with implementation of the principle of free, prior and informed consent as found in the Declaration. Prior to the adoption of the Declaration in 2007, Canadian courts held that the Crown (federal, provincial and territorial governments) has a duty to consult and, where appropriate, accommodate, when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights. The Courts have determined that the duty to consult stems from the Honour of the Crown and the Crown's unique relationship with Indigenous peoples. The duty to consult has continued to evolve and as a result of numerous court decisions, a robust set of principles for meaningful recognition and protection of Aboriginal and treaty rights under section 35 of Canada's *Constitution Act, 1982* have been developed. To meet its obligations, Canada has established a whole-of-government approach to consultation which is continually refined in response to court decisions and best practices established by federal departments and agencies to meet their specific needs.

Various tools exist in Canada to support meaningful participation of Indigenous groups and relationship building when Canada is consulting. Consultation Protocols exist between the federal government and a number of Indigenous communities, and in some cases include provinces/territories. These protocols represent a proactive approach to meeting the legal duty to consult by setting out a clear and efficient process in advance of specific consultations taking place. In some cases, they go beyond the legal duty to consult and are used to facilitate engagement on other matters of interest and concern to communities. More recently, Canada has been

supporting resources centres which serve to support the capacity needs of Indigenous communities by providing access to consultation-related resources and services that facilitate community involvement in consultation processes.

Consistent with the purposes of the Declaration and free, prior and informed consent, both section 35 of the *Constitution Act, 1982* and the duty to consult serve to protect rights held by Indigenous collectives in Canada from federal, provincial and territorial government action, including for example, where government action is involved in regulating and approving resource development projects. The ultimate purpose of these protections has often been described as the reconciliation between the rights of Indigenous peoples and those of wider society.

In Canadian law, consultation does not give Indigenous peoples a veto over Crown conduct. Canadian courts have held that the duty to consult guarantees a process, not a particular result. There is no duty to reach agreement, but there must be good faith efforts and a commitment to a meaningful process by both the government and the Indigenous group whose rights may be adversely impacted and must always include consideration of accommodation measures. Where adequate consultation has occurred, a development may proceed without consent. Resulting infringements of section 35 rights, if any, must be justified as pursuing an important public interest in a proportionate way that minimizes impacts on rights. The extent of the government's obligations in fulfilling its duty to consult varies depending on the strength of the claim to the right and the severity of the potential adverse impact on the right.

Like free, prior and informed consent, the duty to consult in Canadian domestic law is intended to provide protections to the core rights of Indigenous peoples before rights are negatively impacted by government's action. Both also require the informed involvement and participation, by appropriate representatives, without coercion in consultation processes that are defined by good faith and meaningful engagement. However, Canada recognizes it may need to take steps beyond just relying on the duty to consult in order to implement the full scope of free, prior, and informed consent and explore mechanisms in collaboration with Indigenous partners in that regard.

Engagement with Indigenous peoples as well as other interested stakeholders will be undertaken, including through the recently announced Recognition and Implementation of Rights Framework engagement process to develop a made-in-Canada approach to free, prior and informed consent and the various means through which Canada may seek to implement it in various contexts, across levels of government and in partnership with Indigenous peoples.