

The UN Declaration on the Rights of Indigenous Peoples and BC's Declaration on the Rights of Indigenous Peoples Act



Qeluc' (To Spin) /
Bodies of Knowledge, 2023

This design is an abstract spindlewhorl meant to embody movement, transformation, and the drawing upon of two bodies of knowledge to create something new. Spindle whorls are used in the spinning of wool for weaving in Coast Salish culture. They are prominent examples of our traditional art forms. In this design, Eliot White-Hill (*Kwulasultun*) drew upon Coast Salish forms to tell a narrative of two systems, two bodies of knowledge coming together to make something new.



Overview

The British Columbia Law Institute (“BCLI”) is BC’s law reform agency. The 2019 *Declaration on the Rights of Indigenous Peoples Act* requires all laws in British Columbia to be brought into alignment with the *United Nations Declaration on the Rights of Indigenous Peoples*.

The BCLI has launched its Reconciling Crown Legal Frameworks Program to support the research and innovations required to implement this legislation. This is the first of a series of primers designed to provide information about some of the law reform issues related to this legislation.

The *Declaration on the Rights of Indigenous Peoples Act*¹ establishes the *United Nations Declaration on the Rights of Indigenous Peoples*² as the framework for reconciliation in BC. This primer provides a brief overview of the *Declaration Act* and its implications for BC laws.

The work of the BCLI primarily takes place on the unceded territories of the The x^wməθk^wəy̓əm (Musqueam Indian Band), Sḵw̓x̓w̓ú7mesh (Squamish Nation), and səlilwətaʔ (Tseil-Waututh Nation).



¹ SBC 2019, c 44 (“Declaration Act”).

² UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*, available at: <https://www.refworld.org/docid/471355a82.html> (“UN Declaration”).



The UN Declaration

The UN Declaration was adopted by the United Nations General Assembly in 2007. Whereas an international convention is an agreement in which countries bind themselves to international law, a declaration reflects a global standard.³ It affirms a universally valid principle and while a declaration is not a binding agreement as between nation states, the principles set out in a declaration may nonetheless be binding through other means. In the case of the UN Declaration, it was unconditionally endorsed by Canada in 2016 and in 2019, the BC Legislature established it as the framework for reconciliation in BC when it passed the *Declaration Act*. The UN Declaration interprets international human rights as they apply to the Indigenous Peoples of the world. It is a comprehensive articulation of

Indigenous Peoples' inherent individual and collective human rights, which state governments have a responsibility to recognize and respect.

The UN Declaration's 46 Articles cover a wide range of areas, including:

- rights of self-determination and self-government;
- cultural rights;
- health rights;
- land rights; and
- protection against discrimination.

Taken together, the rights described in the UN Declaration are to be considered the "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."⁴

The Declaration Act and the UN Declaration

The *Declaration Act* affirms that the UN Declaration applies to the laws of BC. The *Declaration Act* sets out 3 principles for its interpretation:

1. the diversity of Indigenous Peoples in BC must be considered, particularly their distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories, and knowledge systems (what has come to be

referred to as a 'distinctions-based approach');

2. nothing in, or done, under the *Declaration Act* is to be seen as abolishing or detracting from the rights recognized and affirmed under s. 35 of the *Constitution Act, 1982*; and
3. nothing in the *Declaration Act* is to be seen as delaying the application of the UN Declaration to the laws of BC.⁵

³ Government of Canada, "Glossary of terms – human rights", online: <https://www.canada.ca/en/canadian-heritage/services/human-rights-glossary.html>.

⁴ UN Declaration, *supra* note 2 at Article 43.

⁵ *Declaration Act*, *supra* note 1, s. 1.





Implementation of the *Declaration Act* and the UN Declaration through it will require significant investments by the BC government, Indigenous governing

bodies (IGBs), and all others involved in the legal system to address and clarify the implications of the interpretive principles above.

The BC Government's Legal Obligations under the Declaration Act

The BC government (or the “Province”) has three distinct legal obligations under the *Declaration Act*:

1. to take all measures necessary to ensure the laws of BC are consistent with the UN Declaration (section 3);
2. to prepare and implement an action plan to meet the objectives of the UN Declaration (section 4);⁶ and
3. to report annually to the Legislative Assembly on progress (section 5).

All these obligations must be met “in consultation and cooperation with the Indigenous peoples in British Columbia.” The BCLI is supporting the work of bringing BC laws into alignment with the UN Declaration through its research and law reform work.

Alignment of Provincial Laws with the UN Declaration

In BC, there are approximately 800 provincial statutes and 2,200 regulations. Efforts to bring these laws into alignment with the UN Declaration are guided by an interim approach developed by the *Declaration Act* Secretariat. The interim approach is rooted in the distinctions-based approach described above and builds on legislation and policy specific initiatives that have occurred since the adoption of the *Declaration Act*. It is intended to support the development of cross-government measures that will lead to a fully reformed

process of engagement with Indigenous Peoples.⁷

The BC government has recently amended the *Interpretation Act*, adding a universal non-derogation clause to confirm that “every Act and regulation must be construed as being consistent with the [UN] Declaration.”⁸ This amendment supports the *Declaration Act*'s provision providing that nothing in the Act is meant to delay application of the UN Declaration to BC law.⁹



⁶ The first action plan was released by the Province on March 30, 2022 for the 2022-2027 period: <https://bit.ly/3XZAf3U> (“2022-2027 Action Plan”).
⁷ *Declaration Act* Secretariat, “Interim Approach to Implementing the Requirements of Section 3 of the Declaration on the Rights of Indigenous Peoples Act”, online: <https://bit.ly/3XZgnOu>.
⁸ *Interpretation Act*, RSBC 1996, c 238, at s 8.1(3).
⁹ *Declaration Act*, *supra* note 1 at s 1(4).



Other recent legislative amendments made with the objective of beginning to achieve consistency with the UN Declaration include:

- adding Indigenous identity as a protected ground against discrimination under BC's *Human Rights Code*;
- recognizing Indigenous communities' inherent right of self-government with respect to child and family services under the *Child, Family and Community Service Act*;
- prescribing a process for the chief forester to consult and cooperate, and attempt to achieve consensus and resolve disputes, with IGBs for any Indigenous Peoples whose rights could be affected before establishing forest landscape plans under the *Forest and Range Practices Act*; and
- establishing the *Anti-Racism Data Act*, which mandates "consultation and cooperation with Indigenous peoples" regarding the development of data standards, data directives, research priorities, and the publication of statistics.¹⁰

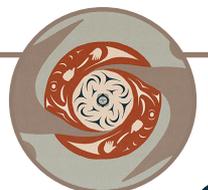
Agreements Between the BC Government and Indigenous Governing Bodies

The *Declaration Act* includes provisions for the BC government to enter decision-making agreements with IGBs. The agreements contemplated by the *Declaration Act* include:

- joint decision-making agreements, where the exercise of a 'statutory power of decision'¹¹ is to be exercised jointly by an IGB and the Province or another decision-maker; and
- consent-based decision-making agreements, where the agreement will stipulate how the consent of an IGB will be obtained prior to the exercise of a statutory power of decision.

¹⁰ For additional information about the alignment of laws process, including other examples of legislative reforms, see: <http://bit.ly/3SxA8vs>.

¹¹ A "statutory power of decision" is defined in the *Judicial Review Procedure Act*, RSBC 1996, c 241 at s 1 as "a power or right conferred by an enactment to make a decision deciding or prescribing (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it, and includes the powers of the Provincial Court."





The *Declaration Act* defines an Indigenous governing body, as “an entity authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the Constitution Act, 1982.” ‘Indigenous peoples,’ as it is used in the Act, has the same meaning as ‘aboriginal peoples’ in section 35 of the *Constitution Act*,

1982—that is, the “Indian, Inuit and Métis peoples of Canada.”¹² Importantly, the *Declaration Act* does not specify what IGBs must look like; instead, Indigenous Peoples determine their own governing bodies, including organizing and empowering the entities that can enter into agreements with the Province on their behalf.¹³

In September 2022, the Province entered into the first agreement under the *Declaration Act* with the Tahltan Central Government as IGB for the Tahltan Nation. This agreement provides that the Tahltan Central Government

will independently assess the potential effects of a proposed mine on Tahltan lands, and that the mining project will not proceed without Tahltan consent.¹⁴

The provision in the *Declaration Act* for the BC government to enter into agreements with IGBs does not replace provisions in other provincial legislation whereby the BC government has

entered into agreements with IGBs and where IGBs may already be exercising certain statutory powers of decision.



¹² The *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, at s. 35(2).

¹³ See also: 2022-2027 Action Plan, *supra* note 6 at 10-11, Theme 1 “Self-Determination and Inherent Right to Self Government”.

¹⁴ “*Declaration Act* Consent Decision-Making Agreement for Eskay Creek Project”. Online: <https://bit.ly/3YyCtK>



Future Work on the Implementation of the Declaration Act

In 2012, former Chief Justice of the BC Court of Appeal, Lance Finch, noted that the majority of lawyers and judges are “wholly unfamiliar with Indigenous languages, cultures and world views”, and that there is much that we must do to “make space” for Indigenous legal orders.¹⁵ Current BC Chief Justice Robert J. Bauman recently built on this commitment when he spoke of the legal community’s “Duty to Act” and the responsibility that non-Indigenous people have to ensure that the legal system is not a barrier to justice for Indigenous Peoples, but rather a critical tool in the pursuit of justice.¹⁶

The BCLI is committed to undertaking work to support reconciliation and the decolonization of Crown legal frameworks. The *Declaration Act* is a Crown law mechanism for upholding the standards and respecting the rights affirmed in the UN Declaration. In much the same way as reconciling the assertion of Crown sovereignty with pre-existing Indigenous sovereignty raises questions requiring novel solutions so, too, will the implementation of the *Declaration Act*. In future publications, the BCLI will explore issues that emerge as implementation of the *Declaration Act* proceeds.

Further Resources

For more information on the BCLI’s Reconciling Crown Legal Frameworks Program, please visit: <https://www.bcli.org/project/reconciling-crown-legal-frameworks/>

¹⁵ Honourable Chief Justice Lance SG Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (prepared for the Continuing Legal Education Society of BC, November 2012), online: <https://bit.ly/3xPwuUb>.

¹⁶ Robert Bauman, “A Duty to Act” (Opening remarks delivered at the 2021 CIAJ Annual Conference: Indigenous Peoples and the Law), Vancouver, 17 November 2021, online: <https://bit.ly/3KCuvAp>.





RECONCILING CROWN LEGAL FRAMEWORKS

BRITISH COLUMBIA LAW INSTITUTE

PRIMER 1

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The BCLI is BC's independent law reform agency. We have been bringing collaborators together to clarify and improve the law, develop just and innovative solutions, and increase access to justice for over 25 years.

Our Funders

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