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# The Major Project of Reconciliation: Locating an Indigenous Consent Standard Within the BC Environmental Assessment Act, 2018

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# MAJOR PROJECT OF RECONCILIATION: LOCATING AN INDIGENOUS CONSENT STANDARD WITHIN THE BC *ENVIRONMENTAL ASSESSMENT ACT*, 2018

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## INTRODUCTION

Rights afforded to Indigenous nations in BC under section 35 of the *Constitution Act, 1982* ("section 35") form an incomplete package of governance entitlements and, on their own, are insufficient to entrench Indigenous legal sovereignty into Canadian law. Aboriginal rights under section 35 have not been interpreted by the Supreme Court of Canada (SCC) to contain broad Indigenous self-governance rights greater than the sum of the specific practices, customs, and traditions proven to be integral to pre-contact Indigenous societies under the narrow *Sparrow/Van der Peet* test.[1] Section 35 Aboriginal title is a

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The terms "Aboriginal" and "Aboriginal Law" refer herein strictly to matters related to section 35 jurisprudence and the subset of Canadian public law which applies to Indigenous peoples in Canada. The term "Indigenous Law" refers to the traditional and customary legal systems and institutions of Canada's Indigenous peoples. References herein to the "Crown" or "EA" refer to those of the province of BC.

1 See *R v Pamajewon*, [1996] 2 SCR 821 at para 27, 138 DLR (4th) 204; Kent McNeil, "Judicial Approaches to Self-Government Since *Calder*: Searching for Doctrinal Coherence" in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 129; Brian Slattery, "The Generative Structure of Aboriginal Rights" in Patrick Macklem & Douglas

proprietary interest lacking express entitlement to legislative authority of a constitutional nature.[2] It is restricted as a vehicle for advancing Indigenous self-governance by the inherent limitations of the land-use rights it confers and is vulnerable to justified Crown infringement.[3] The modern treaty process, under which the Crown confers limited property, self-governance, and Aboriginal rights to Indigenous groups offers significant powers but over relatively confined spatial areas.[4] The Crown's duty to consult and

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Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 100 at 108.

2 In describing the content of Aboriginal title, the SCC has stopped short of expressly conferring jurisdictional authority to titleholders over territories held. See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 73 [*Tsilhqot'in*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 117–25, 153 DLR (4th) 193 [*Delgamuukw*]. See also McNeil, *supra* note 1. Felix Hoehn, however, posits that Aboriginal title, as described by the SCC, does in fact confer such jurisdictional authority. See Felix Hoehn, "Back to the Future—Recognition and Indigenous Sovereignty after *Tsilhqot'in*" (2016) 67 UNBLJ 109 at 126–28. Detailed analysis of the content of Aboriginal title is beyond the scope of this work.

3 See *Delgamuukw*, *supra* note 2 at paras 128, 154; *Tsilhqot'in*, *supra* note 2 at paras 77–88.

4 The modern treaty process originally required the widespread surrender of outstanding section 35 claims by signatory Indigenous groups. See e.g. Frank Cassidy, "The Modern Treaty Process and Aboriginal Governments in British Columbia" (1993) 3:64 Aboriginal L Bulletin 10; Terry Fenge, "National Parks in the Canadian Arctic: The Case of the Nunavut Land Claim Agreement" (1993) 22:1 Environments 20. Recently, government policy foundations underlying the modern treaty process have evolved somewhat to create agreements which are "based on the recognition and implementation of rights and not their extinguishment, modification, or surrender.": Department of Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Canada, 2018) at 11, online (pdf): *Department of Justice Canada* <justice.gc.ca/eng/csj-sjc/principles.pdf>. See also British Columbia, First Nations Summit & Canada, *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (4 September 2019) at para 9. These updated principles appear to be forming the basis of contemporary agreements. See e.g. *shíshálh Foundation Agreement* (4 October 2018), online (pdf): *Government of British Columbia* <gov.bc.ca/assets/gov/environment/natural-resource-

accommodate (DCA) Indigenous nations when contemplating decisions which may affect claimed or established Aboriginal rights or title flows from section 35 to offer procedural protections against Crown unilateralism but fails to ensure consensus is established before Crown actions are taken.[5]

The *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*),[6] binding in BC only insofar as it has been incorporated into domestic legislation or to the extent that it codifies customary international law,[7] has realizable potential to reconcile competing state and Indigenous claims to legal sovereignty.[8] *UNDRIP* outlines the standards to which Indigenous sovereignty in BC should be elevated and, by applying the norms of international relations to domestic Indigenous-state relations, provides a framework to achieve such elevation.[9] The "*sui generis*

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stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted-_signed.pdf>.

5 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at paras 26–38 [*Haida*]; Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23:1 Can J Admin L & Prac 93 at 97–107.

6 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [*UNDRIP*].

7 See e.g. *Gitxaala Nation v Canada*, 2015 FCA 73 at para 16; Christina Gray & John Borrows, "Rights & Responsibilities: Implementing UNDRIP in BC and in our own Communities" in Hayden King, ed, *Special Report: The UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from BC* (Toronto: Yellowhead Institute, 2020) 9 at 9.

8 The international dimensions of state-Indigenous relations in settler nations gives weight to Robert Hamilton and Joshua Nichols's supposition that the internal sovereignty of Canadian Indigenous nations raises the need to resolve matters of constitutional jurisdiction beyond the Crown's DCA. See Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729 at 750–60.

9 Canada Research Chair in Global Indigenous Rights and Politics Sheryl Lightfoot, arguing that *UNDRIP* "does live up to the vast majority of its original intent", summarizes the successes of *UNDRIP* as (1) setting "guidelines for state implementation of Indigenous rights [and] providing a framework for new Indigenous-state relationships grounded in mutual respect"; (2) establishing "international standards that would be utilized

status [of Indigenous peoples in settler states], arising from their prior occupancy . . . and their continuity with pre-contact communities",[10] distinguishes the nature of Indigenous rights from those of civil rights claimed by other minority groups and arises a need for political resolution of jurisdictional claims.[11] Embedded within the contemporary Canadian constitutional order is a latent and unresolved contest between settler governments and Indigenous nations over legitimate legal authority.[12] Indigenous peoples in BC, subjected to centuries of colonization and forced displacement without clear legal abdication or extinguishment of jurisdiction, have been brought into formal horizontal and vertical jurisdictional relationships with the contemporary state.[13] These relations are "are governed by mechanisms that are recognizably 'quasi-international' in character, bearing many of the hallmarks of international relations".[14] The similarities between

morally and politically in Indigenous rights struggles around the world"; (3) establishing "global consensus" with nation states and Indigenous groups around the world, allowing for "active participation of Indigenous peoples in the consensus-building process"; and (4) reflecting hard-fought compromises between Indigenous peoples and nation states by "expect[ing] states to recognize, negotiate, and protect a variety of possible self-government or autonomy arrangements for Indigenous peoples, dealing with them as 'peoples,' even if not as states. At the same time, [*UNDRIP*] expects Indigenous peoples to negotiate the same with states and not seek secession from or dismemberment of them": Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (London, Routledge: 2016) at 34–35 [emphasis removed]. However, it must be noted that article 46(1) of *UNDRIP* reaffirms "the territorial integrity" and "political unity of sovereign and independent States": *UNDRIP*, *supra* note 6, art 46(1). This suggests that *UNDRIP* eschews the possibility of Indigenous sovereignty being equal to state sovereignty, which would be a direct contradiction of the equality norms inherent to international relations between sovereign states.

10 Kristy Gover, "Indigenous Jurisdiction as a Provocation of Settler State Political Theory: The Significance of Human Boundaries" in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (New York: Routledge, 2013) 187 at 191–92.

11 See *ibid*; Hamilton & Nichols, *supra* note 8 at 750–60.

12 See e.g. *ibid* at 738–50.

13 See Gover, *supra* note 10 at 187.

14 *Ibid*.

Indigenous-state relationships and international relations (though the former's location lies wholly within the domestic sphere, thus creating its inability to trigger the equalizing international norms of sovereign equality and comity)[15] necessitate the development of normalized terms of engagement. *UNDRIP*, in reconceptualizing Indigenous-state relationships to realize the self-determining rights of Indigenous peoples, strives to allocate greater force of law to Indigenous sovereignty by restraining state unilateralism.[16]

The ability for *UNDRIP* to advance Indigenous self-determination in BC is especially salient in the context of environmental assessment (EA). Indigenous nations, who often must bear and adapt to impacts of major project development within their traditional territories,[17] have historically been inadequately included in major project decision making and have experienced systemic disregard for their interests and perspectives in EA processes.[18] Principal among the protections available to BC Indigenous groups under *UNDRIP*, if it were fully implemented in the province, is the requirement for governments to obtain "free and informed [Indigenous] consent prior to the approval of any project affecting their lands or territories and other resources".[19] Section 35 rights *per se*, including the Crown's DCA flowing therefrom,[20] are non-synonymous with *UNDRIP*'s

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15 For discussion of sovereign equality and comity, see *R v Hape*, 2007 SCC 26 at paras 40–52.

16 See *supra* note 9 and accompanying text, *above*.

17 See Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53:2 Osgoode Hall LJ 632 at 676–79.

18 See *ibid* at 671–75; Annie Booth & Norm W Skelton, "'We Are Fighting for Ourselves'—First Nations' Evaluation of British Columbia and Canadian Environmental Assessment Processes" (2011) 13:3 J Environmental Assessment Policy and Management at 392–99; Hollis Katherine Andrews, *Mechanisms of Indigenous Exclusion in British Columbia's Environmental Assessment Process* (MSc, Thesis in Resource Management and Environmental Studies, University of British Columbia, 2017) at 26–44 [unpublished].

19 *UNDRIP*, *supra* note 6, art 32(2).

20 Strickland J of the Federal Court found that "the question of whether [an] alleged duty to consult is owed must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. [He understood] this to mean that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding

proclaimed entitlements and fail to satisfy *UNDRIP* requirements for free, prior, and informed Indigenous consent (FPIC).[21] Moving the Indigenous-Crown relationship in major projects planning beyond mere consultation and accommodation towards true collaboration consistent with an *UNDRIP* FPIC standard will require proactive EA policies which give greater force of law to Indigenous decision-making systems.

When read in combination with other recent BC legislation, the 2018 BC *Environmental Assessment Act* (*EAA18*) signals the provincial government's intention to reconcile inconsistencies between *UNDRIP* and BC's EA law.[22] *EAA18* does not give express force of law to an *UNDRIP* FPIC standard but instead requires that EA decision makers seek to achieve consensus with Indigenous nations at multiple steps along the EA process.[23] In guidelines issued by the BC Environmental Assessment Office (EAO), the government organization tasked with administering *EAA18*,[24] consensus-seeking is described as a consultative and informative process focused on dialogue.[25] Consensus-seeking of this type,

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the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty": *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at para 104. See also *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 at paras 50–51.

21 See Jeremy Patzer, "Indigenous Rights and the Legal Politics of Canadian Coloniality: What is Happening to Free, Prior, and Informed Consent in Canada?" (2019) 23:1/2 Intl JHR 214 at 221–28; Andrew M Robinson, "Governments Must Not Wait on Courts to Implement *UNDRIP* Rights Concerning Indigenous Sacred Sites: Lessons from Canada and *Ktunaxa Nation v British Columbia*" (2020) 24:10 Intl JHR 1642 at 1655–59.

22 *Environmental Assessment Act*, SBC 2018, c 15, s 2 [*EAA18*]; *Declaration of the Rights of Indigenous Peoples Act*, SBC 2019, c 44 at s 2 [*DRIPA*].

23 See *EAA18*, *supra* note 22, ss 16(1), 19(1), 19(2)(b)(i), 27(5), 28(3), 29(3), 29(6)(b), 31(5), 32(7–8), 34(3), 35(2), 41(5)(c), 41(6), 73(2).

24 See *ibid*, s 2.

25 See British Columbia, Environmental Assessment Office, *Guide to Consensus-Seeking under the Environmental Assessment Act, 2018* (2020) at 4–10, online (pdf): *Province of British Columbia* <gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/2018-act/guide_to_consensus_seeking_under_the_ea_act_v1_-_april_2020.pdf>.

interpreted by the EAO as being "consistent with the United Nation's interpretation of [FPIC] which emphasizes the importance of the process of dialogue and negotiation over the course of a project from planning to implementation",[26] is claimed to be "foundational to [FPIC]."[27]

As I will explain below, *EAA18*'s novel employment of consensus-seeking terminology in the EA context creates significant interpretive space to define the exact legal contours of this new Indigenous-Crown EA relationship. I seek to guide potential interpretations of *EAA18*'s consensus-seeking mandate by outlining the impetus for *EAA18*'s enactment, highlighting the risk that a narrow understanding of *EAA18*'s consensus seeking mandate could result in a limited departure from the status-quo, and finding a pathway for an FPIC standard to be nested within BC's new *UNDRIP*-affirming legislation. Positing that any proper construction of *EAA18*'s consensus seeking mandate must arise from Indigenous laws and Indigenous conceptions of FPIC, I conclude that *EAA18*'s consensus-seeking approach requires the Crown to maintain a forum for EA negotiation with the fullhearted intention of reaching mutually consensual agreement with Indigenous nations.

## UPDATING THE INDIGENOUS-CROWN RELATIONSHIP UNDER ENVIRONMENTAL ASSESSMENT

From the BC government's perspective, the 2002 BC *Environmental Assessment Act* (*EAA02*)[28] created significant legal uncertainty regarding the defensibility of EA decisions. *EAA02* EA, an already imperfect vehicle through which to implement the DCA,[29] excluded Indigenous perspectives and fostered dissatisfaction among Indigenous groups by failing to adequately understand or address their concerns in major projects

26 *Ibid* at 4.

27 *Ibid* at 6.

28 SBC 2002, c 43 [*EAA02*].

29 See Jocelyn Stacey, "The Deliberative Dimensions of Modern Environmental Assessment Law" (2020) 43:2 Dal LJ 865 at 891.

development.[30] This discontent fuelled the appeal of EA decisions by Indigenous groups on section 35 grounds. The Crown, attempting to meet bare minimum DCA requirements but unable to pronounce upon the scope or existence of section 35 rights, could not determine whether they had adequately discharged the DCA and did not know if their decisions met the minimum requirements to survive judicial review.[31] They were thus making decisions which were at risk of being overturned, [32] necessitating the creation of highly defensible Indigenous consultation records to support EA decisions.

*EAA18* attempts to reduce EA's legal uncertainties by advancing Indigenous reconciliation[33] and mandating a consensus-seeking approach to the Crown's relationship with Indigenous

30 See Booth & Skelton, *supra* note 18 at 392–99; Andrews, *supra* note 18 at 26–44.

31 See *Prophet River First Nation v British Columbia (Environment)* 2017 BCCA 58 at paras 12, 27, 31.

31 See *ibid* at para 31.

32 The SCC, sending a clear signal to legislatures when they held that regulatory agencies must be able to properly discharge DCA requirements as appropriate, warned that "[i]f the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the court": *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 63.

33 The term "reconciliation" has been used to describe varied aspects of the complex Canadian Indigenous-state relationship, both within and beyond the context of environmental governance. See e.g. Jennifer Lavalley et al, "Reconciliation and Canada's Overdose Crisis: Responding to the Needs of Indigenous Peoples" (2018) 190:50 Can Med Assoc J E1466; JR Miller, *Residential Schools and Reconciliation: Canada Confronts its History* (Toronto: University of Toronto Press, 2017); Sam Adkins et al, "Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title" (2016) 54:2 Alta L Rev 351; Kirsten Manley-Casimir, "Reconciliation, Indigenous Rights and Offshore Oil and Gas Development in the Canadian Arctic" (2011) 20:1 Rev European Community & Intl Environmental L 29. In this paper, language centered on reconciliation refers broadly to the resolution of competing Indigenous and Crown claims over land and resource governance in a manner which is satisfactory to Indigenous groups and the Crown alike.

communities.[34] When introducing *EAA18* for its first reading in the BC Legislative Assembly as Bill-51, Honourable Minister of Environment and Climate Change Strategy George Heyman proclaimed that the changes to the EA framework:

> focused on enhancing public confidence, transparency and meaningful participation; advancing reconciliation with Indigenous nations, including supporting the implementation of the United Nations declaration on the rights of Indigenous peoples in the act through environmental assessment processes; and protecting the environment while offering clear and efficient pathways to sustainable project approvals.[35]

Reading Bill-51 for a second time in the BC Legislature, Minister Heyman reiterated that his government intended for *EAA18* to:

> reduce the uncertainty and consequent expenditure by project proponents [through] the early engagement phase and [ensure] that what needs to be addressed in a project design is identified early, before a lot of money is spent, before suspensions of the process are asked for and granted, and then proponents have to go back and redesign a process almost from stage one. . . .
>
> We want to reduce uncertainty by requiring the environmental assessment office to seek consensus with Indigenous nations at numerous points throughout the process. We believe that by this consent-based process that involves both the environmental assessment office and the proponent, we will build lasting and durable project certainty, as well as partnerships with Indigenous nations.[36]

Statutory requirements for the Crown to employ such reconciliatory tools as consensus-seeking, if they exceed the Crown's minimum DCA requirements, would reduce the grounds

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[34] *EAA18*, *supra* note 22.

[35] British Columbia, "Bill 51, Environmental Assessment Act", 1st reading, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 178 (5 November 2018) at 6197 (Hon G Heyman) [emphasis added].

[36] British Columbia, "Bill 51, Environmental Assessment Act", 2nd reading, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 181 (7 November 2018) at 6378 (Hon G Heyman) [emphasis added].

on which to appeal EA decisions and thus reduce uncertainties regarding their legality.

*EAA18* also contains other reconciliatory provisions which have potential to make EA decisions more mutually agreeable between the Crown and participating Indigenous groups. The mandate of the EAO was updated to require that it "support reconciliation with Indigenous peoples in [BC]" through "supporting the implementation of [*UNDRIP*]", "recognizing the inherent jurisdiction of Indigenous nations", and "collaborating with Indigenous nations . . . consistent with [*UNDRIP*]".[37] *EAA18* creates an early engagement process to identify and seek to resolve Indigenous concerns early in the EA process,[38] and a distinct dispute resolution process under which Indigenous nations and the EAO can seek thorough resolution of their disagreements.[39] Under *EAA18*, Indigenous consent is required for project approval on lands subject to a pre-existing Indigenous-Crown agreement which require such consent.[40] Further, whether participating Indigenous nations consent or not to final ministerial EA approval or to any ministerial termination of an EA or exemption of a project from the EA process before a full EA is conduced must be communicated to the minister before their decision is made.[41] Where the minister's makes termination, exemption, or final EA approval orders despite being informed of withheld Indigenous consent, the minister must give reasons for their decision.[42] Such public justification, a necessary safeguard against arbitrariness, enhances the legal authority of Crown decisions at common law and ensures Crown decisions are well-reasoned and robust when they expressly contradict Indigenous project decisions.[43]

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37 *EAA18*, *supra* note 22, s 2(2)(b)(ii).

38 See *ibid*, ss 13–18.

39 See *ibid*, s 5.

40 See *ibid*, s 7.

41 See *ibid*, ss 16(4), 16(5), 29(2), 29(5).

42 See *ibid*, ss 17(6), 29(7).

43 See *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 14, 79.

## THE RISKS OF NARROW INTERPRETATION

Canadian law does not require the Crown to consult Indigenous nations when it interprets EA legislation.[44] This means there is real risk that the EAO will privilege western norms and ideals when interpreting *EAA18*'s consensus-seeking provisions and the courts, showing deference, will fail to correct them. This ability of the state, including the courts, to prejudice Indigenous peoples' rights when they interact with the Crown in consultative processes is reflective of what Darcy Lindberg explains as the "Canadian judiciary [not being] currently competent to receive and apply Indigenous laws, legal traditions, and legal processes in a robust manner without significant assistance from the Indigenous peoples and nations whose laws they are tasked with applying."[45]

A contradictory finding made by the SCC regarding the oversight of ministerial strength-of-claims assessments during their discharge of the DCA illustrates the degree to which deference is given to the world views of Crown decision makers. In *Ktunaxa Nation*, the responsible minister under *EAA02* assessed the Ktunaxa Nation's claim that no accommodation could adequately address their concerns—their "Late-2009 Claim"—as weak.[46] This assessment was allowed to stand because it was simply deemed to fit within an overall spiritual claim which was assessed by the minister as strong, making it immaterial.[47] Further, the SCC found that the minister understood the Ktunaxa Nation's secrecy protocols which required certain spiritual details be generally unknown among the Ktunaxa Nation membership except

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44 See *Fort Nelson First Nation v British Columbia (Environmental Assessment Office)*, 2016 BCCA 500 at para 124.

45 Darcy Lindberg, "Judicial Expertise, UNDRIP & the Renewed Application of Indigenous Law" in Hayden King, ed, *Special Report: The UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from BC* (Toronto: Yellowhead Institute, 2020) 21 at 22.

46 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras 43, 46 [*Ktunaxa Nation*].

47 See *ibid* at para 99. The SCC stated that it was "reasonable to find this aspect of the Ktunaxa's overall claim weak": *ibid* at para 100.

for select few "knowledge keepers."[48] The Court also found that section 35 "[c]laims should be identified early in the process and defined as clearly as possible",[49] and that the minister was justified in assessing the "Late-2009 Claim" as weak because they "did not have evidence that the Ktunaxa were asserting a particular practice that took place . . . prior to contact."[50] This finding was due to the fact that the content of the "Late-2009 Claim", at the time is was assessed by the Crown, "had not been shared with and was not known to the Ktunaxa population generally."[51] By finding the minister understood the secrecy protocols insofar as necessary to shield his decision, and then allowing his demonstrated misunderstanding of the same to be relied upon in the strength-of-claim analysis, the SCC muddied the water as to the appropriate method of supervising ministerial strength-of-claim assessments. Just as the minister did, the SCC appeared to all but lay bare their doubt of the authenticity of the Ktunaxa Nation's claim.

It is possible to envision a scenario where *EAA18* is interpreted narrowly by Crown EA practitioners as merely codifying the DCA to ensure its proper discharge in every circumstance. *EAA18* appears to internalize judicial DCA guidance. Consistent with Minister Heyman's insistence that *EAA18* adds certainty to EA project approvals, *EAA18* may be interpreted as being intended to improve the legal reliability of Crown EA decisions regarding Indigenous consultation by simply increasing the likelihood the Crown will adequately discharge its DCA. The British Columbia Court of Appeal (BCCA), confirming that early engagement with Indigenous nations is a necessary part of the EA process, held that early engagement "can be essential to proper [Indigenous] consultation".[52] In light of this warning from the court, *EAA18*'s early engagement process can be read as a codification of this

48 *Ibid* at para 96.

49 *Ibid* at para 86.

50 *Ibid* at para 100 [emphasis added].

51 *Ibid* at para 99.

52 *Nlaka'pamux Nation Tribal Council v British Columbia (Environmental Assessment Office)*, 2011 BCCA 78 at para 97 [*Nlaka'pamux Nation*].

requirement to ensure the Crown satisfies it in every case and produces a more defensible consultation record.[53] Further, legislative requirements that the Crown treat all Indigenous participants' claims seriously by structuring the statutory consultation process in a way which mirrors a deep DCA process would more easily allow Crown decisions to be sheltered under the deferential standard of reasonableness.[54] A court will assess the Crown's discharge of its DCA on a reasonableness standard after determining the Crown correctly assessed the strength of a section 35 claim and the potential impact of contemplated infringement.[55] The BCCA has affirmed that such a rigid statutory consultation model could discharge the DCA even if it was "constitutional overkill" in some instances.[56] Judicial deference to interpretations of *EAA18* which simply enhance procedural elements of consultation without fundamentally reformulating the Crown's basic assumptions underlying their EA relationship with Indigenous nations will limit *EAA18*'s reconciliatory potential.

Canadian law, including the DCA, are further limited in that they do not require the government to involve Indigenous peoples in high-level policymaking. Where ministers exercise their parliamentary functions and make decisions as part of the legislative process, the DCA ceases to apply due to the inability of courts to review legislative action.[57] The administrative law duty of procedural fairness similarly does not provide rights to participate in high-level policymaking of a legislative nature

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53 See *EAA18*, *supra* note 22, ss 13–18.

54 The SCC contend that it "is possible for a decision maker to mischaracterize a right and still fulfill the duty to consult. Thus, even in the face of any alleged mischaracterization or undervaluing, the key question is the level of consultation regarding the asserted right": *Ktunaxa Nation*, *supra* note 46 at para 104 [citations removed].

55 See *Haida*, *supra* note 5 at paras 60–63.

56 *Nlaka'pamux Nation*, *supra* note 52 at para 89.

57 See *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 2, 127–33 [*Mikisew 2018*].

regardless of whether the decision maker is acting in an executive or legislative capacity.[58]

Indigenous self-determination can only be advanced if Indigenous decision-making institutions and land management frameworks form part of Crown EA decision making.[59] When Indigenous groups lack standing to participate in high-level planning, unilateral government policymaking can have far reaching implications for Aboriginal and treaty rights. Application of the DCA, which is limited to executive activity, is unable to cure the condition and instead operates as a treatment to manage ongoing symptoms. Aboriginal law scholars argue that the DCA perpetuates the sovereign-to-subject relationship between the Crown and Indigenous peoples.[60] If *EAA18* is primarily interpreted using existing DCA doctrine and the assumptions embedded therein, it will not be able to carry Crown-Indigenous relations into the new paradigm needed to achieve meaningful Indigenous reconciliation.

## FREE, PRIOR, AND INFORMED CONSENT IN BC

Interpretations of *EAA18*'s consensus-seeking provisions as merely codifying the DCA and containing no further provisions for advancing reconciliation should be viewed skeptically. Such interpretations would work against both the EAO's mandate of "supporting the implementation of [*UNDRIP*]"[61] and Minister Heyman's claim that *EAA18* will "advanc[e] reconciliation with

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58 See *Att Gen of Can v Inuit Tapirisat et al*, [1980] 2 SCR 735 at 758–59, 115 DLR (3d) 1; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 670, 69 DLR (4th) 489.

59 As Jocelyn Stacey explains, by placing the Crown's constitutional DCA alongside the administrative law duty of procedural fairness EA is hindered in its capacity to be a "rights-affirming doctrine with the potential to mediate across legal orders": Stacey, *supra* note 29 at 892.

60 Robert Hamilton and Joshua Nichols posit that "the Supreme Court will only address claims that are articulated as contingent rights within a sovereign-to-subjects framework. The Aboriginal perspective only counts when it clearly situates its claims as being subject": Hamilton & Nichols, *supra* note 8 at 749.

61 *EAA18*, *supra* note 22, s 2(2)(b)(ii)(A).

Indigenous nations".[62] Suggesting that the EA process cannot be a mere embodiment of the DCA, the BCCA found that the EA process must include Indigenous consultation regardless of external sources of consultation obligations placed upon the Crown, such as those of the constitution.[63]

In addition to *EAA18*'s explicit reference to *UNDRIP*, the BC legislature also committed to implementing *UNDRIP* through their enactment of the BC *Declaration on the Rights of Indigenous Peoples Act* (*DRIPA*).[64] Section 3 of *DRIPA* advances reconciliation by requiring the Crown to cooperate and consult with Indigenous peoples while taking "all measures necessary to ensure" BC's laws are consistent with *UNDRIP*.[65] The drafting of this section makes it clear that this requirement applies to the executive branch, including the EAO and the minister, and requires that these actors act in a manner which keeps BC legislation in line with *UNDRIP*.[66] Extrapolating from the SCC's demarcation between legislative and executive actions in the context of the DCA,[67] this can be understood as mandating that all executive actions related to *EAA18*, including its interpretation and implementation, be wholly consistent with *UNDRIP*. Thus, the implication of this *DRIPA* provision is that Indigenous consultation and cooperation must form part of all policymaking functions exercised under *EAA18* by the Crown on matters relevant to *UNDRIP.* In other words, the executive government is under a legal obligation to work with Indigenous peoples to the full extent permitted by its mandate

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62 British Columbia, "Bill 51, Environmental Assessment Act", 1st reading, *Official Report of Debates (Hansard)*, 41st Parl, 3rd Sess, No 178 (5 November 2018) at 6197 (Hon G Heyman).

63 See *Nlaka'pamux Nation*, *supra* note 52 at para 97.

64 See *DRIPA*, *supra* note 22.

65 *Ibid*, s 3.

66 *DRIPA* states that the "government must take all measures necessary to ensure the laws of British Columbia are consistent with [*UNDRIP*]": *ibid* at s 3. The term "government" is defined as "Her Majesty [which is defined as the Sovereign of the United Kingdom, Canada, and Her other realms and territories, and Head of the Commonwealth] in right of British Columbia": *Interpretation Act*, RSBC 1996, c 238, s 29 [*Interpretation Act*].

67 See *Mikisew 2018*, *supra* note 57 at paras 30–41, 116–26.

towards implementing *UNDRIP* principles into BC EA law. This aligns with the BC *Interpretation Act*'s requirement that every BC "[a]ct and regulation must be construed as being consistent with [*DRIPA*]."[68] Given the exemption of *DRIPA* contraventions from constituting any general offence at law,[69] the legal enforceability of this obligation is uncertain as the exemption suggests mere political rather than legal accountability on the BC government. Nonetheless, on the assumption that the Crown generally operates with a good-faith intention to remain consistent with the law, the mandated collaboration with Indigenous peoples is a welcome step towards Indigenous reconciliation and *UNDRIP* implementation in BC.

To fit within the EAO's *UNDRIP*-supporting mandate and the Crown's requirement under *DRIPA* to collaborate with Indigenous nations while taking "all measures necessary" to be consistent with *UNDRIP*,[70] a domestic FPIC standard appropriate for EA has been distilled. Writing for the Yellowhead Institute, Hayden King and Shiri Pasternak define an FPIC standard relevant to the Canadian context as follows:

> **FREE—**consent given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations, or timelines that are externally imposed.
>
> **PRIOR—**consent is sought sufficiently in advance of any authorization or commencement of activities.
>
> **INFORMED—**the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.

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68 *Interpretation Act*, *supra* note 66, s 8.

69 See *DRIPA*, *supra* note 22, s 8.

70 *Ibid*, s 3. See also *EAA18*, *supra* note 22, s 2. Under the *EAA18*, the EAO is responsible for the majority of consensus-seeking activities. See *ibid*, ss 16(1), 19(1), 19(2)(b)(i), 27(5), 28(3), 29(3), 31(5), 32(7).

> **CONSENT—**collective decision made by the rights holders and reached through the customary decision-making processes of the communities.[71]

Given the continued existence of Indigenous legal orders and their significance to Indigenous communities, Canada Research Chair in Indigenous Law John Borrows, Gordon Christie, and many others argue for the need to integrate Canadian Indigenous law into the laws of the Canadian state for a true Canadian FPIC standard to crystalize.[72] Through recourse to Indigenous law, King and Pasternak elucidate the elements of their FPIC standard to show its practicality. They identify:

> Indigenous conceptualizations of consent [that] are articulated … in practice through the recent actions of a range of Indigenous communities across Canada. . . . These conceptualizations flow from the ongoing re-constitution of Indigenous law and governance, and in some cases [are] a manifestation of them. This generalized version of Indigenous consent has four distinct elements, building on the existing notion of free, prior, and informed consent:
>
> > **RESTORATIVE:** Promotes the active and intentional centering of Indigenous models of governance and law and

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71 Hayden King & Shiri Pasternak, "Part One: The Spectrum of Consent" in *Land Back: A Yellowhead Institute Red Paper* (Toronto: Yellowhead Institute, 2019) 15 at 20 [emphasis in original].

72 See e.g. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws: Special Report* (Waterloo, ON: Center for International Governance Innovation, 2017); Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making; Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions" (2017) 50:1 UBC L Rev 95 at 152–53; John Borrows, "Introduction" in John Borrows at al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Center for International Governance Innovation, 2019) 1; Gordon Christie, "Indigenous Legal Order, Canadian Law and UNDRIP" in John Borrows at al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Center for International Governance Innovation, 2019) 47; Gray & Borrows, *supra* note 7.

> moving away from Western frameworks and definitions. This does not necessarily exclude band councils or tribal councils but promotes the revitalization of authentic governance practices and institutions.
>
> **EPISTEMIC:** Accepts Indigenous knowledge frameworks and languages for understanding relationships to the land. This may include Indigenous science, land management customs, obligations to the land and waters, or recognizing the land as having agency. This knowledge can be embedded in Indigenous law and governance.
>
> **RECIPROCAL:** Ensures that Indigenous people are not merely being asked to grant consent, but are determining the terms of consent. This is an active and enduring condition whereby consent may be revoked or the terms changed depending on the ability of outsiders to abide by the terms in good faith. This is less a process of governments obtaining consent, but an active maintenance of Indigenous authority.
>
> **LEGITIMATE:** While community politics can be fraught, decisions about granting or withholding consent generally require representatives perceived as legitimate by the community, and with a stake in the decision (whether band council, hereditary council, youth, elders, all genders, and urban populations) to participate or be accommodated. A decision should not be made until the legitimate authorities consent.
>
> While these constitute an evolving and generalized form of consent (many nations often have their own models and principles), we see this conceptualization emerging from Indigenous-led consent-based practices that de-centre state authority and obligations, revitalize Indigenous knowledge, law and custom, and promote inclusion within and even across communities.[73]

Instead of merely fitting within the western conception of the EA process, King and Pasternak's FPIC standard can transform the fundamental assumptions underpinning colonial legal systems and provoke the development of a new kind of EA apparatus. King

[73] King & Pasternak, *supra* note 71 at 21 [emphasis in original].

and Pasternak's FPIC standard uses domestic Indigenous law to contextualize the *UNDRIP* FPIC standard, which is itself a product of global Indigenous collaboration and deliberation. EA scholars imagine Canadian EA law in a way that is more receptive to Indigenous law than the narrow interpretations outlined in the previous section. For example, Neil Craik posits the need for a transformative and reciprocally justified model of Indigenous-Crown engagement which would fully realize reconciliation during the EA process by offering "an opportunity for those affected by government decisions to participate in the elaboration of the norms of evaluation."[74] King and Pasternak's FPIC model, developed with domestic and international Indigenous perspectives, can be viewed as an operationalized example of the type of collaborative norm elaboration advocated for by Craik.

Further, King and Pasternak's FPIC model embodies the core elements of Jocelyn Stacey's deliberative EA decision-making model, which requires that the framework respects the agency of participants, fosters mutual respect, and requires reflexivity from all parties.[75] The need for consent-based decisions to be legitimate respects the agency of participants by allowing them to select their preferred representatives.[76] This element exists alongside the EAO's mandated recognition of "the inherent jurisdiction of Indigenous nations and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves".[77] An FPIC model that is restorative and epistemic fosters mutual respect by elevating the status of Indigenous legal orders and knowledge systems and

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74 Craik, *supra* note 17 at 674.

75 See Stacey, *supra* note 10 at 874–75.

76 While the merit of community-selected representation is uncontroversial, disputes within communities regarding the legitimacy of purported representatives or the criteria for their designation engage complex governance issues and can be difficult to resolve, often making them ill-suited to judicial resolution. See e.g. *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16; *Behn v Moulton Contracting Ltd*, 2013 SCC 26.

77 *EAA18*, *supra* note 22, s 2(2)(a)(ii)(B).

giving them authoritative value beyond token recognition. The requirement for reciprocity, by giving Indigenous groups the ability to define the terms of consent and the conditions required for its maintenance, necessarily implies that the Crown be reflexive to the demands of Indigenous peoples. Consistent with EA theory, King and Pasternak's FPIC standard contains the elements required to transform BC EA into a process which stands on a set of shared norms built by both Indigenous and settler participants.

The fitness of King and Pasternak's FPIC model for application in the BC EA process is reinforced by the collaborative nature of the DCA. In seeking to abandon elements of the DCA which perpetuate the sovereign-to-subject relationship between Indigenous nations and the Crown,[78] the DCA's fundamental orientation towards multilateral decision making should be preserved.[79] Although the exact degree to which the Crown must address the concerns of section 35 rights claimants is fact-specific,[80] unjustified unilateral decisions by the Crown on such matters run amuck of the Crown's requirement to display some degree of responsiveness to Indigenous concerns.[81] Unilateral decisions by the Crown on matters affecting the asserted or established section 35 rights of Indigenous groups fail to demonstrate the necessary good-faith intentions of addressing

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78 See *supra* notes 59, 60 and accompanying text.

79 Starting from the same place, FPIC and the DCA both require Indigenous-state collaboration when the state contemplates conduct which could have an impact on Indigenous peoples or their rights. The DCA, however, fails to meet the FPIC standard because the former is inherently limited by its status as a tool for Indigenous participation within a broader decision-making system based on western norms and rooted in settler Canadian law. See e.g. Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples" (2017) 7:1 Western J Leg Studies 4 at 5–8.

80 See *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 32.

81 See *ibid* at para 25. The DCA "always requires meaningful, good faith consultation and willingness on the part of the Crown to make changes based on information that emerges during the process.": *ibid* at para 29.

the concerns of proven or asserted section 35 rights holders.[82] These constitutionally required minimum deliberative elements lay the groundwork within Canadian law for a more fulsome reimagining of shared EA decision making.

Because "Aboriginal rights in Canadian law do not give Indigenous people rights—they merely recognize Crown obligations",[83] section 35 and the DCA fail to meet King and Pasternak's FPIC standard and cannot be relied upon by the Crown to advance their required support of *UNDRIP*. The SCC has characterized the DCA as entailing no ability for Indigenous groups to have final say on project development decisions through any sort of "veto" power.[84] Further, the DCA creates obligations for the Crown to fulfil, but it "does not create a reciprocal constitutional right to be consulted on the part of Aboriginal peoples".[85] This distinction is especially relevant to the Crown's fact-specific duty to accommodate. The Crown's duty to accommodate entails substantive entitlements for Indigenous nations but is only engaged on the "deeper" end of the spectrum of obligations arising from the DCA, the determination of which is dependent on the Crown's strength-of-claim and scope-of-impact analyses.[86] Janna Promislow notes that, "[a]s a result, consultation and accommodation does not have to result in agreement. Instead, Aboriginal parties' consent to the contemplated conduct will be required only in rare cases in relation to established rights."[87] When engaged, the Crown's duty to accommodate requires that the Crown only attempt to reach compromise by addressing the individual and specific concerns raised by Indigenous peoples. In

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82 See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 64–67.

83 Shiri Pasternak "Part Three: Recognition" in *Land Back: A Yellowhead Institute Red Paper* (Toronto: Yellowhead Institute, 2019) 35 at 37.

84 *Ktunaxa Nation*, *supra* note 46 at para 80.

85 See Janna Promislow, "Irreconcilable?: The Duty to Consult and Administrative Decision Makers" (2013) 26:3 Can J Admin L & Prac 251 at 262.

86 See *Haida*, *supra* note 5 at paras 30, 37, 43–45.

87 Promislow, *supra* note 85 at 259 [emphasis added].

*Haida Nation*, the SCC described the Crown's duty to accommodate as follows:

> The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise" . . . . The accommodation that may result from pre-proof consultation is just this—seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.[88]

The focus on compromise, not consensual agreement, and the compartmentalized checklist of Crown obligations under the DCA contrasts with the holistic approach required under King and Pasternak's FPIC standard. If it is correct to view King and Pasternak's FPIC standard through Stacey's deliberative EA model, then their FPIC standard would reject the characterization of Indigenous consent as a veto power and instead require that consent be the ultimate goal of Indigenous consultation.[89] Such a standard would require moving beyond mere attempts at compromising on individual concerns and instead towards seeking truly consensual agreements between the parties.

If *EAA18* is to result in significant departure from the DCA during EA, the EAO must execute their *UNDRIP*-related mandate in a manner appropriate to BC and operationalize an FPIC standard of the type established by King and Pasternak. The EAO, with significant powers over EA process planning under *EAA18*,[90] is able to establish terms of engagement, timelines, expectations, information gathering and sharing models, and consensus-seeking frameworks which accord to King and Pasternak's conception of FPIC. *DRIPA*'s requirement that the Crown "take all measures necessary to ensure the laws of [BC] are consistent with

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88 *Haida*, *supra* note 5 at para 49 [emphasis added, citations removed, ellipses in original].

89 See Stacey, *supra* note 29 at 895; Boutilier, *supra* note 79 at 8.

90 See *EAA18*, *supra* note 22 at s 19.

[*UNDRIP*]" necessarily implies that the implementation of *UNDRIP* in BC reflects the province's legal context.[91] King and Pasternak's FPIC model is borne from *UNDRIP* and built largely on Canadian case studies, half of which originate in BC and thereby show its applicability as a properly contextualized standard.[92] Thus in addition to the necessary powers, the EAO has a statutory obligation through *DRIPA* to take "all measures necessary to ensure" consistency with King and Pasternak's FPIC standard or one like it.[93] This obligation supplements the EAO's more passive mandate of "supporting the implementation of [*UNDRIP*]".[94]

## CONSENSUS-SEEKING AND A NEW PARADIGM FOR INDIGENOUS-CROWN RELATIONS

Prior to *EAA18* coming into force, King and Pasternak's model was limited in its ability to serve as a blanket FPIC standard for Indigenous nations across BC because it is based on Indigenous consent frameworks that existed in spite of, not because of, established Canadian law. The main bar against the general replicability of King and Pasternak's FPIC model, which they published before *EAA18* was given force of law, was its situation outside of "accepted Canadian legal and institutional channels."[95] The frameworks they canvassed relied instead on the highly contextualized ability of each individual Indigenous nation to mobilize political capital and leverage strategic assets in service of their interests. Similar approaches could have also incorporated exploitation of externally imposed mechanisms such as Impact Benefit Agreements and Revenue Sharing models.[96] These redistributive vehicles, although they recognize Indigenous

91 *DRIPA*, *supra* note 22, s 3.

92 See King & Pasternak, *supra* note 71 at 20–21; Hayden King & Riley Yesno, "Part Four: Reclamation" in *Land Back: A Yellowhead Institute Red Paper* (Toronto: Yellowhead Institute, 2019) 46 at 46–61.

93 *DRIPA*, *supra* note 22, s 3.

94 *EAA18*, *supra* note 22, s 2(2)(b)(ii)(A).

95 King & Yesno, *supra* note 92 at 48.

96 See *ibid*; Pasternak, *supra* note 83 at 37.

jurisdiction to a degree, fail to accord real authority and end up "reinforc[ing] the state's monopoly on power".[97] The patchy constellation of Indigenous consent models relied upon by King and Pasternak display the diversity of governance mechanisms individual Indigenous nations could carve out for themselves in the absence of overarching consent-affirming law in the province.

Statutory interpretation provides a vehicle through which King and Pasternak's FPIC standard can be incorporated into the BC EA process. Other BC legislation which uses the term "consensus" in the context of fostering agreement between disputing parties serves as a useful illustrative tool. Although "[m]eanings fixed by drafting convention are not legally binding,"[98] the presumption that "the legislature uses words and patterns of expressions in a consistent way" implies that the term "consensus" has a consistent meaning across enactments.[99] An elaboration of the term "consensus" was found in only one other BC statute. Section 17 of the BC *Family Law Act* states:

> S17. A parenting coordinator may assist the parties in the following manner:
>
> (a) by building consensus between the parties, including by
>
> (i) creating guidelines respecting how an agreement or order will be implemented,
>
> (ii) creating guidelines respecting communication between the parties,
>
> (iii) identifying, and creating strategies for resolving, conflicts between the parties, and

97 *Ibid* at 36.

98 Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 78.

99 See *ibid* at 43.

> (iv) providing information respecting resources available to the parties for the purposes of improving communication . . . .[100]

Absent evidence to the contrary, the *Family Law Act*'s elucidation of elements nested within a consensus-oriented approach to relationship management can guide the furnishing of elements within consensus-seeking under *EAA18.* Because the statutory interpretation presumption of consistency "applies not only to words and phrases but to any structure or feature of expression,"[101] the *Family Law Act*'s structured elucidation of the elements included within a consensus-oriented approach, as opposed to an express definition, does not prevent the presumption from operating. The legislature, presumed "to be aware of the rules of interpretation and to draft with them in mind",[102] must be presumed to have intended to nest the *Family Law Act*'s elaboration on the meaning of "consensus" within *EAA18*'s consensus-seeking approach to Indigenous-Crown relationships.

The *Family Law Act* provision shows that core elements of King and Pasternak's model can be nested within the consensus-seeking mandate of EAA18, creating a channel for their FPIC model to receive mainstream legal legitimacy. Subsection (i) of the Family Law Act provision, creating guidelines respecting how an agreement or order will be implemented,103 strengthens Indigenous collaboration under the EAA18 process. It shows that consensus-building requires a mechanism for operationalizing both mutually consensual agreements and unilateral orders. The EAO, being either empowered or required to make and amend orders at multiple points throughout the EAA18 process,104 must be guided by both its reconciliatory mandate and section 3 of DRIPA to collaborate with Indigenous peoples when creating

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100 *Family Law Act*, SBC 2011 c 25, s 17 [*Family Law Act*] [emphasis added].

101 Sullivan, *supra* note 98 at 43.

102 *Ibid* at 41.

103 See *Family Law Act*, supra note 100, s 17(b)(i).

104 See e.g. *EAA18*, *supra* note 22, ss 13, 19, 23, 32.

guidelines for the implementation of these orders.105 For orders issued by the minister,106 potentially including the minister's final EA decision,107 the implementation guidelines may need to comply with the ministers responsibilities to implement UNDRIP flowing from DRIPA.108

The *Family Law Act* provision also shows that consensus-seeking under *EAA18*, at its core, requires that Crown discussions with Indigenous groups be focused on securing their FPIC. Use of the resolution-focused terminology in subsection (iii) implies final dispute adjudication to the satisfaction of both parties without seeking redress from courts or other dispute resolution facilitators—in other words, seeking to reach a mutually consensual agreement. Thus subsection (iii) is perhaps the most useful element of the *Family Law Act* provision for its inclusion within the consensus-seeking approach of a need to identify and create strategies for resolving conflicts between parties. The use of language focused on resolution, instead of on compromise, harmonization, or reconciliation, suggest something more than merely accommodating the concerns of the protesting party.[109] It suggests a fundamental altering of the parties' positions in a manner which exemplifies true responsiveness and shared norm creation.

Despite the existence within *EAA18* of distinct dispute resolution provisions,[110] the legislature should be presumed to have intended for the consensus-seeking relationship to include an internal dispute resolution function independent of the distinct dispute resolution provisions. The distinct dispute resolution provisions under *EAA18* are triggered only when EA participants refer a prescribed matter to a dispute resolution facilitator,[111]

105 See *ibid*, s 2(2)(ii).

106 See *ibid*, ss 17, 24.

107 See *ibid*, s 29.

108 See *DRIPA*, *supra* note 22, s 3.

109 See *supra* notes 83–89 and accompanying text.

110 See *EAA18*, *supra* note 22, s 5.

111 See *ibid*.

presumably following a breakdown in consensus-seeking discussions. The implication is that the FPIC-seeking dispute resolution feature internal to the consensus-seeking relationship does not rest within *EAA18*'s distinct dispute resolution provisions, and that these provisions should be read as creating a standalone process which is not ordinarily part of the consensus-seeking approach.[112] If the dispute resolution function inherent to *EAA18's* consensus-seeking mandate is earnestly aimed at securing Indigenous FPIC instead of mere compromise or placation, then *EAA18*'s consensus-seeking mandate would move BC EA closer towards having a true FPIC standard.

## AFFIRMING THE NEED FOR AN FPIC STANDARD IN BC

The framework I propose in this work is intended to pre-empt Crown unilateralism and minimize or completely eliminate Crown reliance on legal justification to infringe upon section 35 rights. Absent Indigenous consent, the Crown can infringe section 35 rights through successful application of a justification test.[113] Similarly, article 46 of *UNDRIP* affirms state sovereignty and can be interpreted as creating a justification framework for states to limit the scope of *UNDRIP* rights.[114] While the availability and scope of legal justification under either *UNDRIP* or the Canadian constitution for Crown infringement of Indigenous peoples' rights

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112 Ruth Sullivan, explaining that every word in an enactment must be given meaning, explains that "[t]he legislature does not include unnecessary or meaningless language in its statues . . . [nor does it] make the same point twice": Sullivan, *supra* note 98 at 43.

113 See *Tsilhqot'in*, *supra* note 2 at paras 77–88; *R v Sparrow*, [1990] 1 SCR 1075 at 1111–19, 70 DLR (4th) 385 [*Sparrow*].

114 See *UNDRIP*, *supra* note 6, art 46. However, reading *UNDRIP* article 46 alongside the procedural entitlements found elsewhere in *UNDRIP* potentiates an interpretation which elevates the availability of *UNDRIP*'s Indigenous rights beyond their current limitations under Canada's constitutional framework: see e.g. Ryan Beaton, "Articles 27 and 46(2): *UNDRIP* Signposts Pointing beyond the Justifiable-infringement Morass of Section 35" in *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic, and Indigenous Laws: Special Report* (Waterloo, ON: Center for International Governance Innovation, 2018) at 111.

is beyond the purview of this paper, an Indigenous-Crown relationship based on infringement and justification is adversarial and invites judicial intervention. As indicated by the SCC multiple times, Indigenous-Crown disputes over land and resource governance are best settled through negotiation and dialogue instead of litigation.[115] The approach I articulate herein has potential to facilitate equitable, mutually consensual governance while avoiding lengthy, costly, and inefficient Indigenous-Crown litigation.

Interpreting and administering *EAA18* in a manner consistent with FPIC has broader benefits for industry and government. The EA process is proponent driven and works in concert with the commercial decision-making pathways that lead to capital investment in major projects. The degree to which regulatory regimes foster stability, predictability, and economic efficiency may be somewhat malleable but ultimately must preserve favourable investment conditions.[116] Conventional Indigenous consultation and accommodation does not foster economic or legal certainty of the type needed for long-term sunk investment in BC.[117] Failure to adopt a provincial FPIC standard thus presents significant downside risk to natural resource developers. The potential costs to proponents associated with Indigenous and community conflict, including lost revenue, disruptions, blockades, litigation, reputational harm, and unfavourable treatment by regulators may diminish the returns on immovable capital and dissuade investment.[118] In light of the unsettled and fiercely contested nature of Aboriginal rights and title in the province, including their uncertain interaction with private property

[115] See e.g. *Delgamuukw*, *supra* note 2 at para 186; *Haida*, *supra* note 5 at para 25; *Sparrow*, *supra* note 113 at 1105.

[116] See Jeffrey Church, "Defining the Public Interest in Regulatory Decisions: The Case for Economic Efficiency" (2017) CD Howe Institute Commentary No 478 at 10–12.

[117] See Nosek, *supra* note 72 at 124–25.

[118] See *ibid* at 136–41; Church, *supra* note 116 at 10–12.

rights,[119] the establishment of the *Tsilhqot'in* consent standard for proven Aboriginal title incentivizes institutional internalization of proactive consent-seeking.[120] The SCC has made it clear that "[g]overnments and individuals proposing to use or exploit land . . . can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."[121] The Crown, able to delegate only the procedural aspects of Indigenous consultation and not ultimate legal responsibility,[122] must assure proponents that they are providing reliable instructions.

In addition to curbing investor risk, realizing *EAA18*'s potential to advance Indigenous self-governance would allow BC to shape the terms of global FPIC adoption. BC, the first North American jurisdiction to enact *UNDRIP* legislation,[123] can position itself as a leading global innovator in the institutional operationalization of FPIC. As trade associations come to adopt FPIC standards,[124] development of a domestic FPIC protocol presents the province

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119 See Robert Hamilton, "Private Property and Aboriginal Title: What is the Role of Equity in Mediating Conflicting Claims?" (2018) 51:2 UBC L Rev 347.

120 See *Tsilhqot'in*, *supra* note 2 at paras 2, 76, 88; Nosek, *supra* note 72 at 150–51.

121 *Tsilhqot'in*, *supra* note 2 at para 97.

122 See *Haida*, *supra* note 5 at para 53.

123 See "UN Indigenous Rights Bill Approved Unanimously in BC", *CBC News* (26 November 2019) online: <cbc.ca/news/canada/british-columbia/b-c-first-nations-leaders-worry-u-n-indigenous-rights-bill-may-be-in-trouble-1.5374095>.

124 There has been recent momentum towards FPIC standards in private sector organizations: See e.g. Nosek, *supra* note 72 at 141–46; "Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada. Part I.: Recent Developments and Effective Roles for Government, Industry, and Indigenous Communities" (September 2015), online (pdf): *Boreal Leadership Council* <borealcouncil.ca/wp-content/uploads/2015/09/BLC_FPIC_Successes_Report_Sept_2015_E.pdf>. Despite this momentum, there remains room for improvement on the public international stage: see e.g. Risa Schwartz & Judy Whiteduck, "A Proposal for a Joint Declaration on Trade and Indigenous Peoples" (27 April 2020) online: *Center for International Governance Innovation* <cigionline.org/articles/proposal-joint-declaration-trade-and-indigenous-peoples>.

with significant upside potential in the form of competitive advantage. Instead of facilitating strictly legal justifications for section 35 infringements during the EA process, *EAA18*'s consensus seeking mandate should internalize FPIC to advance reconciliation while simultaneously elevating BC's ability to thrive in an increasingly FPIC-based international order.

## CONCLUSION

On its own, the DCA is unable to protect Indigenous interests to the same degree as requiring that the Crown seek FPIC in EA decision making. One reason for *EAA18*'s enactment was to advance Indigenous reconciliation in the EA process beyond simple reliance on the DCA. Despite *EAA18*'s apparent codification of section 35 jurisprudence, attempts to utilize *EAA18* as a mere framework for discharging the DCA would be misguided because they would fail to reformulate Crown assumptions or advance Indigenous self-determination. Instead, I have shown that *EAA18* and its consensus-seeking mandate, when read alongside *DRIPA*, requires Crown adherence to an FPIC model based on *UNDRIP* and grounded in Canadian Indigenous law. I established that one such model, King and Pasternak's articulation of FPIC requirements, is both relevant to the EA context and can be located within *EAA18*'s consensus-seeking framework by reading it in harmony with the *Family Law Act*. Implementation of this FPIC standard is not only the just approach to take but is also consistent with the BC Government's responsibility to protect the public interest by maintaining the productivity of BC's economy.