

## BACKGROUNDER<sup>1</sup> – FRESH WATER AND CROWN RECONCILIATION COMMITMENTS: What are Opportunities for BC First Nations?



April 2019

Recent commitments to reconciliation with First Nations made by the BC and federal governments are broadly viewed as a promising step towards a new relationship between First Nations and Crown governments.<sup>2</sup> However, many First Nations leaders and communities emphasize that greater action is required to ensure full recognition of First Nations' inherent jurisdictions and responsibilities for fresh water in their traditional territories, and to achieve real improvements on-the-ground.

In November 2018, the First Nations Water Governance Roundtable<sup>3</sup> (Roundtable) drafted a **Statement of Requirements for Water Governance in British Columbia According to Crown Commitments to Reconciliation**. The purpose of the Statement is to provide further direction on the transformative measures required by the BC Government to fulfill reconciliation commitments and support the implementation of First Nations water jurisdiction. The Statement articulates 16 principles. It offers language that First Nations can use when engaging with the BC Government on freshwater governance and management decisions by:

- 1) Providing direction and clarity to the provincial government on how UNDRIP and other provincial commitments to reconciliation apply to fresh water specifically in relation to First Nations' jurisdiction and decision-making; and,
- 2) Providing recommendations to First Nations that are seeking to assert jurisdiction of fresh water in their traditional territories.

This Backgrounder accompanies the Statement of Requirements and offers clarity on key questions to support its implementation.

### What is the status of Crown commitments to reconciliation?

- Both the federal and BC governments endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Recommendations of the Calls to Action of the Truth and Reconciliation Commission and committed to their implementation.
- Federally<sup>4</sup>, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (Bill C-262) was introduced by MP Romeo Saganash in the House of Commons in April 2016 as a private members bill. Passed overwhelmingly in the House of Commons on May 30<sup>th</sup>, 2018, the Bill enacted would ensure that the laws of Canada are in harmony with UNDRIP. On May 16<sup>th</sup>, 2019, the Bill was referred to the Senate's Standing Committee on Aboriginal Peoples. Senators are aiming to make a decision before

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<sup>1</sup> This backgrounder was prepared by the Centre for Indigenous Environmental Resources and First Nations Fisheries Council of BC on behalf of the BC First Nations Water Governance Roundtable. For more information, please contact Natasha Overduin at [NOverduin@yourcier.org](mailto:NOverduin@yourcier.org) or Genevieve Layton-Cartier at [Genevieve@fnfisheriescouncil.ca](mailto:Genevieve@fnfisheriescouncil.ca).

<sup>2</sup> These commitments include the [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP) and the recommendations of the [Truth and Reconciliation Commission](#) (TRC) Calls to Action.

<sup>3</sup> The BC First Nations Water Governance Roundtable was established by in June 2017 to advance engagement in planning, management, and governance of fresh water, and to facilitate a collective First Nations voice on fresh water. Roundtable participants include 15 staff and leadership comprising 55 First Nations. The Roundtable is hosted by First Nations Fisheries Council of BC. The Centre for Indigenous Environmental Resources is a facilitation and implementation partner.

<sup>4</sup> Additionally, commitments were made in the Ministerial mandate letters from Prime Minister Trudeau and the *Principles respecting the Government of Canada's relationship with Indigenous peoples* published in 2018.

Parliament is scheduled to break for the summer on June 21<sup>st</sup> which will then be followed by the fall election.

- Provincially<sup>5</sup>, several BC laws are under review with consideration to UNDRIP (e.g., Environmental Assessment Act). In November 2018, BC committed to working with the First Nations Leadership Council to co-develop legislation to implement UNDRIP. It is still unclear what this process will involve, and whether it will be similar to the process taking place at the federal level with Bill-262. A potential positive early sign of the BC government taking seriously its UNDRIP commitments is the new free, prior, and informed consent (FPIC) proposal for the Environmental Assessment process out of the BC Environmental Assessment Office<sup>6</sup>.

### **What does UNDRIP say about water? Does it create new water rights?**

- UNDRIP, with its 46 Articles, does not create new rights. It emphasizes pre-existing and inherent rights. UNDRIP sets a minimum standard – not a gold standard – for ensuring the “survival, dignity and well-being of the Indigenous peoples of the world.”<sup>7</sup>
- Water is only mentioned specifically twice in the text of UNDRIP. However, numerous articles can be used as points of legal and political leverage for water, including those related to Indigenous people’s rights (including to self-determination), and FPIC<sup>8</sup>.
- UNDRIP reinforces the critical importance for BC First Nations to assert their rights, jurisdiction and authority over waters – even if Crown governments are falling behind in their commitments to reconciliation and their management of water resources.

### **What might *free, prior, and informed consent (FPIC)* mean for water decision-making and Indigenous peoples’ assertion of jurisdiction over water?**

- Crown governments (and international bodies) typically interpret UNDRIP weakly, as a declaration of procedural rights only. From a Crown perspective, UNDRIP and FPIC sets a high bar for demonstrating that consent was sought through *consultation and cooperation* with Indigenous peoples. But, UNDRIP is not interpreted by the Crown nor Canadian and international courts as a substantive right that flows from rights to self-determination. This interpretation, with its continued focus on “consultation” after-the-fact, poses a serious tension in government-to-government relationships.
- Because application of UNDRIP is likely to face these limitations, there is potentially a strategic benefit for First Nations to co-develop joint with the BC Government processes (e.g., territory-wide land and water or watershed planning). Government-to-government processes will look different from place to place, depending on the First Nation(s) involved, their priorities, governance structures, and histories of working together. Reaching agreement on policy, law, and governance issues ahead of time may help

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<sup>5</sup> Additionally, commitments were made in the Ministerial mandate letters from BC Premier John Horgan and the *Draft Principles that Guide the Province of British Columbia’s Relationship with Indigenous Peoples* published in May 2018.

<sup>6</sup> The new BC Environmental Assessment Act (Bill 51) was passed in the legislature in November 2018 but there are still a number of policies and regulations that must be developed before the Bill comes into force (anticipated in late 2019). The outline of the new changes can be found in the *Environmental Assessment Revitalization Intentions Paper* ([https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea\\_revitalization\\_intentions\\_paper.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_intentions_paper.pdf)).

<sup>7</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) [UNDRIP].

<sup>8</sup> West Coast Environmental Law. *Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with Reference to Fresh Water Resources* (September 2017), online (PDF): <<https://www.wcel.org/sites/default/files/publications/betweenlawandaction-undrip-fpic-freshwater-report-wcel-ubc.pdf>>.

ensure that singular, point-in-time, project-specific decisions align with the shared vision and agreement and avoid getting to “yes/no” situations.

### **What are some strategies that BC First Nations are currently using to assert jurisdiction of fresh waters in their traditional territories?**

Numerous examples of BC First Nations leadership in water point to a range of options for First Nations to exercise their jurisdiction and authority over fresh water. Depending on a First Nations’ priorities and capacity, this may involve strengthening water monitoring; initiating a watershed planning process; articulating a Water Declaration to solidify political direction, or articulating sacred responsibilities to water. Litigation and government-to-government negotiations related to Rights and Title also remain important avenues. For case studies of First Nations’ water governance initiatives see the FNFC report, [Protecting Water Our Water Our Way: First Nations Freshwater Governance in British Columbia](#).

### **How can BC First Nations use the Statement of Requirements?**

- Revise the *Statement of Requirements* so that it reflects your Nation’s unique relationship with water, such as including translations for important words into your local language and describing specific priorities and challenges.
- Use the Statement of Requirements to engage and educate other governments in your region (e.g., municipalities), and stakeholders, and re-assert jurisdiction and authority:
  - Directly share the Statement (as well as the original text of UNDRIP, TRC, and BC Draft Principles) with local governments, industry partners, funders. If possible, specify any immediate actions or responses your First Nation requires. For example, at a minimum, you could require these stakeholders respond by identifying how they will work to respect/uphold the Statement.
  - Inform the broader community about your Nation’s water rights and interests by engaging local/regional media: arrange for an [interview or hold a press conference](#) to generate news and raise awareness.
- Regularly share news about water issues through social media and your community’s newsletter (or other forums). Help community members understand UNDRIP as it relates to water by sharing this backgrounder.
- Attach the Statement to negotiated agreements with industry or government as an Appendix.

### **Additional Resources: Research and Analysis on UNDRIP**

- [Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples \(April 2019\)](#). A collection of essays that engage with the legal, historical, political and practical aspects of UNDRIP implementation, written by Indigenous legal scholars and policy leaders.
- Webinar: [UNDRIP: The Canadian Context and Implications for Reconciliation and for Protecting Canada’s Environment](#). A December 2018 webinar with perspectives from Eli Enns, Danika Littlechild, Jessica Clogg.
- [Between Law and Action: Assessing the State of Knowledge on Indigenous Laws, UNDRIP, and Free, Prior, Informed Consent with reference to Fresh Water Resources](#)  
Research by West Coast Environmental Law and Decolonizing Water investigating UNDRIP.

Organizations providing direct assistance, expertise, and/or resources related to Indigenous water governance and planning:

- **First Nations Fisheries Council *Water for Fish* Initiative;**

- **Centre for Indigenous Environmental Resources:** supports Indigenous-led watershed planning; can provide in-kind coordination, research, communications support to First Nation partners on water initiatives.
- **Indigenous Law Research Unit (University of Victoria):** dedicated research unit at the University of Victoria's Faculty of Law committed to the recovery and renaissance of Indigenous laws.
- **West Coast Environmental Law:** offers a program to First Nations on revitalizing law and developing Indigenous legal tools for water and land governance.
- **POLIS Water Sustainability Project:** develops research and legal analysis to improve freshwater decision-making and management in BC (and Canada); partners with Indigenous and non-Indigenous organizations and communities.
- **BC Water Funders Collaborative:** convenes a mix of philanthropic and government water funders in BC.
- **BC Freshwater Legacy Initiative:** invests in collaborative partnerships that are advancing new and better approaches to watershed governance in BC.