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October 22, 2018

VIA EMAIL

British Columbia Treaty Commission
700-1111 Melville St.
Vancouver, BC V6E 3V6

Attention: Chief Commissioner

RE: BC Treaty Process and the Realization of Free, Prior and Informed Consent

Dear Chief Commissioner and Commissioners:

You requested our opinion regarding whether the BC treaty negotiations process ("BC Treaty Process") is consistent with free, prior and informed consent ("FPIC"), as described in the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") and conceptualized in Canadian law.

In our opinion, treaties negotiated and concluded through the BC Treaty Process are entirely consistent with FPIC, as properly conceptualized in a pluralistic and democratic society consistent with Canadian constitutional law. Indeed, the BC Treaty Process provides a practical model for operationalizing FPIC and "breathing life" into Indigenous rights underlying UNDRIP.

We set out below our analysis of these issues.

Overview of the BC Treaty Process

The BC Treaty Process originated from the British Columbia Treaty Commission Agreement (the "BCTCA"), entered into among Canada, British Columbia and the First Nations Summit (which itself was represented by a three-member task force). The BCTCA was based on recommendations made in 1991 by the tripartite British Columbia Claims Task Force (the "Task Force"), with terms of reference endorsed similarly by Canada, British Columbia and the First Nations Summit (the "Terms of Reference").

The Terms of Reference asked the Task Force to recommend how British Columbia, Canada and the First Nations Summit could begin negotiations regarding Aboriginal title and rights in BC and what the negotiations should include. The Task Force unanimously recommended that an open, fair and voluntary process be adopted that follows a six-stage process.[1]

[1] See the Report of the British Columbia Claims Task Force, June 28, 1991.

The BCTCA led to the passage of provincial[2] and federal legislation.[3] This legislation set out the statutory framework for the BC Treaty Process, which in large part follows the recommendations from the Task Force. One result of the legislative framework was to create the BC Treaty Commission (the "BCTC").

The purpose of the BCTC is to be an independent, arms-length entity that acts as a facilitator for negotiations in the BC Treaty Process.[4] Among other tasks, the BCTC is responsible for assessing a First Nation's readiness to negotiate in the BC Treaty Process, for ensuring ongoing negotiation mandates and for allocating negotiation funds.[5]

The principles of transparency, voluntary participation and independence are critical to the BC Treaty Process:

- The BC Treaty Process is transparent. The mechanism for allocating funding, the criteria and policies applied to all parties at each stage and the management of the BCTC are all transparently published and publicly accessible. The requirement that the group's mandate be confirmed before progressing to next stages in the BC Treaty Process also provides transparency into the negotiation table for the broader community of the First Nation.

- The BC Treaty Process is voluntary. First Nations determine when they are ready and willing to enter the process by submitting a Statement of Intent. While the BCTC assesses the First Nation's readiness, it is completely in the First Nation's hands to decide how it wants to organize itself, how it wants to be represented in negotiations and the positions that it wants to advance. No final agreement can be entered into without the ratification of the First Nation as a community in a way to be determined by the First Nation.

- The BCTC is independent. The BCTC is not a party to negotiations and does not negotiate treaties. The BCTC does not take a position or represent any parties to the negotiations. Its four commissioners include representatives from the three principals, British Columbia, Canada and First Nations. A Chief Commissioner is also appointed by the three principals. The BCTC recognizes the nation-to-nation dynamic among First Nations, British Columbia and Canada. This includes recognition of each negotiating party's status as an autonomous nation.

As discussed in our opinion to you dated April 18, 2017, treaties represent a constitutionally-protected sharing of sovereignty among the signatories to the treaty. The BC Treaty Process is intended to facilitate tripartite, nation-to-nation negotiations of a constitutionally-protected agreement that would provide a comprehensive model for shared governance, stability, certainty and reconciliation.

We note that the role of treaties and the BCTC was recently re-affirmed in an instruction letter to the Chief Commissioner signed by representatives of the First Nations Summit, British Columbia and

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[2] *Treaty Commission Act*, R.S.B.C. 1996, c. 461 ["TCA"]
[3] *British Columbia Treaty Commission Act*, S.C. 1995, c. 45
[4] BCTCA s. 3.1, TCA s. 5(1)
[5] See generally, *Spookw v. Gitxsan Treaty Society*, 2017 BCCA 16 ["*Spookw*"]

Canada that confirmed: "[t]hrough its role in facilitating treaty negotiations, the BCTC will support the implementation of the UN Declaration, the TRC's [Truth and Reconciliation Commission of Canada] 94 Calls to Action, the federal Principles [Respecting the Government of Canada's Relationship With Indigenous Peoples], and the recognition of First Nations rights and title."[6]

Origins of UNDRIP and FPIC

The genesis of UNDRIP is traced to the efforts of the UN Working Group on Indigenous Populations (the "Working Group"). The Working Group was established in 1982 as part of the Sub-Commission on the Promotion and Protection of Human Rights. The Working Group's original mandate was to review developments concerning Indigenous peoples and work towards the development of corresponding international standards.[7]

In 1985, the Working Group decided to draft a declaration on the rights of Indigenous peoples for adoption by the UN General Assembly. The initial draft was developed over an eight-year period in consultation with Indigenous representatives, government delegations and various experts (the "Draft Declaration"), and was submitted in 1993 to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which approved it the following year.[8]

On its approval, the Draft Declaration was sent to the Commission on Human Rights, which established a process allowing Indigenous peoples' organizations to participate actively in the drafting work. By the mid-1990s, over 700 people regularly attended the sessions of the Working Group, including observers for governments, Indigenous peoples and non-governmental organizations.[9]

The free, prior and informed consent language that ultimately appears in UNDRIP did not appear in the Draft Declaration (it used "free and informed consent"). As the Draft Declaration continued to evolve, the concept of free and informed consent was broadened to "free, *prior* and informed consent".[10] In 2006, the Draft Declaration was accepted by the United Nations Human Rights Council and, in 2007, UNDRIP was adopted by a majority of the United Nations General Assembly.[11]

Position of Canada

Canada initially opposed the adoption of UNDRIP, along with Australia, New Zealand and the United States. Since 2007, each of Australia,[12] New Zealand,[13] and the United States[14] reversed their

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[6] Instruction letter to the Chief Commissioner of the BCTC from the First Nations Summit, British Columbia and Canada dated November 23, 2017.
[7] S. James Anaya, Indigenous Peoples in International Law, 2d ed (Oxford: Oxford University Press, 2004) at 63.
[8] For the text of the draft declaration, see Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1994/45, annex, dated August 26, 1994, online: http://www.un-documents.net/c4s29445.htm
[9] http://www.ohchr.org/documents/publications/factsheet9rev.1en.pdf
[10] Comparison of Articles 10, 12, 20, 27 and 30 of the draft Declaration to Articles 10, 19, 28, 29 and 32 of the Declaration.
[11] The whole of the Declaration can be found at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
[12] On April 3, 2009, the Australian government formally endorsed the Declaration, stating, "While there is continuing international debate about the meaning of '[FPIC]', we will consider any future interpretations in

positions and announced that they would, with certain qualifications, support UNDRIP. On November 12, 2010, Canada announced its qualified endorsement of UNDRIP:

> Today, Canada joins other countries in supporting the United Nations Declaration on the Rights of Indigenous Peoples. In doing so, Canada reaffirms its commitment to promoting and protecting the rights of Indigenous peoples at home and abroad.[15]

This support was, however, qualified by references to UNDRIP being an "aspirational" and "non-legally-binding" document.[16] Canada subsequently fully endorsed UNDRIP on May 8, 2016 following the election of the current federal government, although its endorsement has continued to be qualified with reference to implementing UNDRIP in accordance with the Canadian Constitution. In the *Principles Respecting the Government of Canada's Relationship With Indigenous Peoples*, Canada has adopted the language of FPIC as an objective rather than an outcome:

> ...the Government recognizes the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent.[17] [Emphasis added]

On May 30, 2018, Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* (the "UNDRIP Act"), entered second reading in the Senate. The UNDRIP Act is discussed further below. In short, it "affirms" UNDRIP as "a universal international human rights instrument with application in Canadian law". Further, it requires Canada to "take all measures necessary to ensure that the laws of Canada are consistent with [UNDRIP]".

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accordance with Article 46". Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, online: http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

[13] On April 19, 2010, Pita Sharples, Minister of Māori Affairs, announced New Zealand's support of the declaration. Mr. Sharples was clear that New Zealand viewed the declaration as an aspirational document and that rights and restitution for traditionally held land and as well as Indigenous involvement in decisions making would continue to be governed by its own distinct approach. See New Zealand Statement Before 9th Session of the United Nations Permanent Forum on Indigenous Issues, oniine: http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2014/0-23-Sept-2014.php .

[14] The United States endorsed the Declaration, but rejected FPIC as requiring consent. A White House statement stated that, "the United States recognizes the significance of the Declaration's provisions on [FPIC], which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken". Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples – Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples, online: http://www.state.gov/documents/organization/184099.pdf

[15] Aboriginal Affairs and Northern Development Canada, Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, November, 12, 2010, online: www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142

[16] *Ibid.*

[17] See *Principles respecting the Government of Canada's relationship with Indigenous peoples*, online: http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html.

Although a private members bill, Bill C-262 has the support of the government and is expected to become law.[18]

Position of British Columbia

British Columbia has committed to adopting UNDRIP and to ensuring that its policies, programs and legislation conforms with UNDRIP, including the BC Treaty Process.[19] British Columbia does not appear to interpret UNDRIP's requirement for FPIC as an absolute (e.g. a veto), but as a right for Indigenous peoples to participate in decision making that affects their land and resources, and a requirement that government cooperate and consult in good faith with the aim of securing FPIC. This approach to FPIC as an objective rather than an outcome is similar to the approach adopted by Canada.

In May 2018, British Columbia issued the *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*.[20] Principle 6, which addresses FPIC, states that British Columbia "recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior and informed consent when B.C. proposes to take actions which impact them and their rights, including their lands, territories and resources." This engagement goes beyond British Columbia's legal duty to consult and recognizes Indigenous peoples' right to participate in decision making. It also states that British Columbia "will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together."

Judicial Interpretation of FPIC

In Canada, the concept of FPIC, as it appears in UNDRIP, has not been considered by the courts. Even where UNDRIP has been expressly raised in argument, Canadian courts have been reluctant to

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[18] As of the date of this opinion, Bill C-262 has not received royal assent.

[19] The "2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus" (http://bcndpcaucus.ca/wp-content/uploads/sites/5/2017/05/BC-Green-BC-NDP-Agreement_vf-May-29th-2017.pdf) states that "a foundational piece of this relationship is that both caucuses support the adoption of UNDRIP, the Truth and Reconciliation Commission calls-to-action and the Tsilhqot'in Supreme Court decision. We will ensure the new government reviews policies, programs and legislation to determine how to bring the principles of the Declaration into action in BC."

See also: Mandate Letter to the Honourable Scott Fraser, Minister of Indigenous Relations and Reconciliation, dated July 18, 2017, which states, *inter alia,* the following priorities: (i) "work collaboratively and respectfully with First Nations to establish a clear, cross-government vision of reconciliation to guide the adoption of [UNDRIP], the Truth and Reconciliation Commission Calls to Action, and the *Tsilhqot'in* Supreme Court decision"; and (ii) In partnership with First Nations, transform the treaty process so it respects case law and UNDRIP. (https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/fraser-mandate.pdf)

[20] https://news.gov.bc.ca/files/6118-Reconciliation_Ten_Principles_Final_Draft.pdf?platform=hootsuite. See also News Release, Office of the Premier, May 22, 2018 "*Draft principles guide B.C. Public Service on relationships with Indigenous peoples*". Accessed: https://news.gov.bc.ca/releases/2018PREM0033-000978

consider it.[21] In a handful of cases, the courts have discussed UNDRIP in more detail.[22] However, the conclusions on the applicability of UNDRIP in the Canadian legal context are generally the same; courts are "unable to accept the reliance placed by the petitioners upon the Declaration. The Declaration has not been endorsed as having legal effect by either the Federal Government or the Courts. Canada is a signatory to UNDRIP, but has not ratified the document."[23]

More recently, in *Ross River Dena Council v. Canada*[24] the Supreme Court of Yukon noted that the parties agreed that UNDRIP, having been endorsed by Canada, can be used "as an aid to the interpretation of domestic law", but expressed reservations as to whether UNDRIP can be used to interpret Canada's Constitution.[25] The Court further canvassed the evidence to date about Canada's efforts to implement UNDRIP, including statements by Cabinet ministers suggesting an intent to implement UNDRIP, and concluded that even though Canada had not yet implemented UNDRIP, Canada had not refused to implement UNDRIP in a manner inconsistent with the duty of honour of the Crown.[26]

To date, no Canadian cases have treated UNDRIP as imposing enforceable obligations, particularly as it concerns FPIC.[27] It remains to be seen what effect, if any, the anticipated passage of Bill C-262, the UNDRIP Act, will have on this.

Indigenous Consent under Section 35

In 1982, Canada constitutionally protected the rights of First Nations, Inuit and Métis peoples through the enactment of section 35 of the *Constitution Act, 1982* ("Section 35"), which reads: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

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[21] See *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, where the SCC did not refer to UNDRIP in its decision despite the inclusion of UNDRIP in counsels' arguments (e.g., the Appellant's factum at para 191), online: www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34986/FM010_Appellant_Roger-William.pdf

[22] See *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445. http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/60712/1/document.doc ; See also: *Manitoba Metis Federation Inc. v. The Government of Manitoba et al.*, 2018 MBQB 131, where the Court noted that "there is no question that [UNDRIP] creates a strong aspirational impetus which should guide in the formulation and development of the strategy for reconciliation. Whatever that strategy may be, [UNDRIP does not] create specific substantive or legal obligations respecting discretionary questions regarding the expenditure of public funds" (at para. 85).

[23] *Snuneymuxw First Nation v Board of Education – School District #68*, 2014 BCSC 1173 at para 59.

[24] 2017 YKSC 59

[25] *Ross River Dena,* at paras. 303-304.

[26] *Ross River Dena,* at paras. 307-311.

[27] We note that FPIC and UNDRIP have been considered by judicial bodies outside of Canada. While most domestics courts have been unwilling to ascribe legally enforceable obligations to FPIC and UNDRIP, there are examples of international human rights courts and other judicial bodies applying these concepts as substantive legal obligations. See for example the decision of the Inter-American Court on Human Rights in *Saramaka People v. Suriname* (November 28, 2007) and the decision of the African Commission on Human and Peoples' Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (November 25, 2009).

While earlier case law had already begun the task of delineating Aboriginal and treaty rights in Canada, Canadian courts, in particular the Supreme Court of Canada (the "SCC"), were left with the significant task of interpreting Section 35, including answering the following questions:

- What are the "existing aboriginal and treaty" rights?
- How are these rights proven?
- Who can exercise these rights?
- Over what lands do these rights exist?
- How do these rights interact with the rights of other groups?
- Are these rights absolute?
- What obligations exist on the Crown before these rights are established?

The earliest Aboriginal rights litigation after the enactment of Section 35 was substantive in nature and frequently arose in the context of regulatory charges under various forms of natural resource legislation. For example, Aboriginal persons were charged with violating hunting or fishing regulations and pleaded substantive Aboriginal or treaty rights in defence. It was against this backdrop that the key principles of interpreting Section 35 were developed, including tests to determine the existence of an Aboriginal right,[28] and whether and how the Crown could infringe established Aboriginal or treaty rights.[29]

Despite the rapid development of the law under Section 35 in the years following 1982, establishing substantive Aboriginal rights has been difficult. Voluminous evidentiary records are needed to prove the central role of various practices, customs or traditions to Aboriginal communities several hundreds of years ago, or to meet the necessary tests to demonstrate Aboriginal title. Aboriginal rights claims have resulted in some of the lengthiest court trials in Canadian history.[30]

These challenges fostered a shift away from substantive rights litigation to procedural rights. Beginning with the *Haida Nation* decision in 2004,[31] the case law began to focus on the Crown's duty to consult, and where appropriate, to accommodate potential impacts to Aboriginal and treaty rights. The duty to consult provided Aboriginal communities with a seat at the table in respect of Crown decisions which may affect them, without the need to conclusively define the scope of the claimed Aboriginal or treaty right. Consultation held out greater promise for achieving reconciliation.

Procedural rights, however, have their limitations. Where the Crown has failed to fulfil its consultation obligations, government decisions are typically remitted back to the decision-maker to engage in further consultation. This remedy does not preclude decisions contrary to the wishes of Indigenous communities after the duty has been fulfilled. The duty to consult affords Indigenous communities a right only to a process, not an outcome.

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[28] *R v Van der Peet*, [1996] 2 S.C.R. 507.
[29] *R v Sparrow*, [1990] 1 S.C.R. 1075.
[30] See e.g., the 339 day trial from 2002-2007 in *Tsilqot'in Nation v. British Columbia,* 2007 BCSC 1700.
[31] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73

It appears that a shift back toward substantive rights litigation is underway. In 2014, the Tsilhqot'in Nation became the first Indigenous community in Canada to obtain a declaration of Aboriginal title over portions of its territory.[32] The same year, the SCC also released its decision in *Grassy Narrows First Nation v. Ontario (Natural Resources).*[33] The decision affirmed the provincial Crown's ability to "take up" lands under Treaty 3, but stated that this right is "not unconditional." The taking up of lands must respect the treaty rights of the Aboriginal peoples affected and cannot leave communities with no meaningful right to hunt, fish or trap, as laid out in the treaties themselves. Both decisions have led to a significant increase in litigation on the basis of substantive rights, coupled with many of the same issues of difficult evidentiary burdens, long and costly trials and uncertainty that were seen in the early case law.[34] The *Tsilhqot'in* decision itself followed 24 years of litigation. It took 12 years for the case to get to trial, which itself lasted 5 years, and was followed by 7 years of appellate proceedings.

Key Principles under Section 35

The international standard of FPIC is typically contrasted with the Crown's duty to consult under Section 35. While consultation has served a significant role in moving toward reconciliation, it is a right only to a process, not an outcome. It is not a veto.

As noted above, however, the Crown's duty to consult is only one aspect of the protections afforded to Aboriginal and treaty rights under Section 35. Canadian law already recognizes Indigenous consent rights and has an existing framework for determining how consent rights can be applied in a democratic and pluralistic country like Canada. While the law continues to develop, a number of principles are clear about the scope of such substantive protections:

- *Consent is the standard for infringement*: Consent is clearly the standard for infringing an Aboriginal title right. While consent has not been the language used by the courts in respect of other Aboriginal rights and treaty rights, it is our view that consent is also the effective standard for such rights, given the clear guidance of the SCC that any infringement of aboriginal or treaty rights must be justified by the government (see below).

- *Consent is not absolute:* If a government does not have the consent of an Aboriginal or treaty rights holder, then the government must be able to justify infringing the right before a proposed activity can take place, including ensuring that the government's actions have an appropriate objective, satisfying the government's fiduciary duties to the Aboriginal group in question and that the Crown's duty to consult has been met.[35] When an infringement cannot be justified, a lack of consent effectively amounts to a veto.

- *What is required will depend on the impact:* To date, there is limited case law about what is required to justify an infringement to an Aboriginal and treaty right. It is clear, however, that the nature and extent of the potential infringement will determine the threshold for the government to

[32] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
[33] 2014 SCC 48.
[34] See e.g. the series of litigation involving the West Moberly, Blueberry River, Haida and Cowichan First Nations.
[35] *Tsilhqot'in* at para. 91

justify the infringement. Some infringements may be minor and more easily justified, while some infringements could potentially never be justified.

- *The purpose of Section 35 is reconciliation:* The SCC has confirmed that the purpose of Section 35 is reconciliation, not only between the Crown and Aboriginal peoples, but also as between Aboriginal and non-Aboriginal peoples: "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*."[36] As a result, we have seen a consistent theme of cases from the SCC emphasizing the need for balance in the interpretation of Section 35.

Conceptualizing consent – what does FPIC mean?

As noted above, there has been limited judicial interpretation or analysis of the meaning of "free, prior and informed consent." Nevertheless, the Canadian experience with Section 35 provides guidance in understanding how FPIC may evolve. To take a specific example, Article 32(2) of UNDRIP reads as follows:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

As with Section 35, there are a number of complex questions underlying Article 32(2) that will need to be answered, including:

- What are the mechanisms for states to consult and cooperate in good faith to obtain FPIC?
- Who are the "representative institutions" of Indigenous peoples?
- Are all impacts the same or will minor interferences be subject to a different standard of consent than major interferences?
- What are the "lands or territories and other resources" of Indigenous peoples?
- How will overlaps or disputes between Indigenous groups over lands or territories be resolved?

Perhaps most importantly, Article 32(2) does not address the interaction between the rights of Indigenous peoples and non-Indigenous peoples, including the interests of the broader society. In this regard, we note that Article 46(2) of UNDRIP clearly contemplates that Indigenous rights will be subject to limitations:

> "The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of

[36] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para. 10.

securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[37]

The precise meaning and scope of FPIC will continue to evolve and will ultimately be informed by its implementation in Canada and elsewhere. Nevertheless, the following principles appear to be clear:

- The requirements of FPIC are contextual; what is required will depend of the impact of the government action on the relevant Indigenous group.
- FPIC has both procedural and substantive elements; in some circumstances, it will be sufficient to "seek" FPIC, in other circumstances, obtaining FPIC is required. This could mean a veto in certain circumstances.
- Even where FPIC is a substantive right, it is not an absolute right; FPIC is subject to limitations and to balancing against the rights and interests of others, including the broader public good.

In our view, many of these principles are similar to those that Canadian law has developed since the enactment of Section 35 in 1982 and are wholly consistent with the principles of and the approach taken in the BC Treaty Process.

Operationalizing consent -- recognizing rights through the BC Treaty Process

There is a significant distinction between recognizing the existence of a right and determining how that right is going to be exercised on the ground. One of the most significant illustrations of this difference is found in the *Tsilhqot'in* decision. Here, despite the historic declaration of Aboriginal title by the SCC in 2014, significant negotiations and agreements between British Columbia and the Tsilhqot'in Nation government have been required over several years to begin to operationalize an Indigenous consent right of the Tsilhqot'in Nation over its Aboriginal title lands.[38] As noted in our previous opinion to you, declarations by courts are inherently limited and the *Tsilhqot'in* decision did not establish a clear set of rules for how Aboriginal rights can be exercised, or how such rights will work with the powers and jurisdictions of other levels of government. Court declarations cannot possibly take the place of the "detail and sophistication of modern treaties"[39] achieved through negotiation.

Just as a court declaration does not set out means to meaningfully implement the exercise of an Aboriginal title right, UNDRIP does not establish a model for the necessary shared governance and decision-making under which the rights set out in UNDRIP, including in relation to FPIC, can be exercised into the future. As noted by the SCC in *Little Salmon/Carmacks*: "[i]nstead of *ad hoc* remedies to smooth the way to reconciliation, the modern treaties are designed to place Aboriginal and

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[37] The need to impose limits on the exercise of rights appears under other international human rights instruments. For instance, Article 29 of the UN Declaration of Human Rights states that: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

[38] See e.g., the Nenqay Deni Accord between the Tsilhqot'in Nation and the B.C. government dated February 11, 2016, as re-affirmed in a letter of commitment dated October 31, 2017.

[39] *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para. 12.

non-Aboriginal relations in the mainstream legal system with its advantages of continuity, transparency, and predictability."[40]

The Nisga'a Final Agreement provides a good example of how a modern treaty can provide answers to the questions raised above in relation to Article 32(2) of UNDRIP. Today, a government or third party engaged with the Nisga'a Nation knows exactly what the governing institutions of the Nisga'a Nation are, which lands and resources are owned by the Nisga'a Nation and the scope of matters under the exclusive legislative jurisdiction of the Nisga'a Nation or where there may be shared jurisdiction with British Columbia or Canada (including the rules to resolve conflicts). Resolving these and other foundational questions through the Nisga'a Final Agreement means not only that the rights of the Nisga'a Nation as a government responsible for its own people, land and resources are recognized, but that they can be operationalized in a meaningful way. Additionally, a modern treaty may provide for rights that do not otherwise exist under Section 35. For example, the Nisga'a Final Agreement requires British Columbia to consult with the Nisga'a Lisims Government in certain circumstances during the legislative process.[41] While the SCC recently ruled that the duty to consult under Section 35 does not extend to the legislative process, the Court confirmed that its conclusions do not affect the enforceability of treaty requirements that explicitly require pre-legislative consultation.[42]

The BC Treaty Process has been criticized by some Indigenous groups as a rights extinguishment process.[43] While we acknowledge the importance of these concerns, we do not share this view. Rather, we see the BC Treaty Process as a rights *recognition* process that provides for the fulfilment and operationalization of rights. Treaty negotiations are not an exercise to compromise rights, but are meant to find and establish means for the exercise of rights in a manner that is consistent with the sovereignty of the Indigenous group situated in a pluralistic and democratic society. As noted in our previous opinion, the Nisga'a Final Agreement did not create rights; it acknowledged, affirmed and specified Nisga'a jurisdiction which was already in existence. This concept of "recognition" is consistent with jurisprudence affirming the existence of systems of Aboriginal law – an essential component of self-government – before the arrival of Europeans in North America.[44] Treaty negotiations provide a consensus-driven approach to define rights and their exercise, as opposed to an adversarial, costly

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[40] *Ibid. at* para. 12.
[41] *Nisga'a Final Agreement*, Chapter 11, paragraphs 30-31.
[42] *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 at para. 51.
[43] The notion of extinguishment stems from language in historic treaties that required Aboriginal groups to "surrender, entirely and forever" tracts of land in return for resources and other benefits. Recognizing the approach requiring surrender of aboriginal land and rights created substantial impediments to treaty-making, legal certainty has been pursued by a variety of legal mechanisms, including "transforming" the aboriginal group's section 35 rights exhaustively into treaty rights or obtaining a commitment from the aboriginal group not to exercise aboriginal rights beyond those in the treaty. This approach has been further refined as subsequent treaties have been negotiated.
[44] *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at para. 114.

and uncertain process through litigation. We understand that both Canada and BC are currently engaged in efforts to further clarify that rights recognition is the foundation of treaty negotiations.[45]

Alternatives to the BC Treaty Process

Treaties are not the only means of recognizing and operationalizing rights. A common criticism of treaties is that it takes too long to provide economic benefits that may otherwise be attainable through bilateral agreements or other more flexible arrangements. These agreements may be seen as providing more immediate and tangible benefits to the community without the need of foregoing (or compromising) fundamental positions, such as Aboriginal title and rights. Indeed, British Columbia has signed several hundred of these bilateral agreements with over 200 Indigenous groups since the early 2000s.[46]

Bilateral agreements serve an important purpose in this regard. In particular, bilateral agreements can provide immediate economic benefits and address critical issues in a flexible and timely manner that treaties may not necessarily be able to provide. While there is clearly a place for these types of agreements, their role is ultimately limited as they do not serve the foundational role that is at the core of a modern treaty.

First, bilateral agreements are not constitutional documents and do not afford the same level of protection as treaties under Canadian law. As such, bilateral agreements cannot provide rights protected under Section 35.

Second, bilateral agreements are typically short-term focused and often narrow in scope. These agreements often do not address larger and more fundamental issues such as recognition of the legal status of the Aboriginal group's traditional governance structures and laws. The focus of these agreements is frequently economic and they are often focused on specific projects or industries.

Third, the process that leads to the consummation of these agreements is not as robust as negotiations in a treaty process. They are more *ad hoc* and the dynamics vary depending in part on the geographical location of the Aboriginal group. Moreover, because bilateral agreements are frequently negotiated in response to resource development, not all Aboriginal groups have the same opportunity and ability to negotiate these agreements.

Finally, these agreements do not generally provide for broad-based governance rights and Indigenous subject-matter jurisdiction. These agreements are frequently a stop gap measure and, as a result, fall short of implementing the right to self-government recognized under Section 35 and inherent in UNDRIP and FPIC.

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[45] For example, in February 2018 the federal government initiated a process of engagement with Indigenous Peoples to develop a Recognition and Implementation of Rights Framework, including changes to its policies for treaty negotiations.

[46] Michael Hudson, *British Columbia – Indigenous Nation Agreements – Lessons for Reconciliation?* IRPP Insight March 2018 No. 20.

Conclusion

Treaties provide an avenue and blueprint for self-determination. Treaties manifest a rights-based approach. Treaties essentially create new forms of government – political and government bodies that are manifestations of Aboriginal self-governance. Neither court-declared Aboriginal title nor bilateral agreements are legally capable of providing a model of shared sovereignty. Furthermore, neither alternative to treaties can provide comprehensive governance structures based on the Aboriginal group's traditional governance models and with equal legal status for Aboriginal laws on the treaty territory. The implications of treaties therefore go beyond economic or governance impacts. In essence, treaties provide Aboriginal groups with a way of deciding how to govern themselves and how to conduct their own societies. This may have "spill-over" effects in other considerations, such as preservation and revitalization of the group's culture, language, arts, laws, traditions and education. Indeed, most modern treaties also have self-government agreements with shared sovereignty, including in critical areas such as education that have a material impact on long-term revitalization.[47] In short, the path to self-government is generally through conclusion of treaties.

The significance of treaties is that they are not *only* a declaration of rights (as in a court declaration) or *only* a provision of economic benefits (as is often the main component of bilateral agreements). Rather, they provide a constitutionally-entrenched framework, resulting from a consensus-based, voluntary and informed process, under which rights and economic benefits can be recognized, exercised and developed long into the future. Just as Section 35 rights cannot be meaningfully exercised in the abstract, the implementation of UNDRIP and FPIC requires a legal framework. The negotiation of a modern treaty through the BC Treaty Process provides that framework.

In conclusion, treaties negotiated through the BC Treaty Process facilitate operationalization of FPIC as properly conceptualized under UNDRIP and in accordance with Canadian constitutional law. Treaties concluded in a voluntary, independent, transparent and informed process allow for comprehensive resolutions that have long-term and fundamental impacts and that are aligned with the aspirations of UNDRIP and the goal of reconciliation as repeatedly emphasized in Canadian constitutional jurisprudence.

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[47] For a more detailed discussion of shared sovereignty in treaties, see our opinion to you dated April 18, 2017.

We thank you for the opportunity to advise the Commission on these important matters. Please contact us if you have any questions or concerns regarding the foregoing opinion and analysis.

Yours very truly,

Roy W. Millen

Sam Adkins

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