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THE UNION OF BRITISH COLUMBIA  
INDIAN CHIEFS

# CONSENT

PREPARED BY  
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NEW RELATIONSHIP TRUST

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## EXECUTIVE SUMMARY

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Free, prior, and informed consent (FPIC) is increasingly central to public discourse and policy debate regarding Indigenous reconciliation. At the same time, however, the meaning, nature, and roots of FPIC are poorly understood – including how it is understood in domestic and international law, its foundations in Indigenous legal orders, the relationship of FPIC to Indigenous sovereignty and jurisdiction, and how the rebuilding of Indigenous Nations and governments is connected to the implementation of FPIC. In unhelpful ways, consultation and accommodation have become a lens through which attempts are made to understand FPIC.

In addition to challenges with how FPIC is understood and discussed, there remains little practical focus on how to operationalize FPIC and what models of consent-based decision-making may look like. Rather than exploring and building models of how Indigenous and Crown decision-makers may work together in ways that meet the minimum standards of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), are rooted in the recognition of Title and Rights, and respect Indigenous legal orders, governments, and jurisdictions, much of the dialogue descends into partisan division, fear-mongering, or misinformation, such as the lazy and incoherent conflation of ‘consent’ and ‘veto’.

This paper advances understandings and dialogue about FPIC by identifying and examining foundations for understanding FPIC – including from Indigenous perspectives. Furthermore, it places a focus on how to operationalize FPIC including the work that the

Crown, Indigenous Nations, and industry should be doing. The paper comments on three models of consent-based decision-making and makes recommendations for how to advance practical approaches to FPIC. By adopting this approach, the paper encourages all actors to shift their focus from the now out-of-date arguments about whether the UN Declaration or the recognition of Title and Rights will guide our work of reconciliation, to collaborating on how we can take tangible and real steps forward.

## INTRODUCTION

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We are in a moment of rupture in Crown-Indigenous relations.

Generations of advocacy by Indigenous peoples – on the ground, in communities, and in courts – has led to this moment where colonialism is being confronted and a transition to patterns of relations that respect Indigenous self-determination, Title, and Rights is occurring.

But the fact that it has been a long journey to this point does not make the nature of this shift we are in the midst of any less dramatic. In recent years, there has been an acceleration of those factors which force dramatic change.

In 2014, the *Tsilhqot'in Nation v. British Columbia* decision finally resolved the age-old Indian Land Question in British Columbia. Aboriginal Title is real, meaningful, territorial in nature, and requires the standard of consent to be met. Court declaration and agreement are not prerequisites to Title being a legally enforceable property interest and impacting that Title without consent may result in damages, the cancellation of projects, or both.

In 2015, the Truth and Reconciliation Commission completed its *Final Report*, tearing away the veil that hid the public from an understanding of the true history of Canada.

In 2016, the Government of Canada fully endorsed the *United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)* without reservations. This step was subsequently taken by British Columbia, and both governments have advanced legislation to



ensure laws are aligned with the minimum standards contained in the *UN Declaration*, though such legislation has not been successfully passed to date.

Beginning in 2017, the Governments of Canada and British Columbia both began implementing programs intended to effect transformative change in laws, policies, and operational practices to ensure that the recognition and implementation of Indigenous Rights is the foundation of all relations. This has included the adoption by both governments of ten principles of recognition<sup>1</sup>, as well as commitments to co-develop new frameworks for relations based on recognition.

These developments are significant. They hold the potential to place the future on a different course – one which significantly diverges from the original sin of Canada: that when the fathers of Confederation gathered to form Canada, Indigenous peoples were not present, Indigenous Title and Rights were never considered, historic treaties that expressed the relations between sovereigns were ignored or forgotten, and a pattern of assimilation, oppression, and denial was advanced.

Of course, moments of change are also moments of challenge. Transforming relations as is necessary will only occur through ongoing and diligent work and advocacy by Indigenous peoples. There remain strong views and forces that oppose this disruption of the status quo of colonialism and the re-shaping of a future with proper roles for Indigenous governments, laws, and jurisdictions.

1. Department of Justice Government of Canada, “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples,” July 14, 2017, <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>; Government of British Columbia, “Draft Principles That Guide the Province of British Columbia’s Relationship with Indigenous People,” May 22, 2018, [https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft\\_principles.pdf](https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf).

The issue of free, prior, and informed consent is one that exemplifies the dynamics of change in this moment, as well as the challenges which continue to be posed.

The requirement for consent is an expression of Indigenous sovereignty. It derives from the reality that Indigenous governments and legal orders owned and regulated large territories prior to the arrival of Europeans, and the Title and Rights that exist as a result of this sovereignty have not been ceded or surrendered. Rather, the relationship between sovereigns that must exist either remains to be properly worked out or has been articulated in a treaty relationship.

Consent, as such, is one of the standards for proper relations between Crown and Indigenous governments. This is reflected throughout the *UN Declaration*, where the need to obtain consent from Indigenous peoples is expressed in numerous articles. It is also the standard for the use of Title lands pursuant to section 35 of the *Constitution Act, 1982*.

Focusing on consent is also indicative of the necessary movement away from the process-oriented and often transactional nature of the duty to consult and accommodate. The evolution of the law regarding consultation and accommodation unfolded in a context where the courts were specifically asked whether Indigenous Title and Rights had to be considered in a context where the outstanding Land Question in British Columbia remained unresolved. Now, in an era of the *Tsilhqot'in* decision and the *UN Declaration*, a focus on mere consultation is increasingly obsolete.

With the focus on consent, however, renewed efforts to divide, distract and delay

real change have emerged. There has been fear-mongering and misinformation about what the roots of consent are, what it means, and how it will be operationalized. Certain politicians, so-called experts, other commentators, and some in industry have taken to positioning consent and the *UN Declaration* as political and economic threats. Convoluted paternalistic arguments have also been advanced that somehow the implementation of the *UN Declaration* and consent will be to the detriment of Indigenous peoples. Often, these efforts to sow confusion and fear have relied upon lazy rhetorical confluences of consent with some idea of “veto”.<sup>2</sup>

At the same time, while there have been extensive and growing dialogues, conferences, papers, and analyses of consent in recent years, little of this literature has usefully and practically outlined how to operationalize it. Rather, much of it has focused on (often circular) descriptions and debates about what consent may or may not mean, and how it relates to consultation and accommodation.<sup>3</sup>

As well, and more importantly, much of this literature has failed to be grounded in Indigenous perspectives of consent and an understanding of Indigenous legal orders.

There is only so much that common and international law can tell us about what

2. Explanations that help explain the relationship between consent veto include: Roshan Danesh, “Rhetoric Matters When Discussing First Nations’ Role in Resource Decisions,” *The Globe and Mail*, December 9, 2016, <https://www.theglobeandmail.com/news/british-columbia/rhetoric-matters-when-discussing-first-nations-role-in-resource-decisions/article33293082/>; Paul Joffe, “‘Veto’ and ‘Consent’ – Significant Differences,” August 30, 2018, 34, <https://quakerservice.ca/wp-content/uploads/2018/10/Veto-and-Consent-Significant-differences-Joffe.pdf>.

3. Some excellent recent papers on the UN Declaration and its implementation, including consent include: Union of BC Indian Chiefs and Canadian Centre for Policy Alternatives, *True, Lasting Reconciliation: Implementing the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia Law, Policy and Practices*, 2018, <http://www.deslibris.ca/ID/10098870>; Residential School History & Dialogue Centre, “Summary Report: Special Dialogue on Implementing the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia,” December 2018, [https://irshdc.ubc.ca/files/2018/12/IRSHDC\\_UNDRIP\\_Report\\_Dec2018.pdf](https://irshdc.ubc.ca/files/2018/12/IRSHDC_UNDRIP_Report_Dec2018.pdf).

Indigenous consent means and how it is implemented by Indigenous peoples.<sup>4</sup>

This document is intended to help address some of these shortcomings and provide a grounding in how to understand and operationalize consent, including from Indigenous perspectives. Its genesis is in an earlier volume – *Advancing an Indigenous Framework for Consultation and Accommodation in BC* – produced by the First Nations Leadership Council in 2013.<sup>5</sup> While many of these themes were explored in that earlier work, this new paper, reflecting the moment of rupture we are in, specifically focuses on the meaning and implementation of consent. Its goal is specific: to provide theoretical and practical advice and perspectives on how to think about and operationalize consent on the ground.

This volume is in four parts, which are interrelated and build upon each other:

### **Part 1:**

**Legal and Political Understandings of Consent** describes how consent has been treated in international and domestic law, as well as our political discourses. This Part provides a survey of the predominant current trends in how consent is talked about.

### **Part 2:**

**Envisioning Consent** explores how consent must be properly understood in the context

4 An excellent volume that bridges some of this divide is: Centre for International Governance Innovation, “UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws,” 2018, <https://www.cigionline.org/sites/default/files/documents/UNDRIP%20II%20Special%20Report%20lowres.pdf>.

5 First Nations Leadership Council, “Advancing an Indigenous Framework for Consultation and Accommodation in BC: Report on Key Findings of the BC First Nations Consultation and Accommodation Working Group,” 2013, [http://fns.bc.ca/wp-content/uploads/2016/10/319\\_UBCIC\\_IndigActionBook-Text\\_loresSpreads.pdf](http://fns.bc.ca/wp-content/uploads/2016/10/319_UBCIC_IndigActionBook-Text_loresSpreads.pdf).

of reconciling sovereignties, Indigenous governments and legal orders, title, and Indigenous self-determination and self-government. From this perspective, consent is only one possible emanation of proper jurisdictional and legal relations. This approach analyzes and critiques how current ways of thinking and acting have prioritized consultation and accommodation and as a result also mis-positioned what consent means by trying to fit it into the consultation paradigm. Arguments are made for a vision based on relations between distinct governments, co-operative federalism, and recognition of Indigenous authority and jurisdiction.

### **Part 3:**

**Operationalizing Consent** speaks about the work that Indigenous peoples, Crown governments, and third parties must do for consent to be implemented on the ground. The specific roles and responsibilities of First Nations, the Crown, and industry are examined. As well, models of consent-based decision-making are illustrated.

### **Part 4:**

**Recommendations for Moving Forward** provides specific concrete recommendations to First Nations, Crowns, and third parties on how to move from the status quo to the new world of consent. Specific actions for moving through this moment of transition in a coherent manner are proposed.

## PART 1: LEGAL AND POLITICAL UNDERSTANDINGS OF CONSENT

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Indigenous consent, expressed through a range of terms and ideas, has always been a part of the vision of proper relations with the Crown expressed by Indigenous peoples. This is recorded throughout post-contact history in the understanding of treaty relationships, in the patterns of interaction, sharing, and fellowship that were advanced, in petitions and declarations seeking fairness and justice, and through political and legal advocacy.

However, it is only recently that this long-standing commitment by Indigenous peoples to the standard of consent has become a part of broader legal and political discourse in Canada. Indeed, until very recently, Crown governments often consciously and consistently avoided the use of the term, trying to maintain their historic commitment to perspectives and policies grounded in denial of Indigenous governments, laws, jurisdictions, and rights.

With the emergence of consent as part of broader political and legal discourse, there now exists a small but growing body of political and legal statements about consent, and certain trends shaping how the subject is treated. **Part 1** sets out to provide an overview of the status quo of how consent is talked about in law and politics. This provides a foundation for **Part 2**, which will set out to critique that status quo and propose how consent must be understood and talked about in novel ways.

## **LEGAL CONTEXT**

In order to understand the meaning of consent, it is helpful to review how the term has been considered and used in both international law and Canadian constitutional law. In general terms it can be said that there has not been much legal consideration of free, prior, and informed consent, and there is no generally accepted legal definition of the term.

### **1. UN Declaration**

The *UN Declaration* was adopted by the UN General Assembly in 2007. In 2010, the Harper government endorsed, with reservations, the *UN Declaration* and referred to it as an “aspirational document”.<sup>6</sup> In 2016, Canada endorsed it without reservation or qualification. Today, it has the consensus of all UN member states, with none formally in opposition.

The UN Declaration outlines “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world” (article 43).<sup>7</sup> It does not create new rights. Rather, it is “an interpretative document that explains how the existing human rights are applied to Indigenous peoples and their contexts. It is a restatement of principles for postcolonial self-determination and human rights.”<sup>8</sup>

6 CBC News, “Canada Endorses Indigenous Rights Declaration,” CBC, November 12, 2010, <https://www.cbc.ca/news/canada/canada-endorses-indigenous-rights-declaration-1.964779>.

7 UN General Assembly, “United Nations Declaration on the Rights of Indigenous Peoples,” 2007, [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

8 James Y. Henderson, “A snapshot in the journey of the adoption of the UN Declaration on the Rights of Indigenous Peoples”, *Justice as Healing*, Newsletter, Native Law Centre, University of Saskatchewan, vol. 13, No. 1, 2008, at 2-3.

Free, prior, and informed consent appears in six articles of the *UN Declaration*:

#### **Article 10**

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

#### **Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

#### **Article 19**

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, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

#### **Article 28**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or



otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

### **Article 29**

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

### **Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

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, particularly in connec-

The most attention has typically been paid to articles 10, 19, 28, and 32, which are most explicitly about land and resource development. However, as can be seen, the use of consent is broader than this, including in relation to cultural, social, intellectual, religious,

and spiritual aspects of life.

There are many other articles of the *UN Declaration* that are relevant to the question of consent without explicitly using the term. This includes the emphasis on Indigenous self-determination and self-government:

### **Article 3**

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

### **Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

### **Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 26 also speaks broadly to land and resource rights:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

The importance of the *UN Declaration* and consent has been continually reaffirmed. For example, the General Assembly of the United Nations has reaffirmed the *UN Declaration* on many occasions.

The Supreme Court of Canada has not broadly considered provisions of the *UN Declaration* regarding consent, though it is an accepted principle of international and domestic law that instruments such as the *UN Declaration* can be used to interpret domestic law.

James Anaya, former UN Special Rapporteur, has identified that consent should not be understood as a general veto power and that it is the objective of consultation with Indigenous peoples.<sup>9</sup>

Mr. Anaya also stated, after a visit to Canada:

...as a general rule resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned....

The general rule identified here derives from the character of free, prior and informed consent *as a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within their territories.*<sup>10</sup>

9 For a summary of Anaya's perspectives see, in particular, paragraphs 21-25 in: Frank Iacobucci et al., "Free, Prior and Informed Consent in Canada Towards a New Relationship with Indigenous Peoples," July 12, 2016, <https://www.torlys.com/insights/publications/2016/07/part-ii-the-principles-of-free-prior-and-informed-consent>.

10 James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya - Extractive Industries and Indigenous Peoples" (UN General Assembly), accessed July 26, 2019, [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41\\_en.pdf](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf).

There have also been interpretations and findings related to consent by Courts elsewhere, as well as by human rights bodies. A summary of the status of these developments was provided by the Expert Mechanism on the Rights of Indigenous Peoples in 2018.<sup>11</sup>

## 2. Canadian Constitutional Law

The genesis of consent in Canadian law is in how the common law interprets the fact that when Europeans arrived in what is now Canada, Indigenous peoples were already here and organized as Nations with political, legal, social, and cultural structures and systems. This fact means that, as common law, Indigenous sovereignty was recognized and must be the basis for any legal relationship that would be forged.

This was reflected in the *Royal Proclamation of 1763* which recognized the existence of Aboriginal Title and the need for treaties between Indigenous Nations and the British Crown in order for the Crown to access lands and resources. Chief Justice Beverley McLachlin explicitly interpreted the *Royal Proclamation* in these terms in 2009:

The English in Canada and New Zealand took a different approach [from Spain, France, and Australia], acknowledging limited prior entitlement of indigenous peoples, which *required the Crown to treat with them and obtain their consent before their lands could be occupied*. In Canada – indeed for the whole of North America – this doctrine was cast in legal terms by the Royal Proclamation of 1763, which *forbade settlement unless the Crown had first established treaties with the occupants*.<sup>12</sup>

11 Expert Mechanism on the Rights of Indigenous Peoples, “Free, Prior and Informed Consent: A Human Rights-Based Approach,” August 10, 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement>.

12 Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, "Aboriginal Peoples and Reconciliation", (2003) 9 *Canterbury Law Review* 240. [emphasis added]

The *Final Royal Commission on Aboriginal Peoples* similarly concluded: “the Royal Proclamation ... initiate[d] an orderly process whereby Indian land could be purchased for settlement or development. ... In future, lands could be surrendered only on a nation-to-nation basis, from the Indian nation to the British Crown, in a public process in which the assembled Indian population would be required to consent to the transaction.”<sup>13</sup>

Despite this established understanding of the *Royal Proclamation of 1763* there has been little judicial consideration of the meaning and nature of consent. Of course, this absence is largely a result of the history of colonialism in Canada and state policies that sought to deny Indigenous governments, rights, and territories.

The most extensive commentary on consent by the Supreme Court of Canada was in *Tsilhqot’in Nation* in [2014],<sup>14</sup> where Indigenous consent is discussed around a dozen different times. In *Tsilhqot’in Nation* Indigenous consent is confirmed as the standard that must be met by the Crown and third parties in relation to Aboriginal title lands and is accompanied by discussion of the Indigenous right to control the land and determine its uses.

In *Tsilhqot’in Nation* the court stated:

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary

13 Royal Commission on Aboriginal Peoples, "Looking Forward, Looking Back", *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 1, at 209-210. See also Brian Slattery, "Is the Royal Proclamation of 1763 a dead letter?", *Canada Watch*, Fall 2013, [http://activehistory.ca/wp-content/uploads/2013/09/CW\\_Fall2013.pdf](http://activehistory.ca/wp-content/uploads/2013/09/CW_Fall2013.pdf), 6 at 6: “the Proclamation, like the Magna Carta, sets out timeless legal principles. ... Changes in circumstances have altered the way in which these principles apply, but the principles themselves are as fresh and significant as ever. ... [Indigenous] peoples hold legal title to their traditional territories, which cannot be settled or taken from them without their consent.”

14 *Tsilhqot’in Nation v. British Columbia*, 2 SCR 257 (SCC 2014).

duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. (Paragraph 92)

More broadly, the court explicitly encouraged the movement towards consent-based relationships:

I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group. (paragraph 97)

Prior to the *Tsilhqot'in* decision one finds a few, though not extensive, references to consent. In *Delgamuukw v. British Columbia* [1997],<sup>15</sup> also in the context of Aboriginal Title, the Supreme Court of Canada stated:

Moreover, the other aspects of aboriginal title suggest that the fiduciary duty may be articulated in a manner different than the idea of priority. This point becomes clear from a comparison between aboriginal title and the aboriginal right to fish for food in *Sparrow*. First, aboriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to

<sup>15</sup> *Delgamuukw v. British Columbia*, 3 SCR 1010 (C 1997).

discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands. (paragraph 168)

In *Haida Nation v. British Columbia (Minister of Forests)* [2004]<sup>16</sup> the Supreme Court of Canada, in the context of considering the duty to consult and accommodate with respect to ‘asserted rights’, commented on consent in the following ways:

The Court’s seminal decision in *Delgamuukw, supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims. (paragraph 24)

As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a “mere” duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided. (paragraph 30)

<sup>16</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 3 SCR 511 (SCC 2004).

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take. (paragraph 48)

The Supreme Court of Canada has not explicitly considered terms such as “free”, “prior”, and “informed” in relation to consent. However, Canadian law has evolved through development of the duty to consult and accommodate such that all of these elements can be assumed to be a part of the domestic understanding of consent. This is reflected in how the courts have articulated elements of the honour of the Crown that must be met, including good faith, the sharing of information, the necessity to fulfill duties and obligations prior to decisions being made, and the need for proper consideration of the perspectives of Indigenous peoples.

### 3. Indigenous Laws and Legal Orders

Canada is a multi-juridical society that includes common law, civil law, and Indigenous law.

For thousands of years, Indigenous peoples have been living and creating law, including law around decision-making about lands, waters, and resources, as well as laws around consent. The need for consent-based relations amongst Indigenous Nations is a very old and foundational concept. Across Canada, Indigenous peoples have established treaties and alliances amongst each other for a variety of purposes, but all to create order in relations premised on respect and recognition of each other.



The need for the shift to a paradigm of consent-based decision-making between the Crown and Indigenous peoples arises from the reality of recognizing and respecting the legitimacy of the continuity of Indigenous decision-making power and authority with respect to themselves and their lands, waters, and resources. Here, the recognition of the legitimacy and continuity of Indigenous laws, legal orders, and traditions is a transformative step in relations that requires a consent framework to coordinate decision-making in something like cooperative federalism.

Examples abound of the continuity and operation of Indigenous law. Though largely obscure to the Canadian public, Indigenous law continues to live, thrive, and evolve within Indigenous Nations. Notwithstanding the assault on its legitimacy and its denial by the policies of colonialism, it continues as part of the lived reality of Indigenous peoples. Like other legal orders and traditions, Indigenous law structures and orders everything from the most personal matters such as the naming of individuals, marriages, and adoption, to the most public matters such as ownership of land, resources, and Nations' obligations and duties to safeguard and steward those lands and resources.

As a recent example, the Tsleil-Waututh Nation made explicit use of Coast Salish Indigenous law in their own environmental assessment of the Kinder Morgan pipeline expansion project. In explaining the Indigenous law foundation of their assessment, they said:

The Tsleil-Waututh Stewardship Policy rests on the foundation of our ancestral laws and is interpreted in accordance with them. The following section of the assessment provides an overview of applicable legal principles

as laid out by Tsleil-Waututh teachings and other traditional and contemporary Coast Salish sources.<sup>17</sup>

## ***Political Context***

While the amount of commentary by governments about their understanding of Indigenous consent remains limited, there has been an increasing amount in recent years. As the summary below illustrates, governments have yet to provide coherent and consistent understandings of consent.

### **1. Government of Canada**

There has been a fairly clear evolution in the Government of Canada's statements regarding Indigenous consent.

When the Harper government endorsed (with qualification) the *UN Declaration* in 2010 it stated the following:

... In 2007, at the time of the vote during the United Nations General Assembly, and since, Canada placed on record its concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, States and third parties. These concerns are well known and remain. However, we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.

<sup>17</sup> Treaty, Lands & Resources Department, Tsleil-Waututh Nation, "Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal," [Undated], <https://twnsacredtrust.ca/wp-content/uploads/2015/05/TWN-Assessment-Summary-11x17.pdf>.

Aboriginal and treaty rights are protected in Canada through a unique framework. These rights are enshrined in our Constitution, including our Charter of Rights and Freedoms, and are complemented by practical policies that adapt to our evolving reality. This framework will continue to be the cornerstone of our efforts to promote and protect the rights of Aboriginal Canadians...<sup>18</sup>

A government legal analysis at the time of the Harper government's endorsement also stated:

The Supreme Court of Canada has been clear – both before and after the UNDRIP was endorsed – that our constitutional framework does not give aboriginal groups a veto right in respect of asserted rights and title. Instead, the Court has imposed other requirements to achieve reconciliation while still recognizing government's right to govern.<sup>19</sup>

The Harper Government also rejected the Outcome document from the 2014 World Conference on Indigenous Peoples which stated:

We recognize commitments made by States, with regard to the United Nations Declaration on the Rights of Indigenous Peoples, to consult and cooperate in good faith with the indigenous peoples concerned ... in order *to obtain their free and informed consent prior to the approval of any project* affecting their lands or territories and other resources.<sup>20</sup>

Since the Trudeau government endorsed the *UN Declaration* without qualifications in 2016 there have been an increasing number of government statements about consent.

18 Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," event; fact sheet; reference material, November 12, 2010, <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

19 Canadian Environmental Assessment Agency [CEAA], "The Law of Canada in Relation to UNDRIP," [Undated], <https://ceaa-acee.gc.ca/050/documents/p63928/92200E.pdf>.

20 UN General Assembly, "Outcome Document of the High-Level Plenary Meeting of the General Assembly Known as the World Conference on Indigenous Peoples: Resolution / Adopted by the General Assembly," September 25, 2014, <https://undocs.org/pdf?symbol=en/A/RES/69/2>.

Principle 6 of the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples (Principles)* adopted by the Government of Canada and the Government of British Columbia (with minor amendments) state:

*6. The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.*

This Principle acknowledges the Government of Canada's commitment to new nation-to-nation, government-to-government, and Inuit-Crown relationships that builds on and goes beyond the legal duty to consult. In delivering on this commitment, the Government recognizes the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent.

The Supreme Court of Canada has clarified that the standard to secure consent of Indigenous peoples is strongest in the case of Aboriginal title lands. The Supreme Court of Canada has confirmed that Aboriginal title gives the holder the right to use, control, and manage the land and the right to the economic benefits of the land and its resources. The Indigenous nation, as proper title holder, decides how to use and manage its lands for both traditional activities and modern purposes, subject to the limit that the land cannot be developed in a way that would deprive future generations of the benefit of the land.

The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands. To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.<sup>21</sup>

21 Government of Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples."

The Former Minister of Justice and Attorney-General of Canada Jody Wilson-Raybould has also given a number of several talks discussing consent. In an address to the BC Business Council in April 2018, she articulates an understanding of consent that distinguishes it from consultation:

Second, we have tended to think about consent through the lens of the processes we currently used for consultation and accommodation, and that somehow consent involves doing what we have already been doing, with additional enhancements involving whether or not consent is achieved.

I would suggest that this is not a very helpful way of thinking about consent. Consent is not simply an extension of existing processes of consultation and accommodation, nor is the law of consultation – being heavily procedural in its orientation – a particularly practical or helpful way for thinking about how to operationalize consent. We need to see consent as part and parcel of the new relationship we seek to build with Indigenous Nations, as proper title and rights holders, who are reconstituting and rebuilding their political, economic, and social structures.

In this context there is a better way to think about consent...grounded in the purposes and goals of section 35 and the *UN Declaration*. Consent is analogous to the types of relations we typically see, and are familiar with, between governments. In such relations, where governments must work together, there are a range of mechanisms that are used to ensure the authority and autonomy of both governments is respected, and decisions are made in a way that is consistent and coherent, and does not often lead to regular or substantial disagreement.

These mechanisms are diverse, and can range from shared bodies and structures, to utilizing the same information and standards, to agreeing on long term plans or arrangements that will give clarity to how all decisions will be made on a certain matter or in a certain area over time. Enacting these mechanisms is achieved through a multiplicity of tools – including legislation, policy, and agreements.

The structures and mechanisms for achieving this consent, once

established, are also consistent over time and across types of decisions – they are known and transparent—roles and responsibilities are defined, and they are ready to be implemented when needed. One result of this is significant certainty.<sup>22</sup>

## 2. Government of British Columbia

Some Canadian Provinces have also made statements relevant to the issue of consent.

A few provinces have made explicit commitments around the *UN Declaration*. The previous Alberta government committed to the implementation of the *UN Declaration* in 2015. They have described their approach in the following terms:

The Alberta government is committed to renewing its relationship with Indigenous people based on trust and respectful engagement.

Our government’s intention is to transform our relationship with Indigenous communities so that First Nations, Metis and Inuit people have every opportunity to participate as equals in all aspects of Alberta society, while maintaining their cultures and unique identities.

One of the paths we are following to bring about this renewed relationship is the implementation of the principles of *the United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration).

Alberta is currently engaging with Indigenous leaders and representative groups to explore how best to implement the principles of the UN Declaration in a way that is consistent with the Canadian Constitution and Alberta law.

The former Government of Ontario in *The Journey Together: Ontario’s Commitment to Reconciliation with Indigenous Peoples* laid out its vision of reconciliation, which included the following:

<sup>22</sup> Jody Wilson-Raybould and Department of Justice Canada, “The Recognition and Implementation of Rights Framework Talk,” April 27, 2018, <https://www.canada.ca/en/department-justice/news/2018/04/the-recognition-and-implementation-of-rights-framework-talk-1.html>.

Many of the principles reflected in *the United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) are consistent with Ontario’s approach to Indigenous relations and reconciliation, which is rooted in a commitment to establish and maintain constructive, co-operative relationships based on mutual respect that lead to improved opportunities for all Indigenous peoples. Ontario will work in partnership with Canada and Indigenous partners as the federal government moves forward on its national plan to implement UNDRIP, and will take a strong, supportive and active role in considering policy options to address UNDRIP.

The current BC NDP government committed to the adoption of the *UN Declaration* and the *Tsilhqot’in* decision as part of its election platform. This was reconfirmed in their “Confidence and Supply” agreement with the BC Green Party which states:

A foundational piece of this relationship is that both caucuses support the adoption of the UN Declaration on the Rights of Indigenous Peoples, the Truth and Reconciliation Commission calls- to-action and the *Tsilhqot’in* Supreme Court decision. We will ensure the new government reviews policies, programs and legislation to determine how to bring the principles of the Declaration into action in BC.<sup>23</sup>

Provincial governments have not been as explicit in talking about how they might implement free, prior, and informed consent specifically. Like the Government of Canada, the most direct statement is in the ten *Draft Principles that Guide the Province of British Columbia’s Relationship with Indigenous Peoples (Draft Principles)*. As well, BC has completed a “Commitment Document” with the First Nations Leadership Council which states:

23 BC Green Caucus and BC New Democrat Caucus, “2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus,” May 30, 2017, [https://thetyee.ca/Documents/2017/05/30/BC%20Green-BC%20NDP%20Agreement\\_vf%20May%2029th%202017%20copy.pdf](https://thetyee.ca/Documents/2017/05/30/BC%20Green-BC%20NDP%20Agreement_vf%20May%2029th%202017%20copy.pdf).

Indigenous Nations and peoples pre-existed and continue to exist today and have their own laws, governments, political structures, social orders, territories and rights inherited from their ancestors. This inherent right of self-government is an Aboriginal right recognized and affirmed under the Constitution. Indigenous peoples also have the right to self-determination, affirmed in the Declaration. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. The standard of free, prior and informed consent is an element of the exercise of the right of self-government, as well as the Indigenous human right of self-determination. The Declaration (e.g. Articles 19 and 32), and common law, speak to the application of the standard of consent in Crown-Indigenous relations.<sup>24</sup>

### 3. Indigenous Governments

Indigenous governments have also frequently referred to consent, throughout history and today. It is not possible in this paper to review the full history of these statements and perspectives. However, a few points are worth emphasising:

- Indigenous peoples have been consistent over many generations in the expectation that consent is a standard that must be met for the use of lands and resources;
- The oral traditions and Indigenous understandings of many historic treaty relationships is that the treaties were intended to confirm a recognition of Indigenous rights, governments, law and jurisdictions within which the standard of consent would apply;
- Patterns of relations amongst Indigenous Nations in the creation of alliances and treaties have had mutual recognition and respect at their core and have required a consent-based approach to relations.

<sup>24</sup> First Nations Leadership Council, “Joint Agenda: Implementing the Commitment Document - Shared Vision, Guiding Principles, Goals and Objectives,” May 10, 2018, [https://bcfn.ca/wp-content/uploads/2018/07/Vision-distribution\\_Sept19.pdf](https://bcfn.ca/wp-content/uploads/2018/07/Vision-distribution_Sept19.pdf).



## 4. Consent and Veto

A feature of public discourse about Indigenous consent has been perpetual dialogue about relationship between “consent” and “veto”. Every possible articulation of the relationship between these two terms is utilized:

- Those who wish to discredit or attack the need for Indigenous consent use the terms interchangeably in an effort to instil fear about its implications. One often sees rhetoric to the effect that no part of the Canadian population will be given a “veto” over resource development. Such rhetoric has been commonplace amongst politicians who wish to raise political division and fear about Indigenous consent. For example, former BC Premier Christy Clark stated “there are a few clauses [of the *UN Declaration*] that are really problematic....Those clauses are the ones that would seem to suggest that First Nations could have an absolute veto over resource development on any of their territories .”<sup>25</sup>
- Governments who are articulating support for the *UN Declaration*, such as the current federal and BC governments, are also careful to repeat that consent and veto are different, though often for the purposes of reducing fear about or opposition to the emphasis being placed on Indigenous consent. For example, Premier John Horgan, referring to mentions of free, prior, and informed consent in the *UN Declaration* stated that “nowhere in the UN declaration on the rights for indigenous peoples is there any reference to vetoes of any kind .”<sup>26</sup> BC Minister Lana Popham stated “Free, prior and informed consent means consultation, but it doesn’t mean a veto (for First Nations).”<sup>27</sup>

25 Justine Hunter, “Indigenous Rights Declaration Not Simple,” *The Globe and Mail*, October 28, 2016, <https://www.theglobeandmail.com/news/british-columbia/assessing-undrip/article32581384/>.

26 Vaughn Palmer, “NDP Grapples with Pipelines, Consent, and Reconciliation,” *Vancouver Sun*, January 14, 2019, <https://vancouversun.com/opinion/columnists/vaughn-palmer-ndp-grapples-with-pipelines-consent-and-reconciliation>.

27 Randy Shore, “First Nations ‘Encouraged’ by Popham’s Warning Shot to Fish Farms,” *Vancouver Sun*, October 19, 2017, <https://vancouversun.com/news/local-news/first-nations-encouraged-by-pophams-warning-shot-to-fish-farms>.

- Indigenous leaders rarely, if ever, use the term “veto” when speaking of their jurisdictional and governance authorities. However, it has become commonplace to speak of the “right to say yes or no”. At the same time, some leaders and experts have made the effort to distinguish between these terms, such as the statements cited earlier from Special Rapporteur Anaya. Grand Chief Stewart Philip has described consent in the following terms: “First Nations’ free, prior and informed consent is an integral and fundamental element of the UN Declaration on the Rights of Indigenous Peoples. Further, the legal and practical need to secure First Nations’ consent is featured in Delgamuukw, Haida and the Tsilhqot’in Supreme Court decisions. Consent is part of Canadian law .”<sup>28</sup>

In this multiplicity of voices, we see a reflection of the politically charged nature of the issue of Indigenous consent. As a basic standard and element of proper relations based on the reconciliation of Indigenous and Crown sovereignties, it represents a break from the predominant and entrenched patterns of the last 150 years of this country, including how land and resources have been used and Canada’s economy built. In this context, consent increasingly has become used as a rhetorical device to advance particular political agendas.

It is important to clarify the relationship between “consent” and “veto”. Simply stated, they are not the same. They have different meanings and uses. There are various analyses that illustrate this well.<sup>29</sup> A summary of key points on how the terms are different is as follows:

- The term “veto” does not appear in the *UN Declaration*.
- The term “veto” does not appear in the *Tsilhqot’in* decision.

28 UBCIC, “Consent,” November 6, 2016, <https://www.ubcic.bc.ca/consent>.

29 Joffe, “‘Veto’ and ‘Consent’ – Significant Differences”; Danesh, “Rhetoric Matters When Discussing First Nations’ Role in Resource Decisions.”

- The Supreme Court of Canada, in *Haida*, speaks of “full consent” as maybe being required on very serious issues, in the context of both unresolved claims and settled claims. (Paragraph 24) At the same time, the Supreme Court of Canada states that Indigenous peoples do not have a “veto” pending final proof of a claim. (Paragraph 48) This suggests “consent” and “veto” have different meanings.
- The Supreme Court of Canada has consistently emphasised that both the Crown and Indigenous peoples have limits on what they can each do pending claims resolution and has emphasised the importance of negotiations to find both interim and final solutions. Negotiations are a mechanism for reaching agreement – which includes obtaining consent.
- It is well established in domestic and international law that no rights are absolute. This is reflected in both the jurisprudence established by the Supreme Court of Canada regarding section 35, as well as the language of article 46 of the *UN Declaration*. The use of the term “veto” tends to reinforce a notion of absolute rights. Consent does not in the same way, which is reflected in how consent is the term used in both the *Tsilhqot’in* decision and the *UN Declaration*.

Paul Joffe summarizes many of these points when he states:

In the Indigenous context, there are significant differences between “veto” and “consent”. In contrast to “veto”, the term “consent” has been extensively elaborated upon in Canadian constitutional and international human rights law. Yet these essential legal sources and arguments have not been fairly considered. Indigenous peoples’ right of self-determination has not been applied at all.

In the landmark 2014 *Tsilhqot’in Nation* decision that addressed in detail Indigenous peoples’ consent, the term “veto” was not raised by the Supreme Court of Canada. The term “veto” is not used in the *UN Declaration on the Rights of Indigenous Peoples*. “Veto” implies an absolute power, with no balancing of rights. This is neither the intent nor interpretation of the UN Declaration, which includes some of the most comprehensive balancing provisions in any international human rights instrument.<sup>30</sup>

30 Joffe, “‘Veto’ and ‘Consent’ – Significant Differences.”

In addition to these compelling legal and technical reasons for why “consent” and “veto” cannot and should not be conflated, there are also conceptual and principled reasons for the distinction. Dr. Roshan Danesh has argued that “consent” and “veto” are distinct. The interchangeable use of the terms – whether out of ignorance, or as a deliberate attempt to create fear or confusion – is wrong and should stop.”<sup>31</sup> He provides a number of reasons to support this view. First, as discussed above, he notes the different ways these terms have been employed in the jurisprudence. Second, he argues that reconciliation as defined in law is between Indigenous and Crown sovereigns. He argues that:

This basic understanding of reconciliation explains why "veto" and "consent" are used, what they share, and how they are different. The Crown and aboriginal groups are different decision makers acting under different authorities. One does not "veto" the decision of the other. Neither has the power to reach into the other's jurisdiction and overrule the decision of the other. The relationship is one of difference and distinction – not of inferiority and superiority. Further, reflective of our understanding of government power in Canada's constitutional order, no government has absolute power.<sup>32</sup>

Third, given this understanding of reconciliation between sovereigns:

because the Crown and aboriginal groups are different decision makers with different authorities, contexts will arise where absent alignment between the decisions, which may be provided by aboriginal consent, things may not be able to proceed. At the same time, we know, for example in relation to aboriginal title, there are some narrow contexts where, despite a lack of consent, something may proceed given its particular character and compelling nature and demonstration that indigenous rights and responsibilities have been respected.<sup>33</sup>

31 Danesh, “Rhetoric Matters When Discussing First Nations’ Role in Resource Decisions.”

32 Danesh, “Rhetoric Matters When Discussing First Nations’ Role in Resource Decisions.”

33 Danesh, “Rhetoric Matters When Discussing First Nations’ Role in Resource Decisions.”

Flowing from this, Dr. Danesh argues that the use of the term “veto” invites conflict and uncertainty, while consent is inviting Indigenous and Crown actors to build the proper patterns of relations between them, including intergovernmental structures and processes.

## PART 2: ENVISIONING CONSENT

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The legal and political context outlined in **Part 1** is, of course, vital for understanding the meaning, scope, and nature of free, prior, and informed consent. However, as **Part 1** also demonstrates, there remains a limited amount of analysis by the courts or governments about consent and how it may be operationalized.

The lack of such analysis is compounded by certain tendencies in how consent has been talked about in public discourses. The discussion in **Part 1** about the distinction between “consent” and “veto” is one example of problematic tendencies in our discourses about consent. **Part 2** explores these public discourses in depth, and examines how consent has been envisioned. In particular, it identifies two different ways of talking and thinking about consent, and the meaning and principles that underlie them. Further, it is argued that the most legitimate lens for thinking and talking about consent is as an expression of the proper relationship between distinct Crown and Indigenous governments, jurisdictions, laws, and authorities.

### ***Understanding Consultation***

In recent years, and particularly since the decision of the Supreme Court of Canada in *Haida*, the Crown’s duties of consultation and accommodation have come to predominate discourse about section 35 of the *Constitution Act, 1982*. While important, the focus on consultation and accommodation has been, and continues to be, misplaced. This is seen in relation to consent, where a tendency has emerged to think about consent,

primarily through the lens of consultation, where other possibilities are more appropriate.

In order to understand this, it is helpful to examine the emergence of the law of consultation and accommodation.

The courts have used a framework of consultation and accommodation throughout the history of evolution of section 35 jurisprudence. While in *R. v. Sparrow* [1990]<sup>34</sup> the Supreme Court of Canada makes only passing references to consultation in the context of Crown efforts at justification for an infringement of an Aboriginal Right, by the time of the decisions in *R. v. Gladstone* [1996],<sup>35</sup> *R. v. Van der Peet* [1996]<sup>36</sup> and *Delgamuukw*<sup>37</sup> “consultation” and “accommodation” became one foundation of the Court’s way of describing Crown-Indigenous relations.

It was in 2004 in *Haida Nation v. British Columbia*, however, where consultation and accommodation became a primary preoccupation in articulating Indigenous-Crown relations. The focus in that case was whether the Crown had obligations to be met to Indigenous peoples regardless of whether Title and Rights had been proven in court or recognized in agreement. The answer was yes. The “honour of the Crown” is always operative in Indigenous-Crown relations, and one expression of this is a duty to consult and accommodate when asserted Title and Rights may be impacted by a proposed Crown action.

Out of that decision grew a required restructuring of Crown patterns of decision-making and engagement, acceleration of forms of capacity development amongst Indigenous

34 *R. v. Sparrow*, 1 SCR 1075 (C 1990).

35 *R. v. Gladstone*, 2 SCR 723 (C 1996).

36 *R. v. Van der Peet*, 2 SCR 507 (C 1996).

37 *Delgamuukw v. British Columbia*, 3 SCR.

peoples, new forms of agreement-making, and a vast expansion of litigation focused on whether the duty to consult and accommodate had been met

Often lost in this activity over the past 15 years was that the decision in *Haida* was about what needed to be done in the interim space and time when the Crown and Indigenous peoples had not sufficiently advanced processes of reconciliation between them, including the proper patterns of relations that respect and implement Indigenous Title and Rights. This is made explicit in the decision itself, where the Supreme Court of Canada states:

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate. (Paragraph 20)

The work of the Crown and Indigenous Nations is to reconcile sovereignties – which is the true meaning of treaty-making. Sovereignty, as is well-established in law, refers to governance and control by a people over a territory or area of land. Consultation and accommodation arise as a subset and expression of that overarching work, with particular relevance in the context of ensuring the Indigenous interest is protected as the broader work unfolds.



Since *Haida*, however, the subsidiary place of consultation and accommodation in the broader work of reconciling sovereignties has been obscured. A disproportionate focus has been placed on procedural aspects of the duty, steps to be followed, timing of actions, the roles to be played by industry and third parties, and structuring systems that provide evidence that obligations may have been fulfilled. Conversely, less time has been spent on the work of establishing effective and respectful mechanisms for decolonization and structuring of proper relations between governments.

There exists another dimension of the *Haida* decision that has often been de-emphasised but has since been confirmed in strong terms – namely that Indigenous Title and Rights are real and meaningful, regardless of whether they have been proven in court or affirmed in an agreement. This is one meaning of the ‘inherent’ nature of Indigenous Rights. Their existence and meaning are rooted in the pre-existing sovereignty of Indigenous peoples and do not find their source in the Constitution or any other act of the Crown.

In *Tsilhqot’in and Saik’uz First Nation and Stellat’en First Nation v. Rio Tinto Alcan Inc.*

[2015]<sup>38</sup> this was irrefutably confirmed. In *Tsilhqot’in*, the Court stated:

... At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada ... (Paragraph 69)

38 *Saik’uz First Nation and Stellat’en First Nation v. Rio Tinto Alcan Inc.* (BCCA 2015).

In *Saik'uz and Stelat'en* the Court stated:

The effect of the ruling by the chambers judge is to create a unique prerequisite to the enforcement of Aboriginal title and other Aboriginal rights. Under this approach, these rights could only be enforced by an action by a court of competent jurisdiction or are accepted by the Crown. In my view, that would be justifiable only if Aboriginal title and other Aboriginal rights do not exist until they are so declared or recognized. However, the law is clear that they do exist prior to declaration or recognition. All that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights.

[62] The proposition that Aboriginal rights exist prior to a court declaration or Crown acceptance is embodied in s. 35(1) of *the Constitution Act, 1982* (being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11):

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[Emphasis added.]

The use of the words “recognized and affirmed” indicates that the Crown has already accepted the existing Aboriginal rights, and it is really just a matter of identifying what they are. (Paragraphs 61-62)

The importance of these statements is that they reinforce that the core work of Crown-Indigenous relations is establishing proper relations based on the reconciliation of sovereignties and the recognition and implementation of Indigenous Rights. This is distinct from the focus of consultation and accommodation, which is on preserving the Indigenous interest pending those proper relations being established.

### ***Consent as Beyond Consultation***

Understandings of consent have followed this broader pattern of discourse around

Aboriginal Title and Rights. There remains a predominant tendency to think and talk about consent as an extension of consultation and accommodation. From this perspective, consent effectively entails engaging and acting as the Crown and Indigenous governments are currently, with an additional step of confirming whether or not Indigenous consent has been received at the end of the process.

Such an understanding of consent is unhelpful for a number of reasons.

First, it ignores the current ineffectiveness of the consultation paradigm.

For First Nations, the growth of emphasis on consultation and accommodation over the past 15 years – while important and part of the overall shift to respect for Aboriginal Title and Rights – has also carried with it the imposition of significant burdens and responsibilities often without a corresponding increase in support and capacity for development for those roles. It is commonplace to hear from First Nations how they are inundated with hundreds, or even thousands, of referrals, which demand significant action, and do not have the capacity or resources to substantively address each one. As well, many First Nations have expressed and experienced concerns related to how properly addressing referrals requires the reallocation of resources from elsewhere in their government, as well as a recalibration of priorities, some of them quite urgent and pressing. Further compounding these challenges are what sometimes have been interpreted as deliberate strategies by Crown governments to ‘bury’ Nations in the process around referrals, while often avoiding substantive engagement on meaningful accommodations that actually matter.

For the Crown, properly consulting and accommodating has proven an elusive goal, that far more often than not it has failed to meet. This is evidenced by hundreds of court cases across the country about the Crown's consultation practices, the vast majority of which have been won by Indigenous peoples. The effect of this has been a paradoxical situation in which Crown governments 'engage' more with Indigenous peoples than they ever have in the past, and at the same time there is ever-greater legal, political, and economic uncertainty as a result of patterns of relations with Indigenous peoples. Combined with this is the fact that the expansion of consultation and accommodation has also required a significant change in the skillsets, processes, structures, and capacities that government has traditionally relied upon. It has been, and remains, a significant struggle for Crown governments to adjust accordingly .

For industry, their roles and responsibilities in consultation and accommodation processes remains an issue of significant challenge. While it is correct that the *Haida* decision confirmed that the duty to consult and accommodate rests with the Crown, and that only procedural aspects may be delegated to third parties, legal and practical realities demand that industry do more. On the one hand, as noted earlier, the fact that Aboriginal Title and Rights are real and meaningful, and not dependent upon court declaration or agreement, has a necessary corollary that third parties may be sued directly for impacting those rights (*Saik'uz and Stellat'en*). In effect, this means that for industry achieving Indigenous consent is the wisest course of action. As the Court stated in the *Tsilhqot'in* decision: "I add this. Governments and individuals proposing to use or exploit

land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.” (Paragraph 97) As well, the nature of Crown processes, and their often insufficient nature, has contributed to industry often taking on broader roles, including, as is increasingly the industry standard, reaching agreements with First Nations that cover a full range of economic, environmental, and decision-making matters related to a project.

Second, beyond the impracticality of the current consultation paradigm, using consultation processes as a lens for thinking about consent fails to properly advance the foundational work of a fundamental transformation in relations based on government-to-government and Nation-to-Nation relationships that reconcile sovereignties. As distinct from thinking of consent as an extension of consultation processes, consent may be operationalized through the lens of building proper structures and processes between governments for decision-making that respects jurisdictions, laws, and authorities. In this sense, consent is inextricably linked with the work of advancing Indigenous self-determination, the inherent right of self-government, and the work led by Indigenous peoples to rebuild their governments and nations.

Former Minister of Justice and Attorney-General of Canada Jody Wilson-Raybould discussed these two ways of thinking about consent in an April 2018 speech:

We have tended to think about consent through the lens of the processes we currently use for consultation and accommodation, and that somehow consent involves doing what we have already been doing, with additional enhancements involving whether or not consent is achieved.

I would suggest that this is not a very helpful way of thinking about consent. Consent is not simply an extension of existing processes of consultation and accommodation, nor is the law of consultation – being heavily procedural in its orientation – a particularly practical or helpful way for thinking about how to operationalize consent. We need to see consent as part and parcel of the new relationship we seek to build with Indigenous Nations, as proper title and rights holders, who are reconstituting and rebuilding their political, economic, and social structures.

In this context there is a better way to think about consent...grounded in the purposes and goals of section 35 and the UN Declaration. Consent is analogous to the types of relations we typically see, and are familiar with, between governments. In such relations, where governments must work together, there are a range of mechanisms that are used to ensure the authority and autonomy of both governments is respected, and decisions are made in a way that is consistent and coherent, and does not often lead to regular or substantial disagreement.

These mechanisms are diverse, and can range from shared bodies and structures, to utilizing the same information and standards, to agreeing on long-term plans or arrangements that will give clarity to how all decisions will be made on a certain matter or in a certain area over time. Enacting these mechanisms is achieved through a multiplicity of tools – including legislation, policy, and agreements.

The structures and mechanisms for achieving this consent, once established, are also consistent over time and across types of decisions – they are known and transparent—roles and responsibilities are defined, and they are ready to be implemented when needed.<sup>39</sup>

39 Wilson-Raybould and Canada, “The Recognition and Implementation of Rights Framework Talk.”

## PART 3: OPERATIONALIZING CONSENT

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A constant challenge for Indigenous peoples in their advocacy for justice has been the implementation of established standards and principles that would, once effectively acted upon, help transform the conditions created by colonialism. While many standards and principles have been established and confirmed – time and again – they have continued to be ignored. Such is the case with section 35 of the *Constitution Act, 1982*. The promise of section 35 itself has been delayed through Crown governments demanding that these rights be proven in court or confirmed in an agreement before they will be respected and implemented. This pattern is also seen in the hundreds of judicial decisions which confirmed section 35 rights, but which have not been implemented. Stated another way, the legacy of denial of rights, as described earlier, remains a potent force today in limiting progress towards ending the marginalization and colonization of Indigenous peoples.

In some respects, we see this familiar pattern playing out in relation to consent. Indeed, patterns are already emerging where consent is much talked about, debated, demanded, and defined, but little active and tangible work is taking place to advance its practical implementation. **Part 3** provides pathways for the operationalization of consent. It examines what Indigenous Nations, Crown governments, and industry could be doing to be constructive actors in implementing consent on the ground. A series of models of consent-based decision-making are also discussed.

## ***Indigenous Nations and Operationalizing Consent***

As identified in **Part 1** and **Part 2**, a proper understanding of consent is as an expression of Indigenous self-determination and of the need to reconcile Indigenous sovereignty with assumed Crown sovereignty. This was exemplified in how consent is best understood as one standard of the relationship between Indigenous governments and Crown governments, and not merely as a type of process, or as an extension of the constitutional duty to consult and accommodate.

Fully operationalizing such an understanding of consent requires certain things of Indigenous Nations. All of these, in effect, relate to Indigenous Nations furthering the work of building their structures, processes, and mechanisms for the exercise of their decision-making and legal jurisdiction. Four critical aspects of this work are discussed: representation of the Title and Rights holder; clarifying decision-making authority; Indigenous decision-making and consent regimes; and building implementation capacity.

## ***Representation of the Title and Rights Holder***

Part of the modus operandi of colonization was to break up the governance structures which Indigenous peoples utilized to apply their laws and jurisdictions throughout their territories and make decisions about how lands and resources will be used. That has resulted in a contemporary reality today where many Indigenous Nations who exercised sovereignty historically, and continue to hold Title and Rights today, remain divided into smaller groupings, which may in varying ways be defined by aspects of the *Indian Act*, historic treaties, modern treaties, other contemporary agreements, or specific outcomes



or statements by the courts. One practical consequence of this is that there are often typically many Indigenous governments from the same Title and Rights holding group, seeking to advance governance and stewardship over the same territory.

This divisive legacy of colonialism has implications for the operationalization of consent.

Where these divisions exist, there will often be a lack of clarity about the *who* and *how* of Indigenous decision-making regarding lands and resources, including determinations concerning whether consent exists. As history has shown, where such lack of clarity exists, greater opportunity exists for Crown governments and third parties to minimize the full meaning and extent of Indigenous sovereignty, jurisdiction, Title, and Rights.

Stated more positively, as Indigenous Nations strengthen their structures and systems of representation over lands and resources throughout territory, the strength and clarity for operationalizing consent will be increasingly great. This is why the work of Indigenous Nation and government rebuilding, based on self-determination, is inextricably linked to fully operationalizing consent.

This emphasises the importance of the work that Indigenous Nations are already doing across British Columbia to rebuild their systems of governance that both reflect their historical groupings as distinct peoples, and to meet the realities of the contemporary world. As should be expected – consistent with the necessity of self-determination – one sees this work being undertaken in a range of diverse ways, defined by the histories, visions, and priorities of Indigenous peoples themselves.

Some examples of this Nation and government rebuilding work include the following:

- A number of Nations across British Columbia have enacted their constitutions pursuant to their own laws and jurisdictions. Like all constitutions, these address topics such as governmental structures, areas of power and jurisdiction, membership, voting, and rights and responsibilities. In many instances, these constitutions address territorial governance as a role, including the roles to be played by *Indian Act* band councils, as well as the roles and responsibilities of hereditary and elected leadership. There are many examples of such constitutions, such as those of the Constitution of the Haida Nation<sup>40</sup> and the Taku River Tlingit Constitution.<sup>41</sup>
- A number of Nations across British Columbia have built models of tribal government through establishment of tribal councils that exercise authority over certain matters that are territorial in nature, and/or relate to Title and Rights. The precise structure of these tribal governments varies, from hereditary or elected councils, to councils of all elected *Indian Act* chiefs. In some instances, these tribal governments utilize the *Societies Act* or legislative tools in addition to being established under their own Indigenous laws. There are examples of such structures across British Columbia, including the Tahltan Central Government, the T̓silhqot'in National Government, the Okanagan Nation Alliance, the Nlaka'pamux Nation Tribal Council, and the Shuswap Nation Tribal Council.
- While the vast majority of Nations across British Columbia do not have historic treaties with the Crown, there are a few Nations who through their historic treaty relationship with the Crown are working to implement proper relations based on the original vision of recognition of Indigenous sovereignty which was at the core of the treaty relationship. This has included efforts to implement jurisdictional regimes based on the original treaty promises. For example, the Snuneymuxw First Nation, that has a pre-Confederation treaty from 1854, entered into a reconciliation agreement with the Province in 2013<sup>42</sup>

40 Haida Nation, "Constitution of the Haida Nation," 2014, [http://www.haidanation.ca/wp-content/uploads/2017/03/HN-Constitution-Revised-Oct-2014\\_official-unsigned-copy.pdf](http://www.haidanation.ca/wp-content/uploads/2017/03/HN-Constitution-Revised-Oct-2014_official-unsigned-copy.pdf).

41 Taku River Tlingit First Nations Clan Members, "Taku River Tlingit First Nation Constitution Act, 1993," March 30, 1993, <http://trfn.com/wp-content/uploads/2014/08/trfn-constitution1.pdf>.

42 British Columbia and Snuneymuxw First Nation, "Snuneymuxw First Nation Reconciliation Agreement," March 27, 2013, [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/snuneymuxw\\_reconciliation\\_agreement.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/snuneymuxw_reconciliation_agreement.pdf).

that includes identifying work to establish the proper jurisdictional relationships based on the historic treaty relationship.

- A number of Nations across British Columbia are articulating their specific laws of consent, through establishment of decision-making and consent regimes across their Territory. Examples include the shíshálh Nation who have a decision-making policy and process which covers their entire territory, including all lands and resources.<sup>43</sup> Decision-making and consent regimes are discussed in more detail later.
- In some parts of British Columbia co-ordinated strategies and actions are being taken by groups of Indigenous Nations across a number of territories to establish regional arrangements that manage issues and resources that require or benefit from such efforts across broad geographic areas. One example is the 3 Nations-British Columbia Regional Partnership (Tahltan, Kaska, Tlingit).<sup>44</sup>

### ***Clarifying Decision-Making Authority***

A distinct but related issue to that of representation of the proper Title and Rights holder is the specific issue of who legitimately speaks for the Nation's government and has the authority to make decisions. While typically this issue is framed as one concerning the respective roles and responsibilities of hereditary and elected leadership, it more broadly speaks to the issue of ensuring that within a Nation there is legitimacy under its own laws rendered to who and how the Nation is making decisions.

Of course, there exists no single or common approach to this matter. The legitimacy of decision-making processes depends on the legal orders, traditions, and cultures of Indigenous peoples themselves. This is reflected in how today the issue of legitimacy of

43 shíshálh First Nation, "shíshálh Nation Lands and Resources Decision-Making Policy," May 1, 2013, <https://shishalh.com/wp-content/uploads/2018/10/Decision-Making-Policy.pdf>.

44 Kaska Dena Council, "3 Nations Win BC Premier's Award," *Kaska Dena Council* (blog), November 15, 2018, <https://kaskadenacouncil.com/3-nations-win-bc-premiers-award/>.

authority is dealt with through a multiplicity of ways. In some instances, it is addressed through internal delineation of the roles that will be played by hereditary, family, and elected leadership. In other instances, it is also addressed through processes of community participation in the decision-making process, including community ratification processes. In other instances, it is addressed through how constitutions and laws are articulated and relied upon.

One thing that is evident is that clarifying decision-making authority is an internal matter that Canadian courts are ill-equipped to deal with. When confronted with such questions, the courts often turn to common law legal tests and doctrines that were developed in a completely different context of questions of legal standing and representative proceedings (e.g. *Komoyue Heritage Society v. British Columbia (AG)* [2006];<sup>45</sup> *Campbell v. British Columbia (Forest and Range)* [2012])<sup>46</sup> Courts have also acknowledged the limitations of their own capacity and jurisdiction to deal with aspects of such matters regarding decision-making authority (*Wesley v. Canada* [2017])<sup>47</sup> Ultimately these matters can only properly be resolved by Nations themselves, based on their own laws.

### ***Indigenous Decision-making and Consent Regimes***

A significant element of operationalizing consent is Indigenous Nations expressing, under their own laws, their regimes for decision-making including for determining whether consent will be granted for a particular action or project. In effect, this is accomplished for Nations by expressing and implementing their laws regarding how they make

<sup>45</sup> *Komoyue Heritage Society v. British Columbia (AG)* (BCSC 2006).

<sup>46</sup> *Campbell v. British Columbia (Forest and Range)* (BCCA 2012).

<sup>47</sup> *Wesley v. Canada* (FC 2017).

decisions and determine consent. Such a regime can assist with ensuring that a Nation's connection with their territory is maintained as it wishes, and that Title and Rights are being respected. Such regimes are also part of directing the Crown and third parties on how to shift their conduct in appropriate ways that reflect recognition and advance reconciliation. By providing guidance to the Crown and third parties, better patterns of relations, and more appropriate models of agreement, can also be achieved.

Some elements of any regime include the following:

- A regime should make clear its Indigenous legal foundations grounded in the sovereignty and jurisdiction of the Nation. This may include illustration of how the Nation has always had laws and practices around authorization/consent, how these have always been used and exercised, and continue to be so today including through the regime. The regime could also express how Indigenous consent is enshrined in the *Declaration* and Canadian constitutional law. As part of this discussion of sources of authority, the Nation could define what it means by consent.
- A regime should lay out the basic structures and processes the Nation uses to make decisions. This could be done at a general level, or with significant detail that outlines every step and who does what.
- A regime could identify the types of information the Nation requires as part of its decision-making process. This may include the types of studies that are required, transparency regarding the proponent's dialogue and communication with others, and information regarding how the proposal relates to Title and Rights.
- A regime should lay out the substantive standards that a Nation applies in decision-making. This may include standards around how the proposal relates to the protection of Title and Rights, cumulative impacts, the location, scope, and nature of the project, particular environmental, social, or stewardship interests, and the relationship of proposal to the economic, social, environmental, and cultural objectives of the Nation.

- A regime should lay out what the potential outcomes are of the Nation's decision-making process (e.g. no consent, authorized with conditions, or authorized). This should include discussion of the steps a Nation may take to enforce its decisions.
- A regime should identify what is expected of the Crown and third parties as they move through the process. This could include discussion of how costs may be addressed, the potential for processes or other agreements to be completed, and what best practices for the Crown and proponents might be. It could also include guidance on who they should be engaging with, the form in which information should be provided, and other technical requirements.

### ***Implementation Capacity***

One of the strategies of colonialism has been to erode the capacity and effectiveness of Indigenous governments to govern. This strategy has been pursued in a wide range of ways from limiting access to resources, to imposing administrative burdens, to creating disincentives to long-term capacity development within Indigenous organizations. Limited capacity can have real implications for the effectiveness of operationalizing consent. The full operationalization of consent requires predictability and reliability in how a Nation will approach decision-making and determinations of whether consent will be granted.

While some of these realities are changing, the challenges remain great. In **Part 4: Recommendations for Moving Forward**, specific strategies for increasing implementation capacity are provided .

## ***Crown Governments and Operationalizing Consent***

Just as Indigenous Nations have significant work to do to advance the implementation of proper Nation-to-Nation relationships based on reconciling sovereignties, in which consent is a common-place standard of conduct, Crown governments have significant work to do as well. Crown governments must transform long entrenched laws, policies, and practices that interfere with Indigenous self-determination and self-government, and prevent proper relations between Crown and Indigenous governments from flourishing.

Federal and provincial land and resource laws were developed and passed without proper consideration of the existence of Title and Rights. Indeed, it could be said that in most respects they were passed on the assumption that Title and Rights do not exist. This is seen in a range of ways including the following:

- Crown land and resource laws are primarily structured to reflect that the Crown decision is the only relevant decision regarding whether or not a project may proceed. They do not recognize the role, authority, or jurisdiction of Indigenous governments .
- Crown land and resource laws create decision-making powers and authorities which typically do not allow Crown decision-makers to enter into consent-based arrangements with Indigenous peoples or build and structure consent-based structures and processes. Efforts to do this are often understood to be an unlawful fettering of decision-making authority on principles of administrative law.
- Crown land and resource laws are typically premised on the (false) foundation that all lands and resources they purport to regulate are owned by the Crown, and not subject to Indigenous Title.
- Crown policies respecting Title and Rights – such as the federal *Comprehensive Claims Policy* and *Inherent Right of Self-Government Policy*

—are effectively denial based. At their core is the premise that Crown acknowledgement and agreement is needed for Title and Rights to be recognized and implemented. This also means that for Indigenous decision-making, jurisdiction, and authority, including the necessity for Indigenous consent, to be recognized it needs to be explicitly confirmed in an agreement. This is also seen in how the British Columbia Treaty Process has been implemented as a “political process” where the standards and principles of section 35 of the *Constitution Act, 1982* and the *UN Declaration* are in many respects not adhered to as part of treaty-making. One effect of this is that consent is typically not broadly operationalized through modern treaties.

In effect, Crown laws and policies need to be pulled back. They have encroached upon areas of jurisdiction and authority that are properly those of Indigenous Nations and taken up legal and political space for exercising control over the land. This encroachment rests upon denial of Title and Rights – the assumption that they do not exist. Laws and policies which recognize Title and Rights will look different, ensuring there is the space for the operation of Indigenous jurisdictions and laws, including the space for structuring proper consent-based decision-making processes.

It is important to acknowledge that some of these changes are beginning to emerge. Specifically, the following steps are beginning to set the stage for this transformative change by the Crown – however, progress has been inconsistent and, to date, many commitments have not been followed through.

- The federal government’s *Principles* – released in July 2017 – specifically recognizes Indigenous laws, jurisdictions, and governments, the importance of securing Indigenous consent, and the need for changes to federal laws, policies, and practices. A federal Working Group of Ministers has been formed to review laws, policies, and practices for alignment



with the recognition of section 35 rights, the *UN Declaration*, and the *Principles*. On May 22, 2018, the British Columbia government adopted a similar set of *Draft Principles* and began applying them.

- The federal government supported passage of Bill C-262, *United Nations Declaration on the Rights of Indigenous Peoples Act*, a private member's bill that requires the alignment of the laws of Canada with the *UN Declaration*. Bill C-262 did not pass through the Senate.
- The federal government has committed to passage of a recognition and implementation of Indigenous Rights framework that will include new laws and policies that entrench the recognition of Rights across government. However, work on the framework has stalled. The federal government did pass legislation on Indigenous languages (Bill C-91) and Indigenous children and families (Bill C-92) that reference the *UN Declaration*.
- The BC government and the First Nations Leadership Council have completed a "Commitment Document", updated in April 2018, which expresses a principled foundation for relations based on the recognition of Rights, and commits to completing a number of legislative priorities, including adopting a provincial version of Bill C-262 by fall 2019. BC also passed a new *Environmental Assessment Act* that includes references to the *UN Declaration* and obligations to assess whether consent has been achieved.

While these are steps, they are just starting points. They set the stage for the necessary legislative and policy reform by the Crown, but they do not yet give effect to it.

There exists another dimension that the Crown must address in order to be properly positioned for operationalization of consent. For decades, Crown governments have been led by legal interpretations that have been largely minimalist and denial-based in orientation. These legal positions have resulted in Indigenous peoples having to continually go to the courts to protect their rights and have them implemented. These Crown legal positions have included that all Title and Rights have been extinguished, and that,

if they have not been extinguished, they are minimal in scope, nature, and meaning.

This has included a consistent rejection of Indigenous self-determination, self-government, sovereignty, and the need for consent.

The depth and endurance of these legal positions should not be underestimated. For example, in September 2014, BCAFN Chiefs, by consensus, adopted four principles as a response to the *Tsilhqot'in* decision. The four principles stated:

1. Acknowledgement that all our relationships are based on recognition and implementation of the existence of Indigenous peoples' inherent title and rights, and pre-confederation, historic and modern treaties, throughout British Columbia.
2. Acknowledgement that Indigenous systems of governance and laws are essential to the regulation of lands and resources throughout British Columbia.
3. Acknowledgment of the mutual responsibility that all of our government systems shall shift to relationships, negotiations and agreements based on recognition.
4. We immediately must move to consent based decision-making and title based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements.

On July 13, 2015, the Deputy Attorney-General sent a letter to the First Nations Leadership Council regarding the four principles which includes the following statements:

- "We are unaware of anything in Canadian law that gives effect to Indigenous governance authority either over Aboriginal title lands or beyond those lands."
- "Indigenous systems of governance are not required for the regulation of lands and resources in British Columbia."
- "...nothing in *Tsilhqot'in* provides for either First Nation governance or authority or jurisdiction over such [title] lands."

- “...there is nothing in the [*Tsilhqot’in*] decision to ‘implement’ outside of the declared title area. In particular, the decision does not require recognition of Aboriginal title, “consent-based” decision making or “title based” fiscal relations....”
- “Until claims to Aboriginal rights or Aboriginal title are determined by the court or through valid and binding agreement, the principles and framework for consultation and, as appropriate, accommodation, set out in *Haida* continue to apply to those claims.”
- “Indigenous peoples” is terminology used in international contexts such as the UNDRIP. The terminology has not, to my knowledge, yet been defined for use in the Canadian context.”

Such statements provide little space or foundation for proper Indigenous-Crown relations based on the recognition of Title and Rights, including the operationalization of consent. Rather, they can be interpreted as reflecting long-standing views that have contributed to legal conflict, and delaying progress. It is a hopeful sign that four years after such a letter both the federal and provincial governments have made multiple statements and commitments that appear to reject and counter such views.

### ***Industry and Operationalizing Consent***

Agreements between companies and Indigenous Nations about the use of lands and resources are now commonplace. While there remains a wide range of diversity amongst these agreements based on many factors, two features of these agreements typically relate to consent.

First, it could be suggested that, in many instances, agreements between companies and

Indigenous Nations de facto provide consent for a particular project or action. For example, many “impact and benefit” agreements often include, through a range of legal provisions and devices, Indigenous agreement to a project proceeding.

The challenge, however, remains that often these agreements are not entered into because of companies recognizing Indigenous Title and Rights, and the necessity for Indigenous consent. Indeed, often (though not always) these agreements continue to avoid the language of recognition and consent. There is also often an extreme reliance on legal language (e.g. releases) that is designed to limit or restrict Indigenous Title and Rights and the essential governance and legal roles of Indigenous Nations.

As well, it remains the case that Nations sometimes feel coerced or pressured to enter into agreements, rather than freely choosing the path they wish by the standards of free, prior, and informed consent. This arises because Nations are often faced with overwhelming challenges to exercise and enforce their legitimate authority and jurisdiction in the face of Crown laws and processes that are not based on recognition, along with pressing social and economic conditions that have to be addressed.

Second, a feature of these agreements is almost always related to building collaborative relations and structures, including how a company and Indigenous Nation will engage and work together with respect to proposed authorizations and approvals a company may need in the future. As such, one often finds decision-making processes and structures within agreements, including information gathering processes, technical teams, boards, and other mechanisms.

The challenge is that often these processes and structures are largely designed to facilitate, supplement, and plug into Crown processes of consultation and accommodation. They are often not designed to facilitate and ensure the consent of the Indigenous Nation that is required because of the governance and legal jurisdiction and authority of the Nation.

This is beginning to change. There are some emerging examples of companies and Indigenous Nations leading the way in crafting agreements which are based on recognition and the standard of consent. Such agreements can look starkly different – but in effect they share the orientation that they are structured around the acknowledgement of an Indigenous Nation as an essential, even primary, regulator for a project. This role as the regulator is an expression of Title and Rights, and the governance and legal roles of the Nation.

Such models of agreements may have a number of unique features including the following

- They reject a reliance on legal devices that limit or restrict Indigenous Rights (e.g. releases) and emphasise the Nation's authorization/consent for certain actions to take place as long as certain conditions are met.
- They do not limit a Nation's ability to take action (such as legal action), if they must, to ensure their Title and Rights are respected in relation to the project, though they often build collaborative mechanisms to be utilized prior to such action being taken.
- They build a process and structure for future decision-making about the project which obtains consent from the Nation about future authorizations and approvals prior to any approvals being sought from the Crown.

Industry needs to increasingly pioneer such new models of agreement in which consent is actually sought and operationalized into the future. Doing this is a prime vehicle for advancing and meeting industry's goals of predictability and clarity, while reflecting the realities of the age of recognition in which we are emerging.

### ***Models of Consent-Based Decision-Making***

What might models of consent-based decision-making between Indigenous and Crown governments look like?

As discussed in detail in **Part 2**, consent-based decision-making is not just an extended application of a process of consultation and accommodation. Rather, consent-based decision-making refers to the structures and mechanisms which distinct governments and jurisdictions use between them on matters where they both have a decision that must be made.

There are, of course, many ways in which governments can and do structure such decision-making between them. As a foundation to examining generally what different models may look like, three points are important to highlight. First, in **Part 1** we have already outlined critical issues including the meaning of “free, prior, and informed consent”, the distinction between “consent” and “veto”, and identified many of the core principles and standards implied by consent. We have not repeated these in this brief description of models of consent-based decision-making.

Second, there exist a number of models of “shared decision-making” (sometimes

referred to as collaborative or consensus decision-making) that have between First Nations and British Columbia and are in various stages of implementation. In some respects, aspects of some of these models reflect some of the models discussed below. However, only in a few exceptional ways do these agreements express, reflect, and implement the goal of achieving decision-making consistent with the standard of free, prior, and informed consent as defined in **Part 1. Appendix B** is a survey from 2019 – an update of a prior survey from 2016 – of models of agreement in British Columbia including models of shared decision-making.

Third, regardless of which model of consent-based decision-making may be utilized, there are broader tools that can be used to solidify and confirm a foundation of consent-based decision-making. For example, a First Nation and Crown government may both adopt a joint land use plan across a geographic area, including legal orders and directives for the implementation of that plan. Depending on the level of specificity of the plan, and assuming it is legally affirmed by both governments, a fundamental building block of consent-based decision-making is already in place. In such a context, it can be expected that efforts to achieve consent with respect to any particular decision will be significantly more effective and efficient to achieve.<sup>48</sup>

Building on these points, the following models of consent-based decision-making can be imagined:<sup>49</sup>

48 For a discussion of land use planning and Indigenous consent see: Roshan Danesh and Robert McPhee, “Operationalizing Indigenous Consent through Land-Use Planning,” *IRPP Insight*, no. 29 (July 2019): 24; As well, see the op-ed: Douglas White III (Kwulasultun), “Island Voices: Land-Use Planning Is a Path to Certainty,” *Times Colonist*, February 3, 2019, <https://www.timescolonist.com/opinion/op-ed/island-voices-land-use-planning-is-a-path-to-certainty-1.23621005>.

49 These models reflect and draw on ideas that Roshan Danesh has been advancing in various lectures, training, and writing, including in Danesh and McPhee, “Operationalizing Indigenous Consent through Land-Use Planning.”

Consent can be operationalized through a First Nation and the Crown government reaching an understanding that, in respect to a certain set of matters, one of the First Nation or Crown government will take the decision-making lead, including the application of the laws and processes of that jurisdiction. While the government that is agreed to not be in the lead may still have ancillary duties and actions they must take to meet their specific legal obligations, in practical effect the decision of the lead jurisdiction would stand as the decision to be applied in that circumstance.

In effect, this is an approach to structuring consent-based decision-making through the prior action of acknowledging a particular approach to the relationship between the jurisdictional spheres of the First Nation and Crown. Of course, from one vantage point there is nothing unique about such an approach to organizing decision-making authority between distinct orders of government. For example, such an approach is at the core of federal systems of government, including Canada, where certain matters fall exclusively within the jurisdiction and authority of the federal or provincial government, while there are other matters that touch on both federal and provincial jurisdiction.

Arguments can be made that in some respects, such an approach may be seen in certain historic treaties, where for example a treaty recognized a geographic area or resource activity of a Nation that the Crown could not, and would not, intrude upon. An example would be the pre-Confederation (Douglas) treaties on Vancouver Island and the recognition of the village sites, enclosed fields, and fisheries of the Indigenous signatories. Of course, the pattern since the signing of these treaties has been extreme Crown



resistance to such an understanding of the treaty relationship, and the outright ignoring and infringement of the treaties.

Consent-based decision-making can be operationalized through First Nation and Crown governments establishing, pursuant to their respective jurisdictions and laws, a joint body or structure that has the authority to make the final decision on behalf of both governments. Again, similar to clarifying jurisdictional relationships, this would be structuring of consent through the prior authorization of the mechanism through which a final, joint, consent-based decision would be made.

There are, of course, a vast array of forms such a jointly authorized decision-making body could take. They may take the form of political forums of leadership, technical boards made up of experts, or combinations of both. These would typically be supported by clear processes for decision-making, as well as standards and criteria to be met.

Regardless of the particular form a body may take, there are certain aspects that would always have to be addressed to ensure it is reflecting the meaning and nature of consent as described in **Part 1**. This would include: matters such as ensuring a proper and equitable role for the First Nation in determining who sits on the body; clarity on the role that Indigenous laws must play in informing the decision-making; structuring the decision-making process to ensure that a majoritarian dynamic cannot dominate (e.g. utilizing consensus approaches to final decisions); and ensuring the operating premises of the body are grounded in the recognition and implementation of Title and Rights.

There are not many current examples of such bodies; however, some of the elements

of such a model are found in the Archipelago Management Board for the Gwaii Haanas National Park Reserve.<sup>50</sup>

Consent-based decision-making can take place through acknowledgement that there will be two decisions on a particular matter, one by the First Nation and the other by a Crown government, and that there are agreed to structures, processes, and mechanisms to help ensure the harmony between these decisions. Such an approach is about having a system and understandings in place where consent in relation to any particular decision can be worked out. Unlike the previous models, where the First Nation and the Crown government have either recognized the other as the lead or handed off the decision to a joint body, in this model each government would be making their respective decisions on every matter to which the model applies, while utilizing certain approaches to ensure those decisions are harmonious at the end of the day.

There exists vast flexibility about how such models may be designed and implemented. A whole range of tools may be used to ensure the governments are on a consent-based path including joint committees, shared criteria for information and analysis, the development of joint recommendations to respective decision-makers, points throughout the process where agreement is needed

The most challenging and essential issue is ensuring that proper mechanisms are in place for how final decisions from the respective governments are dealt with, in particular where there is a situation of conflict between them. Are there mandated and required

<sup>50</sup> Government of Canada Parks Canada Agency, "Park Management - Gwaii Haanas National Park Reserve, National Marine Conservation Area Reserve, and Haida Heritage Site," May 9, 2019, <https://www.pc.gc.ca/pn-np/bc/gwaiihaanas/info/coop>.

processes that must be followed where decisions are in conflict? What is the legal effect of respective decisions when there is a conflict (e.g. one government says proceed and the other says do not)? Are there certain contexts where the parties might agree in advance that the decision of one government may proceed even if not aligned with the decision of the other?

There are many models of shared decision-making currently in place which have elements of this model. However, these models – because of Crown government policies and positions – have not yet answered these critical questions about final decision-making in a way that is fully aligned with the standard of free, prior, and informed consent and the legal recognition of the jurisdiction and authority of Indigenous governments.

## PART 4: RECOMMENDATIONS FOR MOVING FORWARD

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Based on the discussion in this paper, a summary of some general recommendations for operationalizing consent include the following.

### ***For Nations***

The work of implementing consent is inextricably linked with organizing around the proper Title and Rights holder, government re-building, and legal revitalization. As such, recommendations are tied to supporting those endeavours. Examples of actions to be included:

- development of consent regimes – specifically articulate the Nation’s understanding and approach to issues of consent under its own laws, and how these relate to *UN Declaration* standards;
- passing laws around specific resources or areas regarding consent;
- making known and public the decision-making structure and how proponents and governments can work with it;
- developing options and approaches for dispute resolution based on traditional laws for when consent is not achieved;
- adopting a principled approach in all negotiations that reinforces the standards of consent. As an example, companies should be required to work with Nations as the “front-door”, with Crown processes contingent on passing through key aspects of Nations’ laws.

### ***For Crown***

Existing Crown legislation, policy, and practices are all insufficient for consent

operationalization. Some steps have been taken but are not entrenched. The Crown must take steps to deepen their approach, including:

- making space through legislative change – e.g. to vacate limitations in existing statutes;
- adopt a coherent approach to moving towards implementing the *UN Declaration* through federal and provincial legislation, supplemented by other legislation that sets standards for public officials based on recognition and implementation of Title and Rights and establishes new institutions and mechanisms to support Nation and government rebuilding;
- explicitly advance agreements that pilot multiple models of consent – beyond the limited current models;
- recognize no ‘one size fits all’ – the federal and provincial approach has to be through adoption of flexible and adaptable systems;
- be clear in articulating what consent means in the positive and not the negative (e.g. stop saying ‘not a veto’, educate the public by focusing on how consent is about how different governments align their decisions and use collaborative forms of dispute resolution to address differences);
- invest substantially in a multi-layered approach that achieves higher-level and strategic-level understandings such as through land use planning that then give a level of simplicity and focus to project-based decisions.

### ***For Industry***

Industry needs to shift to viewing Indigenous Nations as a jurisdictional door and not merely through economic partnership terms. They can begin the work toward proper implementation of consent approaches by:

- adopting models where Indigenous consent is pursued and confirmed prior to major Crown processes;
- for major projects, adopting and supporting the Indigenous approach to major project assessment including as a replacement to Crown processes;
- considering long-term relationship agreements that are beyond transactional project agreements where presence in a territory is long-term;
- supporting Nations in advocating for broader legislative and policy change that will stabilize the government-to-government and Nation-to-Nation models of decision-making, including operationalization of consent;
- recognizing that Nation-building is important to the success of any project agreement and implementation of said agreement and support it as determined by nations.

## APPENDIX A: GUIDE FOR DEVELOPING AN INDIGENOUS NATION DECISION-MAKING AND CONSENT REGIME – PREPARED IN 2015

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This short guide has been developed to assist Indigenous Nations in further developing and implementing their decision-making and consent regimes. The guide answers basic questions at a general level about the development of a regime and identifies a few drafting considerations to assist in beginning this work. This guide does not provide legal advice, but is intended to be helpful background information for Indigenous Nations, and your legal and technical advisors, as you continue the work of developing, drafting, and implementing your regimes.

For countless generations Indigenous peoples have governed their territories through Indigenous laws and systems of government. Like all sovereigns, Indigenous peoples – in diverse ways reflecting their own cultures, protocols and traditions – made decisions regarding how the territory could be used and who could use it.

Reflecting the sovereignty of Indigenous peoples, international law, through the *United Nations Declaration on the Rights of Indigenous Peoples*, recognizes the authority of Indigenous peoples over their lands and affirms the standard of free, prior, and informed consent as the basis for decision-making. Similarly, section 35(1) of the *Constitution Act, 1982* also affirms the standard of consent. In the historic *Tsilhqot'in* decision, the Supreme Court of Canada confirms that, wherever Aboriginal Title exists, the consent of the Indigenous Title-holder is required. The Court strongly encourages the full implementation of the standard of consent: “Governments and individuals proposing to use or

exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.” (Paragraph 97)

Today, Indigenous Nations are working in various ways to implement their laws on the ground and reconnect in proper ways with their territories through their modes of decision-making. One mechanism for doing this is through the development and implementation of a decision-making and consent regime throughout their territory so that the Crown, and all third parties, know the standards, processes, and structures a Nation applies in deciding whether their lands can be used and on what terms.

## 1. Why develop a decision-making and consent regime?

Indigenous Nations have been working to rebuild their systems of governance through many paths. This work involves applying the laws and teachings passed down over many generations, rebuilding and strengthening structures and processes of governing, articulating laws and policies in a diversity of ways, and deepening cohesion within governing institutions and communities. All of this work takes place in a context where Indigenous Nations are working to implement their Title and Rights and reconnect with territory.

A decision-making and consent regime is one tool that can assist Indigenous Nations in this pivotal work. Through developing a decision-making and consent regime, an Indigenous Nation can advance the following objectives:

1. *Implementation of Indigenous laws:* A regime is part of implementing Indigenous laws on the land. It is one mechanism through



which those laws are given expression, and made applicable to those who seek to use the land.

2. *Protecting a Nation's connection with the land, including culture, way of life, and Title and Rights:* A regime can assist with ensuring that a Nation's connection with their Territory is maintained as it wishes, and that Title and Rights are being respected.
3. *Re-establishing relationships on a proper foundation grounded in recognition and respect:* A regime is part of directing the Crown and third parties on how to shift their conduct in appropriate ways that reflect recognition and advance reconciliation. By providing guidance to the Crown and proponents, better patterns of relations, and more appropriate models of agreement, achieved.

### ***Drafting Considerations***

In effect, developing a decision-making and consent regime shows to all the world who seek to use your territory what the proper and appropriate pathway is for engaging with the Nation, how the Nation makes decisions, and what standards that will be applied. By doing this, a Nation exercises sovereignty.

Reflecting this, a decision-making and consent regime could make clear the following:

- That it is an expression of Indigenous sovereignty;
- That it is an implementation of Indigenous laws;
- That it upholds the Title and Rights of the Nation.

In drafting a regime Nations may wish to consider:

- Opening the regime with a statement of the Nation's sovereignty and historic, contemporary, and future connection with their territory;
- Make clear from the outset that the regime is an expression of Indigenous laws, and is an exercise of decision-making authority and jurisdiction pursuant to those laws;

- State that the regime is part of upholding and protecting the Title and Rights of the Nation.

As well, because regimes will relate to consultation and accommodation with the Crown, engagement with third parties, and be a tool for reconciliation, it is very important for Nations to have direct and independent legal and technical advice in the development, drafting, and review of a regime.

## 2. What are the key topics of a regime?

There are certain topics that should be addressed in any decision-making and consent regime. In particular, a regime could answer the following questions:

- *What are the sources of jurisdictional and legal authority for the regime?* The regime could make clear its Indigenous legal foundations grounded in the sovereignty and jurisdiction of the Nation. This may include illustration of how the Nation has always had laws and practices around authorization/consent, how these have always been used and exercised, and continue to be so today including through the regime. The regime could also express how Indigenous consent is part of the *UN Declaration* and Canadian constitutional law. As part of this discussion of sources of authority, the Nation could define what it means by consent.
- *How does the Nation make decisions and decide whether or not to authorize an activity?* The regime could lay out the basic structures and processes the Nation uses to make decisions. This could be done at a general level, or with significant detail that outlines every step and who does what.
- *What information does a Nation require in its decision-making?* The regime could identify the types of information the Nation requires as part of its decision-making process. This may include the types of studies that are required, transparency regarding the proponents' dialogue and communication with others, and information regarding how the proposal relates to Title and Rights.

- *What standards guide the Nation's decision-making?* The regime could lay out the substantive standards that a Nation applies in decision-making. This may include standards around how the proposal relates to the protection of Title and Rights, cumulative impacts, the location, scope, and nature of the project, particular environmental, social, or stewardship interests, and the relationship of the proposal to the economic, social, environmental, and cultural objectives of the Nation.
- *What are the potential outcomes of the Nation's decision-making process?* The regime could lay out the potential outcomes of the Nation's decision-making process (e.g. no consent, authorized with conditions, or authorized). This should include discussion of the steps a Nation may take to enforce its decisions.
- *What are the expectations on the Crown and third parties in the process?* The regime could identify what is expected of the Crown and third parties as they move through the process. This could include discussion of how costs may be addressed, the potential for process or other agreements to be completed, and what best practices for the Crown and proponents might be. It could also include guidance on who they should be engaging with, the form in which information should be provided, and other technical requirements.

### ***Drafting Considerations***

In preparing a regime, a Nation should consider how to ensure it is operational. It should have a 'how-to' aspect in that it is providing guidance to the Crown and third parties about how to move through the Nation's decision-making process.

At the same time, the regime should make sure it is clearly grounded in the laws of the Nation, as well as international and constitutional law. The regime is also part of the Nation's effort to advance reconciliation regarding Title and Rights.

A proposed structure that will help achieve these objectives follows below. This

structure is only one option.

**Opening Statement:** A statement articulating the Nation's values, vision, and sovereignty which is the basis from which the regime is developed

**Purpose:** A statement of the purpose of the regime

**Sources:** Provides an overview of the legal foundations and sources of authority for the regime -including in Indigenous, international, and constitutional law. This could include a discussion of the standard of consent – how it is defined, and what the Nation means by it.

**Scope:** Identifies to what the regime applies to – e.g. what kinds of decisions and what geographic area.

**Authorization and Approval Process:** Identifies elements of how decisions are made regarding whether a Nation's authorization will be granted. This could include details of who makes decisions, what the process is for decision-making, what information is required, and roles and responsibilities in the decision-making process.

**Standards:** Identifies the main criteria that inform a Nation's decision-making. These could include standards regarding Title and Rights, nature of relationships, impacts, and environmental stewardship.

**Enforcement:** Describes how a regime may be enforced

A Nation may also want to include other elements in a regime such as the following:

- Lists of best practices for the Crown and proponent;
- Lists of fees or costs for different elements of implementing the regime;
- Models of process agreements that the Nation uses in implementing the regime;
- Relevant maps.

### 3. Elements of Drafting, Operationalizing, and Implementing a Regime

Indigenous Nations have their own internal processes for developing and implementing decision-making and consent regimes and will be at different stages in undertaking this important work. This work requires many to be involved including Chiefs and Councils, Elders, community members, and legal and technical advisors.

A few additional general points to consider in doing this work include the following:

- It is important to have consistency in the application of regimes once they are adopted. As such, Nations should consider the resources and capacities that will be needed to implement the regime they are developing, and ensure those are in place.
- The Crown and third parties will respond in a range of ways to the development and implementation of a regime. Some will refuse to engage with it, while others may embrace it. Nations should expect and be prepared for this range of responses.
- It is important in preparing the regime that in addition to grounding it in Indigenous laws, that careful thought be given to how it aligns and reflects the constitutional law of Canada and the goal of reconciliation. This will impact the language chosen and some elements of the processes developed. Regimes will have a relationship to consultation and accommodation with the Crown, engagement with third parties, and whether consent is given. It should also be expected that regimes may appear in the record as part of court and other proceedings.
- Nations will often need to align other elements of their decision-making infrastructure to support the implementation of the regime. For example, letters to the Crown and third parties in response to referrals should be drafted around the regime.

## APPENDIX B: AN OVERVIEW OF FIRST NATION-BRITISH COLUMBIA AGREEMENTS OUTSIDE THE BCTC TREATY PROCESS – PREPARED MAY 2019

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Negotiations and agreements between First Nations and BC are changing. While we are early in this period of change, it is apparent that certain shifts are occurring through which solutions may emerge that address long-standing challenges in negotiations. In particular, there has been an intensification of efforts to negotiate agreements that are consistent with the legal principles articulated in the *Tsilhqot'in* decision, focused on the recognition and implementation of Title and Rights, and aligned with the standards of *the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)*. A few examples of such agreements have been completed. As well, BC has adopted the *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples (Draft Principles)* which signal a commitment to certain shifts in negotiations.

These changes indicate that we are in a moment of opportunity and innovation where First Nations may be able to advance models of negotiations and agreements that further and more appropriately address their priorities and visions and remove some of the obstacles that limited progress in the past. In particular, comprehensive pathways and new possibilities are emerging outside of the British Columbia Treaty Process (BCTC process).

To be clear, a long way to go remains, and systemic shifts – including in legislation and policy – are critical for negotiations and agreement-making to fully advance.

This overview summarizes where we are at today in agreement-making between First Nations and BC outside the BCTC process, and the new directions that appear to be emerging. The focus has been placed on agreements outside the BCTC process for a number of reasons including: (1) Significant innovation appears to be emerging in agreements outside the BCTC process; (2) There has been increased interest amongst UBCIC membership and from BC to examine potential future development of such agreements; (3) Other materials, resolutions, and analyses address matters regarding the BCTC process.

### ***The Agreement Landscape***

Agreement making between First Nations and BC has become a predominant focus of reconciliation efforts. Every First Nation is engaged in some way in negotiations with BC, and the provincial government itself estimates that at any given time it is involved in over 400 active negotiations with First Nations. In one form or another, all of these negotiations touch on issues of Aboriginal Title and Rights and have their genesis in the unresolved Land Question.

These negotiations, and the agreements that may flow from them, come in all shapes and sizes, with First Nations pursuing their distinct priorities and visions. At the same time, however, laws, policies, and practices of BC have generally limited the models of agreements and what might be addressed within them.

Until 2018, the typical categories of agreements could be summarized as follows:

**Treaty Agreements:** BC has always privileged the BCTC process as the venue for negotiations since its founding in 1993. Since that time, four modern treaties have been completed. Today, it is estimated there are around 25 active negotiations through the BCTC process.

**Incremental Treaty Agreements:** Over the last six years BC began negotiating interim agreements called Incremental Treaty Agreements (ITA) with some First Nations in the BCTC process. Approximately twenty-three have been completed to date. Most ITAs have been about the transfer of land parcels prior to the completion of a final treaty.

**Program Agreements:** The vast majority of the negotiations and agreements between First Nations and BC have been related to ‘programs’ established by BC to address land and resource matters, and to provide a form of “accommodation” and/or economic opportunity. These negotiations and agreements are relatively transactional in nature. Examples include agreements that share forestry benefits (e.g. Forest Consultation and Revenue Sharing Agreements – the number of these is over a hundred across the Province), that share portions of the Province’s mineral revenue tax (e.g. Economic and Community Development Agreements – there are less than twenty such agreements), and agreements that share benefits related to LNG development (e.g. Natural Gas Pipeline Benefits Agreements – there are over sixty such agreements).

**Decision-Making Agreements:** Some agreements are particularly focused on how decision-making takes place regarding land and resources matters and are called by various names, including “strategic engagement agreements”, “framework agreements”, and “shared decision-making agreements”. There are about a dozen such agreements, all of which involve multiple First Nations

**Reconciliation/Government-to-Government Agreements:** These agreements are very diverse in nature and scope, and range from addressing specific matters between a First Nation and BC to establishing an overarching framework through which reconciliation of Aboriginal Title and Rights may be pursued. There are about a dozen such agreements, most of which involve multiple First Nations. Some of these also include components more typically seen in a decision-making agreement.



Since 2018 a few new agreements have been completed that indicate change from these typical categories.

The ***shíshálh* Foundation Agreement** was signed in October 2018, and provides substantial immediate benefits and measures, as well as a long-term set of milestones regarding Title and Rights implementation, consent based decision-making, the application of *shíshálh* laws and jurisdiction and other matters. BC has labelled this model of agreement “Comprehensive Reconciliation Agreements”.

A Letter of Understanding was completed in December 2018 between the Province and the ‘Namgis First Nation, the Kwikwasut’inuxw Haxwa’mis First Nations, and Mamalilikulla First Nation, regarding aquaculture in the Broughton Archipelago and consent-based decision-making. The LOU provides for an orderly joint decision-making process and transition from current aquaculture practices in the Broughton Archipelago aligned with the standards of the *UN Declaration*.

A number of other new agreements that reflect some changes from past models are reported to be nearing completion.

### ***What is changing?***

Until recent shifts in agreements and negotiations, relatively consistent patterns could be identified in the agreements signed outside of the BCTC process in the previous few decades.

To be clear, program agreements, reconciliation agreements, and decision-making

agreements have been venues for a number of First Nations to advance their visions and priorities and have often been the product of their tremendous advocacy and work. For many First Nations, agreements have also provided benefits and opportunities, and paths to deepen relations and achieve shifts out of the status quo.

At the same time, certain limitations have been imposed in negotiations and agreements as a matter of law, policy, and practice by BC. Specifically, through these agreements:

- With few exceptions, BC has not been willing to formally recognize and implement Title and Rights or Indigenous laws, governments, and jurisdiction.
- BC has not been typically willing to design and implement models of joint or consent-based decision-making.
- While forms of economic sharing are often achieved through these agreements, they were typically not based on the economic value of Aboriginal Title and Rights.
- BC has often expected acknowledgements, admissions, or releases regarding consultation and accommodation, and/or impacts and infringements on Indigenous rights that are problematic for many First Nations.

A by-product of this has been, for example, that many shared decision-making agreements from the past decade have been largely structured around procedural aspects of the duty to consult, rather than structuring a proper relationship between Indigenous and Crown laws and jurisdictions. Another by-product has been that many reconciliation agreements have been limited in their substantive scope, including what benefits and measures could be included, and the range of topics addressed. One reason for this was

BC maintaining the position that the primary venue for broader substantive measures or comprehensive relations had to be through the BCTC process.

As well, many of the types of agreements prior to 2018 were largely created by BC to meet specific interests and priorities they had around gaining support for particular forms of land and resource development. These models were not designed or advanced by the province to address recognition and implementation of Title and Rights, reflect the legal principles of the *Tsilhqot'in* decision, meet the standards of the *UN Declaration*, or achieve the distinct priorities and visions of First Nations. *(Note: Attached to this memo is a summary of the key themes seen in agreements prior to 2018.)*

The changes we have seen since 2018 indicate that these long-standing limitations in negotiations and agreements outside the BCTC process are beginning to be addressed. The evidence for this is found both in new policy commitments from the BC government that have implications for negotiations, as well as the details of the few new agreements that have been completed. However, to be clear, it is early days of change and massive work remains to be done.

### ***Policy Commitments***

The BC Government has endorsed the UN Declaration and its implementation. The *UN Declaration* has numerous implications for negotiations and agreements, including the following:

- The *UN Declaration* articulates, recognizes, and affirms the inherent rights of Indigenous peoples including Indigenous self-determination and self-government (e.g. articles 3 and 4), and rights regarding lands and resources, consent, and application of jurisdiction and laws (e.g. articles 18, 19, 20, 28, 29, and 32).
- States are expected to take positive action in consultation and co-operation with Indigenous peoples to uphold the human rights of Indigenous peoples articulated in the *UN Declaration* (article 38).
- Just and fair procedures for the resolution of conflicts and effective remedies for infringements of Indigenous rights are required (article 40).
- Indigenous peoples have a right to recognition, observance, and enforcement of treaties, agreements, and other constructive arrangements (article 37)

In a broad sense it can be said that many of the minimum standards of the *UN Declaration* have not been reflected or met in agreement models in BC. Meeting the standards around recognition of Rights, self-determination, self-government, Indigenous jurisdiction, decision-making, and laws stated in the *UN Declaration* require changes to the typical agreement models that BC has been willing to enter. As well, the general historic pattern of BC defining the parameters and models of agreements and then offering to “negotiate” with First Nations is not aligned with the right of self-determination or the requirements for co-operation and collaboration in the *UN Declaration*.

The *Draft Principles*, which are grounded in the *UN Declaration*, contain many elements that are directly related to negotiations. Principle 1 explicitly expresses the shift towards recognition: “the Province of British Columbia recognizes that all relations with

Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self-government.” The implication of this for negotiations and agreements is made clear in Principle 5 where the historic pattern of BC defining parameters and types of agreements is rejected, and that the substance of agreements must be based on recognition:

In accordance with section 35 of the Constitution Act, 1982, all Indigenous peoples in Canada should have the choice and opportunity to enter into treaties, agreements, and other constructive arrangements with the Crown as acts of reconciliation that form the foundation for ongoing relations. The Province prefers no one mechanism of reconciliation to another. It is prepared to enter into innovative and flexible arrangements with Indigenous peoples that will ensure that the relationship accords with the aspirations, needs, and circumstances of the Crown-Indigenous relationship.

The Province also acknowledges that the existence of Indigenous rights is not dependent on an agreement and, where agreements are formed, they should be based on the recognition and implementation of rights and not their extinguishment, modification, or surrender.

Accordingly, this principle recognizes and affirms the importance that Indigenous peoples determine and develop their own priorities and strategies for organization and advancement. The Province recognizes Indigenous peoples’ right to self-determination, including the right to freely pursue their economic, political, social, and cultural development.

Principle 9 also rejects the idea of “final” treaties and agreements:

Treaties, agreements, and other constructive arrangements should be capable of evolution over time. Moreover, they should provide predictability for the future as to how provisions may be changed or implemented and in what circumstances. The Province is open to flexibility, innovation, and diversity in the nature, form, and content of agreements and arrangements.

The *Draft Principles* appear to direct BC to negotiate agreements that are: (1) focused on the recognition and implementation of Title and Rights; (2) respectful of Indigenous laws, governments, and jurisdictions; (3) guided by the priorities and visions of First Nations; (4) adaptable, flexible, and open to change; (5) without any bias or preference for any particular process or model, such as the BCTC process. This suggests a significant shift from predominant practices in BC in recent decades.

In addition to the endorsement of the *UN Declaration and the Draft Principles*, BC has announced a range of ongoing reviews and measures that may have a further impact on negotiations and agreement-making. Two important developments are:

- In November 2018, the Premier committed to the passage of legislation to implement the *UN Declaration*. The legislation is expected in fall 2019. How this legislation may open new space for negotiations and agreements is something to closely monitor.
- In 2018, the First Nations Leadership Council and BC released an updated *Commitment Document and Concrete Actions: Transforming Laws, Policies, Processes and Structures*. Action 5 in the *Concrete Actions* states:  
**ACTION 5:** New Approaches to Effective Negotiations and Dispute Resolution First Nations, BC, and all citizens will all benefit from “better” outcomes from negotiations and consultation/engagement processes. Better outcomes include outcomes that may be reached more expeditiously and with less expense, have more flexibility, be more substantive and fair, and be more responsive to specific needs, interests and issues. To support this, new approaches to negotiations and associated dispute resolution options will be designed and implemented, incorporating and borrowing from both western and Indigenous models of interaction and resolution. The following specific initiatives will be advanced:

**Goal:** Design and establishment of a range of negotiation and dispute resolution models: Reflecting on existing reports discussing the barriers and challenges to successful negotiations, assess gaps and possibilities for new approaches that will be more appropriate, effective, constructive, and successful.

**Outcomes:** By end of Year One: Development of a joint set of innovative and creative principles for how negotiations may be conducted in new ways and collating existing material.

Work on the Concrete Actions is just beginning.

### ***New Agreements***

Two new agreements completed in 2018 – the *shíshálh* Foundation Agreement and the LOU on the Broughton Archipelago – both illustrate a change from the typical agreement models towards approaches more aligned with the recognition and implementation of Title and Rights, the *UN Declaration*, and the *Draft Principles*.

Importantly, both agreements are about the priorities and visions determined by the First Nations involved and the models of agreement are new. They do not fit into the types of agreements we have seen before and much of the subject matter they contain are topics which BC previously limited from addressing in negotiations.

The *shíshálh* agreement is the first comprehensive agreement that covers all aspects of the relationship between *shíshálh* and BC out of the BCTC process. It is a flexible, long-term arrangement that will continue to grow and develop over time, while also providing *shíshálh* substantial immediate benefits and compensation that were not available to it in previous BC agreement models. Some examples from the *shíshálh* Foundation

Agreement that indicate new directions are :

- Explicit statements and commitments around the recognition and implementation of *shíshálh* Title and Rights, the *UN Declaration*, as well as *shíshálh* jurisdiction and laws.
- Explicit commitments to implement consent-based decision-making models supported by the immediate adoption of new decision-making structures and processes.
- Commitment to completion of a joint land use plan.
- Immediate benefits and measures including significant lands for economic, cultural, and social purposes, and approximately \$75 million in immediate compensation, capacity funds, and supports for *shíshálh* governance, culture, and community development. Additional lands, compensation, and economic measures will be implemented throughout the life of the agreement.
- Establishment of new dispute resolution mechanisms and processes.
- Agreed targets and milestones regarding all aspects of the relationship between *shíshálh* and BC to be implemented in stages over the next 25 years.
- Maintenance of *shíshálh* legal rights to use the courts to protect and uphold their Title and Rights. The agreement does not provide legal “certainty” in ways that BC has historically demanded.

The LOU on the Broughton Archipelago and the subsequent outcomes of the work pursuant to the LOU significantly advance resolution of a long outstanding and serious matter that BC had not been open to negotiating and resolving previously. This resolution was accomplished through commitments and arrangements that were not typically previously reflected in agreements including

- Implementation of a consent-based decision-making process grounded in articles 19 and 32 of the *UN Declaration*.



- Recognition of Indigenous laws, jurisdictions, and Title and Rights of the First Nations.
- Establishment of new structures and processes for government to government decision-making and dispute resolution grounded in the UN Declaration.
- Agreement on an orderly transition from open-pen finfish aquaculture and substantive measures to protect wild salmon, including addressing economic and environmental aspects of the transition.

It is reported that a number of other First Nations are close to completing important new agreements. The details of these agreements will further help to illustrate the new directions that may be emerging and what significant challenges remain.

### ***Where are we headed?***

Recent policy and agreement developments indicate that a moment of opportunity exists where past negotiation and agreement patterns could be significantly transformed. Agreements outside the BCTC process are emerging as an innovative and growing space where the recognition and implementation of Indigenous Rights may occur, comprehensive and long-term relations established, significant and sometimes transformative benefits and measures provided, and acknowledgement of Indigenous laws, governments, and jurisdictions supported.

It remains, however, early days in assessing this shift, and whether and how it will advance. A major focus for First Nations should be how to advance and accelerate this shift through joint strategies, as well as strategies within respective tables and processes. It is

also vitally important that First Nations systematically advance the view that acting consistent with the standard of Indigenous self-determination in the UN Declaration means that agreements are grounded in the priorities and visions of First Nations, and that models are open, co-designed, and not pre-determined by categories of agreements set through internal BC processes.

As well, there are many critical issues that BC still must demonstrate it is shifting its practices on to demonstrate we are truly moving to an era of agreements grounded in the recognition of Title and Rights and the UN Declaration. These include the divisive practice of impacting the Title and Rights of neighbouring Nations.

As well, increasingly, as agreements become focused on proper Title implementation and the inherent right of self-government, First Nations will have to address the issue of how they will further organize as proper Title and Rights holders, including as governments entering into agreements. Significant work and leadership will have to be shown by Nations to strategically bring forward and advance their visions and priorities and how these may be constructively reflected and implemented through agreements, and how challenges, including those related to territorial boundaries and governance capacity, can be addressed through Indigenous laws and legal orders.

## APPENDIX C: SUMMARY OF AGREEMENTS OUTSIDE THE BCTC PROCESS PRIOR TO 2018

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In 2016, UBCIC completed an analysis of agreements between First Nations and British Columbia outside of the BCTC Process, focusing on “Reconciliation Agreements” and “Decision-Making Agreements”. The key findings from that analysis were as follows:

### ***Reconciliation Agreements:***

1. “Reconciliation Agreement” is not a term that describes any particular content of an agreement and does not reflect a particular or fixed set of mandates.
2. Reconciliation agreements often set the stage, at a high level, for broader and more expansive negotiations.
3. Reconciliation agreements have included some substantive measures that constitute a form of accommodation, such as land transfers or other economic and environmental benefits.
4. Reconciliation agreements do not recognize, define, limit, surrender, or extinguish Aboriginal Title and Rights.
5. Reconciliation agreements, while often framed as a step on the path of reconciliation, have not to date resulted in any final reconciliation agreements, treaties, or other comprehensive agreements.

### ***Decision-Making Agreements***

1. “Decision-Making Agreement” is not a term with set or defined meaning and does not refer to a particular set of principles, standards, structures or approaches.
2. Decision-making agreements are primarily, though not exclusively, about how procedural consultation will take place, and many have a focus on structuring and routinizing provincial decision-making.
3. Decision-making agreements do not legally recognize First Nations’ inherent jurisdiction or governance authority and largely exist within current legislation and policy.

4. The standard of consent is not present in any decision-making agreements, though the agreements can lead to increased engagement and influence in decision-making.
5. Decision-making agreements often provide necessary capacity support for First Nations to build up their decision-making processes and structures.