

Collaborative Consent and British Columbia's Fresh Water: Towards Watershed Co-Governance

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POLIS Project on Ecological Governance

[watersustainabilityproject](http://watersustainabilityproject.org)



Overview

- Project background
- Context - need for new approaches
- Collaborative consent in concept and action
 - Collaborative consent 101
 - Hallmarks & examples
 - Water Sustainability Act example

Background + purpose of project

- **Explore** concept of collaborative consent as articulated to describe processes in NWT, and **apply** it in B.C. freshwater context.
- Purpose is to provide **ideas for further discussion** about the pathways forward towards co-governance – not prescriptive/the final word.



Realizing commitments made

It's time for Canada to have a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition, rights, respect, co-operation, and partnership. This is both the right thing to do and a sure path to economic growth.
(Federal gov't statement, 2015)

As part of our commitment to true, lasting reconciliation with First Nations in British Columbia our government will be fully adopting and implementing the United Nations Declaration on the Rights of Indigenous Peoples.

Premier John Horgan



Legal imperative for consent

- **UNDRIP**
- **Section 35:** recognizes and affirms existing and emerging treaty rights—du
- **Case law**
 - **Tsihqlot'in dec** to use the land
Aboriginal title
- **Indigenous wat**

32(2): “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent** prior to the approval of any project affecting their lands or territories and other resources....”

Collaborative consent 101

- An ongoing process of committed engagement between Indigenous and non-Indigenous governments to secure **mutual consent** on proposed pathways forward

An outlook...

...A process

...An outcome

- Fundamentally about **governance** and changing how decisions (at all levels) are made



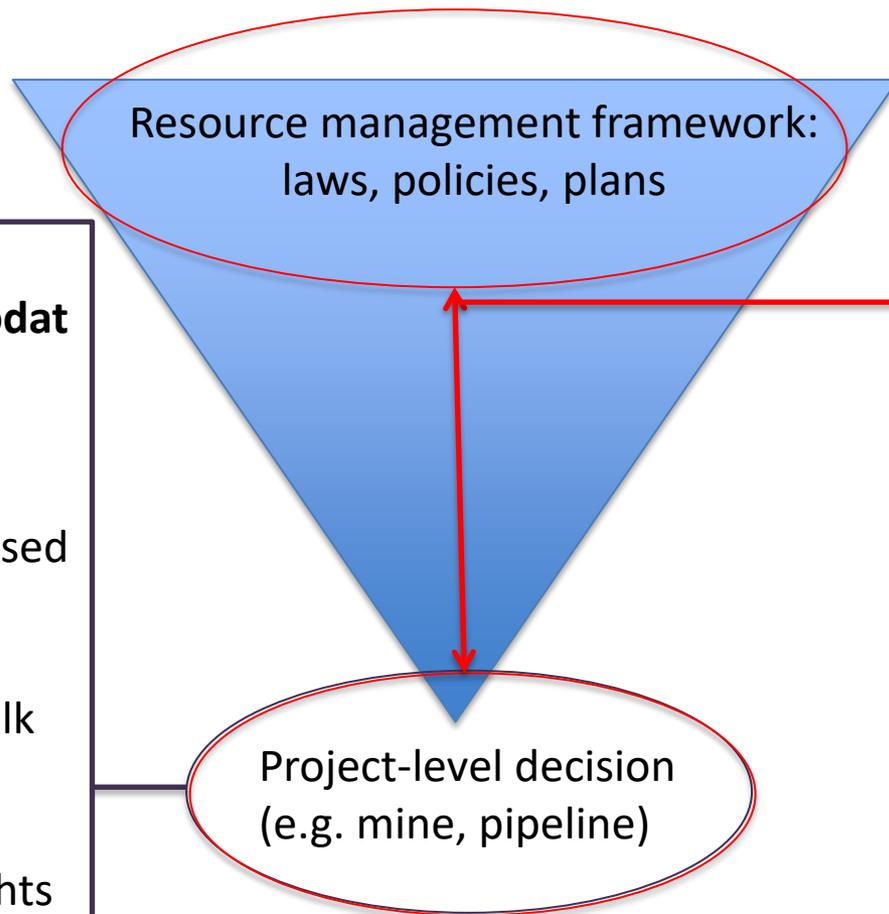
Collaborative consent 101

- Does not mean that all parties are involved in all decisions, but that they decide **where collaboration is necessary (or not)**



- **Bending the beams:** Both Indigenous and Crown governments adapt institutions, governance regimes, and timelines – **creating shared spaces**

Collaborative consent VS. consultation and accommodation (resource mgmt context)



s. 35 consultation/accommodation:

- “End of pipe”: Indigenous nations *responding* to proposed projects.
- Crown decides who, how, and when to talk to Indigenous rights holders
- Process to justify rights infringements

Collaborative consent:

- Indigenous nations involved in the setting of the broader legal/policy foundations
- Consultation/accommodation becomes **“safety net”**

7 Hallmarks of Collaborative Consent

#1. Collaborative consent is fundamentally based on respect, trust, and the art of diplomacy between governments.

- Mutual respect as partners, with ability to exert jurisdiction in own sphere.
- Commitment to not proceed over disagreement of partner(s).



Indigenous and territorial governments in the NWT were partners from the beginning of the three-year negotiation process for the Alberta-Northwest Territories Mackenzie River Basin Bilateral Water Management Agreement. All parties were involved in the scoping of interests, options, and development of all elements of the final agreements.

7 Hallmarks of Collaborative Consent

#2. All governments recognize each other as legitimate authorities

- Each government recognizes that the others hold jurisdiction, but do not need to agree about scope/ basis.
- Authorities intact
- Can proceed even with existence of fundamental uncertainties – e.g. title, rights, areas of overlapping interest.



Haida Reconciliation Protocol: Haida Nation and Province acknowledge conflicting views with regard to sovereignty, title, and jurisdiction. Notwithstanding competing claims, the Protocol commits parties to working together

7 Hallmarks of Collaborative Consent

#3. Collaborative consent tables are decision-making tables.

- Representatives must have the authority to participate fully and make decisions.
- Indigenous nations define through their own internal processes who should sit at the table.
- Time, space, resourcing required for institution building



The Haida Gwaii Management Council makes strategic resource management decisions, including for land use, forestry, and conservation. It has delegated Indigenous and Crown authority to make joint decisions

7 Hallmarks of Collaborative Consent

#4. Scope of issues considered can be extensive and ultimately must be satisfactory to all parties.

- From project level to law/policy development; process will look different depending on place, issues, scale.

NWT Co-drafting legislation, e.g. Species at Risk Act: 3 year process led by working group comprised of all Indigenous gov'ts & GNWT and their lawyers. They co-drafted the Act.

#5. Collaborative consent starts at the front-end and all governments commit to remaining at the table for the long haul

- Spans from planning to negotiation to implementation: never “over” —instead a long-term, iterative process of engagement.

The Great Bear Rainforest negotiations spanned over 15 years, and the Agreements and Order commit the parties to ongoing governance relationship.

7 Hallmarks of Collaborative Consent

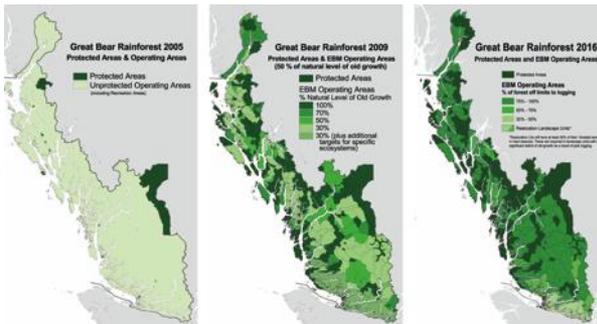
#6. Each government's interests must be dealt with in a satisfactory manner from their own point of view

- All interests welcome at the table; critical for building trust.

As a result of Indigenous gov't partnership, NWT Transboundary Water Agreements had to protect traditional uses as well as economic interests of other parties (rather than one to the exclusion of the other)

#7. The process generates real outcomes.

- Collaboration not an end in itself, but a process to reach measurable improvements on the ground (e.g. protecting water for ecological & cultural uses; reducing conflict).



The Great Bear Rainforest Agreements generated actual outcomes on the landscape and for communities, including designation of conservation areas

One example - Collaborative consent & WSA applications

WSA element	Possible collaborative consent approaches
Water sustainability plans (ss. 64-85)	<ul style="list-style-type: none">• Explicitly share authority and recognize Indigenous nations' participation with their own laws/authority• Co-chaired model from the outset including problem definition through to implementation
Environmental flows (s. 15)/water objectives (s. 43)	<ul style="list-style-type: none">• Co-governed regional decision-making tables and/or advisory boards to propose regional and site-specific environmental flow standards & thresholds to protect ecological health and related rights.
Water use/licensing decisions	<ul style="list-style-type: none">• Standing Advisory Board(s) or other body provides decision-maker with policy/guidance on considerations/criteria for local licensing.
Delegated governance (s.126) & advisory boards (s. 115)	<ul style="list-style-type: none">• Potential governance structures for collaborative consent.• Opportunities for collaborative consent depends on how entities are structured, and how their decisions (or recommendations) are implemented and by whom.• Governance could be delegated by each party to the table.



These are NOT small or easy changes...

Talking about long-term institutional and governance shifts...and ultimately transformation.

CWB is well on the path...

3 concluding key messages



- Collaborative consent is an ongoing process building **long-term, governance relationships** on a foundation of **mutual consent**
- **No one size fits all** – what it looks like depends on place, actors, scale, issues
- **Fresh water is a key starting place for B.C.:** multiple opportunities to apply this approach and realize UNDRIP commitments