

# BC GOVERNMENT CONSULTING ON NEW LAW TO GIVE INDIGENOUS GROUPS CONTROL OVER CROWN LAND DECISIONS

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**Categories:** [Insights](#), [Publications](#)

Earlier this month the BC Government posted (without any media release) a topic “Land Act Amendments” on a little-known website [www.engage.gov.bc.ca](http://www.engage.gov.bc.ca). The “Land Act Amendments” item shows a pleasing photo of an alpine meadow and is listed among other consultations related to matters such as “Specialty Licence Plates Program Expansion” and “Reimagining the Royal BC Museum”.

But make no mistake – the subject matter of the consultation is unprecedented and of profound importance to any company that requires authorization to use Crown land in BC. These include things like grazing leases, mining leases, licenses of occupation, dock permits, rights of way etc. As a short Powerpoint posted on the website notes, the “Land Act allows for access and use of public land for 25 separate programs from communication towers to agriculture to waterpower projects.”

Up until now, these decisions have always been made by the Minister responsible for the *Land Act* (or her or his delegates in the senior ranks of the public service), with a corresponding duty to consult affected First Nations. These types of decisions are a major part of governing the land base and economy in BC, and these decision-makers are supported by well-drafted and comprehensive Crown Land policies and procedures manuals.

Under the amendments being proposed by the BC government, changes will be made to enable agreements with Indigenous groups such that they will be provided a veto power over decision-making about Crown land tenures and / or have “joint” decision making power with the Minister. Where such agreements apply, the Crown alone will no longer have the power to make the decisions about Crown land that it considers to be in the public interest.

These amendments would go much further than the Supreme Court of Canada’s rulings based on the recognition of Aboriginal rights set out in s. 35 of the *Constitution Act, 1982*. While the Supreme Court has issued many decisions making clear Indigenous groups hold certain special rights, including the right to be consulted before decisions are made that could affect them, the Court has repeatedly stated that they do not have a veto over Crown land decision-making.

Why would BC contemplate giving such extraordinary power to Indigenous groups, if it is not premised on Canada's already exceptional recognition of Indigenous rights in our constitution? The answer is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). While not a treaty or international convention, and while not legally binding under either international law or Canadian law, it is the beacon against which BC is charting its Indigenous reconciliation course. This is reflected in the 2019 *Declaration on the Rights of Indigenous Peoples Act* through which government mandated itself to review all of BC's laws and determine where changes should be made to give effect to UNDRIP.

The consultation process consists solely of written submissions, which must be submitted by March 31, 2024 (though the presentation also notes drafting of the legislation will start in early February). It is expected that legislation will be introduced into the Legislature sometime between April 22 and May 16, 2024.

Unfortunately, the Powerpoint posted as the basis for the virtual consultation is extremely brief and there are no details of what is being proposed. For example, there is no discussion of issues such as:

- Will an Indigenous governing body that is making these decisions be able to require / receive financial benefits (such as an IBA) from the proposed project or development on the Crown land being applied for?
- Will the same standards of administrative law apply to Indigenous governing bodies (including requirements for independence and impartiality)?
- Will the Indigenous governing body be required to consult itself or other First Nations in respect of potential impacts on its Indigenous rights? Will it be required to discharge the duty clearly defined by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* to "reasonably balance" Indigenous and non-Indigenous interests?
- Will these new powers apply to renewals or extensions of tenures that may not have been approved by an Indigenous group in first instance?

The proposed amendments, though vague at this point, will clearly affect how business may be conducted in the Province. Companies and industry associations that rely on *Land Act* tenures may wish to review these materials and consider making submissions in a timely manner. The website, including details about where to send submissions, can be found at: [engage.gov.bc.ca/govtogetherbc](https://engage.gov.bc.ca/govtogetherbc).

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

The logo for mcmillan, featuring the word in a lowercase, sans-serif font. The 'm' and 'c' are in a dark red color, while the 'm', 'i', 'l', 'l', 'a', and 'n' are in a light blue color. The logo is positioned in the upper left corner of a banner image that shows a low-angle view of a modern glass skyscraper against a clear sky.

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