FNEMC Mining and Consent Discussion Paper
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FNEMC

MINING AND CONSENT DISCUSSION PAPER

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BC First Nations Energy and Mining Council

CARVING: MYLES EDGARS, HAIDA

This PDF contains interactive capabilities where we are soliciting your responses to questions that are located in Part F. Each of the sections in Part F has questions that we invite you to answer. You are also welcome to provide any additional thoughts on our process and this Discussion Paper.

Text fields are supplied for that purpose. These fields are multi-line and scrollable so you can enter more text than the box appears to allow. Afterward, you can scroll through your responses to see your full text. After you have entered your responses in the text fields, go to page XX and submit your feedback automatically via the Internet by clicking on the SUBMIT button. Please submit your responses once only.

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If you want to start a dialogue with Indigenous peoples, you have to put everything on the table—bad/negatives and good/positives … Because the problem is that while we talk about beautiful things about mining, we know that when the mining industry is coming to Indigenous people it brings destruction and nothing is going to be the same after it is gone.

José Francisco Cali Tzay, Guatemala
UN Special Rapporteur on the Rights of Indigenous Peoples

A. INTRODUCTION

This is a dynamic time. Indigenous resilience and renewal are driving new reconciliation initiatives. Crown governments acknowledge that reconciliation with Indigenous peoples will require deep legal changes. The United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) is the globally established human rights framework that enables these overdue changes.

Implementation of the UN Declaration is important for Crown governments in "unwinding centuries of colonialism,"[1] and the rights that it guarantees are the minimum standards for Indigenous peoples. Both Canada and British Columbia have committed to implement the UN Declaration. The *Declaration on the Rights of Indigenous Peoples Act* (***Declaration Act***) is the BC law to implement the UN Declaration.

This Consent for Mining on Indigenous Lands Project is intended to take a complex legal concept—"free, prior and informed consent"—unpack it and develop options as to how it may practically apply in relation to mining activities on Indigenous lands in what is now BC. It was conceived as a means to bridge from academic and international understandings of consent, toward a practical application for Indigenous peoples, lands and resources in BC.

This project has evolved out of three interrelated developments:

- The legal obligation to implement the UN Declaration in BC
- Longstanding needs to update BC's out of date mining law framework
- Recognition of the shift toward new legal approaches to Indigenous rights at the international level, and BC's role in that through the *Declaration Act*.

FNEMC's objective is to develop ways to understand and apply consent, while raising awareness of the *Declaration Act* for Indigenous nations in BC. This project is intended to support Indigenous nations and their governing bodies in exercising their sovereignty in advance of mining activities. In the fall of 2020, FNEMC commissioned a series of short issue papers prepared by recognized experts. FNEMC then hosted a series of webinars to discuss these papers through three inter-related areas of law—the Indigenous legal context, the international legal context, and the BC mining law context. These materials are the basis for this discussion paper. The list of issues for these papers are included as Appendix A and the materials are available on the FNEMC website.[2]

The *Declaration Act* requires that provincial laws be consistent with the UN Declaration, which includes Indigenous legal frameworks.[3] This Discussion Paper is an opportunity for Indigenous nations to consider and discuss ways that consent could apply in relation to mining on their lands. FNEMC wishes to obtain input from Indigenous nations on this Discussion Paper and then produce a final report containing practical suggestions to exercise consent for mining.

B. FREE PRIOR AND INFORMED CONSENT IN CONTEXT

This part will examine consent as it has developed through the UN and its mechanisms, and in other international instruments. The human right standard of consent is universal; its application will depend on the context in which it operates. Consent is a human rights standard in both substance and process. It is woven into the Indigenous right of self-determination and into exercises of Indigenous sovereignty. Consent operates as a substantive human right, and not solely as a procedural right dictated by the most powerful.[4] This context is important for both Indigenous peoples and for Crown governments.

1. Consent in the UN Context

The **UN Declaration** is the primary international authority on "free, prior and informed consent". It was adopted by the United Nations General Assembly in 2007, after two decades of negotiations spearheaded by Indigenous peoples. The UN Declaration does not create new rights for indigenous peoples. Rather, it consolidates existing human rights standards and reaffirms that Indigenous rights are human rights that take on a special meaning for Indigenous peoples because of their unique circumstances. Indigenous peoples have always had these rights under international law.[5] Importantly, the UN Declaration has a dual function. It confirms the existence of Indigenous human rights, and it is also a tool to "interpret" States' national laws. The *Declaration Act* provides for this interpretative function.

While all of the rights in the UN Declaration are important, our emphasis is on rights relating to "free, prior and informed consent." Consent appears expressly in six articles and is an integral thread in the UN Declaration.[6] The concept of consent has existed since long before the UN Declaration was concluded in 2007 and it was issues around consent that were a key reason for the delay in adopting the UN Declaration.[7]

The UN Declaration was reaffirmed by the UN General Assembly in 2014, when the General Assembly adopted the Outcome document of the high-level plenary meeting known as the World Conference on Indigenous Peoples. This document reinforces various articles of the UN Declaration.[8]

THROUGHOUT THIS DISCUSSION PAPER, WE USE THE WORD "CONSENT" INSTEAD OF THE PHRASE "FREE, PRIOR AND INFORMED CONSENT", OR THE ACRONYM FPIC. "CONSENT" IN THIS PAPER INCLUDES BOTH OF THESE TERMS.

A detailed discussion of consent is found in a 2018 report by the Expert Mechanism on the Rights of Indigenous Peoples (**EMRIP**). The EMRIP report, subsequently adopted by the UN Human Rights Council, states that "indigenous peoples have always had the inherent power to make binding agreements between themselves and other polities" and that the modern concept of consent has its roots in historical treaty making processes.[9] Consent constitutes three interrelated and cumulative rights of Indigenous peoples—the right to be consulted; the right to participate; and the right to lands, territories and resources. Consent cannot be achieved if one of these components is missing.[10]

Consent is not a stand-alone concept. It exists within a broader human rights framework, which for Indigenous peoples, includes the right to self-determination, the right to be free from discrimination,[11] the right to participate in public life and the right to own and control lands and resources.[12] Three other notable UN conventions support these rights.

The **International Covenant on Civil and Political Rights** is a human rights treaty adopted by the United Nations General Assembly in 1966. This convention is binding on Canada, which adopted it in 1976. Articles 1 and 27, recognizing the right to self-determination and the right to enjoy one's culture, have been interpreted as upholding consent.[13]

Similarly, the **International Covenant on Economic, Social and Cultural Rights** is another human rights convention adopted by the United Nations General Assembly in 1966. Canada adopted this Covenant in 1970 and it too is binding. Articles 1 and 15①(a) and (c), which recognize the right to self-determination, the right to take part in cultural life, and the right to benefit from therefrom, have also been interpreted as upholding consent.[14]

The **International Convention on the Elimination of All Forms of Racial Discrimination** was adopted by the United Nations General Assembly in 1965 and entered into force in 1968. Canada ratified this binding convention in 1970. Article 5(d)(v) guarantees collective property rights and has been interpreted as requiring consent.[15] In 1997, the UN Committee on the Elimination of Racial

Discrimination, which oversees the Convention, identified consent as a human rights norm and a means to combat discrimination and the exclusion of Indigenous peoples from public decision-making. The Committee has called on States to implement a consent standard when making decisions directly impacting the rights and interests of Indigenous peoples.[16] The Committee has also advocated that States obtain consent when making decisions directly related to indigenous peoples' rights and interests.[17]

2. Consent in Other International Instruments

The right to consent has been recognized for well over 30 years at the international level. The three main instruments are the UN Declaration, International Labour Organization's Indigenous and Tribal Peoples Convention, 1989 (No. 169), and the American Declaration on the Rights of Indigenous Peoples. These three, complemented by other international instruments, are the primary instruments in requiring consent.[18] They are also examples of consent as an international standard to be respected and continuously strengthened. This part reviews these and other notable international instruments which incorporate consent.

Consent provisions are to be mutually reinforcing and should continuously operationalize the exercise of self-determination. The strongest statement of consent should be seen as the minimum standard, and the bar should continue to rise as states—and Canada in particular—support exercises of self-determination. This was emphasized by Professor Dorough—Indigenous peoples need to be vigilant to ensure that consent standards are robustly applied and strengthened over time.[19] It is important both in BC and beyond that steps to implement consent do not fall below the minimum standards identified in these instruments but, rather, that there is an ascending trajectory of Indigenous rights.

The earliest international instrument to explicitly require consent is the **ILO Indigenous and Tribal Peoples Convention No. 169 (ILO Convention 169)**. This is a legally binding convention adopted in 1989. It evolved through the efforts of Indigenous peoples and Indigenous rights movements to organize against the impact of extractive industries such as mining and has contributed to the modern understanding of consent as an expression of human rights.[20] These movements saw Indigenous peoples calling for a return of control over their lands and resources, and now ILO Convention 169 requires consent in limited circumstances.[21] Article 16② mandates consent in the case of relocation of indigenous peoples. Article 6② establishes that states must seek consent when undertaking consultations with Indigenous peoples. Consultation is mandated in most instances concerning Indigenous peoples and their rights.[22]

Chief Wilton Littlechild notes that Canada has not ratified ILO Convention 169 but that given our multi-juridical context, this international convention should nonetheless be applied in Canada.[23] In other words, the weight of ILO Convention 169 should be considered in Canada even though Canada has yet to ratify it.

The **American Declaration on the Rights of Indigenous Peoples** is a non-binding declaration adopted by consensus in 2016 by the Organisation of American States (**OAS**).[24] Canada is not a signatory, but as a member of the OAS, Canada could still adopt the Declaration. Canada had participated in the early proceedings, and it is problematic that Canada will not sign it.[25] Many

provisions in the American Declaration mirror the UN Declaration, including those requiring consent. However, some provisions in the American Declaration set a higher standard than the UN Declaration.[26] For instance, Article 28 of the American Declaration builds on Articles 25 and 26 of the UN Declaration and arguably create greater protection for Indigenous ownership of lands, territories and resources. It requires "legal recognition" of Indigenous ownership of land and requires that States "establish special regimes appropriate for such recognition and for their effective demarcation or titling." This provision is a tool that could ensure states confirm title to Indigenous land.[27]

The **American Convention on Human Rights** is a binding convention adopted by the Inter-American Commission on Human Rights in 1969.[28] Canada is not a signatory, but as a member of the Organization of American States, Canada could still ratify the Convention. The Convention does not specifically mention consent, though the Inter-American Court of Human Rights has interpreted Article 21 as conveying a right to communal property and as requiring consent in the case of development projects with significant impacts.[29] If Canada ratified the convention, Canada would be bound by the jurisprudence on Article 21 which the court has used to require consent. Indigenous nations could then potentially bring cases to the Inter-American Court of Human Rights when consent is not obtained prior to granting mining tenures.

The **American Declaration on the Rights and Duties of Man** is a non-binding declaration adopted by the Inter-American Commission on Human Rights in 1948.[30] The Commission has stated that Articles XVIII and XXIII, which guarantee the right to a fair trial and the right to property, require consent in determining the extent to which Indigenous claimants maintain an interest in traditional territories and for State decisions which impact Indigenous lands.[31] This instrument has been relied on by Indigenous peoples, namely the Hul'quami'num Treaty Group, in legal proceedings before the Inter-American Commission on Human Rights.[32]

The **Convention on Biological Diversity** is a binding convention ratified by Canada in 1992. Article 8(j) mandates that access to traditional knowledge is subject to the approval and involvement of the knowledge holders and has been interpreted as requiring consent.[33] Canada's focus on sustainable development suggests that it requires consent in all dealings with Indigenous peoples; proceeding without consent would be inconsistent with sustainable development.[34]

The following international financial institutions have developed approaches to consent that are relevant:

International Finance Corporation's Performance Standard 7, adopted in 2012, mandates consent in the case of impacts on traditionally owned lands and natural resources, relocation of indigenous peoples from traditional lands and impacts on cultural heritage sites. The adoption of Performance Standard 7 by the IFC "both reinforced and led to a trend of industry beginning to acknowledge the necessity of the process of FPIC when engaging with indigenous peoples."[35]

World Bank Operational Policy 4.10. Under this policy, adopted in 2005, the Bank conditions financing of projects affecting indigenous peoples on a borrower's engaging in free, prior and informed *consultation* leading to "broad support" by the community.[36]

The **UN Global Compact**, the world's largest corporate responsibility initiative, issued its Business Reference Guide to the UN Declaration in 2013. This reference guide and associated materials offer guidance for companies wanting to align themselves with the UN Declaration. The guide states that its objective is to "help business understand, respect, and support the rights of indigenous peoples by illustrating how these rights are relevant to business activities." It does so by describing the rights in the UN Declaration and the offering examples of practical actions businesses can take to respect and support these rights.[37]

3. Consent in Other Jurisdictions

The experience of Indigenous peoples in other jurisdictions is helpful to understand how consent is being applied to date. Appendix B contains a scan of legal developments and case decisions relating to consent, primarily in Latin America and South America, but also the Philippines, Finland, Kenya and Australia. This section contains a summary of notable examples from that scan.

Colombia emerges as an international leader on consent for two reasons. First, Colombia's constitution protects Indigenous and tribal people and their rights, and its constitutional block doctrine ensures that international treaties which Colombia has ratified are automatically incorporated into its domestic law with constitutional status.

Second, Colombia's Constitutional Court has issued multiple decisions affirming the direct applicability of the UN Declaration in Colombian law and the State duty to obtain consent, including where there may be a significant negative impact on Indigenous lands. In 2011 the constitutional court declared reforms to the Mining Code unconstitutional due to the state's failure to engage in prior consultation with Indigenous peoples. Further, Indigenous-developed consent protocols have been successfully implemented in Colombia due in part to recognition from the Constitutional court. In 2012, the Embera Chamí people developed a framework to govern mining in their territory. This framework was recognized and affirmed by the Constitutional Court in 2016; no mining has occurred in that territory since this framework was concluded.

Bolivia was the first country to codify the UN Declaration into domestic law. Its constitution contains progressive mechanisms for Indigenous peoples to establish autonomous governance systems. A 2010 decision by Bolivia's constitutional court held that the State must obtain the consent of Indigenous peoples in the case of large-scale development projects on their lands and that in these cases Indigenous peoples can veto a project.

The Philippines was one of the first countries to codify the right to consent in its domestic legislation when it adopted its Indigenous Peoples' Rights Act in 1997. The Act was modelled directly on the draft UN Declaration and expressly requires consent for mining on Indigenous lands. However, there is criticism of the way it has been implemented. Despite the existence of this legislation, the Philippines is not considered a progressive jurisdiction when it comes to implementing consent.

Australia's *Aboriginal Land Rights Act* is another example of domestic legislation requiring consent. This act requires consent for extractive projects on Aboriginal title lands in the Northern Territory and it also provides for a veto right. It must be noted that similar to Canada, Australia has only

recognized Aboriginal title in rare cases and to very small parcels of land, and that different rules apply in the Australian states than they do in Canadian provinces. There has also been criticism about the way the Act operates; it has been shown that the Land Councils, established to represent traditional Indigenous landowners, do not always speak for the Indigenous peoples they represent.

EQUATING A LACK OF CONSENT TO A VETO IS NOT ACCURATE OR HELPFUL AND SHOULD BE DISCOURAGED. THE TERM **VETO** "INVITES CONFLICT AND UNCERTAINTY", WHILE **CONSENT** "INVITES INDIGENOUS AND CROWN ACTORS TO BUILD BETTER RELATIONS."[38] USE OF THE TERM VETO IS PROBLEMATIC AND INSTILS FEAR;[39] IT ALSO IMPLIES THAT ONE PARTY HAS ABSOLUTE POWER WITH NO BALANCE OF RIGHTS.[40] CONSENT IS AN EXERCISE OF SELF-DETERMINATION THAT IS ONGOING AND CONSTRUCTIVE, UNDERTAKEN IN GOOD FAITH, AND THAT WILL ENDURE OVER THE LIFE OF THE PROJECT.

Rulings of the Inter-American Court of Human Rights. The Inter-American Court of Human rights (**IACHR**) is a regional court in the Americas that applies the American Convention on Human Rights. In a series of decisions between 2001 and 2012 concerning Nicaragua, Suriname and Ecuador, the court held that consent is sometimes required for development projects on Indigenous lands. The decisions considered proposals to conduct logging and explore for oil and mineral resources. The court relied on Article 21 of the Convention, ILO 169 and the UN Declaration. Article 21 guarantees the right to own property. The Court interpreted this as Indigenous peoples' rights to communally own their ancestral lands. Based on this right, the court held that in the case of large-scale development projects on Indigenous lands, States must first obtain the consent of affected Indigenous peoples.

C. RIGHTS AND PRINCIPLES

The UN Declaration expresses universal human rights in an Indigenous context and describes States' positive obligations. The international context needs to be made meaningful in BC and the experience of Indigenous peoples in BC should, in turn, help inform and raise the bar internationally. This part reviews key rights and principles that are part of consent.

1. Self-determination

The right to self-determination is expressly stated in Article 3 of the UN Declaration. This right does not come from recognition by States—it is grounded in the practices of Indigenous peoples.[41] Self-determination is the right to determine one's status as a people—the right to choose how to self-govern. The importance of this being a "right" and not a "principle" is significant—it is included as a right in the UN Declaration as a result of the demands of Indigenous groups at international tables. This issue resulted in a "prolonged deadlock" in UN negotiations—it might be that the UN Declaration could have been adopted a decade earlier if not for the insistence of the Indigenous representatives on this right.[42]

Self-determination and consent are mutually reinforcing—self-determination is the key to exercising consent, and consent is the key to operationalizing self-determination.[43] Indigenous action is important. Professor Dorough noted that it is Indigenous peoples themselves that must do the work to emphasize "the clear linkages between their voices, their right of self-determination and the right to consent."[44]

The right to consent is grounded in the right to self-determination,[45] and that "the right of self-determination must be the foundation upon which all other human rights [including the right to consent] are exercised and enjoyed."[46] Doug White considers self-determination an inherent right that nations in BC exercised both before and for decades after colonization—historical treaties were considered nation-to-nation agreements. White notes that consent is a by-product of self-determination.[47]

Decolonization is rooted in self-determination—it is colonialism that caused the subjugation of Indigenous peoples.[48] Professor Davis cautions that care must be taken to make sure that self-determination supports a more robust implementation of consent, rather than allowing self-determination to diminish consent to a procedural right.[49]

2. Human rights

Consent is the exercise of a human right.[50] A key characteristic of all human rights is that they are "interrelated, interdependent, interconnected, and indivisible" and that interference with any one

human right "will have a direct impact upon all other human rights."[51] The UN Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Cali Tzay emphasizes this interrelatedness:

> *... it is not possible to speak of the FPIC [consent], without the guarantee of the right to life, to existence, to the identity, the history of Indigenous Peoples. Nor can one speak of rights to the Territory, Natural Resources, and Lands, without drawing attention to the rights to Autonomy, Self-government and Self Determination of Indigenous Peoples.*[52]

The UN Declaration does not create new rights—rather, it elaborates "general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples."[53] Indigenous peoples are entitled, at a minimum, to the protection of all human rights afforded to other peoples. The human rights of Indigenous peoples are distinct from those of all peoples as a result of advocacy focused on pressuring and maintaining distinct societies that exist alongside the majority society.[54] In this way, the right to consent takes on a unique meaning when applied to Indigenous peoples and their special relationship with their lands. Professor Dorough points to this special meaning when she explains that consent is an expression of Indigenous peoples' legal status as distinct peoples.[55]

Two UN conventions—the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights—impose legal obligations on Canada. Canada's ratification of these treaties obliges it to respect and promote the rights of Indigenous peoples.[56] Both Dave Joe and Justice LaForme emphasized Article 34 of the UN Declaration which affirms that Indigenous peoples have the right to promote and maintain their structures, customs, juridical systems, traditions and spirituality in accordance with international human rights standards.

3. Minimum standards

The rights in the UN Declaration constitute the minimum standards for the survival and dignity of Indigenous peoples.[57] In other words, Indigenous peoples should not be subjected to any state conduct that is less than these standards. Professor Dorough emphasizes that Indigenous peoples need to be vigilant to ensure that consent standards are fully applied and strengthened over time.

Paul Joffe has a similar view. In the context of "minimum standards" he recommends that the UN Declaration should be applied together with the American Declaration on the Rights of Indigenous Peoples because on any given issue, the instrument with the higher standard should apply. Both of these declarations contain provisions that protect the rights that Indigenous peoples "now have" or "may acquire in the future." Thus, the minimum standard should be steadily ratcheting up.[58] All international instruments need to be interpreted in a manner that is increasingly raising the bar. The recognition and implementation of the rights of Indigenous peoples must be on an "ascending trajectory."[59]

4. Lands, resources and consent

The importance of consent becomes clear in the context of land, resource and territorial uses. Throughout most of what is now BC, Indigenous title was never ceded and still exists. In 1859, the

British Crown issued a proclamation asserting crown title "over all Indigenous owned and held lands, territories and resources" in what is now British Columbia.[60] Our experts note that "Indigenous peoples neither knew, agreed to nor consented to any of this."[61] Indigenous nations in BC never ceded their lands and Indigenous identities continue to be tied to their land, through historical occupation and reliance for physical, emotional, spiritual and cultural survival.[62]

Chief Littlechild notes that "land and its natural resources are in fact the principal source of livelihood, social and cultural cohesion, and spiritual welfare of indigenous and tribal peoples."[63] As such, consent is required. Former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, identifies it as:

> *... a general rule that extractive activities should not take place on lands within the territories of indigenous peoples without their free, prior and informed consent. Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure ... The general rule identified here derives from the character of free, prior and informed consent as a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within their territories.*[64]

Current Special Rapporteur Cali Tzay says this even more bluntly. Land connections are critical to the very survival of Indigenous peoples—the struggle against dispossession of lands is the struggle against dispossession of life. Projects or activities that affect lands require consent.

THIS DISCUSSION PAPER DISTINGUISHES BETWEEN INDIGENOUS TITLE AND ABORIGINAL TITLE.

INDIGENOUS TITLE
EXISTS ON LAND WHERE INDIGENOUS PEOPLES HAVE ALWAYS BEEN AND CONTINUE TO BE BY VIRTUE OF THEIR OCCUPATION AND STEWARDSHIP OF THOSE LANDS PRIOR TO COLONIZATION. INDIGENOUS TITLE IS NOT DEPENDENT ON RECOGNITION BY COURTS OR GOVERNMENTS. IT IS BASED ON PRE-COLONIAL OCCUPATION AND PRE-EXISTING SOVEREIGNTY. IT IS "DEFINED THROUGH INDIGENOUS LEGAL ORDERS AND CUSTOMS," AND AS SUCH, IT IS A "POLITICAL AND LEGAL RELATIONSHIP."[66]

ABORIGINAL TITLE
IS A CROWN COMMON LAW PROPERTY CONCEPT THAT ENABLES INDIGENOUS PEOPLES TO ACQUIRE TITLE BY SATISFYING A TEST BASED ON CROWN LEGAL PRINCIPLES, AS SET OUT IN ***DELGAMUUKW*** AND ***TSILHQOT'IN***. IT CONVEYS RIGHTS TO LAND THAT ARE SIMILAR TO FEE SIMPLE OWNERSHIP.[67] ROSHAN DANESH NOTES THAT ABORIGINAL TITLE "EXISTS, IS DEFINED, AND OPERATES WITHIN, NOT WITHOUT, THE ROLE OF SECTION 35① TO ARTICULATE COLLECTIVE RIGHTS THAT EXIST AS LIMITS ON ACTION BY THE CROWN."[68]

Professor Davis also agrees that consent is required where the resource industry affects Indigenous peoples in their territories and might also be required where industry impacts nations outside their territories, if there is a direct or significant impact on Indigenous peoples.[65]

5. Force of law

Our experts support the view that consent in the UN Declaration is legally binding:

- Professor Dorough observed that the draft UN Declaration was being used in litigation before the courts even before it was adopted by the General Assembly—it carries significant force and has an influence on legal norms and obligations.[69]
- Special Rapporteur Cali Tzay agrees that the UN Declaration has the force of law regardless of its official legal status in any country. He asserts that litigants and advocates must use it; and that it affirms rights that have existed for hundreds of years, many of which are legally protected in other instruments and at customary international law[70]
- Professor Davis states that the UN Declaration has the privileged status as a human rights instrument, and thus the force of law.[71]
- Paul Joffe observes that the UN Declaration has been affirmed, by consensus, nine times by the UN General Assembly, and no country in the world formally opposes it, which reinforces its legal status and effect[72]
- The International Law Association states that when a country or a third-party acknowledges a breach of an international standard such as consent, the fact of the breach and that a state may justify or defend the breach, effectively acknowledges that consent is a recognized international standard[73]

> THE ABSENCE OF LEGISLATION OR INCONSISTENCIES IN CURRENT REGULATIONS IN NO WAY FREES THE STATE FROM COMPLYING WITH AN INTERNATIONAL OBLIGATION. THIS AFFIRMATION IS BASED ON THE PRINCIPLES OF *PACTA SUNT SERVANDA* AND THE PRIMACY OF INTERNATIONAL LAW, SET FORTH RESPECTIVELY IN ARTICLES 26 AND 27 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES.[75]
>
> **— Special Rapporteur Cali Tzay**

The International Law Association further states that many of the rights confirmed in the UN Declaration have attained the status of customary international law:

> *... the rights expressed by certain provisions included in [the UN Declaration] have already achieved the status of rules of customary international law. These rules relate to, in particular, the rights of Indigenous peoples to self-determination, to autonomy or self-government [... and] to their traditional lands, territories and resources.*[74]

The Supreme Court of Canada's 2014 *Tsilhqot'in* decision confirms that Indigenous consent is required for activities on aboriginal title lands.[76] Roshan Danesh points out that aboriginal title is not dependent on a court-declaration for its existence: "Aboriginal title exists, and has always existed since Confederation, wherever there is sufficient, continuous, and exclusive occupation historically."[77] Indigenous nations in BC continue to hold Indigenous title, inherent rights, and aboriginal title and rights—thus the "functional reality" is that "the only path to true certainty for land and resource development is through achieving consent."[78]

Finally, Special Rapporteur Cali Tzay says that the most important thing we can do to make the UN Declaration binding is to simply use it.[79] Professor Davis made the same statement—its continued use is essential to maintaining its force as a legal instrument; the more it is used, the more power it will carry.[80] Using the UN Declaration will help address the "massive power imbalances" and "wiggle room" that states and corporations have historically relied upon.[81]

D. INDIGENOUS GOVERNANCE CONTEXT IN BC

This part considers the ways in which Indigenous governance frameworks in BC integrate consent. International frameworks are important yet meaningful consent in BC will need to be operationalized by Indigenous nations themselves as an expression of self-determination. Key to exercising self-determination will be resolving internal conflicts and working "shoulder to shoulder" with other nations to move forward stronger, together. Nations will need to develop collective strategies to revitalize indigenous legal frameworks in the most powerful way. This is a legal strategy as well as a political and economic one.[82] This part sets out the BC context for consent.

1. Indigenous Sovereignty

Self-determination infrastructure needs to be developed in the right way to ensure it supports a powerful form of consent.[83] The UN Declaration affirms sovereignty and self-government in multiple articles. Article 4 affirms that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs." Article 34 supports this by affirming that Indigenous institutions and customs operate in accordance with international human rights standards. Justice Laforme maintains that the UN Declaration "requires the recognition of Indigenous jurisdiction and the application of Indigenous law within their territories."[84]

Historical treaty making was approached from this understanding—that Indigenous peoples are self-determining peoples, with the power to enter into nation-to-nation agreements. Over the last

few decades the Crown has turned these treaties into aboriginal rights and aboriginal law, based on the Crown legal framework, not Indigenous legal frameworks and values. The Crown's emphasis on aboriginal law has ignored and diminished Indigenous legal orders. All treaties, laws agreements and agreement-making mechanisms should be reinterpreted in light of the *Declaration Act*, to align with self-determination.

Indigenous governments need to function as sovereigns. This will entail new structures and processes as well as new mindsets and cultures within the Crown system.[85]

> IF YOU WANT TO BE IN A POWERFUL POSITION OF CONSENT YOU HAVE TO BE IN A POWERFUL POSITION OF SELF-DETERMINATION.
>
> **— Doug White[86]**

2. *Declaration on the Rights of Indigenous Peoples Act*

The purposes of the *Declaration Act* are to affirm the application of the UN Declaration in BC, to contribute to the implementation of the UN Declaration and to support relationships with Indigenous governing bodies (**IGBs**). There are three distinct, positive obligations on the Province: 1) to take all measures necessary to ensure the laws of British Columbia are consistent with the UN Declaration; 2) to develop an action plan to meet the objectives of the UN Declaration; and 3) to publicly report annually to the Legislature on progress.[87] The *Declaration Act* requires that the Province consult and cooperate with Indigenous nations on each of these.

There is the additional tool of agreements with Indigenous governing bodies (IGB), which is enabled under sections 6 and 7, which may include decision-making agreements in relation to the exercise of statutory powers of decision jointly, and/or consent-based agreements. These "**section 7 agreements**" enable Cabinet to authorize a minister to make an agreement with an IGB to exercise statutory powers either jointly, or with the consent of the IGB. The *Declaration Act* envisions that an IGB will exercise statutory powers—like granting mineral tenures or issuing permits—these are important powers as nations consider how to grant consent for mining.

> THROUGH THE ALIGNMENT OF LAWS, IMPLEMENTATION OF A CO-DEVELOPED ACTION PLAN AND THROUGH SECTION 7 AGREEMENTS, THE ***DECLARATION ACT*** CREATES SPACE FOR INDIGENOUS LAW AND INDIGENOUS JURISDICTION.

The definition used in the *Declaration Act* for Indigenous governing body or IGB is "an entity authorized to act on behalf of Indigenous peoples that hold section 35 rights". The first half of this definition speaks to the principle of self-determination; the second half of the definition reflects the principle of the proper title and rights holder.[88] This recognizes that it is Indigenous nations that self-determine who can enter into agreements on their behalf, thereby overcoming the obstacles created by provincial law or policy.

While the goal of many nations is to have Indigenous-created governments established according to their own laws and traditional processes, practically speaking, this requires significant time, capacity and resources. Until this process is complete for a nation, it may choose to operate through

a band council, a tribal council or other structure established under federal or provincial law, such as societies and corporations.

The *Declaration Act* also provides that it be interpreted in a manner that does not delay the application of the UN Declaration to BC laws—required legislative changes do not need to be in the action plan to be implemented. Rather, BC has a stand-alone positive obligation to ensure its laws are consistent with the UN Declaration. It also contains accountability and transparency requirements—annual reporting and the requirement that agreements must be published before they can become operational.[89]

Whether this recognition of self-determination should be retroactive is not addressed in the *Declaration Act*, though arguably it should be, on the basis of the "universal realization that colonialism constituted an evil that needed to be overcome".[90] This raises the question of whether agreements for existing operating mines should be revisited in light of the *Declaration Act*.

This project is an opportunity to support the development and implementation of the tools established in the *Declaration Act*. Section 7 enables consent-based decision-making agreements, in recognition of the Indigenous human right standard of consent. It allows BC to withdraw from the constitutional space to allow for co-jurisdiction—which is key because the only way there will be transformative change is if Indigenous legal orders may operate without interference.[91]

3. Crown frameworks that anticipate consent

Consent as a function of indigenous self-determination is not new. Crown legal frameworks and practice demonstrate that the Crown has always been apprehensive and obstructionist about Indigenous peoples' right of consent. While there are many examples of the Crown working to diminish Indigenous jurisdiction, there are some examples of Crown recognition of Indigenous jurisdiction and consent, found in the common law, in legislation and in treaties.

Justice LaForme maintains that Indigenous laws are part of the common law and that they continue to apply in Canada despite the assertion of Crown sovereignty. This doctrine of continuity was recognized by the Supreme Court of Canada in 2001 in *Mitchell v Canada (MNR)*.[92] This doctrine is also the basis for recognition of aboriginal title, affirmed in the 2014 *Tsilhqot'in* decision. In the *Mitchell* case the Supreme Court held that Indigenous laws continue to apply, though subject to Crown imposed limits—where the laws have been extinguished, surrendered, or are incompatible with Crown sovereignty.[93]

The doctrine of continuity means that the ability to apply Indigenous laws has always existed and has been recognized, though obscured, in the Crown legal system. While this doctrine is not the same as consent, it is an expression of Indigenous peoples' right to exercise authority in accordance with their laws. This is the foundation of consent. That the Supreme Court of Canada has identified limits, and that Canadian courts have resisted this doctrine in other cases is problematic. Justice Laforme notes that this discomfort with Indigenous law is most famously demonstrated in the trial court decision in *Delgamuukw*.

Crown recognition of the right to consent is also evident in BC cases that address Aboriginal title. The *Delgamuukw* and *Tsilhqot'in* decisions affirm that when a nation has aboriginal title, consent is required for any activities taking place on those lands. The Supreme Court of Canada has also made clear that minerals are part of Aboriginal title.[95] Lastly, courts have recognized that Indigenous peoples have a beneficial interest in their traditional lands even when those lands have not yet been "recognized" by the Crown as aboriginal title.[96]

> CANADIAN GOVERNMENTS HAVE TREATED INDIGENOUS LAW AS EITHER INVISIBLE OR INAPPLICABLE. AND THAT'S PUTTING IT CHARITABLY. THESE GOVERNMENTS HAVE REFUSED OR FAILED TO TAKE INDIGENOUS JURISDICTION SERIOUSLY OR AT ALL WHEN RESOLVING CONTESTS OVER THE RESOURCES.[94]
>
> **Justice Laforme**

Crown recognition of consent is also evident in some legislation. Chief Littlechild notes the evolution of consent in discourse—over time it has been "consent," "mutual consent," and has now become "free, prior and informed consent."[97] He references the Indian Mining Regulations, adopted under the *Indian Act* in 1954, which require the consent of the band council before mining permits or leases are issued on reserve lands. Even though this only applies to reserve lands outside of BC, it indicates Crown acknowledgement of the need for Indigenous consent for activities on Indigenous lands.[98]

Chief Littlechild also notes that treaties have always recognized consent.[99] Treaty 8, concluded in 1899, covers significant portions of Indigenous lands in what is now BC. This treaty contains a reference to mining, where the Crown is "... to obtain the consent thereto of Her Indian subjects inhabiting said tract, and to make a treaty, and arrange with them ...". Consent has been in practice for well over a century.

More recent examples of treaties that implement consent are found in the Yukon. Dave Joe notes that 11 out of 14 Yukon First Nations have negotiated modern land–claims agreements with the Yukon, which cover approximately 16,000 square miles of land. 10,000 of those square miles, called Category 1 or Category A lands, convey ownership of both the land and the subsurface resources. On these lands, the government must obtain the consent of the Nation before granting any interest in the land.[100] Another example is the Kaska Nation's 2003 Bilateral Agreement with the Yukon government, entered into as a way to create certainty for all parties without resolving title. Among other things, the Agreement states that the Yukon is required to obtain the Nation's consent before authorizing "significant or major" exploration or development work on their traditional territories.[101]

4. Reconciling Indigenous Laws and Canadian Law

Crown legal frameworks must be amended to align with the UN Declaration and recognize Indigenous laws. Justice Laforme explains that Canadian law already includes the tools needed to align these legal systems. The principle of cooperative federalism, which is used to achieve harmony between federal and provincial law, can support alignment between Canadian and Indigenous law. In Justice Laforme's view,

> *As a general principle, the courts should strive for harmonious interpretation between the laws of the Province and those of First Nations. Of course, there may be cases (as in Coastal GasLink)*

> *where the Province says "yes" to a project and the First Nation says "no". But that does not of itself create an impossibility of dual compliance. Impossibility of dual compliance only arises when one government is saying "You must" and the other is saying "You must not." Rather, in a case like Coastal GasLink, both approvals may necessary, but neither may be sufficient on its own.*[102]

Existing legislation, including mining legislation, needs to be amended to recognize Indigenous law and jurisdiction, and to dispel racist doctrines that still persist in the law. Despite the *Declaration Act*, and the more recently proposed federal Bill C–15[103], the *United Nations Declaration on the Rights of Indigenous Peoples Act*, there remain many racist and colonial doctrines in the Crown legal system.

For instance, the Supreme Court of Canada's decisions in *Calder*, *Delgamuukw* and *Tsilhqot'in* have all been criticized for relying on and upholding the doctrines of discovery and *terra nullius*[104] Even though the Supreme Court of Canada has held that these doctrines never applied in Canada,[105] the only way to explain underlying Crown title is through their application. Canada must formally reject these doctrines as they are incompatible with the UN Declaration and with recognition of Indigenous sovereignty. The *Mikisew* decision is another example of a problematic case, because the Supreme Court of Canada held that legislative bodies were not required to consult with Indigenous rights holders prior to adopting legislation that could affect them,[106] even though this is required in the UN Declaration.

The limits of court decisions show that courts are not necessarily best placed to support self–determination and the recognition of Indigenous rights. As Justice Laforme notes, "as pleased as we may be with *Tsilhqot'in*, at the end of the day the court in *Tsilhqot'in* chose to speak only of the division of powers in relation to the federal and provincial governments."[107] It is governments—Crown and Indigenous—that must spearhead this legal reform, it must not be left to the courts to deal with retroactively.

This concept of concurrent jurisdiction—where Crown and Indigenous governments operate in parallel—is not new. Canada is a multi–juridical society that includes common law, civil law, and Indigenous law. Increasing recognition of Indigenous legal frameworks will enable the exercise of concurrent jurisdiction. The Supreme Court of Canada has acknowledged this where it stated that the purpose of treaties is to "reconcile pre–existing Aboriginal sovereignty with assumed Crown sovereignty."[108] Indigenous nations that exist in what is now BC have always shared their jurisdiction, initially with other nations, and then with the Crown.[109]

5. Internal Indigenous Governance Matters should not Detract from Consent

Matters related to internal governance (who has decision–making authority) and decision–making on shared or overlapping territories may have the effect of dividing nations and detracting from the revitalization of Indigenous sovereignty. This is particularly the case where nations are under pressure to address these issues before the Crown or resource companies may develop land and resources. This may divide nations and detract from the exercise of Indigenous sovereignty. That these issues are often unresolved has worked to the advantage of the Crown and resource companies and has made it more difficult for Indigenous nations to resolve these matters to their own benefit.

The *Declaration Act* now supports a different approach—through self-determination. No development should take place on Indigenous lands until matters related to internal governance and shared or overlapping territories are satisfactorily resolved by the nations involved—they are purely internal matters.[110] Self-determination work should come before any negotiations about projects and agreements. For example:

1. **Internal governance.** Internal governance is the essence of self-determination and is exclusively for the nation to determine.111 Issues related to who can act as an IGB, whether hereditary, band council or some other combination, are questions for the nations alone to resolve.
2. **Shared territories and overlaps.** Issues related to shared territory between nations or overlapping claims by more than one nation are also self-determination matters. Neither Crown government nor industry should engage nations until they have resolved these questions internally, to their satisfaction.
3. **Title.** Indigenous title is also a matter of self-determination. While the Crown conceptualizes land as Aboriginal title, Indigenous title must be recognized as distinct from Aboriginal title. Indigenous title is based on pre-existing sovereignty. Aboriginal title is a common law property concept. Ultimately, Aboriginal title must give way to the full recognition of Indigenous title and sovereignty for reconciliation to be meaningful.

Governance and resolution of shared territory and title matters can only be resolved by sovereign nations themselves. This will sometimes present challenges that impact other sovereigns. Professor Dorough notes that "human rights are not absolute and that there is a constant tension between the rights and interests of Indigenous peoples and all others, which is sometimes manifested between the Indigenous peoples concerned."[112]

INDIGENOUS NATIONS NEED RESOURCES TO REBUILD GOVERNANCE. LACK OF **CAPACITY** SHOULD NOT BE A FACTOR IN DELAYING THE REVITALIZATION OF INDIGENOUS LEGAL FRAMEWORKS TO ENABLE CONSENT. IN THE TRUTH AND RECONCILIATION COMMISSION'S CALLS TO ACTION, THE COMMISSION STATES THAT "IN KEEPING WITH THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, WE CALL UPON THE FEDERAL GOVERNMENT, IN COLLABORATION WITH ABORIGINAL ORGANIZATIONS, TO FUND THE ESTABLISHMENT OF INDIGENOUS LAW INSTITUTES FOR THE DEVELOPMENT, USE, AND UNDERSTANDING OF INDIGENOUS LAWS."[113]

Conflicts often arise because nations are pressured to address these issues on timelines driven by Crown or resource company agendas, NOT by those of self-determining Indigenous nations. Indigenous nations must be able to resolve issues well before a proposal for mining on Indigenous lands. Crown legal frameworks must no longer prevail over Indigenous governance—the two must work together. The Crown needs to create constitutional space for Indigenous law and legal orders to operate on an equal footing with colonial law.

E. OPTIONS TO ENABLE CONSENT FOR MINING

International experience makes clear that consent is the minimum standard for mining activities on Indigenous lands. There is no one way for consent to occur. How these minimum standards are exercised is important. Professor Dorough considers these to be the "non-negotiable thresholds" that Indigenous peoples must establish to protect their lands.[114] Clear minimum thresholds and clear requirements will help Indigenous nations to exercise their sovereignty.

This part outlines a set of potential models of consent that could apply in BC and also defines 5 stages of mining to set a practical context for consent over the course of a project. This is one approach to consent; others are yet to be imagined.

1. Existing agreement frameworks do not support a consent standard

Many nations are familiar with Impact Benefit Agreements (**IBAs**) and Economic Community Development Agreements (**ECDAs**), which have been the dominant means of nations negotiating for rights and benefits in relation to mining and other projects to date. While these agreements do confer some benefits on communities, they do not often support a true consent standard. For instance, IBAs are not based on a recognition of title or rights. They often limit or restrict Indigenous title and governance. These agreements are primarily designed to "... facilitate, supplement, and plug into Crown processes of consultation and accommodation."[115]

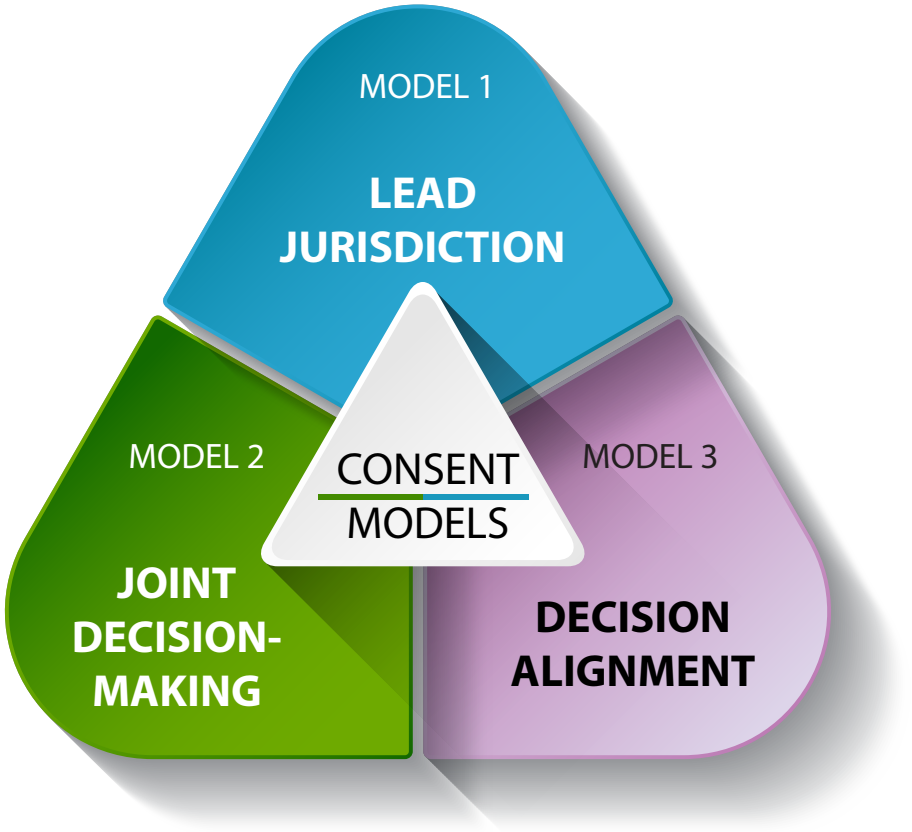
While IBAs secure the agreement of the community in exchange for benefits, in reality these agreements are often negotiated in closed processes due to industry norms. Professor Lightfoot's research notes that IBAs often result in a "truncated version of FPIC [consent]."[116] Consent requires deliberation and negotiation by the whole community, but in the IBA process the communities are often only consulted after the agreement has been made when they are given the chance to vote on the whole package. Confidentiality requirements mean that the broader community may never know the true nature of the decision-making process that occurred. [117]

ECDAs pose similar problems. ECDAs are a means by which the Province shares revenues from projects with communities, but the level of revenue sharing is entirely inadequate.[118] Jay Nelson and JP Laplante note that BC "takes the position that the ECDA is also meant to fund Indigenous consultation for ongoing permitting and oversight at a mine."[119] In this way, ECDAs actually hinder consent. A true consent process will require significant capacity, technical advice and dedicated staff for a nation. Continued reliance on ECDAs will not allow for this capacity and will interfere with the development of consent standards.[120]

Given that neither IBAs nor ECDAs can truly support a consent standard, new models for negotiation and joint-decision making are needed. The following section explores three potential consent models.

2. Models of Consent

Consent models build processes around decision-making, they don't limit a nation's ability to take action to protect rights, and they reject approaches such as "releases" or other ways to limit the exercise of Indigenous rights.[121] These models are premised on an Indigenous nation "as an essential, even primary, regulator for a project."[122] In terms of content, consent is simple—it is the right to say yes, the right to say no or the right to say yes with conditions.[123]



Model 1 – Lead Jurisdiction
In this model, one jurisdiction – either the IGB or the Crown would make the decision, using the laws and processes of that jurisdiction.

Model 2 – Joint Decision-making
In this model, the IGB and the Crown would establish a joint body that would make the decision on behalf of both governments.

Model 3 – Decision Alignment
The IGB and the Crown would each make a decision and then work together to implement the decision.

There are three models of consent for our purposes:

1. The **lead jurisdiction model** where one jurisdiction will take the decision-making lead, including application of the laws and processes of that jurisdiction.
2. The **jointly authorized decision-making body**, where the Indigenous and Crown governments would establish, pursuant to their respective laws, a joint body that has authority to make final decisions on behalf of both governments.
3. The **decision alignment model** where both Indigenous and Crown governments make their decision and work together on implementation.[124]

Consent is more than simply "stretching the duty to consult" or developing a strategy to address a potential infringement. Consent protocols should be developed independent of project proposals and address issues related to jurisdiction in advance of potential infringements, they must also address conflicts of laws issues.[125] Other components of consent are that it must:

> SHIFTING TO PROPER MODELS OF CONSENT-BASED DECISION MAKING HAS ALSO BEEN MADE VASTLY MORE COMPLEX BY THE GENERATIONS OF COLONIAL DELAY AND DENIAL BY CROWN GOVERNMENTS.[128]
>
> **Roshan Danesh, QC**

- Be authorized by the common law and the Indigenous legal order (bijuridical);
- Express "how it has roots" in both the Indigenous and Crown legal perspectives; and
- Confirm certain outcomes based on criteria regarding the proposal and enable "clear, stable, transparent, legally mandated and purposeful structures and processes between Indigenous and crown governments".[126]

3. Stages of mining

We have divided mining into 5 stages that generally align with the key regulatory phases of mining projects as found in the BC Crown regulatory framework.[129] Consent is meant to be ongoing and is a process that continues over the life of the project. These stages are meant to progressively build a constructive relationship between the parties.

There are two primary mining laws in BC—the *Mineral Tenure Act* and the *Mines Act*.[130] Both are outdated legal frameworks that contain no express recognition of the constitutional protections for Aboriginal peoples enshrined in section 35 of the *Constitution Act, 1982* or in the UN Declaration. Neither law acknowledges that mining in BC occurs largely on unceded lands and territories. Both of these laws are long overdue for reform, and even moreso now to make them consistent with the UN Declaration.

> WE MUST ESTABLISH OUR OWN MINING LAWS TO REPLACE THE OTHER LAWS AND REGULATIONS THAT HAVE BEEN ADOPTED BY SOMEONE ELSE AND IMPOSED ON OUR PEOPLE.[127]
>
> **Chief Littlechild**

These two acts govern most mining activities. The *Mineral Tenure Act* deals with mineral claim registration and mining leases. The *Mines Act* deals with regulation and oversight of mining activities ranging from exploration and operation through to mine closure. It operates alongside the *Mines Act* Health, Safety and Reclamation Code and other legislative requirements, for which BC has developed integrated permitting guidance for other permits issued by the various Crown ministries. This framework, along with new BC *Environmental Assessment Act,* guides Crown mining activities in BC.

Stage 1. Tenure + Mineral Claims

Mineral tenure is where the right to explore for minerals is set out. BC's mineral tenure regime establishes that mineral claims are to be registered through an online registry with no notification to Indigenous nations. The system, which has been in place for about 150 years, gives registered "free miners" the right to explore for minerals.[131] Free miners then have rights to the minerals in the claim to the exclusion of anyone else. This legal framework is outdated and offensive. It is inconsistent with self-determination and is a concrete example of the Crown granting land rights that it may not have given the existence of unresolved Aboriginal title or pre-existing Indigenous title.

> FREE ENTRY IS THE ANATHEMA TO THE UN DECLARATION, THE ***DECLARATION ACT*** AND THE CONSTITUTIONAL RIGHTS OF FIRST NATIONS.[133]
>
> **JP Laplante**

Crown grants of mineral claims have a domino effect—once the claim is issued, the presumption that a mining project is may proceed is established. While there are many other steps in the process to get to an operating mine, claim staking begin a process that is not currently consistent with self-determination.

A 2013 decision of the Yukon Court of Appeal has begun to modify this free entry framework. In that case, the court held that the Yukon government was required to consult the Ross River Dena before allowing staking of mineral claims on their traditional lands. This case required only consultation and not consent, however, the result was to place a "no staking" moratorium on lands until the Yukon Government and Ross River Dena Council reached an understanding on claims. That consultation is required is now the "minimum standard" under the Crown legal framework. However, in the context of the UN Declaration, this is still insufficient.[132]

Stage 2. Planning/Environmental Assessment

Planning for a mine or mining activities largely takes place through the environmental assessment process.[134] BC's *Environmental Assessment Act* was passed in 2018, just prior to the *Declaration Act*.[135] This law is significant because it establishes a process whereby the BC Environmental Assessment Office is to "seek to achieve consensus" with Indigenous nations at various points in the process. While this consensus requirement falls short of consent, it nonetheless signifies a shift in recognition of Indigenous governance frameworks and self-determination.

Environmental assessment is the primary planning process for a mine—it is where a mine proponent seeks input on its plans and describes the environmental, economic, social, cultural and health effects of the project. This is the stage where Indigenous nations and stakeholders can contribute to ensuring that the mine will have minimal impacts, maximum benefits and meet community needs. Applying Indigenous laws and values to mine planning can change the operating conditions for mines.

Professor Lightfoot describes how environmental assessment provides the "necessary deliberative space" for Indigenous peoples to exercise their governance. She references two examples of nations in BC that have applied their own governance to environmental assessments—the Secwepmec and Squamish peoples have each applied a two-pronged approach to environmental assessments for major projects on their lands (mining and liquefied natural gas projects respectively).[136]

Historically, land use planning preceded environmental assessments, and would be an opportunity for an Indigenous nation to identify sacred or other areas that would be removed from mining or resource development. Prior land use planning in BC did not include Indigenous nations as rights holders.[137] This means that opportunities for Indigenous nations to contribute to these modern processes have been restricted for decades.

Stage 3. Leasing + Permitting

The Crown law framework contains permitting provisions for exploratory activities as well as leasing and permitting provisions for operating mines. It is these permits or statutory authorizations that function as the day-to-day framework for what will happen at a mine. Mining leases are issued after an environmental assessment. The mine operating permits establish the operating conditions throughout the life of the mine. These are the "statutory powers of decision" that are referenced in the *Declaration Act*.

Conditions of operation found in permits are important. They are where much of the practical effect of consent will unfold. Issues that may be met with concern or rejection by an Indigenous nation in the environmental assessment stage can be addressed in the development of operating conditions in permit requirements. Indigenous perspectives in the development of these conditions are an opportunity for consent processes to evolve. Also, these processes build on each other—what is determined in planning will be approved in permitting.

Financial assurance is important at this stage. Key to the operation of an effective mine regulatory framework is the establishment of financial assurance or security to ensure that there is adequate funding to both respond to accidents and clean up a mine at the end of its life. It is important that these financial matters be addressed prior to the mine commencing operations.

Indigenous interests and rights are critical at this stage. In 2019, the FNEMC released three reports that explored options and made recommendations to strengthen the financial assurance regime for mines in BC. The key overarching recommendation is that Indigenous nations should set their own financial assurance requirements as a condition of their consent to a mining project, and should require "hard" financial assurance, such as posting bonds so that communities are not burdened with clean-up costs after a catastrophic event or reclamation costs.[138]

Stage 4. Operations

Decisions about mine operations will evolve through planning and permitting. In BC, the Mines Health, Safety and Reclamation Code establishes rules and procedures to address mine operations, ensure safety, protect workers, and protect lands and communities around the mine.

This Crown regulatory framework—oversight, compliance, enforcement and resourcing for these activities—must be adjusted for Indigenous governance. Considerations about the role of Indigenous nations in ensuring the safety of mining activities on their territory will factor into this operations stage.

The scope for Indigenous nations is broad. Crown regulatory oversight is complex, and it makes sense to design consent around the features of the existing framework. This is an area where there are a number of options that could inform new tool development.

Indigenous led and independent monitoring should be built in and bolstered by authority to address problems of non-compliance. Indigenous led monitoring programs are responsible for mine compliance in the north.[139] Increasing the use of **Indigenous Guardians** programs that conduct oversight activities and ensure that conditions related to granting consent up front are being honoured is another option. There are existing programs could be adapted to function through the *Declaration Act*.[140] In the Guardians context, Indigenous governments could lead the work to address the "fox ruling the henhouse" problems that have existed to date.[141]

These regulatory options could be developed in the same way that the Crown funds such programs. A **First Nation Resource Charge** has just been proposed in the Yukon. This could be linked to both permitting and operation. In that context, it would be based on self-governing Yukon First Nations power of direct taxation.[142] In relation to revenue sharing, JP Laplante noted that the provincial

revenue sharing policy is “woefully lacking” and a degree of magnitude below what levels of sharing should be.[143]

Stage 5. Closure + Reclamation

Mine closure is the final phase of mining activity, and often lasts for generations after the mine has finished commercial operations. It is also the point at which developers often exit, leaving the legacy and long-term effects of the mine to be managed by others. It is therefore vital that plans to restore and reclaim the land be clear and achievable. Experience with abandoned mines or catastrophic failures have made this issue an ongoing concern. Mine closure plans must have considered alternative assessments undertaken by the Indigenous nation.[144] It is here that financial assurance will need to be applied. While these issues are often addressed at the planning and permitting stage. This stage has an intergenerational impact because it has implications for how the land will be reclaimed.

F. A PROPOSED CONSENT APPROACH: PRACTICAL OPTIONS FOR NATIONS

This part sets out practical considerations for nations on how to grant consent for mining projects on their lands. The development of consent protocols is an exercise of self-determination that entails codifying Indigenous governance frameworks.[145] Professor Lightfoot sees this as a "menu of examples and the menu of opportunities" that are open to nations.[146] This approach is drawn from our materials; other possibilities exist. Whether this is done in advance of a mining project or as part of a mining project will be up to the nation.

This part anticipates that Indigenous nations will do some or all of the following with respect to mining in the future. Nations will:

- be mine proponents
- act as regulators for mine activities, either jointly with the Crown or alone
- collect rents and taxes for mine activities on their territories
- share decision-making and make or jointly make decisions regarding mining activities

Under the *Declaration Act*, these powers are likely to be exercised by IGBs. Section 7 of the *Declaration Act* is an opportunity for nations to "occupy the space" and codify their own laws.[147] Nations could develop template mining agreements that express and define Indigenous jurisdiction for mining, and develop mining laws that reflect their sovereign rights.

The *Declaration Act*, Mining and Consent: How could it work?

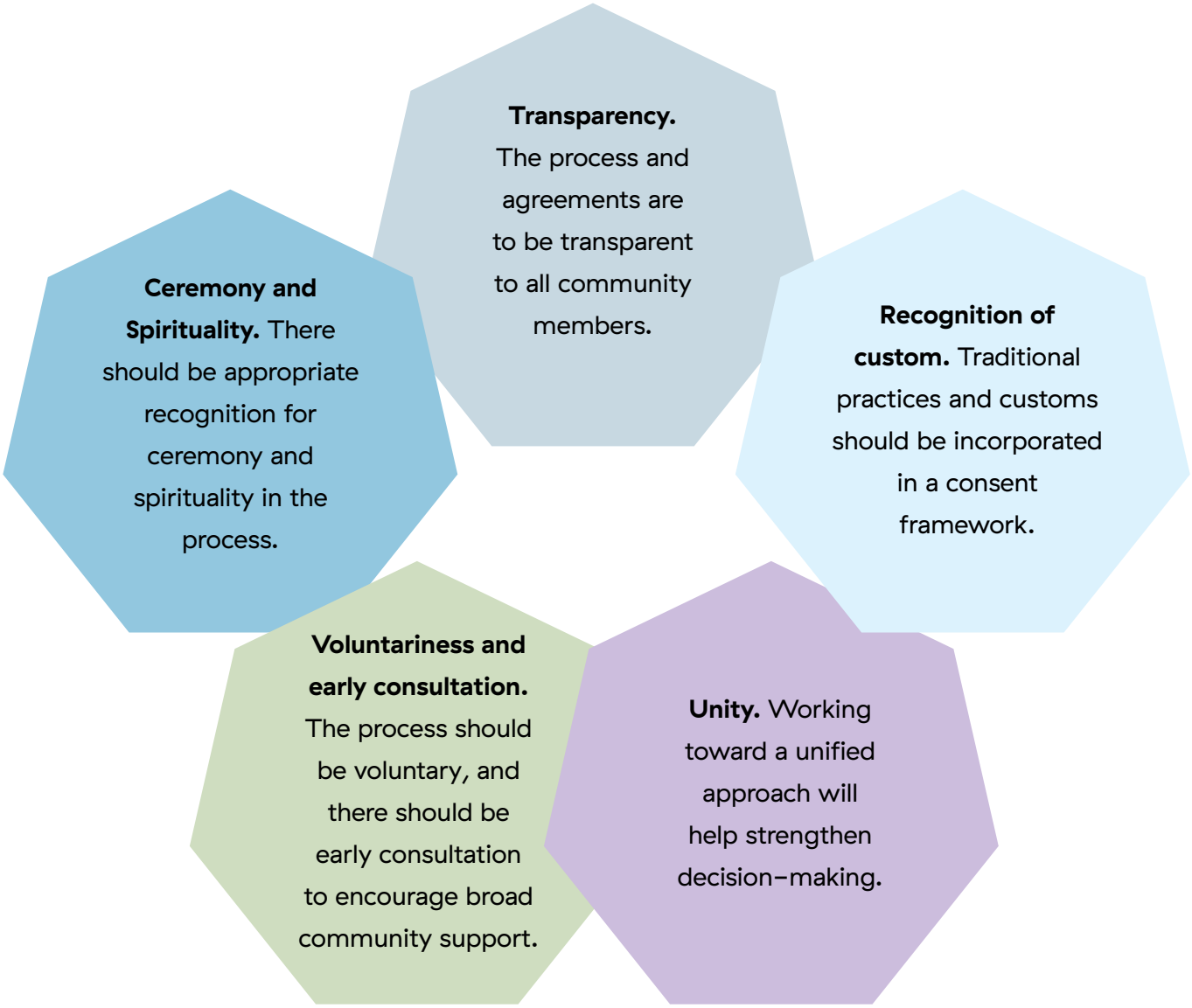
- IGBs will act on behalf of nations
- The Chief Gold Commissioner under the *Mineral Tenure Act* and the Chief Inspector of Mines under the *Mines Act* are the primary statutory decision-makers
- New Indigenous-led institutions can be created to oversee mining
- IGBs can make decisions or share decision-making with respect to lands
- Legislative changes will be needed to align mining laws with the UN Declaration
- New approaches will be developed through agreements, legislative change and the Crown action plan to enable IGBs to make or share statutory decision-making powers
- Agreements are to be published before they can operate, which means they can be models for other agreements
- Exercises of powers by IGBs is still subject to Crown approval

As Indigenous nations exercise sovereignty under the *Declaration Act*, different options should be considered—to help generate new tools to modern governance that honour Indigenous customs.

The Consent Approach, below, sets out the three structural pieces—What are the mining stages? What does the *Declaration Act* enable? What could a consent model look like? As nations work through how to practically develop a consent framework, the following considerations may help to inform their thinking. These considerations build upon the work of Professor Lightfoot.

1. What Values Help to Implement Consent?

The underlying values of the nation will inform the development of a consent protocol. Important considerations may be:



The recently released Yukon Mineral Development Strategy Recommendations Report identifies 7 guiding principles to reform mining in the Yukon:

1. Collaboration
2. Honouring our Ancestors
3. Sustainability
4. Future Generations
5. Respect
6. Transparency and trust
7. Certainty and Clarity[148]

1. Do these values and principles capture or reflect those of your nation? What else would you add?

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2. What Process Helps to Implement Consent?

The following process considerations will help nations as they consider Indigenous consent and oversight for mining:

- **Human Rights standards are paramount.** Consent should be applied in a manner that is consistent with human rights standards.
- **There is more than one legal system in force.** The *Declaration Act* supports multiple legal systems. Consent should occur through an "explicitly legally plural approach".[149]
- **Clear structures will strengthen outcomes.** Professor Lightfoot has identified characteristics of successful Indigenous consent protocols. These include setting preconditions for good faith negotiations; establishing clear timeframes; and identifying the legal principles and practices that ground the process.[150]
- **Community role.** Strong consent processes have a clear role for different community members—women, youth, elders—and recognize that there can be multiple co-existing authorities who will all contribute.
- **Consensus will strengthen outcomes.** The preferred method of achieving consent is through consensus building, which may take time but is culturally appropriate. Voting is considered a failure and is a last resort.[151]

2. Do these factors capture your nation's process for exercising sovereignty and governance? What else would you add? Is your nation's consent process based on consensus?

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3. What Content Helps to Implement Consent?

Nations should consider a range of Indigenous governance and well-being issues in a consent framework, including revenue collection, poverty education, training, health and culture.[152]

The BC *Environmental Assessment Act* requires that project reviews consider environmental, economic, social, cultural and health effects of a project. These five factors (or five pillars) are broad enough to include issues of concern to nations. There is nothing in section 7 that requires that agreements be linked to a project—thus nations can be thorough in creating content for these agreements.

Three content areas in particular should be considered in the context of mining, because they can be significant:

- **Community impacts.** Community impacts can be both positive and negative. While mining projects can bring increased spending on infrastructure, there can also be housing shortages and increased rent. Similarly, those who live in close proximity to mines can live with insecurity resulting from transient workers and visitors, particularly if they bring "discriminatory and intolerant attitudes.[153]
- **Employment.** Employment is a "deceptively simple benefit" to Indigenous peoples, that is emerging as a best practice in agreement making.[154] To date, industrial relations policies have tended to favour employment for people with previous mining experience. This must be overcome and Article 21 of UN Declaration which affirms that Indigenous peoples have the right to improve their social and economic conditions, addresses this.[155]
- **Revenues and Taxes**. Ensuring a revenue stream for the community in relation to mining projects is important for long term capacity. Some Yukon nations have powers of direct taxation. Whether through direct taxation or transfers that operate for various stages of mining, developing revenue sources and capacity is important.

This next section sets out considerations for nations in operationalizing consent for mining across the five stages.

STAGE 1: CLAIM STAKING

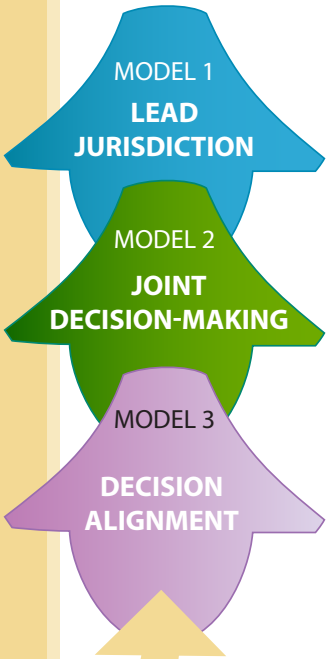
1. WHAT HAPPENS NOW?

- A free miner can stake claims on Indigenous lands with the click of a mouse
- Claim staking gives a free miner rights to minerals, excluding everyone else, including the nation on whose land the claim is staked
- Notice is recommended but not required
- Registering a claim gives legal access to land which the Crown protects over and above Indigenous title and rights

2. WHAT COULD HAPPEN IN THE FUTURE?

- Crown free miner certificates could only be issued with IGB consent
- IGBs could develop and administer their own claim staking process
- IGBs could establish their own free miner certificates, and include a knowledge-based test for staking on their lands
- IGBs could restrict the use of surface rights, regardless of who holds a mineral claim
- IGBs could exercise statutory powers under the *Mineral Tenure Act*
- IGBs could establish an Indigenous Chief Gold Commissioner to function like the Crown Chief Gold Commissioner, and address issuance of free miner certificates, cancel claims or address conflicts related to claims

3. WHAT COULD IT LOOK LIKE?



4. HOW COULD YOU GET IT?

ALIGNMENT OF CROWN LAWS

Law and Policy Change (through section 3 measures to align laws)

AGREEMENTS WITH CROWN

Agreements with Nations (through section 7 agreements)

3. Should the law continue to allow claims to be staked on your land without your consent?

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4. Should claim staking be permitted on your lands without there being any benefit to your nation?

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5. Should there be an Indigenous chief gold commissioner(s)?

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Stage 2: Planning/Environmental Assessment

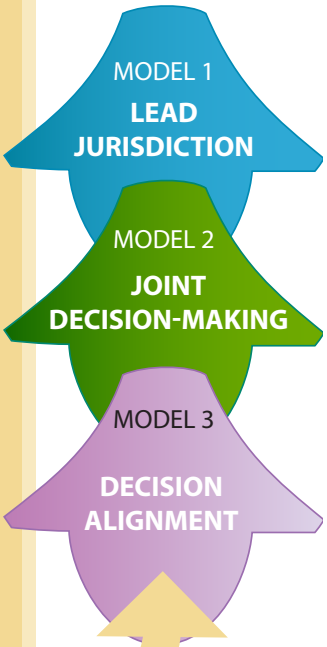
1. WHAT HAPPENS NOW?

- Some areas have land use plans that guide development
- The *BC Environmental Assessment Act* establishes a detailed process to review certain mine projects; Indigenous nations can lead the process
- The Environmental Assessment Office is to "seek to achieve consensus" with participating Indigenous nations at key points in the process
- This process is an early opportunity to address the range of issues presented by the mine – including permitting, operation and closure
- Placer mines generally do not require an environmental assessment

2. WHAT COULD HAPPEN IN THE FUTURE?

- Regional land use planning that includes Indigenous nations could clarify under what circumstances mining may or may not take place
- IGBs could identify and establish no-staking areas
- More nations in BC could develop and conduct their own impact assessments based on their governance systems
- Nations in BC could work to ensure that the "seek to achieve consensus" provision in the Environmental Assessment Act is applied as a consent expectation
- IGBs could lead or co-lead environmental assessments to gain a better understanding of operating conditions and permits to plan to issue them in the future

3. WHAT COULD IT LOOK LIKE?



4. HOW COULD YOU GET IT?

ALIGNMENT OF CROWN LAWS

Law and Policy Change (through section 3 measures to align laws)

AGREEMENTS WITH CROWN

Agreements with Nations (through section 7 agreements)

6. Do your governance frameworks envision land use and project planning?

FEEDBACK HERE

7. What would it take for your nation to be able to lead an environmental assessment?

FEEDBACK HERE

STAGE 3: LEASING + PERMITTING

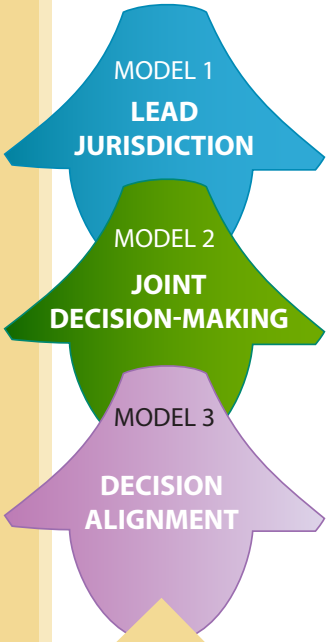
1. WHAT HAPPENS NOW?

- Exploratory permits are issued prior to environmental assessment
- Claims are converted to leases which create legal interests in lands
- Leases and permits are issued once a mine has its environmental assessment certificate
- The permitting process is integrated in that it establishes operating conditions addressing air + water emissions, fishery + wildlife impacts, worker health + safety matters
- Many of these powers are exercised by the Chief Inspector of Mines or their delegate

2. WHAT COULD HAPPEN IN THE FUTURE?

- Mining leases should only be issued with the consent of the IGB
- IGBs establish permit conditions so that mines operate consistent with the nation's values
- Leases and permits include recognition of employment considerations and community benefits
- IGBs can recover resource rents and taxation through leasing and/or permitting
- IGBs are able to incorporate cultural, environmental, workplace, health and safety matters through leasing and permitting
- IGBs may wish to establish their own Chief Inspector of Mines, and undertake regulatory tasks
- An Indigenous Chief Inspector of Mines may need broader powers to take a holistic approach
- Where IGBs act as regulators, responsibility for compliance, risk and liability issues would need to be resolved

3. WHAT COULD IT LOOK LIKE?



4. HOW COULD YOU GET IT?

ALIGNMENT OF CROWN LAWS

Law and Policy Change (through section 3 measures to align laws)

AGREEMENTS WITH CROWN

Agreements with Nations (through section 7 agreements)

8. Should leases or permits be granted without your nation's consent?

FEEDBACK HERE

9. Should your nation determine conditions on a permit or a lease?

FEEDBACK HERE

10. Should there be an Indigenous chief inspector of mines?

FEEDBACK HERE

STAGE 4: OPERATIONS

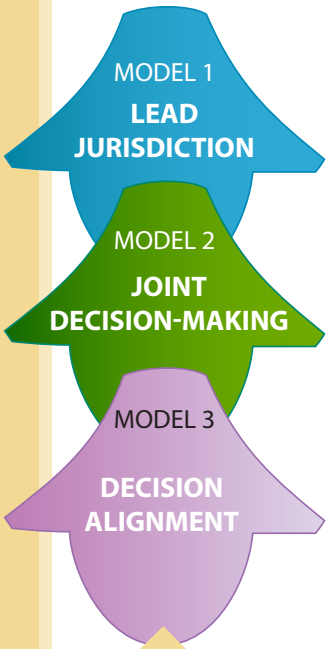
1. WHAT HAPPENS NOW?

- Safe and responsible mine operation is authorized by mine permits
- The Chief Inspector of Mines is ultimately responsible for compliance and enforcement
- In 2016 the Auditor General identified many deficiencies and recommended that there be independent enforcement for mining activities
- The Ministry has an audit unit which works to improve mine safety and performance
- Financial assurance should be in place to protect against the risk of accidents is a factor in operations in the event of an accident

2. WHAT COULD HAPPEN IN THE FUTURE?

- Both IGBs and Indigenous peoples could own, operate and oversee mining projects
- Indigenous peoples can build on their already significant experience with monitoring through programs such as Indigenous Guardians
- IGBs could establish Indigenous led compliance and enforcement units, which could operate province-wide or specific to an IGB
- IGBs could require the Crown to share all enforcement and compliance, inspection and audit data for mines on their territories
- Indigenous oversight of mining could occur; risk and liability issues could be addressed
- IGBs could establish hard financial assurance requirements to protect communities in the event of an accident
- Where IGBs act as regulators, responsibility for compliance, risk and liability issues would need to be resolved

3. WHAT COULD IT LOOK LIKE?



4. HOW COULD YOU GET IT?

ALIGNMENT OF CROWN LAWS

Law and Policy Change (through section 3 measures to align laws)

AGREEMENTS WITH CROWN

Agreements with Nations (through section 7 agreements)

11. What needs to be in place for your nation to be able to enforce permit conditions?

FEEDBACK HERE

12. Should there be an Indigenous chief Inspector of mines?

FEEDBACK HERE

STAGE 5: CLOSURE + RECLAMATION

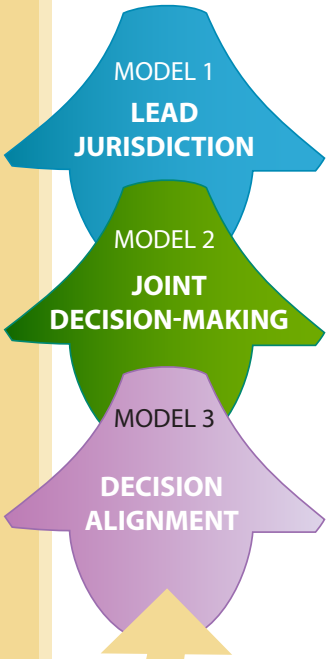
1. WHAT HAPPENS NOW?

- Hard rock mines must have reclamation plans that often require water treatment in perpetuity; this has real implications for how Indigenous nations can use their lands for generations
- Mine legacy is a matter of concern to local communities; when the company leaves, it has no more interest in the land
- Financial assurance is determined by the Chief Inspector of Mines and is rarely, if ever, adequate to cover mine closure and reclamation costs
- Legacy mines are often a result of a mining company declaring bankruptcy
- Downstream communities and nations are not engaged in mine closure and reclamation planning

2. WHAT COULD HAPPEN IN THE FUTURE?

- IGBs should develop capacity to plan for reclamation – this legacy is what the community will live with for years
- IGBs could approve reclamation plans prior to permitting a mine
- IGBs could require there to be adequate funding to implement the reclamation plan if the company defaults
- IGBs should not allow mines to operate on their territories without full financial assurance to cover the costs of reclamation and perpetual treatment
- Release of financial assurance funds could require consent of the affected Nation

3. WHAT COULD IT LOOK LIKE?



4. HOW COULD YOU GET IT?

ALIGNMENT OF CROWN LAWS

Law and Policy Change (through section 3 measures to align laws)

AGREEMENTS WITH CROWN

Agreements with Nations (through section 7 agreements)

14. Should mines be allowed to operate if there is no financial commitment to remediate a mine at the end of its life?

FEEDBACK HERE

15. Should the consent of the affected nation be required before a closure plan can be approved?

FEEDBACK HERE

16. Are there legacy mines on your lands that cause environmental problems?

FEEDBACK HERE

4. Additional questions related to mining and consent

Process

17. Do you need to revitalize your Indigenous governance system before you can engage in project specific discussions?

FEEDBACK HERE

18. What level of community engagement supports broad understanding for a proposal?

FEEDBACK HERE

19. What happens if consent is not unanimous? When is voting an acceptable way to determine community consent?

FEEDBACK HERE

20. Consent is meant to be continuous through the duration of a mine project. Can consent be withdrawn at a later stage? What are the implications?

FEEDBACK HERE

21. Are there existing models that your nation uses already?

FEEDBACK HERE

Outcomes

22. What are the non-negotiable values to protect?

FEEDBACK HERE

23. What outcomes should be in a consent framework for mining?

FEEDBACK HERE

24. Are there existing agreements that could be a model for a consent framework? Is it worth developing a template agreement for IGBs to use?

FEEDBACK HERE

Sovereignty

25. What can Indigenous nations do to advance their sovereign interests?

FEEDBACK HERE

26. Should nations ratify the Inter-American Convention on Human Rights or ILO Convention 169 as an expression of self-determination? And as means to pressure Canada to do so where it has not?

FEEDBACK HERE

27. Should the *Declaration Act* apply to existing projects as well as future projects? Are there any mines that you can think of that should be subjected to a consent process retroactively?

FEEDBACK HERE

28. Do you have any additional comments or thoughts on the materials presented in this Discussion Paper?

FEEDBACK HERE

SUBMIT

Appendix A: Summary of Issue Paper Questions

These issue papers will form the research basis for the Discussion Paper and will be posted on FNEMC's website as part of the project proceedings. Issues and experts are as follows:

A. Indigenous Context:

1. Who is to decide how a nation self-governs? What are approaches to dealing with internal governance issues that may need to be addressed in the process of determining consent? What approaches may address the roles of both hereditary/traditional leadership and band councils in a consent process? How might these approaches be employed in the context of the *Declaration on the Rights of Indigenous Peoples Act*, which recognizes "Indigenous governing bodies"? ***Expert: Doug White***

2. Implementation of the UN Declaration will entail nations granting consent for projects on Indigenous lands, regardless of whether title has been proven in a crown legal context. What are options to engage Indigenous approaches to Indigenous land ownership and stewardship? How can these approaches be understood and applied in the context of crown legal concepts? ***Expert: Roshan Danesh, QC***

3. Indigenous governance systems have established different mechanisms for inclusivity of community members for expressions of consent. What are mechanisms and opportunities to incorporate and reflect community perspectives such as women and youth? What are current options to support community perspectives in mine review and consent processes? What are measures that Indigenous peoples may wish to take to support unified approaches by communities to resource development issues? ***Expert: Professor Sheryl Lightfoot***

4. What is the role of recent natural resource and governance agreements that may inform and support implementation of FPIC in relation to mining. In particular, are there provisions in the Broughton fish farm agreements or the Shishalh agreement that can support approaches to consent in relation to mining? ***Expert: Paul Joffe***

B. International Context

1. Evaluate FPIC as a principle of customary international law. Given that FPIC is enshrined in the UN Declaration, which is a human rights framework, discuss ways in which FPIC is a tool to support the implementation of human rights norms, with particular emphasis on its application to extractive projects. What conditions are advised in order for FPIC to be binding in relation to mining projects? ***Expert: Chief Wilton Littlechild***

2. How important is it that domestic legislatures take steps to implement the UN Declaration? What other mechanisms, tools or conventions are there at international law that will support the robust implementation of FPIC in relation to mining? For example, should Canada sign onto the Inter-American Convention on Human Rights so as to be able to utilize the International Court?

Are there other mechanisms of that sort that could support nations in BC or Canada? ***Expert: UN Special Rapporteur José Francisco Cali Tzay***

3. What international standards exist for FPIC right now and how do they operate in practice? Using existing international human rights and self-determination instruments (such as IFC Performance Standard 7 or ILO Standard 169) discuss how these, and any other, international tools and conventions support the development and implementation of consent, and how they may be applied to mining in BC. ***Expert: Professor Dalee Sambo Dorough***

4. What is the international legal experience with mining and human rights through the lens of the UN Declaration? ***Expert: Professor Megan Davis***

C. BC Mining Context

1. What are the practical stages where consent should be secured in the context of mining projects based on the BC legal framework. In the same way that the new BC *Environmental Assessment Act* identifies key process decision points, what are the key process points in the mining regulatory continuum where consent should be secured? For example, some opportunities include: subsidies, staking, exploration, environmental assessment, leasing, financial assurance, mine approval, mine operations oversight, mine closure and reclamation, final release of bonds. ***Expert: Allen Edzerza***

2. What principles or standards could contribute to meaningful Indigenous oversight of mining in BC to reflect Indigenous self-determination in the mining sector? Are there specific tools or mechanisms that could be applied to support self-determination and Indigenous oversight? How could these mechanisms operate to the benefit of all Indigenous nations that are based in BC? ***Experts: Jay Nelson and JP Laplante***

3. How might Indigenous nations move to better exercise self-determination under Article 34 of the UN Declaration? What concepts and values can be adduced from self-government agreements, particularly those in the Yukon, that can contribute to BC's action plan? Given that s 35 of the *Constitution Act 1982* allows for self-government and self-determination, how can it also recognize consent? ***Expert: Dave Joe***

4. As Indigenous nations exercise their inherent rights and sovereignty, and as both Indigenous and BC governments give effect to the *Declaration on the Rights of Indigenous Peoples Act*, is there a conflict of laws issue? How should prevailing laws concepts be interpreted in light of Article 34 of the UN Declaration? How can the BC action plan account for and incorporate differing legal frameworks such as the doctrine of discovery, relevant provisions of Canada's constitution, and conflicts of laws principles? Are there other legal interpretive principles that should be considered in balancing legal frameworks? ***Expert: Justice Harry LaForme***

Endnotes

1 Minister David Lametti remarks, Indian Residential School History and Dialogue Centre Forum on the UN Declaration (February 4, 2021).
2 See BC First Nations Energy and Mining Council, UN Declaration Resources at <http://fnemc.ca/un-declaration/> for Expert Issue Papers and recordings of Expert Roundtable Webinars.
3 *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*, SBC 2019, c 44.
4 See BC First Nations Energy and Mining Council, "Mining and Consent Expert Roundtable: International Context" recording at <http://fnemc.ca/un-declaration/> [International Context Webinar], Davis at 0:41-0:42.
5 Human Rights Council, *Free, prior and informed consent: a human rights-based approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/39/62 (10 August 2018) [A/HRC/39/62] at para 3.
6 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (13 September 2007) [*UNDRIP*]. Articles 10, 11②, 19, 28①, 29② and 32② reference free, prior, and informed consent.
7 See Mauro Barelli, "Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead" (2012) 16:1 Int'lJ HR 1 [Barelli], at 10. An examination of how certain consent provisions changed from the initial to the final Draft of the Declaration highlights how the understanding of consent has evolved from that of a simple veto right, to the more negotiation and relationship-based concept it is today. For instance, Barelli notes that initially, the original version of Article 32 stated that Indigenous peoples had "the right *to require that States obtain* their free and informed consent" (emphasis added). In contrast, the current Article 32 reads: "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." The change is indicative of early opposition by States to the initial construction, which was construed as a veto right. The current formulation suggests a relationship of negotiation rather than a veto, and although it is a result of compromise, it is nevertheless indicative of the significant political pull of the Indigenous representatives who negotiated the UN Declaration.
8 See UN General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/69/150 (15 September 2014). Paragraphs 3 and 20 are relevant and paragraph 8 reads "We commit ourselves to cooperating with indigenous peoples, through their own representative institutions, to develop and implement national action plans, strategies or other measures, where relevant, to achieve the ends of the Declaration."
9 A/HRC/39/62 at para 4.
10 Joffe Expert Issue Paper at 2, referencing A/HRC/39/62 at para 14.
11 A/HRC/39/62 at para 3.
12 A/HRC/39/62 at para 14.
13 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, art. 1 and art. 27. See also Hans Morten Haugen, "The Right to Veto or Emphasis Adequate Decision-Making Processes: Clarifying the Scope of the Free, Prior and Informed Consent (FPIC) Requirement" (2016) 34:3 Neth Q Hum Rts 250 [Haugen], at 254.
14 UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, art. 1 and art. 15①(a) and (c). See Haugen at 254 and Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC) at 15-16.
15 UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, art. 5(d)(v). See also Haugen at 255.
16 A/HRC/39/62 at para 10, see also the Committee on the Elimination of Racial Discrimination General Recommendation No. 23: Indigenous Peoples (1997), at para 4(d).
17 See Committee on the Elimination of Racial Discrimination General Recommendation No. 23: Indigenous Peoples, at para 4(d).
18 International Context Webinar, Dorough at 1:38.
19 International Context Webinar, Dorough at 1:34. See also Dorough Expert Issue Paper at 15.
20 Kathryn Tomlinson, "Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC" (2019) 23:5 Int'l J HR 880 [Tomlinson], at 883. See also JessieHohmann & Marc Weller, eds., *The Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018), at 44

21 See Convention (No. 169) concerning indigenous and tribal peoples in independent countries, 27 June 1989, UNTS 1650, [ILO Convention 169], art. 6② and art. 16②
22 ILO Convention 169, art. 6② and art. 16②
23 Chief Littlechild Expert Issue Paper at 5.
24 Organization of American States (OAS), *American Declaration on the Rights of Indigenous Peoples*, 15 June 2016. [*American Declaration*].
25 Chief Littlechild Expert Issue Paper at 6.
26 Chief Littlechild Expert Issue Paper at 6.
27 Article XXVIII of the *American Declaration* reads: "Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession and ownership of their lands, territories and resources, in accordance with the legal system of each State and the relevant International instruments. States shall establish special regimes appropriate for such recognition and for their effective demarcation or titling."
28 Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969.
29 *Saramaka People v. Suriname*, Judgment of 28 November 2007, Series C, No. 17, at para 134.
30 Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, 2 May 1948.
31 Inter-American Commission on Human Rights Report No. 40/04, Maya Indigenous Communities of the Toledo District (Case 12.053 (Belize)), 12 October 2004, at para 142.
32 Inter-American Commission on Human Rights Report No 105/09, Petition 592-07, Admissibility Hul'Qumi'Num Treaty Group, Canada, October 30, 2009.
33 *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, art. 8(j). See also A/HRC/39/62 at para 52.
34 Barelli, at 4.
35 Tomlinson, at 884
36 Barelli, at 5.
37 United Nations Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (New York, 2013).
38 See BC First Nations Energy and Mining Council, "Mining and Consent Expert Roundtable: Indigenous Context" recording at <http://fnemc.ca/un-declaration/> [Indigenous Context Webinar], Danesh at around 1:43..
39 Doug White, *Consent* (Union of British Columbia Indian Chiefs, 2019) [White], at 29.
40 Indigenous Context Webinar, Joffe at 1:28.
41 International Law Association, I*mplementation of the Rights of Indigenous Peoples*: Final Report by the Committee on the Rights of Indigenous Peoples for the 79th Biennial International Law Conference (Kyoto, 2020) [Kyoto, 2020], at 7.
42 Mark Weller, "Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23 and 46①" in Jessie Hohmann & Marc Weller, eds., *The Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) [Weller], at 116.
43 Davis Expert Issue Paper at 2.
44 Dorough Expert Issue Paper at 17.
45 Dorough Expert Issue Paper at 1, Davis Expert Issue Paper at 1, Cali Tzay Expert Issue Paper at 8.
46 Dorough Expert Issue Paper at 1.
47 Indigenous Context Webinar, White at 0:38
48 Davis Expert Issue Paper at 2.
49 International Context Webinar, Davis at 0:41
50 A/HRC/39/62 at 10, see also the Committee on the Elimination of Racial Discrimination General Recommendation No. 23: Indigenous Peoples (1997), at para. 4(d).
51 Dorough Expert Issue Paper at 2.
52 Cali Tzay Expert Issue Paper at 2.
53 A/HRC/39/62 at para 3.
54 Martin Scheinin & Mattias Ahren, "Relationship to Human Rights, and Related International Instruments" in Jessie Hohmann & Marc Weller, eds., *The Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018), at 63.
55 Dorough Expert Issue Paper at 1.

56 Indigenous Context Webinar, Joffe at 1:27.
57 UN Declaration, Art. 43.
58 Joffe Expert Issue Paper at 8.
59 Grand Chief Edward John Research Backgrounder at 16.
60 Grand Chief Edward John Research Backgrounder at 16.
61 Grand Chief Edward John Research Backgrounder at 16.
62 The International Law Association's Committee on the Implementation of the Rights of Indigenous Peoples has recognised the "centrality of the profound relationship that Indigenous peoples have with their environment and their reliance upon the same for diverse economic, social, cultural and spiritual ele-ments of their distinct identity" (Kyoto,2020, at 2)
63 Chief Littlechild Expert Issue Paper at 5.
64 James Anaya, "Report of the Special Rapporteur on the Rights of Indigenous Peoples" (UN General Assembly), <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf>, at para 27-28.
65 Regarding impact, Davis notes that "consent is required if a measure or project is likely to have a significant, direct impact on indigenous peoples' lives or land, territories or resources. This approach is known as the 'sliding scale approach' which means that the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question" (Davis Expert Issue Paper at 3-4).
66 Danesh Expert Issue Paper at 2.
67 For a description of the content of and limits on Aboriginal title, see Tsilhqot'in Nation v British Columbia, 2014 SCC 44, at para 74 and Delgamuukw v British Columbia, 3 SCR 1010, at paras 110-117.
68 Danesh Expert Issue Paper at 2.
69 Dorough Expert Issue Paper at 8.
70 International Context Webinar, Cali Tzay at 2:21.
71 International Context Webinar, Davis at 55.
72 Indigenous Context Webinar, Joffe at 1:35.
73 See Kyoto, 2020, at 17. See also International Context Webinar, Dorough at 1:59.
74 Kyoto, 2020, at 11-12.
75 Cali Tzay Expert Issue Paper at 4.
76 See *Tsilhqot'in v British Columbia,* 2014 SCC 44.
77 Danesh Expert Issue Paper at 6.
78 Danesh Expert Issue Paper at 6.
79 International Context Webinar, Cali Tzay at 2:21.
80 International Context Webinar, Davis at 2:32.
81 International Context Webinar, Davis at 0:55.
82 Indigenous Context Webinar, White at 1:50.
83 Indigenous Context Webinar, White at 0:40.
84 Justice Laforme Expert Issue Paper at 1.
85 Danesh Expert Issue Paper at 10.)
86 Indigenous Context Webinar, White at 0:40.
87 DRIPA, ss.3-5.
88 Indigenous Context Webinar, White at 0:38.
89 *DRIPA,* s.5 and s.7④(a)..
90 And further that "Exceptionally in international law, the rule would be retroactive, curing a defect that had arisen in the past." (Weller, at 118).
91 Indigenous Context Webinar, Alexander at 2:29.
92 Laforme Expert Issue Paper at 4.
93 Laforme Expert Issue Paper at 4-5.
94 BC First Nations Energy and Mining Council, "Mining and Consent Expert Roundtable: BC Mining Context" recording at <http://fnemc.ca/un-declaration/> [BC Mining Context Webinar], Laforme at 0:45.
95 *Delgamuukw v British Columbia,* 3 SCR 1010, at para 122.

96 In *Guerin v. The Queen,* the court referenced the *Star Chrome* case and stated that "it does not matter [...] that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases" (*Guerin v. The Queen,* [1984] 2 S.C.R. 335, at 379). However, the court went on to describe the interest as somewhat less than full beneficial ownership of the land.
97 International Context Webinar, Littlechild at 1:14.
98 Chief Littlechild Expert Issue Paper at 2.
99 Chief Littlechild Expert Issue Paper at 2–3. See also International Context Webinar, Littlechild at 1:14.
100 Dave Joe Expert Issue Paper at 2.
101 Bi-lateral Agreement between the Government of Yukon and the Kaska (2003), s.3.3.
102 Laforme Expert Issue Paper at 14.
103 Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples,* 2nd Sess, 43rd Parl, 2020 [Bill C-15].
104 Kyoto, 2020, at 15.
105 See *Tsilhqot'in v British Columbia,* 2014 SCC 44, at para 69. The court mentions the doctrine of *terra nullius* and not the doctrine of discovery, but the two are related.
106 Kyoto, 2020, at 15–16.
107 BC Mining Context Webinar, Laforme at 0:58.
108 White Expert Issue Paper at 1, referencing Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, at para 20.
109 Indigenous peoples established treaties and alliances amongst each other for a variety of purposes, "but all to create order in relations premised on respect and recognition of each other" (White at 20).
110 White Expert Issue Paper at 4.
111 White Expert Issue Paper at 4.
112 Dorough Expert Issue Paper at 11.
113 Truth and Reconciliation Commission of Canada: Calls to Action <http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>, CTA #50. In the 2019 budget, the Government of Canada responded to Call to Action 50 by providing for $10 million over five years to support Indigenous law initiatives through the Justice Partnership and Innovation Program.
114 International Context Webinar, Dorough at 1:36.
115 White, at 56–57.
116 Lightfoot Expert Issue Paper at 7.
117 Lightfoot Expert Issue Paper at 7.
118 Nelson and Laplante Expert Issue Paper at 10.
119 Nelson and Laplante Expert Issue Paper at 11.
120 Nelson and Laplante Expert Issue Paper at 11.
121 White, at 57.
122 White, at 57.
123 Joffe Expert Issue Paper at 2. See also Indigenous Context Webinar, Joffe at 1:27.
124 White, at 60–62.
125 BC Mining Context Webinar, Laforme at 2:32.
126 Danesh Expert Issue Paper at 8–9.
127 International Context Webinar, Littlechild at 1:21.
128 Danesh Expert Issue Paper at 1.
129 The three main laws dealing with mining in British Columbia are the *Mineral Tenure Act, the Mines Act and the Environmental Assessment Act*.
130 See the *Mineral Tenure Act,* RSBC 1996, c 292 and the Mines Act, RSBC 1996, c 293.
131 Edzerza Expert Issue Paper at 4–5.
132 See Edzerza Expert Issue Paper at 5–7 and Joe Expert Issue Paper at 2–3.
133 BC Mining Context Webinar, Laplante at 2:14.
134 The Environmental Assessment Act does not apply to all mining activities. It only applies to new projects or to modifications to existing projects that meet the "reviewable project" definition in the Reviewable Projects Regulation. For instance, for a new mineral mine, the threshold to trigger an assessment under the Environmental Assessment Act is a production capacity of 75 000 tonnes a year of mineral ore, or more. See the Reviewable Projects Regulation s.10.
135 See the *Environmental Assessment Act,* SBC 2018, c 51.

136 See International Context Webinar, Lightfoot at 1:09. See also FNEMC, "Recent Experience with Indigenous Led Assessments: A BC Perspective" (2019) at <http://fnemc.ca/wp-content/uploads/2015/07/Recent-Experience-With-Indige- nous-Led-Assessments-A-BC-Perspective.pdf>.
137 BC Mining Context Webinar, Laplante at 2:16.
138 See BC First Nations Energy and Mining Council, "Mining Risk and Responsibility: How putting a price on risk can help British Columbia reduce it" (June 2019) at <http://fnemc.ca/wp-content/uploads/2019/06/Mining-Risk-and-Responsibility.pdf>; "Reducing the Risk of Mining Disasters in BC: How financial assurance can help" (August, 2019) at <http://fnemc.ca/wp-content/uploads/2015/07/Reducing-the-Risk-of-Mining-Disasters-in-BC-FNEMC.pdf>; and "Using financial assurance to reduce the risk of mine non-remediation: Considerations for British Columbia and Indigenous governments" (November 2019) at <http://fnemc.ca/wp-content/uploads/2015/07/Using-financial-assurance-to-reduce-the-risk-of-mine-non-remediation.pdf>.
139 139 BC Mining Context Webinar, Laplante at 2:10.)
140 See BC First Nations Energy and Mining Council & UVic Environmental Law Centre, "The Case for a Guardian Network Initiative" (2020) <http://fnemc.ca/wp-content/uploads/2015/07/The-Case-for-a-Guardians-Network-July-2020.pdf>.
141 BC Mining Context Webinar, Laplante at 2:11.
142 Mineral Development Strategy Panel, "Yukon Mineral Development Strategy and Recommendations" (2020) <https://secureservercdn.net/198.71.233.179/cvy.a41.myftpupload.com/wp-content/uploads/2020/12/Yukon-MDS-and-Recommendations-Final-Draft-28DEC2020-for-Public-Release.pdf> at 18.
143 BC First Nations Energy and Mining Council, Mining and Consent Expert Roundtable: BC Mining Context recording <http://fnemc.ca/un-declaration/>, Nelson and Laplante at 2:12.
144 Nelson and Laplante Expert Issue Paper at 11.
145 Lightfoot Expert Issue Paper at 10.
146 Indigenous Context Webinar, Lightfoot at 2:45.
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Appendix B: Scan of Consent Practices in Other Jurisdictions

This Appendix provides an overview of other jurisdictions' practices regarding consent in the context of the mining industry. Under each jurisdiction, three areas of practice are considered: the legal framework, relevant case law and/or case studies, and state practice. While there are now quite a few examples of corporations engaging directly with Indigenous peoples to support a consent standard, this jurisdictional scan focuses on state governments and their practices.

Contents

AUSTRALIA

Legal Framework

- Australia's 1976 Aboriginal Land Rights Act (ALRA) requires the consent of Indigenous traditional landowners prior to the authorization of mining on lands held under Aboriginal title in the Northern Territories. This is achieved through the establishment of land councils which represent traditional landowners.[1] Section 42 of the ALRA provides for a veto right which results in a five-year moratorium period. This right has been exercised occasionally, for instance by Indigenous peoples on the island of Groote Eylandt.[2] While the ALRA also provides that the State may overwrite an Indigenous veto when it is "in the national interest," the state has never exercised this right.[3]
- Indigenous peoples and Indigenous rights are not currently recognized in Australia's constitution, although activists in Australia have been campaigning for constitutional recognition for the last few years. In 2016–2017, the Australian Referendum Council held dialogues with Indigenous peoples in twelve different regions regarding constitutional reform, in order to achieve the consensus of the Aboriginal and Torres Strait Islander populations on any proposed reforms.[4]

Case Law

- As of yet, there has been no case in Australia upholding the right to consent in the context of mining on traditional lands.

State Practice

- Australian state practice is not as progressive as one might expect despite the domestic legislation. In the case of consultations regarding the Jabiluka mine, proposed to be built on the territory of the Mirarr people, the Northern Land Council failed to genuinely implement the consent provisions found in the ALRA. The council "usurped the resources, capacity and representation of the Traditional Owners."[5]

BELIZE

Legal Framework

- Belize is not a signatory to ILO 169 and the Constitution of Belize does not explicitly provide protection for its Indigenous peoples.

Case Law

- In the 2004 case of *Maya Indigenous Community of the Toledo District v. Belize*, the Inter-American Commission on Human Rights applied the American Declaration on the Rights and Duties of Man to hold that consent is generally applicable "to decisions by the State that will have an impact upon Indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of Indigenous territories."[6]
- In the 2014 case of *Sarstoon Temash Institute for Indigenous Management v. Belize*, the Supreme Court of Belize "made express references to free, prior and informed consent, including to article 32 of the Declaration, ultimately finding that the failure to obtain consent prior to granting [natural resource] concessions and permissions was unlawful."[7]

State Practice

- Belize's state practice with regard to its Indigenous peoples is not in keeping with its progressive case law. In 2008, the UN Human Rights Committee issued an early warning and urgent action procedure regarding Belize, asking the country to respond to reports of privatization and leasing of traditional land and granting of concessions on traditional land without first consulting or obtaining the consent of the Maya people.[8]

BOLIVIA

Legal Framework

- Bolivia was the first country to incorporate the UN Declaration into its domestic law.[9] In November 2007, Bolivia entrenched all 46 articles of the Declaration into domestic law through Law #3760.[10]
- In addition, recent reforms made to Bolivia's Constitution appear to directly respond to the UN Declaration. For instance, the Constitution created a new form of local government called the Indigenous First Peoples Peasant Autonomy (Autonomía Indígena Originaria Campesina, or AIOC), that implements the Article 4 right to self-government.[11] However, due to significant bureaucratic obstacles, only 3 of 34 communities that are converting to autonomous entities are established as an AIOC.[12]
- Bolivia is also a signatory to ILO 169 and is therefore bound by the consent provisions in that convention.

Case Law

- In a 2010 decision, Bolivia's constitutional court relied on ILO 169, the UN Declaration and the *Saramaka* case to affirm Indigenous peoples' right to prior consultation and to consent in certain circumstances. The Assembly of Guaraní Peoples Itika Guasu contested the fact that the Roads Services Department had signed a contract with the corporation Petrosur without their consultation, authorizing the firm to use a work camp on their lands. The court affirmed that the Guaraní had "the power to veto the project [...] not only in cases of forced relocation or the storage or disposal of hazardous materials, but also when a large-scale development or investment project would have a major impact within their territory."[13]

State Practice

- Unfortunately, the State has not taken "meaningful" steps to implement the requirements in the 2010 ruling concerning the Guaraní peoples.[14]

BRAZIL

Legal Framework

- Brazil is a signatory to ILO 169 and is therefore bound by the consent provisions in that convention.

Case Law and Case Studies

- A 2018 decision by the Federal Court in the Amazonas state of Brazil held that the state must implement the consent standard when contemplating any law or development affecting the Waimiri Atroari people, as well as any military activities taking place on their lands.[15]
- Professor Lightfoot describes an example of an Indigenous-developed consent protocol in Brazil. The Juruna people in the Para state of Brazil began developing their own protocol in 2014 and recently implemented their finished protocol in the face of the Belo Sun mining project. The protocol is modeled after a participatory environmental impact assessment. It requires a two-stage consultation process, which involves developing a consultation plan in partnership with the Brazilian government. A few best practices emerge:
  - The protocol is founded on the collective participation and decision making of all members of the Juruna society. From the very beginning, their protocol development meetings involved all sectors of their society.[16] The protocol stipulates that neither villages nor villagers can be consulted individually and that all meetings must involve "leaders of all the villages, including women, men, the elders and children."[17]
  - The protocol provides that where there is a lack of consensus, decisions will be made by vote, with all three villages having an equal vote despite their population disparity, and that chiefs and community leaders are not empowered to make decisions individually.[18] In this regard, Lightfoot notes that "the protocol has served an important role in encouraging political unity as it discourages unilateral decision-making."[19]
  - The protocol requires that consultations occur *prior* to any activity or decision; "the result of the consultation must serve to influence the decision and not just legitimize it."[20]
  - The protocol is premised on a few key guiding principles: respect, transparency, good faith and honesty, and freedom from physical or moral pressure. These principles are converted into rules contained in the second part. Some of the rules are: "respect for the timing of meetings and traditional activities, obligation to publish all meeting records, need to have some meetings devoted to information sharing only, and the need for independent technical advice."[21]
  - The protocol lays out the Brazilian constitutional and the international human rights context for the right to consultation and consent. Lightfoot notes that voluntariness is an important rule; the Juruna "do not recognize an obligation to participate in any consultation that only serves government interests."[22]
  - Lastly, the protocol "demands that consultations be conducted in accordance with Juruna rules, customs, traditions and representative institutions and explains precisely what each of those mean."[23]

State Practice

- In a 2003 report, the UN Human Rights Committee urged Brazil to ensure that Indigenous peoples are not evicted from their lands. The Committee also urged Brazil to seek the consent of Indigenous peoples prior to conducting natural resource extraction projects on their lands and prior to adopting public policy that affects them.[24]

COLOMBIA

Legal Framework

- Colombia is a signatory to ILO 169 and is therefore bound by the consent provisions in that convention.
- In 1991, Colombia adopted a new constitution which extended special protection to Indigenous peoples and minorities.[25]
- Colombia's Constitution recognizes and safeguards Indigenous rights and it provides effective legal mechanisms for their protection. If the state violates Indigenous peoples' constitutional rights, individuals can apply for judicial review through a mechanism called the tutela. This mechanism is accessible and affordable and doesn't require a lawyer.[26] The constitutional court's jurisprudence on tutela appeals has interpreted rights guarantees in the Constitution in a progressive fashion.[27]
- Further, Colombia has a Constitutional Block doctrine, which holds that international human rights instruments ratified by Colombia are automatically incorporated into domestic law with constitutional-level status, meaning that in the event of conflict of laws, international human rights standards prevail over other domestic laws.[28]

Case Law and Case Studies

- Colombia's constitutional court has issued multiple judgments interpreting the UN Declaration and upholding the right to consent. A series of cases in 2011 and 2012 stated that the UN Declaration had direct applicability in Colombian law due to the Constitutional Block doctrine and that the principle of proportionality required consent in certain circumstances. The court held that consent may be required in the case of large-scale development projects and in any context threatening a negative impact on Indigenous lands, the greater the impact asserting a greater right to consent.[29] In addition, the court has recognized three specific situations requiring consent: the forced removal of Indigenous peoples from their lands; when toxic waste is stored on Indigenous lands; and when state action threatens the very existence of a group.[30]
- Professor Lightfoot describes a case study concerning one of the first formal Indigenous-developed consent protocols in Colombia. In 2012, the Embera Chamí people developed a framework to govern mining in their territory. The framework includes a consent protocol. The framework was recognised and affirmed by Colombia's constitutional court in 2016 and has successfully stopped all mining from taking place in their territory since it was finalized. Lightfoot notes that the framework "is grounded in their constitutional rights, international human rights law, the Colombian constitutional court and Indigenous laws."[31] Some of the best practices in the Embera Chamí framework include:
    - the protocol requires that the consent process be grounded in the Embera Chamí's own processes and norms;
    - there is a section grounding the right to consent in the Colombian constitutional, national and international human rights contexts;

  - the protocol explicitly lays out procedures and identifies the participants and it outlines conditions that can make the process invalid, further stipulating that if any of the guiding principles are not upheld, the entire process will become invalid.[32]
- In a 2011 decision, the Colombian constitutional court declared reforms to the Mining Code unconstitutional due to a failure by the State to engage in prior consultation with Indigenous peoples about the reforms.[33]

State Practice

- The UN Human Rights Committee has noted that Colombia's state practice is not always in line with its progressive jurisprudence. In a 2010 report, the Committee noted that "despite legal recognition of their right to collective land ownership, in practice [Indigenous and Afro-Colombian] groups face enormous obstacles in exercising control over their lands and territories."[34]

ECUADOR

Legal Framework

- Ecuador is a signatory to ILO 169 and therefore bound by the consent provisions in that convention.
- Ecuador's Constitution recognizes Indigenous peoples as distinct peoples and guarantees them collective rights "in conformity with the Constitution and human rights agreements, conventions, declarations and other international instruments."[35] Article 57 contains some very strong protections.
- Notably, article 57⑦ guarantees the right "To *free prior informed consultation* [...] on the plans and programs for prospecting, producing and marketing non-renewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them [...] If *consent* of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken."[36]
- Further, the commentary following Article 57 expressly forbids all forms of extractive activities on ancestral lands occupied by Indigenous peoples living in voluntary isolation. The commentary provides that "The territories of the peoples living in voluntary isolation are an irreducible and intangible ancestral possession and *all forms of extractive activities shall be forbidden there*. The State shall adopt measures to guarantee their lives, enforce respect for self-determination and the will to remain in isolation and to ensure observance of their rights. The violation of these rights shall constitute a crime of ethnocide, which shall be classified as such by law."[37]

Case Law

- In the 2012 case *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Inter-American Court of Human Rights held that Ecuador should have sought the Sarayaku peoples' consent prior to granting concessions for exploration of hydrocarbons and crude oil on their traditional territories. The court relied on the *Saramaka* judgment's Article 21 property right interpretation to hold that the State was required to consult with the Sarayaku people in good faith, with the aim of achieving consent. The court ordered the State to involve the Sarayaku in any future decision-making regarding projects that might impact their traditional territory.[38] The Court emphasized that the State must be the entity to consult and seek consent, and that it was improper for the State to delegate that consultation obligation to the extraction company.[39]
- It is worth noting that, in addition to upholding the consent requirement set in the *Saramaka* case, the court in *Sarayaku* also advanced a progressive view of consultation. The court held that "the State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community."[40] Scholars have argued that the court is recognizing a right to say "no" even within the confines of consultation.[41]

State Practice

- Despite the strong protections for Indigenous peoples in Ecuador's case law and constitution, the UN Human Rights Committee has noted that Ecuador's state practice is not always consistent. In a 2004 report, the Committee noted that "although the Constitution recognizes the rights of indigenous communities to hold property communally and to be consulted before natural resources are exploited in community territories, these rights have regretfully not been fully implemented in practice." The Committee went on to note that concessions for resource extraction had been granted to international companies without the full consent of the concerned communities.[42]

GUATEMALA

Legal Framework

- Guatemala is a signatory to ILO 169 and therefore bound by the consent provisions in that convention.
- Article 65 of Guatemala's 2002 municipal code provides that when the rights and interests of Indigenous communities are particularly affected, municipal councils are empowered to carry out consultations. This provision has been relied upon by Indigenous peoples to exercise their right to withhold consent.[43]

Case Law and Case Studies

- In 2015, the Sipakapa and community organized a community consultation pursuant to the Municipal Code in order to discuss the Marlin mine. The community ultimately voted to withhold their consent for the project. In 2007, the Guatemalan Ministry of Mines challenged the constitutionality of the community vote. Guatemala's constitutional court upheld the villagers' right to vote, holding that the consultation process is legal.[44]

State Practice

- In a 2012 report, the UN Human Rights Committee noted that Guatemala had made positive constitutional reforms in 2001 to entrench respect for Indigenous rights. Yet the Committee also noted that Indigenous peoples are not effectively consulted by the Guatemalan state during decision–making processes that affect their rights, including prior to the granting of mining and other natural resource exploitation.[45]

KENYA

Legal Framework

- Kenya has signed and ratified the African Charter on Human and Peoples' Rights, also known as the Banjul Charter.

Case Law

- In the 2017 judgement *African Commission on Human and Peoples' Rights v. Kenya*, the African Court on Human and Peoples' Rights issued a decision upholding the Ogiek Indigenous peoples' right to consent. The case involved the Kenyan state's repeated attempted eviction of the Ogiek peoples from their ancestral lands in the Mau forest. The court held that the Ogiek have a right to communally own their ancestral lands and that forcible removal without consent was a breach of their rights under the African Charter on Human and Peoples' Rights. The court drew on the UN Declaration to advance this interpretation of the Charter. Further, the Court ordered the state to implement the right to consent in the case of any development on the traditional lands of the Ogiek going forward.[46]
- In the 2010 case *Centre for Minority Rights Development v. Kenya*, the African Commission on Human and Peoples' Rights issued a strong statement on the state's duty to obtain consent. The Commission considered the Endorois people's claim that they were forcibly removed from their ancestral lands without consultation, consent or compensation. The Commission relied on the African Charter on Human and Peoples' Rights as well as the UN Declaration and held that in the case of "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their consent, according to their customs and traditions."[47] The Commission ultimately found that the State had failed to obtain the Endorois people's consent prior to evicting them from their lands. Despite these strong statements, the Commission's exact position on consent is not exactly clear. For instance, although the Commission upheld the right to consent based on the Article 14 right to property, the Commission also noted that the state may encroach on this right if it is in the public interest. In different paragraphs, the Commission refers to both the duty to "obtain" consent and the duty to merely "seek" consent.[48] However, a notable element of the case is that the Commission applied the the three safeguards of participation, benefit-sharing and impact assessment established in the *Saramaka* case.[49]

State Practice

- The International Legal Association noted in a 2020 report that the Kenyan state has yet to implement the requirements in the *Endorois* case, and as such the Endorois have had no actual justice despite the positive judgment.[50]

NICARAGUA

Legal Framework

- Nicaragua is a signatory to ILO 169 and therefore bound by the consent provisions in that convention.

Case Law

- The 2001 decision of the Inter-American Court of Human Rights in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* was the first case in which the Court interpreted Article 21 of the American Convention on Human Rights as conveying a right to own communal property.[51] The decision holds that in order for a community to claim communal ownership of historical territory, they need not show that the State has granted title to the lands, but only that their possession is based in their own customary law.[52] This collective property right interpretation became the basis for the court upholding the right to consent in the 2007 Suriname case.

State Practice

- The UN Human Rights Committee has noted concerns about state practice in Nicaragua regarding Indigenous people. In a 2008 report, the Committee noted the "absence of a consultation process to secure free, informed prior consent to the exploitation of natural resources on indigenous communities' lands."[53] The Committee also commented that the State had still not granted the Awas Tingni community title to their lands, more than six years after the handing down of the decision requiring them to do so. In addition, the Committee noted that the region continued to be prey to illegal exploitation activity.[54]

Nordic Countries: SAAMI PEOPLES in Finland, Sweden and Norway

Legal Framework

- In 2016, after more than a decade of work, the governments of Norway, Finland and Sweden adopted what is known as the Nordic Saami Convention, a human rights instrument recognizing and affirming the rights of the Indigenous Saami peoples whose traditional lands span all three countries.[55]
- The Convention is significant in many respects. It affirms the Saami peoples' right to self-determination and their right to dispose of natural resources (Article 3), their right to continue to use their traditional lands (Article 34), their right to exercise self-determination and be effectively represented by their own Parliaments (Article 14).
- Article 16 is significant for the question of consent. It establishes the Saami Parliaments' right to negotiate with the state on "matters of major importance to the Saami in order to have "a real influence over the proceedings and the result." Further, "the states shall not adopt or permit measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society, unless *consented to* by the Saami parliament concerned."[56]
- Article 36 is also relevant for consent. It establishes that permits for mineral resource prospecting or extraction will not be granted if "the activity would make it impossible or substantially more difficult for the Saami to continue to utilize the areas concerned, and this utilization is essential to the Saami culture, unless so consented by the Saami parliament and the affected Saami."[57] Scholars have noted that this threshold for triggering consent seems to be higher than in the jurisprudence of the Inter-American Court of Human Rights, which requires consent for projects having a "significant impact."[58]

Case Law

- While there is as yet no domestic decision from any of the Nordic countries considering the right to consent, a very recent decision by the Swedish Supreme Court suggests that the court is willing to accept international human rights instruments as customary international law and apply them in Sweden. The Court held that on their lands, the Indigenous Girjas Sameby peoples and not the state have the exclusive right to grant approval for reindeer-herding, hunting and fishing.[59] In a statement that could be significant for the future application of the right to consent, the Court held that certain international rights instruments are applicable in Sweden as customary international law. Specifically, the court held that the underlying principles of ILO Convention 169, Article 26 of the UN Declaration recognizing the right to traditional lands, territories and resources and Article 27 of the International Covenant on Civil and Political Rights, could be considered customary international law and apply in Sweden.[60]

State Practice

- Despite the apparent progressiveness of the Saami Parliament structure, the Nordic states do not always engage with the Saami Parliaments as they should. The Expert Mechanism on the Rights of Indigenous Peoples has noted that the Supreme Court of Norway has previously falsely claimed that the State obtained the consent of the Saami Parliament in order to validate its actions, when in fact consent was not obtained.[61]

PERU

Legal Framework

- Peru is a signatory to ILO 169 and is therefore bound by the consent provisions of that convention.
- In 2011, Peru adopted Law 29785, the Law of the Right of Indigenous or Original Peoples to Previous Consultation. Article 1 affirms that the law is to be interpreted in conformity with ILO 169. Article 3 establishes that in the context of the State considering legislative or administrative acts that will directly affect Indigenous peoples, consultation with the purpose of reaching consent is required.[62]

Case Law and Case Studies

- Peru's constitutional court, while indicating that the UN Declaration is not technically binding in Peru, has relied on the UN Declaration in order to recognize the rights of Indigenous peoples.[63]
- A 2009 decision by the Human Rights Committee in *Angela Poma Poma v. Peru* concerned the Peruvian state's actions over a number of decades that led to the drying out of pastureland. Indigenous families descended from the Aymara people depended on this land for their traditional raising of livestock. In holding that the State had breached its obligations at both domestic and international law, the committee stated that "effective" participation in decision-making "requires not mere consultation but the free, prior and informed consent of the members of the community."[64]
- Professor Lightfoot describes a case study of the Wampis people in the northwest of the Peruvian Amazon, who in 2015 declared their own Autonomous Territorial Government and issued a governing statute. The statute requires consent for projects initiated by people outside of the community, and Lightfoot notes that the community is in the process of developing a consent protocol which will require decision-making at the Nation level, as opposed to the individual community level. The Protocol "will establish pre-conditions for consultations, the basis for negotiations, and the procedures which include long deliberations in which everyone who wants to can contribute to the discussion so that a consensus can be reached."[65] Other key components in the protocol are the translation of documents into the Wamp language and a requirement that information be provided sufficiently in advance of any decision-making.

State Practice

- The Peruvian state has not entirely altered its practice to be in line with these court orders. The International Law Association noted in a 2020 report that the state continues to dispose of Indigenous lands of the Awajún and Wampis peoples to promote gold mining, without regard for their rights or the protection of their culture.[66]

PHILIPPINES

Legal Framework

- In 1997, the Philippines implemented the Indigenous Peoples Rights Act (IPRA). This domestic statute was modelled on the UN Declaration, at that time just a draft, and requires consent for mining projects in Indigenous territories.[67]
- IPRA s.3(g) states that "Free and Prior Informed Consent – as used in this Act shall mean the consensus of all members of the ICCs/IPS [Indigenous Cultural Communities/ Indigenous Peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community."[68]

Case Law

- As of yet, there are no judicial decisions from the Philippines upholding the right to consent in the context of mining.

State Practice

- Despite the apparent strength of the IPRA and its consent requirement, the state's actions and implementation of consent standards have been the subject of international criticism.[69] Scholars have noted the documentation of "numerous violations of customary laws and FPIC [...] in relation to the selection of community representatives and decision–making processes to obtain consent for mining activities" as well as harassment of Indigenous leaders by the military.[70]

SURINAME

Legal Framework

- Suriname is not a signatory to ILO 169 and the Constitution of Suriname does not explicitly provide protection for its Indigenous peoples.

Case Law

- Suriname is the home of the landmark 2007 *Saramaka People v. Suriname* case which first held that States must obtain the consent of Indigenous and tribal peoples when contemplating large-scale development projects on their lands.
- The context for the case was the state granting logging and mining concessions on the ancestral lands of the Saramaka people. The Inter-American Court of Human Rights referred to article 32 of the UN Declaration as well as Article 21 of the American Convention on Human Rights. The court interpreted the Article 21 right to property as conveying the right to own communal property in the form of ancestral lands, as well as the right to own the natural resources found within these lands, but only those "necessary for the survival of Indigenous peoples."[71] However, the court went on to hold that the exploitation by third parties of other resources might impact resources necessary for survival. Consequently, the court held that when the State contemplated authorizing the exploitation of natural resources on Indigenous ancestral lands, it would be required to consult with the objective of reaching agreement. The Court distinguished between small-scale and large-scale development projects and held that large-scale development projects that could affect the integrity of Indigenous peoples' territories, the State was to obtain the consent of the Indigenous peoples concerned.[72] Regardless of whether the project be small or large scale, the court established three "safeguards" to protect the Indigenous peoples' "survival as a tribal people." First, the Indigenous peoples must be afforded effective participation in the decision-making process, in conformity with their customs and traditions; second, the state must enter into benefit-sharing agreements with the Indigenous peoples; and third, the State must perform prior environmental and social impact assessments.[73]

State Practice

- Suriname's state practice does not appear to be in line with the *Saramaka* ruling. In a 2015 report, the UN Committee on the Elimination of Racial Discrimination noted that while Suriname should be commended for developing a consent protocol, the Committee was "concerned that authorizations for mining and logging concessions, activities that pose substantial threats of irreparable harm to Indigenous and tribal peoples, continue being granted to private companies without the consent of the peoples concerned and without any prior impact assessment."[74] The Committee urged Suriname to comply with the obligations imposed by the court in the *Saramaka* ruling, including especially the obligation to demark and recognize title to Indigenous territories.[75]

Other Notable Cases and Instances of Domestic Legislation

- A 2003 decision by the South African constitutional court recognized and affirmed Indigenous peoples' ownership of natural resources, including subsoil resources, "precluding any right of the state to issue concessions on Indigenous lands, and recognizing the need for Indigenous peoples' FPIC."[76]
- A 2013 decision by the Supreme Court of India in the Niyamgiri case set a national precedent by "affirming the rights of forest-dwelling Indigenous peoples, particularly their right to give or withhold consent to the bauxite mining activities of Vedanta/Sterlite."[77]
- Mexico City's Constitution, adopted in 2017, entrenches the UN Declaration. Article 57 of the Constitution states that the UN Declaration applies within the bounds of Mexico City.[78]
- The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has stated that "a general consultation mechanism aimed at obtaining free, prior and informed consent has recently been established by Costa Rica."[79]

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