

## BACKGROUNDER

### The Impact Assessment Act and the Declaration on the Rights of Indigenous Peoples

August 2024

*This document has been prepared for information purposes to set the stage for the Assembly of First Nations' impact assessment webinar series. First Nations' participation in the webinars does not constitute consultation nor the fulfilment of the Crown's duty to consult and accommodate with First Nations in regards to any project or assessment and must not be construed as such.*

In 2021, Parliament passed the *United Nations Declaration on the Rights of Indigenous Peoples Act* [UNDRIPA] affirming the *Declaration on the Rights of Indigenous Peoples* [Declaration] as a universal international human rights instrument with application in Canadian law and providing a framework for the Government of Canada's implementation of the *Declaration*.<sup>1</sup> The Supreme Court of Canada later affirmed that the UNDRIPA incorporated the *Declaration* into the positive law of Canada.<sup>2</sup> UNDRIPA states that the Government of Canada "must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."<sup>3</sup>

The *Impact Assessment Act* [IAA] came into force in 2019 (before UNDRIPA) and references the commitment of the Government of Canada to implement the *Declaration* in the preamble of the legislation.<sup>4</sup> The Impact Assessment Agency of Canada has expressed its commitment to implementing the objectives of the *Declaration* through the IAA, noting that it was written with the implementation of the *Declaration* and supporting policies and procedures in mind.

The Impact Assessment Agency of Canada website states as follows:

*"As a result, the Impact Assessment Act already establishes a legislative and policy framework that align with the Declaration and does not need to be changed in light of the United Nations Declaration on the Rights of Indigenous Peoples Act."*<sup>5</sup>

This short backgrounder examines three areas where further measures are required to achieve consistency between the *Declaration* and the IAA. This examination is not comprehensive, and First Nations may identify other areas of inconsistency between the *Declaration* and the IAA.

#### (1) Article 26 – Lands, Territories and Resources

The *Declaration* recognizes that First Nations have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. That right includes

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<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s. 4. [UNDRIPA]

<sup>2</sup> Reference re *An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para. 4.

<sup>3</sup> UNDRIPA s. 5.

<sup>4</sup> *Impact Assessment Act*, SC 2019, c 28, s 1, preamble [IAA].

<sup>5</sup> Impact Assessment Agency of Canada, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, [online](#) (last visited August 6, 2024).

right to own, use, develop and control, and requires States to give legal recognition and protection to, those lands, territories and resources with due respect to the customs, traditions and land tenure systems of First Nations.

While the IAA provides important new tools to recognize Indigenous Governing Bodies as jurisdictions and provide opportunities for them to exercise powers or perform duties or functions in relation to impact assessments, it does not provide effective mechanisms for those powers, duties or functions to be exercised in accordance with First Nations laws, customs, traditions or land tenure systems. Under the IAA, any duties, powers and functions utilized by First Nations must be exercised in accordance with the IAA. **The failure to give legal recognition and protection to First Nations lands, territories and resources in accordance with the laws, customs, traditions and land tenure systems of First Nations renders the IAA inconsistent with Article 26 of the Declaration.**

**(2) Article 32 – Free, Prior and Informed Consent (Priorities and Strategies for Lands, Territories and Resources)**

The *Declaration* recognizes that First Nations have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. To implement this right, States are required to consult and cooperate with First Nations 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.

The IAA does have mechanisms to consult and cooperate in good faith with First Nations but the ultimate decision-making power under the IAA over projects affecting First Nations lands, territories and resources almost always remains solely with the Government of Canada. **The IAA does not require free, prior or informed consent of impacted First Nations in order for the Government of Canada to approve a project. As a result, the IAA is inconsistent with Article 32 of the Declaration.**

**(3) Article 37 – Treaties, Agreements and Other Constructive Arrangements**

The *Declaration* recognizes that First Nations have right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements. While treaties vary from territory to territory, they are consistent in providing a framework for the sharing of the land and the continued recognition of First Nations sovereignty. **While the IAA provides mechanisms for cooperation and shared decision-making, the failure to effectively implement those powers and share decision-making with First Nations in treaty territories renders the IAA inconsistent with Article 37 of the Declaration.**

The rights recognized in the *Declaration* constitute the minimum standards for the survival, dignity and well-being of First Nations. The effective implementation of those rights is critical to reconciliation in Canada and should be reflected in the content and administration of the IAA.