

UNDRIP as a Framework for Reconciliation in Canada: Challenges & Opportunities for Major Energy and Natural Resource Projects

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The advancement of reconciliation with Indigenous peoples in Canada has had a significant impact on the approval of energy projects since the introduction of Section 35 of the *Constitution Act, 1982*. The legal concepts of consultation, accommodation and consent have pushed the boundaries of our existing regulatory regimes and challenged the way we think about administrative processes. The move toward the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in Canada, including the concept of 'free, prior and informed consent', is certain to further push those boundaries as governments advance reconciliation with Indigenous peoples. In canvassing current and proposed legislative and policy developments across Canada, in particular recent legislative changes in British Columbia, there appear to be different models developing for incorporating UNDRIP into Canadian law. These models range from express requirements in relation to Indigenous consent on major project approvals, to more flexible frameworks that will enable governments to address UNDRIP incrementally over time. Ultimately, many important questions remain with respect to how UNDRIP will impact energy development in Canada.

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“The *Constitution Act, 1982* ushered in a new chapter, but it did not start a new book”

- Binnie J. in *Mitchell v Minister of National Revenue*¹

1. INTRODUCTION

In 1982, Canada constitutionally protected Indigenous rights through the enactment of Section 35 of the *Constitution Act, 1982* (“**Section 35**”).² Since that time, Canadian courts have been tasked with defining both the scope and limits to Section 35 within our existing legal framework, in an effort to reconcile the pre-existence of Indigenous societies with the fact of contemporary Canada. Canada was in 1982, and remains today, one of the few jurisdictions in the world that provides constitutional protection to Indigenous rights.

In this paper, we argue that the adoption and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (“**UNDRIP**”) in Canada is the start of another chapter in our law.³ But, similar to Section 35, it does not start a new book. Our existing legal framework and approach to Section 35 founded on rule of law principles such as predictability, transparency, balance, and fairness, is not displaced by UNDRIP. Rather, it is the bedrock on which any successful approach to implementing UNDRIP into Canadian law must be based.

This critically includes administrative law and, in particular, the regulatory processes that our country relies on in reviewing and approving major projects. By their nature, energy and resource projects require a balancing of many different competing societal interests based on the public

¹ *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911 at para 115.

² We have adopted the term “Indigenous” in most places in this paper given its current widespread use and acceptance. While we acknowledge that “Indigenous” may have a broader meaning under international law, we generally use the term synonymously with “aboriginal peoples of Canada” as used in Section 35 (namely, First Nations, Métis and Inuit peoples). We continue to use other terms in certain circumstances where the legal context is important, particularly in the context of Section 35 or when referring to the *Indian Act*. We use “Aboriginal law” when referring to the Canadian legal framework in order to distinguish it from Indigenous legal orders.

³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007).

interest. Canada has long benefitted from a strong tradition of independent regulatory processes that promote administrative fairness by depoliticizing decision-making, balancing conflicting interests, and making transparent and unbiased determinations about projects. Our regulatory processes have adapted over time to reflect Section 35 requirements in a way that respects administrative law principles. These same principles must continue to guide us as we further adapt our regulatory processes to implement UNDRIP.

This paper is divided into six parts. Part two discusses the background and evolution of Aboriginal law in Canada. Part three provides an overview of UNDRIP and its relevance to the energy and natural resources industry. Part four identifies the most significant policy and legislative steps taken by governments in Canada to date in implementing UNDRIP. Part five discusses administrative law principles that underpin regulatory processes in Canada and considers the key challenges and opportunities for the development of energy and other resource projects from the implementation of UNDRIP. Part six provides our conclusions.

2. RECONCILIATION AND ABORIGINAL LAW IN CANADA

2.1 Reconciliation

Reconciliation between Canada's Indigenous peoples and the Crown is a foundational principle in Canadian Aboriginal law. Reconciliation is necessary because of the historic wrongs committed to Indigenous peoples from the time of colonization onward. The Right Honourable Justice Beverly McLachlin, former Chief Justice of the Supreme Court of Canada, described the historic relationship between Canada's Indigenous and non-Indigenous peoples during a 2015 speech:

The most glaring blemish on the Canadian historic record relates to our treatment of the First Nations that lived here at the time of colonization. An initial period of cooperative inter-reliance grounded in norms of equality and mutual

dependence...was supplanted in the nineteenth century by the ethos of exclusion and cultural annihilation. Early laws forbade treaty Indians from leaving allocated reservations. Starvation and disease were rampant. Indians were denied the right to vote. Religious and social traditions, like the Potlach and the Sun Dance, were outlawed. Children were taken from their parents and sent away to residential schools, where they were forbidden to speak their native languages, forced to wear white-man's clothing, forced to observe Christian religious practices, and not infrequently subjected to sexual abuse. The objective was to "take the Indian out of the child", and thus to solve what John A. Macdonald referred to as the "Indian problem". "Indianness" was not to be tolerated; rather it must be eliminated. In the buzz-word of the day, assimilation; in the language of the 21st century, cultural genocide. We now understand that the policy of assimilation was wrong and that the only way forward is acknowledgement and acceptance of the distinct values, traditions and religions of the descendants of the original inhabitants of the land we call Canada.⁴

While some of the most visible aspects of Aboriginal law, particularly in the context of resource development and energy projects, typically relate to clashes over lands and resources which are subject to Aboriginal and treaty rights, these aspects are ultimately only a piece of the broader reconciliation process. In Canada, the process of reconciliation "is about coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy relationship among people going forward."⁵

⁴ Beverly McLachlin, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance" *National News* (28 May 2015), online: APTN National News <<https://aptnnews.ca/2015/05/29/canadas-top-judge-says-country-committed-cultural-genocide-indigenous-peoples/>>.

⁵ Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation - The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6* (Montreal: McGill-Queen's University Press 2015) at 3.

In its decision on the most recent judicial review of the Trans Mountain pipeline approval, the Federal Court of Appeal considered the concept of reconciliation in the context of Indigenous opposition to the pipeline:

[49] Reconciliation...is meant to be transformative, to create conditions going forward that will prevent recurrence of harm and dysfunctionality but also to promote a constructive relationship, to create a new attitude where Indigenous peoples and all others work together to advance our joint welfare with mutual respect and understanding, always recognizing that while majorities will sometimes prevail and sometimes not, concerns must always be taken on board, considered and rejected only after informed reflection and for good reason. This is a recognition that in the end, we all must live together and get along in a free and democratic society of mutual respect.

[50] Reconciliation in this sense is about relationship...

Reconciliation as relationship [...] is always [...] reciprocal, and [...] invariably involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts [and includes] facing past evil openly, acknowledging its hurtful legacies, and affirming the common humanity of everyone involved. [It] is about peace between communities divided by conflict, but it is also about establishing a sense of self-worth or internal peace within those communities.

Even in the context of energy and resource development, the Court's focus is on the role of reconciliation in repairing the relationship between Indigenous and non-Indigenous peoples in Canada.

While the development of land and resources will continue to be an important part of the process, it is likely, and indeed desirable, that these issues will not be the primary focus as reconciliation, and the implementation of UNDRIP, moves forward. Significant challenges continue to persist in relation to numerous aspects of reconciliation and the relationship between Indigenous and non-Indigenous Canadians. Some examples of areas that require immediate and sustained attention include:

- Indigenous women and girls continue to be disproportionately subject to violent crimes;⁶
- Indigenous peoples continue to represent a disproportionate percentage of Canada's incarcerated population;⁷ and
- Indigenous peoples frequently endure limited access to quality housing, education and health care.⁸

The broad aim of reconciliation was eloquently described by the Truth and Reconciliation Commission of Canada (“TRC”) in its final report:⁹

Reconciliation must support Aboriginal peoples as they heal from the destructive legacies of colonization that have wreaked such havoc in their lives. But it must do even more. Reconciliation must inspire Aboriginal and non-Aboriginal peoples to

⁶ Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: The Final Report, volume 1a (Privy Council Office, 2019), online (pdf): National Inquiry into Missing and Murdered Indigenous Women and Girls <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>.

⁷ Government of Canada, “Indigenous Overrepresentation in the Criminal Justice System” *The Department of Justice* (May 2019), online: JustFacts < <https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/may01.html>>.

⁸ Government of Canada, “The Government of Canada announces significant investments to address Indigenous homelessness and housing” *Employment and Social Development Canada* (20 February 2019), online: News Release <<https://www.canada.ca/en/employment-social-development/news/2019/02/the-government-of-canada-announces-significant-investments-to-address-indigenous-homelessness-and-housing.html>>. See also Billie Allan & Janet Smylie, *First Peoples, Second Class Treatment – The Role of Racism in the Health and Well-being of Indigenous Peoples in Canada* (Toronto, Ont: the Wellesley Institute, 2015).

⁹ The TRC was a federal commission established to investigate and document the impact of Indian residential schools on Canada's Indigenous populations. The TRC was active from 2008 until the release of its final report in 2015.

transform Canadian society so that our children and grandchildren can live together in dignity, peace, and prosperity on these lands we now share.¹⁰

2.2 Section 35 and Aboriginal Law in Canada

On April 17, 1982, the *Constitution Act, 1982* came into force and marked a new chapter for Aboriginal law in Canada through the protection of Indigenous rights under Section 35. Prior to 1982, the rights of indigenous peoples were vulnerable to unilateral extinguishment by the federal government of Canada. Section 35 states:

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

(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Section 35 did not create new rights, but rather provided constitutional protection of rights held by Indigenous people arising from the fact that they were once independent, self governing entities in possession of the lands that now make up Canada.¹¹ Section 35 also did not define rights. As

¹⁰ Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: Reconciliation - The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6* (Montreal: McGill-Queen’s University Press 2015) at 4.

¹¹ *R v Van der Peet*, [1996] 2 SCR 507, [1996] 4 CNLR 177 at para 28.

a result, it was left to the courts to determine the content and scope of Aboriginal and treaty rights protected by Section 35.

Aboriginal and Treaty Rights

Aboriginal rights are those rights held by Aboriginal peoples that relate to activities that are an element of a practice, custom or tradition integral to the distinctive culture of the group.¹² They commonly include rights such as hunting, fishing, gathering and harvesting. Aboriginal rights may also include Aboriginal title, which is a right to the land itself. Aboriginal rights potentially include rights to self-governance, although to date the courts have declined to consider such broadly-framed rights, requiring instead that specific self-government rights be discretely framed and proven like any other Aboriginal rights.¹³ The federal government does, however, recognize self-government more broadly as being an Aboriginal right.¹⁴

Treaty rights are those rights contained in written agreements and are usually described as “treaties”. The numbered treaties across large sections of western Canada are examples of historic treaties protected by Section 35. More recent settlements under land claims agreements, such as the *Nisga’a Final Agreement* or the *Nunavut Land Claims Agreement*, are considered modern day treaties and are also protected under Section 35.

Challenges in Proving Substantive Rights Leads to the Duty to Consult¹⁵

The earliest Aboriginal rights litigation after the enactment of Section 35 was substantive in nature and focused on establishing the existence of specific Aboriginal rights. These claims frequently

¹² *R v Van der Peet*, [1996] 2 SCR 507, [1996] 4 CNLR 177 at para 46.

¹³ *R v Pamajewon*, [1996] 2 SCR 821, [1996] 4 CNLR 164 at para 18.

¹⁴ Government of Canada, “Self-Government” *Indigenous and Northern Affairs Canada* (15 September 2010), online: Self-Government <<https://www.aadnc-aandc.gc.ca/eng/1100100022287/1100100022288>>.

¹⁵ Roy Millen & Sam Adkins, “BC Treaty Process and the Realization of Free, Prior and Informed Consent” BC Treaty Commission (22 October 2018), online: Publications <<http://www.bctreaty.ca/sites/default/files/LegalOpinion-FPIC-BCTC-2018.pdf>> (certain portions of this section were adapted with permission).

arose in the context of regulatory charges under various forms of natural resource legislation. For example, an Indigenous person was charged with violating hunting or fishing regulations and pleaded substantive Aboriginal or treaty rights in defence. It was against this backdrop that the key principles of interpreting Section 35 were developed, including tests to determine the existence of an Aboriginal right, and whether and how the Crown could infringe established Aboriginal or treaty rights.^{16/17}

Establishing substantive Aboriginal rights is difficult. Voluminous evidentiary records are needed to establish the central role of various practices, customs or traditions to Aboriginal communities several hundreds of years ago, in order to prove an Aboriginal right, or to meet the necessary tests to demonstrate Aboriginal title. Aboriginal rights claims have resulted in some of the lengthiest court trials in Canadian history.¹⁸

These challenges resulted in a shift away from substantive rights litigation to procedural rights under Section 35. Beginning with the *Haida Nation* decision in 2004, the case law began to focus on the Crown's duty to consult, and where appropriate, to accommodate potential impacts to Aboriginal and treaty rights.¹⁹ The Supreme Court of Canada articulated the Crown's duty to consult as arising "...when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."²⁰

The duty to consult does not require that either the underlying right or infringement be proven. It is sufficient that there is a *prima facie* right, and there is a potential impact on that right. The obligation of the Crown will depend both on the strength of the claimed right and the potential

¹⁶ *R v Van der Peet*, [1996] 2 SCR 507, [1996] 4 CNLR 177 at para 185.

¹⁷ *R v Sparrow*, [1990] 1 SCR 1075, [1990] 3 CNLR. 160 at paras 67-83.

¹⁸ See e.g., the 339 day trial from 2002-2007 in *Tsilqot'in Nation v British Columbia*, 2007 BCSC 1700, [2013] BCEA No 1.

¹⁹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 10.

²⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 35.

impact. The duty to consult is ultimately a procedural right that only provides the Indigenous groups with the right to a process, not a particular outcome: “[the process of consultation] does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim....what is required is a process of balancing interests, of give and take.”²¹

More recently the Federal Court of Appeal considered the meaning of consultation and reconciliation in the context of Trans Mountain pipeline, which is a federally approved project that was opposed by certain Indigenous groups claiming Aboriginal rights and title over lands affected by the project:²²

[52] Moreover, the fact that consultation has not led the four applicants to agree that the Project should go ahead does not mean that reconciliation has not been advanced. The goal is to reach an overall agreement, but that will not always be possible...The process of consultation based on a relationship of mutual respect advances reconciliation regardless of the outcome.

[53] Put another way, reconciliation does not dictate any particular substantive outcome. Were it otherwise, Indigenous peoples would effectively have a veto over projects such as this one. The law is clear that no such veto exists...At some juncture, a decision has to be made about a project and the adequacy of the consultation. Where there is genuine disagreement about whether a project is in

²¹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 48.

²² *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 35, 314 ACWS (3d) 661.

the public interest, the law does not require that the interests of Indigenous peoples prevail.

...

[57] When adequate consultation has taken place but Indigenous groups maintain that a project should not proceed, their concerns can be balanced against “competing societal interests”. This is the role of accommodation...

Infringement and Justification

As noted above, the duty to consult is a procedural right that provides Indigenous groups with the right to a process, not a particular outcome. However, even when an Aboriginal or treaty right is established and infringement proven, that right is not absolute. The Crown may still infringe on that right if the infringement is justified.

Justification requires the Crown to meet a two-part test. First, the infringement must be related to a compelling and substantial legislative objective. Second, the infringement must be consistent with the honour of the Crown.²³

The Supreme Court of Canada has indicated that the following may be activities that relate to a compelling and substantial legislative objective that may justify infringements of Aboriginal title:

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure

²³ Prior to *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 374 DLR (4th) 1, the Supreme Court of Canada in *R v Sparrow*, [1990] 1 SCR 1075, [1990] 3 CNLR characterized the responsibility of the government with respect to indigenous people as a fiduciary obligation, and the honour of the Crown having to be upheld in attaining legislative objectives. In *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 374 DLR (4th) 1, the Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown. Whereas, the duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title.

and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.²⁴

The courts have, however, found that overly-broad objectives framed as being in the “public interest” are too vague and must be more specifically described in order to meet the test of being a compelling and substantive legislative objective.²⁵ Nevertheless, the public interest clearly informs the types of specific objectives that potentially support justifying an infringement. As will be discussed below, the concept of the public interest frequently plays an essential role in regulatory decision-making frameworks, particularly in the context of energy and resource development.

Consent under Section 35

Canadian courts have not generally addressed consent as a requirement under Section 35 outside of Aboriginal title cases. In cases where Aboriginal title has been established, the Supreme Court of Canada has imposed an additional requirement for the Crown to first seek the consent of the Aboriginal title-holder, while retaining the ability to justify the infringement if consent is not obtained:

After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot

²⁴ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108 at para 1 65 (cited with approval in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 374 DLR (4th) 1 at para 83).

²⁵ *R v Sparrow*, [1990] 1 SCR. 1075, [1990] 3 CNLR at para 1113.

proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*.²⁶

As a result, even in the case of consent, rights are not absolute and may be infringed where the infringement can be justified under the test described above.

Summary of Section 35 and Implications for UNDRIP

Section 35 provides constitutional protection for Aboriginal and treaty rights, but those rights are not absolute. A recurrent theme in Canadian case law is that reconciliation is at the heart of Section 35, which requires balancing the significant protections provided to Aboriginal and treaty rights with the rights and interests of others:

The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act, 1982.²⁷

...

The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process.²⁸

While the Supreme Court of Canada has not specifically identified any legal requirement for the Crown to seek the consent of Indigenous groups in cases not involving established Aboriginal title, the approach to Aboriginal title is instructive. It is clearly not inconsistent with Section 35 for governments to seek the consent of Indigenous groups to a potential infringement. Nor is it difficult

²⁶ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 374 DLR (4th) 1 at para 90 (Tsilhqot'in was the first case in which Aboriginal title was successfully established).

²⁷ *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 10.

²⁸ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, 2017 CSC 41 at para 60.

to perceive of Section 35 imposing such an obligation on governments to seek consent, provided the consent right is not absolute and the government may still proceed where an infringement is justified; in other words, if the consent right is ultimately balanced against other compelling societal interests.

In our view, similar to the rights canvassed above, UNDRIP and its provisions related to “free, prior and informed consent” (“**FPIC**”) are not absolute rights and permit such a balancing process consistent with Section 35.

3. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

In 2007, the United Nations General Assembly adopted UNDRIP in response to a growing acknowledgement that the international human rights system inadequately addresses the particular vulnerabilities of Indigenous peoples.²⁹

UNDRIP identifies minimum standards for the dignity, survival, and well-being of Indigenous people and recognizes both the individual and collective rights of Indigenous peoples across social, civil, political, economic and cultural domains.^{30/31} Although much of the discussion around UNDRIP has focused on its reference to FPIC with respect the use and development of Indigenous lands and territories, the scope of rights and freedoms articulated in UNDRIP goes far

²⁹ Shin Imai et al., *Aboriginal Law Handbook*, 5th ed (Canada: Thompson Reuters, 2018) at 221.

³⁰ Shin Imai et al., *Aboriginal Law Handbook*, 5th ed (Canada: Thompson Reuters, 2018) at 221.

³¹ Shin Imai et al., *Aboriginal Law Handbook*, 5th ed (Canada: Thompson Reuters, 2018) at 221.

beyond rights associated with the development and use of land and include: religion, spiritual beliefs and practices;³² language;³³ education;³⁴ economic development; and health care.³⁵

UNDRIP also expressly acknowledges that the rights and freedoms articulated in its 46 articles are “inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.”³⁶

A number of UNDRIP articles call for FPIC in various contexts including land development;³⁷ expropriation of intellectual property;³⁸ the adoption and implementation of legislative changes;³⁹ historical land expropriations;⁴⁰ environmental management;⁴¹ and natural resource extraction.⁴²

In our view, the application of FPIC should not be interpreted to mean Indigenous groups are conferred a veto right.⁴³ Like Section 35, the rights articulated in UNDRIP are not absolute and must be balanced against other important societal priorities, including the rights of others. Article 46 of UNDRIP expressly contemplates limitations necessary for “...securing due recognition and

³² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 5,7,10 (articles 12, 25 and 36).

³³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 5-6 (articles 13 and 16).

³⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 5,7 (articles 14 and 21).

³⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 7 (article 24).

³⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 1.

³⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 5 (article 10).

³⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 5 (article 11 (2)).

³⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 6 (article 19).

⁴⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 8 (article 28 (1)).

⁴¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 8 (article 29 (2)).

⁴² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 9 (article 32(2)).

⁴³ Ontario, Legislative Assembly, *Standing Committee on Indigenous and Northern Affairs*, 42nd Parl, 1st Session, No 102 (23 April 2018) at 1615 (Thomas Isaac).

respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”⁴⁴

UNDRIP was developed in the context of an international membership which included many countries that routinely denied the human rights of their Indigenous populations. In recognition of this, UNDRIP expressly recognizes that “the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities...should be taken into consideration.”⁴⁵ When considering the implementation of UNDRIP into Canadian law, the recognition of Indigenous rights pursuant to Section 35 and the related case law is one such ‘national particularity’ that must be taken into consideration.

4. IMPLEMENTING UNDRIP INTO CANADIAN LAW

4.1 Background

The implementation of UNDRIP into Canadian law has been on the horizon since Canada announced it would adopt UNDRIP, without qualifications, at the United Nations General Assembly in May 2016. During that announcement, then Minister of Aboriginal Affairs, the Honourable Carolyn Bennett stated that Canada intended “nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution.”⁴⁶

There was considerable pressure on the Government of Canada leading up to the 2016 announcement to formally and fully adopt UNDRIP. Notably, the TRC’s “Calls to Action” released in 2015 specifically called on all levels of governments in Canada to adopt and implement

⁴⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 11 (article 46(2)).

⁴⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 1.

⁴⁶ See Tim Fontaine, “Canada officially adopts UN declaration on rights of Indigenous Peoples”, *CBC News* (10 May 2016), online: <www.cbc.ca>.

UNDRIP and for the federal government to develop a national action plan to achieve the goals of UNDRIP.^{47/48} Each of the provincial premiers through the Council of the Federation endorsed the report of the TRC and the Calls to Action in 2015.⁴⁹

Federally, the implementation of UNDRIP was an element of the Liberal Party of Canada's 2015 election platform.⁵⁰ Similarly, the New Democrat Party in British Columbia campaigned on implementing UNDRIP in 2017. Each party subsequently formed government, and both jurisdictions have been the source of most of the policy and legislative approaches to implementing UNDRIP in Canada to date.

4.2 Approaches to Implementing UNDRIP into Canadian Law

Although the process of incorporating and operationalizing UNDRIP into Canadian law is in the early stages, there has been significant commentary and scholarship on what this means in general and with respect to 'consent' in particular. Much of this commentary and scholarship has emphasized that 'consent', or FPIC, is not purely about the final decision but rather is also about the relationship between governments. The Honourable Jody Wilson-Raybould, then Minister of Justice and Attorney General of Canada, described this approach to consent as follows:

Consent is not simply an extension of existing processes of consultation and accommodation, nor is the law of consultation – being heavily procedural in its

⁴⁷ Truth and Reconciliation Commission of Canada, Calls to Action, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online (pdf): Truth and Reconciliation Commission of Canada <nctr.ca/assets/reports/Calls_to_Action_English2.pdf> at 4 (call to action 43).

⁴⁸ Truth and Reconciliation Commission of Canada, Calls to Action, (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online (pdf): Truth and Reconciliation Commission of Canada <nctr.ca/assets/reports/Calls_to_Action_English2.pdf> at 4 (call to action 44).

⁴⁹ Government of Newfoundland and Labrador, "Premiers affirm commitment to action in response to Truth and Reconciliation Commission Report " *Canada's Premiers* (16 July 2015), online: <<https://www.canadaspremiere.ca/premiers-affirm-commitment-to-action-in-response-to-truth-and-reconciliation-commission-report/>>.

⁵⁰ Liberal Party of Canada, *A New Plan for a Strong Middle Class* (2015), online: <www.liberal.ca> at 48.

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.⁵¹

Addressing these limitations of approaching consent merely as an extension of the duty to consult and accommodate may be done by creating new frameworks for decision making procedures. The operationalization of consent may address this issue by “building proper structures and processes between governments for decision-making that respects jurisdictions, laws, and authorities.”⁵²

To date, there are only a few examples of specific legislation that is aimed at implementing UNDRIP into Canadian law. Of these, there appear to be two basic models. First, a framework model that commits government to implementing UNDRIP and providing a legislative regime

⁵¹ Government of Canada, “The Recognition and Implementation of Rights Framework Talk” *The Department of Justice* (13 April 2018), online: Speech <<https://www.canada.ca/en/department-justice/news/2018/04/the-recognition-and-implementation-of-rights-framework-talk-1.html>>.

⁵² Douglas White III Kwulasultun, “Consent” (Union of British Columbia Indian Chiefs, 21 October 2019) [unpublished] at 41.

through which to do so incrementally over time. Second, targeted legislation aimed at operationalizing specific aspects of UNDRIP.

4.3 UNDRIP Framework Legislation

Federal Framework: Bill C-262 , the Canadian Energy Regulator Act and the Impact Assessment Act

(i) Bill C-262

Bill C-262, which proposed legislation to be titled *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, was introduced into Parliament for consideration as a private member's bill by, as he was then, the Honourable Romeo Saganash, a Member of Parliament for the New Democratic Party of Canada in April 2016. Bill C-262 was passed by the House of Commons, but was not passed by the Senate prior to Parliament being dissolved in advance of the 2019 federal election.

Bill C-262 would have affirmed UNDRIP "as a universal human rights instrument with application in Canadian law" and required Canada to take steps to incorporate UNDRIP into the laws of Canada:⁵³

4 The Government of Canada, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.

⁵³ See Bill C-262 s 3.

5 The Government of Canada must, in consultation and cooperation with indigenous peoples, develop and implement a national action plan to achieve the objectives of the *United Nations Declaration on the Rights of Indigenous Peoples*.

Bill C-262 would have also immediately affirmed UNDRIP into Canadian law, but the process of determining the meaning and impact of that affirmation would just be beginning. UNDRIP, like many legal instruments, requires interpretation to determine the meaning of its provisions. Examples of terms that require definition and interpretation within UNDRIP include “indigenous”, “the lands and territories of indigenous peoples” and “free, prior and informed consent”. Without a further consideration of the meaning of UNDRIP, it is difficult to assess whether Canada’s existing body of Aboriginal law, which has developed legal concepts and definitions such as “traditional territories”, “Indigenous”, “justification” and “consent” to name a few, is consistent with UNDRIP.

Broadly speaking it was concern arising from the uncertainty of the meaning and interpretation of UNDRIP, and specifically around the meaning of ‘consent’, that ultimately led to the bills demise in the Senate. During the hearings of the Standing Committee on Indigenous and Northern Affairs (the “**Committee**”), the Committee heard from dozens of government officials and subject matter experts. While many of those experts lauded the role that incorporating UNDRIP into Canadian law could play in “forming a new relationship [between Canada and indigenous peoples] based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith”, others encouraged a more “thoughtful approach”:^{54/55}

⁵⁴ Ontario, Legislative Assembly, *Standing Committee on Indigenous and Northern Affairs*, 42nd Parl, 1st Session, No 99 (22 March 2018) at 1535 (Brenda Gunn).

⁵⁵ Ontario, Legislative Assembly, *Standing Committee on Indigenous and Northern Affairs*, 42nd Parl, 1st Session, No 102 (23 April 2018) at 1615 (Thomas Isaac).

...many elements of UNDRIP can be extremely relevant to Canada. In particular, I would focus on the ones relating to education, health, equality under the law, the development and maintenance of political systems and institutions, social and economic security, and gender equality. While these and other elements of UNDRIP are relevant to Canada, any effort to adopt UNDRIP must reflect the distance that Canada has travelled to date to prioritize reconciliation with indigenous peoples, the lessons we have learned over the past decades, and the significance—I would say the unique significance at law globally—of section 35, a uniquely Canadian creation.⁵⁶

The approach of incorporating UNDRIP directly into Canadian law was also criticized by then Minister of Justice and Attorney General of Canada, the Honourable Jody Wilson-Raybould, during a speech to the Assembly of First Nations as being a “simplistic” approach that was “unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement [UNDRIP].”⁵⁷

This issue of interpretation was viewed as being particularly problematic for Canada’s natural resource and energy sectors when it comes to FPIC in Article 32.2:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or

⁵⁶ Ontario, Legislative Assembly, *Standing Committee on Indigenous and Northern Affairs*, 42nd Parl, 1st Session, No 102 (23 April 2018) at 1540 (Thomas Isaac).

⁵⁷ Government of Canada, “Assembly of First Nations – Annual General Assembly” *The Department of Justice Canada* (12 July 2016), online: Speech <<https://www.canada.ca/en/department-justice/news/2016/07/assembly-of-first-nations-annual-general-assembly.html>>.

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

Many witnesses at the Committee hearings were in agreement that ‘consent’, as contemplated in UNDRIP, should be incorporated into Canadian law by incorporating First Nations into regulatory and decision-making processes. Brenda Gunn described the process of incorporating First Nations in decision-making processes as follows:

My final point is just to say that the right of indigenous peoples to participate in decision-making on free, prior, and informed consent doesn’t exist in isolation. We have administrative law principles that also will play into how government makes appropriate decisions. We know it is a reasonableness standard. We have all of these principles, so this one aspect that needs to be further developed—indigenous peoples participation—isn’t going to, I don’t think, throw everything off kilter. It’s just going to build on what we have.⁵⁸

This approach, on its face, is consistent with the language in UNDRIP, at article 46, which states that UNDRIP should not be interpreted as “authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”⁵⁹ and that the rights set out “shall be interpreted in accordance with principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance

⁵⁸ Ontario, Legislative Assembly, *Standing Committee on Indigenous and Northern Affairs*, 42nd Parl, 1st Session, No 99 (22 March 2018) at 1620 (Brenda Gunn).

⁵⁹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 11 (article 46(1)).

and good faith.”⁶⁰ In other words, its implementation would need to be layered into the fabric of both Indigenous, administrative and constitutional law that already exists in Canada.

As noted, Bill C-262 was not passed into law prior to the 2019 federal election being called. Following the re-election of the Liberal government in October 2019, the Government of Canada has repeatedly stated its goal is to pass legislation on UNDRIP by the end of 2020.⁶¹ Minister of Crown-Indigenous Relations, Carolyn Bennett, has repeatedly also stated that Bill C-262 “would be the minimum” standard for the upcoming proposed UNDRIP legislation.⁶²

(ii) *Canadian Energy Regulator Act and Impact Assessment Act*

On August 28, 2019, the *National Energy Board Act*⁶³ was repealed and replaced with the *Canadian Energy Regulator Act*⁶⁴ (“**CER Act**”), and, as a result, Canada’s National Energy Board was replaced by the Canada Energy Regulator (“**CER**”). While many aspects of Canadian energy regulation remained consistent in the transition to the CER, one aspect that saw change was the increased incorporation of Indigenous rights and knowledge into the regulatory process. The CER Act contains specific provisions that consider Indigenous aspects that were not included in the CER Act’s predecessor, the *National Energy Board Act*.

The preamble of the CER Act includes a statement that the Government of Canada is committed to implementing UNDRIP.⁶⁵ The CER Act specifically requires that the regulator consider any adverse effects a proposed project may have on the rights of Indigenous peoples and also creates

⁶⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 11 (article 46(3)).

⁶¹ See Jorge Barrera, “Crown-Indigenous Relations Minister Carolyn Bennett said law would be co-developed” (December 4, 2019), online: CBC www.cbc.ca.

⁶² Ontario, Legislative Assembly, *House of Commons Debates*, 43rd Parl, 1st Session, No 3 (9 December 2019) at 2205 (Carolyn Bennett). See also Ontario, Legislative Assembly, *House of Commons Debates*, 43rd Parl, 1st Session, No 18 (18 February 2020) at 2100 (Carolyn Bennett).

⁶³ RSC 1985 c N-7 [Repealed].

⁶⁴ SC 2019 c 28 s 10.

⁶⁵ *Canadian Energy Regulator Act*, SC 2019 c 28 s 10 at preamble.

an Indigenous advisory committee with the explicit purpose of enhancing the involvement of Indigenous peoples with respect to certain types of major project review and decisions of the regulator.⁶⁶ Additionally, the CER Act lists certain factors that are to be considered by the regulator when reviewing a proposed project, including:

- the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;⁶⁷ and
- the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.⁶⁸

While the CER Act has now made review of these factors a statutory requirement, in reality this approach is no different than it was prior to the inclusion of these factors in the CER Act. Regulatory tribunals have been reviewing submissions and evidence directly related to these factors for years prior to their inclusion in the new *CER Act*.

Canada's recent *Impact Assessment Act*⁶⁹ ("**IA Act**") bears many similarities to the CER Act. Both acts came into effect on August 28, 2019 and both increased the incorporation of Indigenous rights and knowledge into their respective regulatory processes. The IA Act repealed the *Canadian Environmental Assessment Act, 2012* and replaced the Canadian Environmental Assessment Agency with the Impact Assessment Agency of Canada ("**IAA**"). Also like the CER Act, the preamble of the IA Act includes a statement that the Government of Canada is committed to implementing UNDRIP.⁷⁰

⁶⁶ *Canadian Energy Regulator Act*, SC 2019 c 28 s 10 at ss 56-57.

⁶⁷ *Canadian Energy Regulator Act*, SC 2019 c 28 s 10 at ss 183(d), 262(d) and 298(d).

⁶⁸ *Canadian Energy Regulator Act*, SC 2019 c 28 s 10 at ss 183(e), 262(e) and 298(e).

⁶⁹ SC 2019, c 8, s 1.

⁷⁰ *Impact Assessment Act*, SC 2019 c 28 s 1 at preamble.

It is notable, however, that neither the CER Act nor the IA Act expressly include any legislative requirement with respect to the consent of Indigenous peoples to particular decisions of the CER or the IAA (outside of very specific circumstances, such as the provisions of a modern treaty). This is distinct from the approach taken in British Columbia with respect to environmental assessment.

Provincial Framework – British Columbia’s Declaration Act

Similar to the federal government, the incorporation of UNDRIP into provincial law in British Columbia has been on the horizon since the new provincial government was elected in 2017 and has occurred in a variety of forms. An obligation to review “policies, programs, and legislation to determine how to bring the principles” of UNDRIP into effect in British Columbia was included in every provincial Cabinet Minister’s July 2017 mandate letter.⁷¹ British Columbia introduced the “Draft Principles that Guide the Province of British Columbia’s Relationship with Indigenous Peoples” in May 2018, in order to provide guidance on how provincial representatives engage with Indigenous peoples.⁷² In June 2018, the Government of British Columbia signed a letter of understanding with three Indigenous nations in the Broughton Archipelago area of the province which, among other things, established a joint decision-making process for salmon aquaculture in the area.⁷³

Finally, on November 28, 2019 the *Declaration on the Rights of Indigenous Peoples Act* (the “**Declaration Act**”) received Royal Assent and became provincial law.⁷⁴ The implementation of

⁷¹ The effect of incorporating an obligation to implement UNDRIP in the ministerial mandate letters is not analyzed for the purposes of this paper.

⁷² While these principles incorporated many aspects of UNDRIP, the effect of these principles will not be analyzed for the purposes of this paper.

⁷³ Government of British Columbia, “Reconciliation & Other Agreements”, *First Nations Negotiations* (June 27, 2018), online: Other Agreements < https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/broughton_nations_and_bc_letter_of_understanding_june_2018_final_signed.pdf>.

⁷⁴ The Declaration Act was introduced into the Provincial Legislature as Bill 41 on October 24, 2019 and was passed into law by a unanimous vote on November 26, 2019.

British Columbia's Declaration Act will provide additional information as to the challenges of affirming and implementing UNDRIP into Canadian law. As the Declaration Act was only passed into law in November 2019, little has developed since its enactment. However, similarly to the framework proposed in Bill C-262, the implementation of the Declaration Act will be guided by an 'action plan' developed in consultation and cooperation with Indigenous peoples of the province.⁷⁵

The Declaration Act goes beyond Bill C-262 and also includes provisions allowing the Province to enter into 'decision-making agreements' with Indigenous governing bodies,⁷⁶ meaning "an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*."⁷⁷ Such decision-making agreements may be related to one or both of:

- the exercise of a statutory power of decision jointly by the Indigenous governing body and the government or another decision maker; and
- the consent of the Indigenous governing body before the exercise of a statutory power of decision.

As the implementation of the Declaration Act is only in its infancy, it is difficult to predict which areas of law and pieces of legislation will be prioritized for review and revision pursuant to the Declaration Act. However, given that all pieces of provincial legislation are potentially subject to review and revision in order to fulfill the objectives of the Declaration Act, the process of implementing UNDRIP into British Columbia's laws will not be accomplished overnight. Much like

⁷⁵ *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019] c 44 s 4.

⁷⁶ *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019] c 44 s 4, s 7.

⁷⁷ *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019] c 44 s 4, s 1(1) "Indigenous governing body".

the evolution of the law under Section 35, this will undoubtedly be a long-term process that may even be generational.

British Columbia has yet to introduce any formal guidance in relation to decision-making agreements. Provincial officials have repeatedly indicated that British Columbia will only consider entering into such agreements with Indigenous nations who have the demonstrated capacity and governance structures to undertake that scope of decision-making authority. It is undoubted that many of British Columbia's Indigenous nations will be eager to enter into decision-making agreements with the Province, however it is likely that only a select few Indigenous nations will be positioned from a capacity and governance perspective to enter into these agreements in the near term. It is also likely that decision-making agreements will not elevate Indigenous rights to an absolute standard, but rather retain the jurisdiction of the Province to make the ultimate decision where the decision is in the broader public interest.

The introduction of the Declaration Act into British Columbia law was a milestone in Canadian Aboriginal law. However, it will take years, and quite possibly numerous court challenges, to determine how elements of the act will be translated into practice. In the interim, the most difficult aspect of the implementation of the Declaration Act may be managing expectations, most importantly those of British Columbia's Indigenous nations.

4.4 Specific Legislation Operationalizing UNDRIP

A second approach to incorporating UNDRIP into legislation is to operationalize specific elements of UNDRIP through legislation. The most comprehensive example of this approach to date in Canada is British Columbia's new *Environmental Assessment Act* ("**EA Act**").⁷⁸ The EA Act was

⁷⁸ *Environmental Assessment Act*, SBC 2018, c 51.

one of the first pieces of British Columbia legislation to expressly include the aim of “supporting the implementation of the United Nations Declaration on the Rights of Indigenous Peoples”.⁷⁹ While the EA Act was passed into law in 2018, it did not come into force until December 2019, mere days after the coming into force of the Declaration Act.

Unlike Bill C-262 and the Declaration Act, the EA Act goes beyond a stated intention of implementing UNDRIP and seeks to operationalize elements of UNDRIP, and of FPIC in particular. This operationalization of UNDRIP, and of the concept of FPIC, was incorporated into the EA Act in two principal ways: the process of drafting the legislation and the language of the statute itself.

The revitalization of British Columbia’s environmental assessment regime, which resulted in the EA Act, was a process that involved considerable consultation with and input from the province’s Indigenous peoples. During the development of the new legislation, the Environmental Assessment Office (“**EAO**”), which is responsible for undertaking environmental assessments in British Columbia, had direct engagements with over 90 Indigenous nations.⁸⁰ The EAO convened an Indigenous Implementation Committee, composed of representatives of Indigenous nations from across the province, to collaborate with the EAO on the implementation of the EA Act and on development of regulations and policies related to the act.⁸¹ Throughout the revitalization process, the EAO made conceptual or draft materials available to Indigenous nations and sought comments on those materials.

⁷⁹ *Environmental Assessment Act*, SBC 2018, c 51 s 2(2)(c)(ii)(A).

⁸⁰ Government of British Columbia, “Engagement on Environmental Assessment Revitalization”, *Environmental Protection & Sustainability*, Online: <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/engagement-on-revitalization>>.

⁸¹ Government of British Columbia, “Engagement on Environmental Assessment Revitalization”, *Environmental Protection & Sustainability*, Online: < <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/advisory-committees>>.

The environmental assessment regime contained in the EA Act was developed in collaboration with Indigenous nations in a manner that is a marked departure from the typical legislative drafting process.⁸² As the Declaration Act is implemented in British Columbia, it is likely that the legislative drafting process used to develop the EA Act, which is arguably a new mechanism of government to government relations, will be used to revise other pieces of legislation to incorporate UNDRIP.

FPIC, and UNDRIP, is operationalized throughout the environmental scheme outlined in the EA Act. The first aspect of this operationalization is seen in the procedure for Indigenous nations to become a “participating Indigenous nation” in an environmental assessment.⁸³ In order to become a participating Indigenous nation (“**PIN**”), an Indigenous nation must provide the EAO with notice that the Indigenous nation intends to participate in the environmental assessment; this notice must be provided within 80 days of the publication of the initial project description (“**IPD**”).⁸⁴ The EAO can only deny an Indigenous nation the ability to participate in an assessment if it is determined “that there is no reasonable possibility the Indigenous nation or its rights recognized and affirmed by section 35 of the *Constitution Act, 1982* will be adversely affected by the project”.

⁸⁵ Decisions with respect to inclusion as a PIN, both by Indigenous nations and the EAO, are based on the IPD provided by a proponent. Practically speaking, the threshold for being denied inclusion as a PIN may be directly related to the amount of detail provided in an IPD and whether or not the EAO is able to determine there is no reasonable possibility of adverse effects. Becoming a PIN carries with it significant rights under the EA Act, including the right to provide consent at key stages of the process as described below.

⁸² Significant feedback from industry groups, environmental groups and other stakeholders was also sought during the drafting of the *Environmental Assessment Act*, SBC 2018, however this is beyond the scope of this paper.

⁸³ *Environmental Assessment Act*, S.B.C. 2018, s 14.

⁸⁴ The initial project description will consist of a preliminary project description and a plan for undertaking public engagement, including with Indigenous nations, during the early engagement phase of the assessment process and prior to the beginning of the environmental assessment.

⁸⁵ *Environmental Assessment Act*, SBC 2018 s 14(2).

While the duty to consult provides that consultation and, potentially, accommodation are required even where Aboriginal rights have not been established in a court, the level of consultation or accommodation required is dictated by the strength of an Indigenous nation's claims and the potential impact on those rights. The EA Act appears to have largely eliminated the reliance on strength of claims analyses and impact assessments at the front-end, avoiding the tiering of potentially impacted Indigenous groups that the EAO previously accomplished through procedural orders at the beginning of the process. While this may reduce conflict at the outset, assessments based on strength of claim and impact to rights will presumably remain relevant at the back-end of the process to the extent the EAO is making decisions that are not consented to by a PIN. Nevertheless, with such a low threshold to becoming a PIN, and without a clear mechanism to distinguish between PINs based on impacts, the EA Act creates new potential avenues for legal challenges. It may also create practical challenges for proponents outside of the regulatory process in potentially expanding the number of commercial agreements that a proponent is required to negotiate with Indigenous groups by providing new and significant leverage to PINs in granting or withholding their consent to a particular project.

The environmental assessment process created under the EA Act, has also operationalized FPIC through its 'consensus-based' approach.⁸⁶ The concept of FPIC is incorporated into the assessment process by requiring the EAO to seek consensus with PINs throughout the process, and also requires the EAO to seek consent from PINs at two specific points. Consensus must be sought prior to making numerous orders or decisions under the EA Act, including a decision as to

⁸⁶ British Columbia, Environmental Assessment Office, *What Changes to B.C.'s Environmental Assessment Act Mean for The Public, Indigenous Nations & Industry*, online <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/images/what_changes_mean_for_public_indigenous_nations_industry.pdf>. Note that consensus is defined in the *Environmental Assessment Act* as "An outcome that is actively supported by all participating Indigenous nations and the Environmental Assessment Office; or, is not objected to by a participating Indigenous nation, while reserving their right to ultimately indicate their consent or lack of consent for a project after assessment." Consent is not defined in the *Environmental Assessment Act*.

whether a project is ready to proceed to an environmental assessment;⁸⁷ an order related to the assessment process;⁸⁸ publishing a draft assessment report or draft environmental assessment certificate;⁸⁹ and amending an existing environmental assessment certificate.⁹⁰ Consent must be sought prior to issuing an exemption or termination order in relation to a project, and prior to issuing a recommendation that an environmental assessment certificate be issued.^{91/92} If a decision or order is issued without the consensus or consent, as required, from any participating Indigenous nation, a dispute resolution procedure can occur within the assessment process.⁹³

The EAO has indicated that this consensus-based approach was developed with the specific intention of addressing all elements of FPIC.⁹⁴ Seeking consensus from participating Indigenous nations with respect to process orders related to an assessment ensures that Indigenous participation will be 'free' and will be incorporated into an assessment process in accordance with the needs of participating Indigenous nations. The 'prior' aspect of FPIC is addressed by requiring consensus with participating Indigenous nations prior to EAO decisions or orders throughout the process. Any consent or consensus received from participating Indigenous nations will be 'informed' by virtue of the fact that Indigenous nations are able to identify their information needs and may work with the EAO to ensure these needs are met by the assessment process. Participating Indigenous nations may also access capacity funding under the EA Act to ensure they have the capacity and resources to both determine their information needs and then to assess the information they receive. Finally, 'consent' is addressed by requiring the minister to

⁸⁷ *Environmental Assessment Act*, SBC 2018 s 16(1).

⁸⁸ *Environmental Assessment Act*, SBC 2018 s 19.

⁸⁹ *Environmental Assessment Act*, SBC 2018 s 28.

⁹⁰ *Environmental Assessment Act*, SBC 2018 s 32.

⁹¹ *Environmental Assessment Act*, SBC 2018 s 16.

⁹² *Environmental Assessment Act*, SBC 2018 s 29(c).

⁹³ The details of this legislated dispute resolution process will be contained in a regulation that is yet to be released.

⁹⁴ Government of British Columbia, "Free, Prior and Informed Consent within the Context of UNDRIP and Environmental Assessments" *Environmental Assessment Office*, Online: <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/free_prior_informed_consent_in_an_ea_context.pdf>

consider consent, or lack of consent, of any participating Indigenous nation prior to issuing an environmental assessment certificate.

Incorporating consensus, or consent, of participating Indigenous nations into the requirements of the assessment process, allows Indigenous nations to assess a project by applying their own laws and decision making procedures to information provided by the assessment process. Where the EAO's final recommendation to issue, or not, an environmental assessment certificate is contrary to the consent or lack of consent from any participating Indigenous nation, the minister must offer to meeting with those participating Indigenous nations and attempt to achieve consensus with those Indigenous nations.⁹⁵ Although the new environmental assessment process does allow an environmental assessment certificate to be issued where there is lack of consent from a participating Indigenous nation, it also requires the minister, as well as the EAO, to make a concerted effort to recognize and incorporate the Indigenous nation's decision.

The EA Act's emphasis on consensus and consent from participating Indigenous nations, potentially gives Indigenous nations the ability to assess projects in accordance with their distinct laws and decision making procedures and requires the decision makers under the EA Act to recognize and consider that Indigenous assessment. Although, like most legislative and policy attempts at incorporating UNDRIP, the environmental assessment process detailed in the EA Act has yet to be widely utilized, the EA Act has created a framework for implementing FPIC in the assessment of large projects that others jurisdictions may ultimately emulate.

⁹⁵ *Environmental Assessment Act*, SBC 2018, ss 29(5), 29(6).

5. INCORPORATING UNDRIP INTO REGULATORY AND ADMINISTRATIVE PROCESSES

The regulatory process is an administrative process. The primary purpose of the regulatory process with respect to major energy and natural resource projects is to provide a venue to review a proposed project whereby the proponent and other interested parties, including Indigenous groups, can express interest and concern, provide input and otherwise assist the regulator as required in order to inform the ultimate decision.

Although the regulatory process in an administrative context is less formalized than a court room setting, energy and natural resource regulators do perform an adjudicative function. The regulator must weigh the evidence and work to resolve those issues as between the parties that can be resolved. Concerns and issues that arise between the proponent and stakeholders must be considered by the regulator, and may be addressed by imposing project approval conditions that limit certain activities or that obligate the proponent to accommodate the issues raised by parties that have an interest in the outcome of the regulatory proceedings and the development of a proposed project.

Ultimately, the role of the regulator is to provide a recommendation to government or come to a decision itself that takes into account the full record of the proceeding.⁹⁶ Where a decision related to a proposed project is ultimately the responsibility of the government, the process record can be used by the government and its ministers to review the regulatory process and weigh the pros and cons of a proposed project based on the submissions of the parties to the regulator. A complete record of the regulatory proceedings, including information put forward by Indigenous

⁹⁶ *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at 1-2 and 5-6 (see for example of recommendation to government); see also Canada, National Energy Board, Trans Mountain Pipeline ULC Application for the Trans Mountain Expansion Project: Reconsideration of Aspects of its OH-001-2014 Report as directed by Order in Council P.C. 2018-1177, (Ottawa: National Energy Board, 2019).

groups, allows the government to make an informed decision with respect to approving or denying the proposed project. Where the regulator is responsible for making a decision with respect to a proposed project, the record provides the evidence and justification for the decision of the regulator. As is frequently the case, if a decision of the government or a regulator is challenged in court, the record produced during the regulatory proceeding will inform the court's review of the ultimate decision and the process leading up to the decision.

As discussed in Section 4.4, the incorporation of UNDRIP into Canadian law, will alter Canada's regulatory and administrative processes by changing the way in which Indigenous nations participate in them. In some cases, particularly in British Columbia, the role of Indigenous nations is increasingly that of a decision-maker. It is critical, however, that while these processes are changing, the fundamental principles of administrative law continue to inform how these regulatory bodies operate, including how Indigenous decision-making is incorporated, to ensure they remain both fair and effective in making decisions that reflect the public interest.

Fundamental Principles of Administrative Law

There are two fundamental principles of administrative law that will inform how UNDRIP is incorporated into regulatory processes: 1) natural justice; and 2) the duty of procedural fairness. These two principles are deeply rooted in the realm of administrative law in Canada and align with the adjudication of issues that may be affected by the implementation of UNDRIP. Additionally, the regulators that oversee decision making for major projects have developed expertise in these areas, including with respect to consultation, impacts on aboriginal and treaty rights, and other matters required when considering the interests of potentially affected Indigenous peoples.

(i) Natural Justice

The principle of natural justice itself contains two fundamental tenets: 1) the right to know the case being made and respond to it; and 2) the rule against bias.⁹⁷ This is a procedural right of the parties that have an interest in the regulatory proceedings. A party with an interest in the proceedings has a right to hear the evidence and submissions of the other parties and to submit its own evidence and positions in response to the other parties. The right to test evidence by the parties is fundamental to the proper operation of a regulator. The same party also has the right to be heard by an unbiased decision maker, being the regulator. These fundamental principles should not change as a result of the implementation of UNDRIP and an Indigenous nation assuming a role in decision-making.

(i) Duty of Procedural Fairness

The duty of procedural fairness is a contextual right that varies significantly based on the type of regulatory proceeding.⁹⁸ The purpose of the duty of procedural fairness is to:

...ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.⁹⁹

While the extent of the procedures that must be made available will vary based on the type of regulatory application, the duty itself remains the same and ensures appropriate levels of participation for potentially affected stakeholders. UNDRIP will not replace the duty of procedural

⁹⁷ Jerry V DeMarco and Paul Muldoon, *Environmental Boards and Tribunals: A Practical Guide*, 2nd ed, 2016: Lexis Nexis at 21.

⁹⁸ *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at paras 21-22.

⁹⁹ *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 22.

fairness as it pertains to the procedural fairness that Indigenous nations must receive as stakeholders, or as it to pertains to the procedural fairness Indigenous decision-makers must afford stakeholders.

Recognition of Tribunals as Specialists

Regulators such as the CER are experts in their respective areas of regulation. This includes reviewing consultation between proponents and potentially affected Indigenous groups, environmental concerns that have been expressed and technical project-specific evidence.

The recognized expertise of administrative tribunals has led to Canadian courts being highly deferential to tribunals during judicial reviews of their decisions. In fact, the Supreme Court of Canada recently stated that the expertise of administrative decision-makers was a consideration in the introduction of a new standard of review framework which relies on a presumption of reasonableness.¹⁰⁰ Reasonableness is the highest level of deference a court can afford an administrative decision-maker during a judicial review.

Proponents who are concerned there will be limited legal recourse to challenge the decisions of Indigenous decision-makers can find reassurance in the fact that the reasonableness standard considers the application of the foundational principles outlined above.

As discussed elsewhere in this paper, it is likely that as Canadian governments begin to increase the decision-making authority of Indigenous nations, they will retain an ability to make an ultimate and final decision if necessary. It is probable that this final decision-making authority will be limited

¹⁰⁰ 2019 SCC 65 at para 30.

to situations where there is a lack of consensus amongst Indigenous nations with overlapping territories and authority, or where a contemplated project is deemed to be in the public interest.

5.1 Challenges and Opportunities in the Regulatory Process

As UNDRIP becomes increasingly incorporated into Canadian law, energy and resource producers in Canada should expect to see changes in regulatory processes and expectations. Practically speaking, most proponents may only need to modify and expand existing practices in order to respond to the majority of these changes. While there will almost certainly be challenges, both legal and practical, as Canada navigates the incorporation of UNDRIP into law, there is also an unprecedented opportunity for companies to establish themselves as leaders in this aspect of energy and resource production. Capitalizing on this opportunity may prove invaluable in the future as reconciliation continues to advance and Canada's Indigenous nations become more significant players in both Canada's regulatory processes and the Canadian economy.

Seeking Consensus with First Nations

It is likely that the incorporation of UNDRIP will see increasing requirements for regulators, and consequently proponents, to seek consensus with or consent from Indigenous nations in relation to proposed projects. As discussed above, such a consent requirement has been codified into British Columbia's EA Act and will be further extended through the Declaration Act by allowing the Province to enter into agreements with Indigenous governing bodies. These decision-making agreements may require the province to seek consent prior to exercising decision-making authority. However, as we see in British Columbia's EA Act, regulators will retain the legal ability, albeit practically and politically constrained, to exercise ultimate decision-making authority even in the face of Indigenous opposition.

While British Columbia's EA Act requires the EAO to seek the consent of PINs at various milestones throughout the EA process, including in relation to its final recommendation to issue (or not) an Environmental Assessment Certificate, it also provides for a dispute resolution procedure in the event the EAO makes a decision that is not consented to.¹⁰¹ In addition, where the EAO recommendation was not consented to by PINs, the minister responsible for the final Certificate decision must offer to meet with the proponent and any PINs who have not consented to the recommendation, and seek to achieve consensus with the PINs on the Certificate decision.¹⁰² If the final Certificate decision is not consented to by all PINs, the minister's decision must provide reasons why the decision was made despite the lack of consent.¹⁰³

Upon a judicial review of any Certificate decision that is lacking consent of any PINs, it is likely that the factors considered by the reviewing court will continue to include the strength of claim and the potential impacts on underlying rights, as well as the process by which the decision was made. In cases where multiple PINs are involved and disagree on the project, a reviewing court is also likely to consider the relative strength of claim and impacts as between the nations in making a decision. As noted above, it is likely that assessments on strength of claim and impacts to rights will also be considered during the dispute resolution procedure outlined in the EA Act.

Incorporation of Indigenous Processes into Regulatory Processes

One of the central roles of an administrative tribunal is to consider conflicting interests between competing parties that present themselves before a tribunal. In the regulatory context, natural resource and energy regulators are tasked with weighing evidence and determining the

¹⁰¹ While the regulation establishing this dispute resolution process has yet to be released, it is anticipated that this process will be relatively informal and subject to a defined and time-limited procedure.

¹⁰² *Environmental Assessment Act*, s. 29.

¹⁰³ *Environmental Assessment Act*, s. 29(7).

appropriate path forward in relation to a proposed project. The evidence presented to the regulator and the eventual determination made by the regulator takes into account the submissions and positions of Indigenous peoples that could be affected by the proposed project being reviewed. This core function will not change with the implementation of UNDRIP. However, the expectations of regulators as to how companies engage with Indigenous nations may change.

As Indigenous nations are given more authority and influence in regulatory processes, regulators will likely expect proponents to incorporate increasing recognition for Indigenous perspectives, including laws and governance processes, into their project planning. Where proponents and/or regulators are required to seek consensus with or consent from Indigenous nations, either as a result of statutory requirements or authorization conditions, Indigenous nations will increasingly be given the opportunity to review and consider projects in accordance with their own laws and governance procedures. One method for incorporating this into a project's development and regulatory review is by facilitating an Indigenous-led review of a proposed project.

Indigenous-led reviews are not new and are increasingly being undertaken across Canada.¹⁰⁴ In the future, they may become especially critical to projects where the prospect of consent from a potentially affected Indigenous nation (or consensus amongst multiple Indigenous nations) is uncertain. Where a government regulator is forced to make a decision in light of Indigenous opposition, an Indigenous-led review may provide a regulator with additional information to include as justification for their decision.

¹⁰⁴ See Gwich'in Council International, "Impact Assessment in the Arctic: Emerging Practices of Indigenous-led Review", Online: https://gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf. See also Centre for International Governance Innovation, Sarah Morales, "Indigenous-led Assessment Processes as a Way Forward", Online: <https://www.cigionline.org/articles/indigenous-led-assessment-processes-way-forward>.

Weighing the Public Interest in Decision Making

Administrative decision makers necessarily engage in the difficult task of weighing and balancing various factors that form part of the “public interest”. The relevant factors to be considered can either be statutorily defined, as in the case of the IAA, or can arise through policy development. They can also be shaped by the common law. No matter the situation, the decision maker must consider each element and weigh all aspects of the project and its impacts, as described.

The National Energy Board, as it then was, described the process of weighing the public interest as:

It is a complex, flexible, and multifaceted inquiry that requires the Board to conduct a thorough and scientific examination of evidence relating to economic, environmental, and social factors; to consider the impacts of the Project on Indigenous rights; to weigh and balance the overall benefits and burdens of the Project; and to draw conclusions. ... The various factors that the Board considers in this inquiry cannot be understood in isolation from one another, or divorced from the specific context and circumstances surrounding this Project.¹⁰⁵

The factual matrix of a particular situation will be highly determinative of how such balancing of interests will occur. A recent example of this is *Redmond v. British Columbia*,¹⁰⁶ where the British Columbia Supreme Court dealt with a judicial review of a decision of the British Columbia Director of Authorizations for the Ministry of Forests, Lands, Natural Resource Operations and Rural

¹⁰⁵ National Energy Board, “Trans Mountain Expansion Project – Reconsideration” (2019) at p. 3, Online: https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/3614457/3751789/3754555/A98021-1_NEB_-_NEB_Reconsideration_Report_-_Reconsideration_-_Trans_Mountain_Expansion_-_MH-052-2018_-_A6S2D8.pdf?nodeid=3754859&vernum=-2.

¹⁰⁶ *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561.

Development. The decision at issue denied an application for land tenure. Under the *Land Act*, land tenure grants must only be issued if they are in the “public interest”.

The statute does not set out specific criteria that must apply, but a policy document outlined key principles that apply to all decisions related to the allocation of public land.¹⁰⁷ These principles included:

1. Public land values are managed for the benefit of the public;
2. Economic, environmental and social needs and opportunities are identified and supported;
3. The interests of First Nations’ communities are recognized;
4. Decisions are timely, well-considered and transparent; and
5. Public accountability is maintained during the allocation of public land.¹⁰⁸

The policy further stated that with respect to the interests of First Nations communities, “[i]n addition to the fulfilment of any legal obligations, Crown land allocation should consider the need to achieve greater reconciliation with First Nations” in British Columbia.¹⁰⁹

In this case, the Court held that “it was well within the Director’s scope of authority to consider the overall impact of the Decision on the public’s interest in achieving reconciliation with First Nations.”¹¹⁰ While initially grounded in the policy statement, he noted that Canadian courts have also endorsed the principle that ‘there is a deep and broad public interest in reconciliation with

¹⁰⁷ British Columbia, Ministry of Forests, Lands and Natural Resources Operations, *Crown Land Allocation Principles, Strategic Policy*, 1 June 2011 at 1-2.

¹⁰⁸ *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at paras 35-36.

¹⁰⁹ *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para 37.

¹¹⁰ *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para 38.

...Indigenous peoples.¹¹¹ He noted that the “Constitutional project of reconciliation is a ‘shared responsibility’ of all Canadians involving ‘complex and competing interests,” and will sometimes require administrative decision makers to make difficult decisions that impact the interests of proponents.”¹¹² With respect to the duty to consult and accommodate, the court further noted that “...Accommodation is ultimately a process of seeking compromise and balancing competing societal interests with Aboriginal and treaty rights – the process does not give the impacted First Nation a veto, and there is no duty to reach an agreement.”¹¹³

In *Fort McKay First Nation v Prosper Petroleum*,¹¹⁴ the Alberta Court of Appeal also recently considered the role of reconciliation when determining if a project is in the public interest. In that case the Fort McKay First Nation (“**FMFN**”) was challenging a project approval by the Alberta Energy Regulator (“**AER**”) on the basis that the AER had failed to consider the honour of the Crown in its determination that the project was in the public interest. The AER did not consider that the FMFN and the Government of Alberta are in the process of negotiating an access management plan to address the cumulative effects of development on the FMFN’s treaty rights in its consideration of the public interest.

In its submissions to the court, the AER argued that its governing legislation forbade it from considering matters of Crown consultation when exercising its decision-making authority. In rejecting this argument, and in the process of vacating the approval and directing the AER to reconsider, the Alberta Court of Appeal stated:¹¹⁵

¹¹¹ *Restoule v Canada (Attorney General)*, 2018 ON SC 114 at para 56, referred to in *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para 38.

¹¹² *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para 42.

¹¹³ *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para 45.

¹¹⁴ *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163.

¹¹⁵ *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at para 68.

The public interest mandate can and should encompass considerations of the effect of a project on aboriginal peoples, which in this case will include the state of negotiations between the FMFN and the Crown. To preclude such considerations entirely takes an unreasonably narrow view of what comprises the public interest, particularly given the direction to all government actors [in cases such as *Mikisew Cree First Nation v Canada*¹¹⁶] to foster reconciliation.

Cases such as *Redmond* and *Prosper Petroleum* underscore that decision makers must consider the effect of a project on Aboriginal peoples, including the honour of the Crown, and that balancing is required when determining whether a project is in the public interest. As the body of case law regarding the duty to consult and accommodate demonstrate, there will be cases in which Indigenous rights will prevail in the overall balancing equation, and there will be cases where proponents have been deemed to come out ahead, demonstrating that the facts in each situation are critically important. The implementation of the principles reflected in UNDRIP are not likely going to change the larger legal landscape in which these interests are considered. In practice, it's clear these interests have been informing that analysis for some time.

The Role of Commercial Agreements

There are two basic forms of common commercial agreements that proponents and Indigenous groups have pursued over the last ten years. The first are capacity agreements, and the second are impact and benefit agreements, or IBAs. Both seek to demonstrate a commitment to relationship development, set expectations, and provide some certainty for how the parties will engage with one another. The signing of these agreements can also be a powerful symbol of a

¹¹⁶ *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 24. See also *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at para 46 for additional case references.

commitment to continuing to work together towards commonly identified goals. When done properly, these agreements can provide greater certainty for proponents and for Indigenous groups, and sets the stage for meaningful engagement and sharing of information between the parties.

Capacity agreements are now referenced in the BC EAO's policy documents for the updated environmental assessment process, but they are in no way a new concept. They are a mechanism by which proponents provide funding to Indigenous groups so that they may hire subject matter experts to advise them on project related impacts. Just like non-Indigenous landowners, Indigenous groups will have varying levels of experience in participating in regulatory processes. However, under the recent changes at both the provincial and federal level, Indigenous groups have been tasked with greater formal involvement in project reviews.

Capacity agreements allow Indigenous groups to hire their own consultants to give them independent advice on everything from specific value components being assessed, potential impacts on their rights and interests, and consideration of project alternatives. These forms of agreement create the means by which Indigenous groups can more fully participate and allow their interests to be considered, and, where required, identify ways in which they may be accommodated.

The second type of agreement, IBAs, allow parties to address concerns, and reach a common understanding regarding commercial aspects of a project.¹¹⁷ At its core, an IBA is a contract entered into by two parties for mutual benefit. It provides recognition of mutual understanding and

¹¹⁷ Norah Kielland, "Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements" (2015) 29-E Library of Parliament Publication.

respect between proponents and Indigenous communities before regulatory approval is sought and a shovel breaks ground.

Like any contract, IBAs provide a measure of certainty for both proponents and Indigenous groups that may be affected by the development of a proposed project. An IBA may provide for many terms that fall outside the scope of regulatory approval conditions, including employment opportunities, business opportunities and economic benefits.¹¹⁸ The parties can also agree to the provision of certain environmental standards and ongoing consultation requirements that may go above what would normally be considered as the minimum standard by the regulator.¹¹⁹ In exchange for providing benefits to the affected Indigenous group, the project proponent can obtain some level of regulatory risk-reduction through a contractual obligation that requires the Indigenous group to support the proposed project, or at the very least not object to the proposed project, during review and assessment by the regulator.¹²⁰

IBAs have become more common over the years, and in our experience are negotiated as a matter of course on projects across the country where there is the potential to impact Aboriginal rights. The ability to reduce some of the regulatory risk by entering into an IBA is a valuable incentive for a proponent. Likewise, the provision of benefits directly related to a project that are generally outside the scope of a regulator's authority to provide can be a significant reason for an Indigenous group to sign an IBA.

A negotiated IBA can also lead to substantial cost-savings over the life of the regulatory approval process if subsequent litigation, such as a challenge to the satisfaction of the duty to consult, is

¹¹⁸ Brad Gilmour & Bruce Mellett, "The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations" (2013) 51:2 Alta L Rev at 392-395.

¹¹⁹ Brad Gilmour & Bruce Mellett, "The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations" (2013) 51:2 Alta L Rev at 392, 395-396.

¹²⁰ Brad Gilmour & Bruce Mellett, "The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations" (2013) 51:2 Alta L Rev at 389-391.

avoided. Avoiding protracted litigation will also allow a project to proceed with construction and development at a faster pace should the proposed project receive regulatory approval. Reducing the risks related to project approval, impacts related to the project and development timelines are an important driver for all parties involved in negotiating an IBA.

Frontloading Project Planning

As Indigenous nations gain additional decision-making authority, proponents can likely expect that project planning activities will need to be completed earlier in the regulatory process. The procedures established under British Columbia's EA Act support this expectation.

Pursuant to the EA Act, an Indigenous nation can notify the EAO within 80 days of the EAO's publication of a project's IPD that it wants to participate as a PIN. The EAO can only deny an Indigenous nation of the right to participate as a PIN if there is "no reasonable possibility the Indigenous nation or its rights...will be adversely affected by the project."¹²¹ This determination will be based entirely on the contents of the IPD.

In guidance documents, the EAO outlines that an IPD should include information on multiple facets of Indigenous nation interests, including:

- a description of alignment of the IPD with Indigenous nation laws, customs and policies; and

¹²¹ *Environmental Assessment Act* at s. 14(2).

- a list of any issues, concerns, or questions raised by Indigenous nations during engagement on the draft IPD or other information shared in relation to the proposed project.¹²²

While the EA Act does contain provisions outlining required early engagement activities, the fact remains that Indigenous nations will require additional information about proposed projects earlier on in the process in order to determine how, or if, they should be involved in the EA process. This is likely to be the case with respect to any regulatory or decision-making authority that Indigenous nations receive as UNDRIP is incorporated into Canadian law and as their capacity increases. Such frontloading of project planning and regulatory processes will add increased time and cost to the early stages of project development; however, it will hopefully result in decreased conflicts and legal challenges as the project proceeds through the regulatory process.

Challenges – Fairness, Efficiency, Cost and Timelines

While a number of opportunities exist with respect to the incorporation of UNDRIP into Canadian regulatory processes, there are also many challenges. It is too early to speculate on how and the extent to which these challenges will manifest themselves, but there are a number of significant areas of concern that will need to be carefully managed as we move forward.

First, the issue of fairness and potential bias in the regulatory process is an area of significant concern. Indigenous nations have an appropriate role to play in the decision-making process for projects, but also have a variety of other roles in relation to a proposed project. There may be a whole host of reasons for an Indigenous nation to grant or withhold consent, but not all of these

¹²² British Columbia Environmental Assessment Office, “Early Engagement Policy version 1.0”, p. 21, Online: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/2018-act/early_engagement_policy_version_1.pdf.

reasons will necessarily be consistent with the obligations of decision-makers in the regulatory process or with the broader public interest in a project proceeding. For example, and as discussed above, proponents have long since pursued the negotiation of commercial arrangements with Indigenous groups as a best practice in parallel to the regulatory processes. Strictly speaking these negotiations do not form part of the regulatory process, but commercial agreements can and do have a significant impact on the process. While there may be valid reasons for withholding consent based on commercial considerations,¹²³ when that consent is being withheld in the context of a regulatory process in which the decision-maker places significant reliance on the existence or absence of consent, commercial considerations can risk distorting the process and rendering it unfair. This is even more so the case when the Indigenous nation is the decision-maker itself. These issues will need to be approached cautiously by regulators.

Second, regulatory efficiency is an area of significant concern. While the potential for Indigenous-led assessments presents a welcome new opportunity, they also risk creating duplicative processes that not only extend regulatory timeframes, but potentially obscure the real impacts and concerns that the assessment is intended to address.¹²⁴ More regulatory review does not necessarily mean better regulatory review. The scope and place for Indigenous-led assessments will need to be carefully considered.

Finally, the issue of cost and timelines are an area of significant concern. With new and untested standards being built into regulatory processes, including seemingly open-ended opportunities for formal and informal dispute resolution to achieve “consensus”, it is becoming increasingly difficult

¹²³ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 69 (for instance, we know that there is an “inescapable” economic aspect to Aboriginal title).

¹²⁴ Chris Hunsberger, Sara Froese & George Hoberg, “Toward ‘good process’ in regulatory reviews: Is Canada’s new system any better than the old?” (2020) 82 *Environmental Impact Assessment Review* at 4. See also Aniekan Udofiaa, Bram Nobleb & Greg Poelzer “Meaningful and efficient? Enduring challenges to Aboriginal participation in environmental assessment” (2017) 65 *Environmental Impact Assessment Review*.

for practitioners to advise proponents on how long an assessment process will take and, therefore, how much it will cost. Moreover, potential increases in the number of Indigenous participants, complex decision-making processes, scope-creep, Indigenous-led assessments, and increased demands for capacity funding and commercial benefits, are all likely to result in increased costs for proponents seeking to navigate the regulatory process. Canada is ultimately not an island and capital movement out of the country is a realistic and serious concern. World-class regulatory processes with no projects proceeding through them is not a successful outcome.

6. CONCLUSION

Section 35 recognizes the existence of aboriginal and treaty rights for Indigenous peoples.¹²⁵ Section 35 is aimed at reconciliation, but the rights protected by it are not absolute. The common law duty to consult is a fundamental component of the Crown's obligation to engage with Indigenous peoples with respect to natural resource and energy projects that may impact the rights of Indigenous peoples.¹²⁶ Consultation is a procedural right and is not a right to a particular outcome. As the Supreme Court of Canada said: "there is no duty to agree; rather, the commitment is to a meaningful process of consultation."¹²⁷ Accommodation inherently involves the balancing of interests of the parties,¹²⁸ and the case law is consistent in its determination that Section 35 rights are not absolute and do not create a "veto" for Indigenous peoples to block projects.¹²⁹

In the context of the implementation of UNDRIP, Section 35 principles will not fade with the review of natural resource and energy projects. Article 32 of UNDRIP requires that the Crown "consult

¹²⁵ *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982 c 11.

¹²⁶ Kirk N. Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada*, (Regina: University of Regina Press 2013) at 53-54.

¹²⁷ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at para 42.

¹²⁸ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 at paras 48-50.

¹²⁹ *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 35, 314 ACWS (3d) 661 at para 55.

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 land or territories and other resources...”¹³⁰ Article 32 does not contemplate creating a right to “veto” by Indigenous peoples in Canada.¹³¹ Section 35, as it is currently understood by the Canadian courts, can be reconciled with the principles of FPIC put forth in Article 32 of UNDRIP.

The implementation of the UNDRIP principles in Canadian legislation should not create any instant, sweeping changes to the current system of project consultation and regulatory review. Procedural fairness and natural justice can be reconciled with the implementation of UNDRIP into our regulatory processes, but will require frank discussions about both the importance and limits of UNDRIP in a diverse and democratic country like Canada. Nevertheless, in this next chapter of Canadian Aboriginal law, it is critical that UNDRIP is implemented in a manner consistent with both reconciliation and the fundamental principles of our existing laws.

¹³⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, (2007) at 9 (article 32(2)).

¹³¹ Sam Adkins et al, “Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title” (2016) 54:2 *Alta L Rev* at 359.