

# Operationalizing Indigenous Consent through Land-Use Planning

Roshan Danesh and Robert McPhee

## IN BRIEF

Implementation of the United Nations Declaration on the Rights of Indigenous Peoples, particularly the standard of free, prior and informed consent, will have significant impacts on resource development, environmental protection and reconciliation in Canada. A revitalized approach to land-use planning is one way of applying the consent standard and furthering implementation of Indigenous title and rights. Three models of consent-based decision-making are discussed, with particular reference to British Columbia. They aim to structure proper Indigenous-Crown relations in ways that will collaboratively achieve consent, while advancing greater predictability in decision-making.

## EN BREF

La mise en œuvre de la Déclaration des Nations unies sur les droits des peuples autochtones, en ce qui concerne notamment la norme relative au consentement préalable, libre et éclairé, aura d'importantes répercussions sur le développement des ressources, la protection de l'environnement et la politique de réconciliation du Canada. L'un des moyens d'appliquer cette norme, en renforçant les titres et les droits ancestraux, consiste à revitaliser l'approche de l'aménagement du territoire. Trois modèles de processus décisionnels fondés sur le consentement sont examinés dans cette étude, qui touchent particulièrement la Colombie-Britannique. Ils visent à structurer les relations Couronne-Autochtones autour d'un consentement obtenu par la collaboration tout en accroissant la prévisibilité dans la prise de décision.

## ABOUT THIS INSIGHT

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## INTRODUCTION

The implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in particular the standard of free, prior and informed consent (FPIC), is emerging as a central focus of policy debate in Canada. The future pace and scale of resource development, approaches to environmental protection and the work of decolonization and reconciliation are all connected to this debate. To date, there are few concrete examples of what FPIC might mean in practice or how meeting this standard may affect the complex public, economic, social and justice demands that weigh on policy development in Canada.

This article examines the potential utility of a revitalized approach to land-use planning as one way of implementing FPIC, with a particular focus on British Columbia. In many respects, British Columbia has been ground zero for efforts to address the relationship between Indigenous title and rights, resource development and environmental stewardship. There are many reasons for this, including the unique historical context: very few treaties were completed in the past and modern treaty-making has moved slowly.<sup>1</sup> Unsurprisingly, a disproportionate number of seminal Supreme Court of Canada decisions on Indigenous title and rights emerged from British Columbia, including *Sparrow*, *Gladstone*, *Delgamuukw*, *Haida Nation* and *Tsilhqot'in Nation*.<sup>2</sup>

Over many decades, there have been numerous attempts at land-use planning processes in British Columbia with different degrees of support and success. The last major attempt at a government-structured land-use planning process, between the mid-1990s and mid-2000s, achieved moderate outcomes at best. While some plans were completed and implemented – including unique achievements like the Great Bear Rainforest plan and agreements – in several places both the process and outcomes were, and remain, a source of controversy and conflict with Indigenous peoples and members of the public. Across the country, with few exceptions – in particular, some important achievements in the North – there have not been many examples of land-use planning between government and Indigenous peoples that explicitly or implicitly sought to address the FPIC standard.

In 2017, the BC Minister of Forests, Lands and Natural Resources was directed to “work with the Minister of Indigenous Relations, First Nations and Communities to modernize land-use planning and sustainably manage BC’s ecosystems, rivers, lakes, watersheds, forests and old growth.”<sup>3</sup> He also received the following direction, as did all ministers:

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<sup>1</sup> M. Hudson, *British Columbia-Indigenous Nation Agreements: Lessons for Reconciliation?* IRPP Insight 20 (Montreal: Institute for Research on Public Policy, 2018), <https://irpp.org/research-studies/british-columbia-indigenous-nation-agreements-lessons-for-reconciliation/>.

<sup>2</sup> *R. v. Sparrow*, [1990] 1 SCR 1075, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/609/index.do>; *R. v. Gladstone*, 2 SCR 723, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1409/index.do>; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do>; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 256, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do>.

<sup>3</sup> Office of the Premier of British Columbia, “Mandate Letter to Minister of Forests, Lands, Natural Resource

*As part of our commitment to true, lasting reconciliation with First Nations in British Columbia our government will be fully adopting and implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Calls to Action of the Truth and Reconciliation Commission. As minister, you are responsible for moving forward on the calls to action and reviewing policies, programs, and legislation to determine how to bring the principles of the declaration into action in British Columbia.<sup>4</sup>*

To date, little information is available on what such a modernized land use planning process would look like. However, the government views it as an opportunity to resolve challenging land issues, guide sustainable land management decisions and “provide certainty – economic, environmental, social, cultural values.”<sup>5</sup> As well, “partnership with Indigenous governments”<sup>6</sup> is highlighted. One of the main drivers for the modernized approach is “evolving relations with Indigenous peoples.”<sup>7</sup> The BC government has presented this approach as one that will be jointly designed and delivered by the province and Indigenous governments, with an emphasis on UNDRIP and the Calls to Action of the Truth and Reconciliation Commission.<sup>8</sup>

Is land-use planning a viable and useful approach to operationalizing FPIC? What would the critical elements of such a land-use planning model be? How might this differ from past models of land-use planning in British Columbia? Will such approaches help address future conflicts that might mirror current resource development debates, such as the proposed expansion of the Trans Mountain Pipeline and LNG Canada projects? These questions are examined below.

## IMPLEMENTATION OF UNDRIP AND FPIC IN CANADA

UNDRIP was developed through a multi-decade deliberative process involving states (including Canada) and Indigenous peoples. It was completed in 2007, and Canada endorsed it, with reservations, in 2010. In 2016, the federal government endorsed UNDRIP without qualification and committed to its full implementation. Alberta and British Columbia have similarly committed to the implementation of UNDRIP in their relations with Indigenous peoples. Other provinces and territories are debating whether and how to implement UNDRIP.

Legislation to implement UNDRIP in Canada is in the early days. Romeo Saganash, member of Parliament (New Democratic Party) for Abitibi – Baie-James – Nunavik –

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Operations and Rural Development,” July 18, 2017, 3, <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/donaldson-mandate.pdf>.

<sup>4</sup> Office of the Premier of British Columbia, “Mandate Letter,” 2.

<sup>5</sup> British Columbia, “Modernizing Land Use Planning” (Victoria, Ministry of Forest, Lands, Natural Resources Operations and Rural Development, 2019), 4. PowerPoint presentation shared with authors, spring 2019.

<sup>6</sup> British Columbia, “Modernizing Land Use Planning,” 4.

<sup>7</sup> British Columbia, “Modernizing Land Use Planning,” 5.

<sup>8</sup> Truth and Reconciliation Commission, *Truth and Reconciliation Commission of Canada: Calls to Action*. (Winnipeg: Truth and Reconciliation Commission of Canada, 2012), [http://trc.ca/assets/pdf/Calls\\_to\\_Action\\_English2.pdf](http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf).

Eeyou, sponsored Private Member's Bill C-262,<sup>9</sup> which was adopted by the House of Commons with the support of the government in May 2018.<sup>10</sup> Bill C-262 would have confirmed the legal status of UNDRIP in Canada and required the establishment of an action plan and reporting on implementation. The bill did not prescribe, require or state anything specifically about FPIC. The British Columbia government has publicly committed to enact a similar law in fall 2019.

Other recent government legislation has referred to and relied upon UNDRIP in general terms, including Bill C-91 (the federal *Act respecting Indigenous languages*<sup>11</sup>) and Bill C-92 (the federal *Act respecting First Nations, Inuit, and Metis children, youth and families*<sup>12</sup>). In addition to referencing UNDRIP, British Columbia's new *Environmental Assessment Act*<sup>13</sup> also requires provincial decision-makers to determine whether or not Indigenous consent has been received.

Policy development concerning the implementation of UNDRIP generally or FPIC specifically is also in the early stages. One of the clearest statements to date is contained in the federal *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*.<sup>14</sup> Released in July 2017, they include a specific principle regarding Indigenous consent (principle 6). British Columbia subsequently issued the nearly identical *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*.<sup>15</sup> Both sets of principles are intended to guide the public service and inform further policy development.

In a few cases, Indigenous nations, organizations and governments have completed agreements that reflect their shared approach to implementing UNDRIP and FPIC. For example, British Columbia and several First Nations developed a consent-based process for aquaculture in the Broughton Archipelago.<sup>16</sup> And the shíshálh Nation and British Columbia completed a landmark agreement that, among other things, called for the piloting of consent-based decision-making processes, including land-use planning. In addition, the federal government has established many tables and processes that include a focus on UNDRIP implementation.

<sup>9</sup> Bill C-262, *Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st session, 42nd Parliament, 2016, <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/first-reading>.

<sup>10</sup> Bill C-262 was not passed by the Senate before Parliament rose in June 2019. Nevertheless, the government committed to include implementing UNDRIP in its election platform.

<sup>11</sup> Bill C-91, *Act respecting Indigenous languages*, 1st session, 42nd Parliament, 2019, <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-91/first-reading>.

<sup>12</sup> Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, 1st session, 42nd Parliament, 2019, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-92/first-reading>.

<sup>13</sup> Bill 51, *Environmental Assessment Act*, 3rd session, 41st Parliament, 2018, <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/bills/first-reading/gov51-1>.

<sup>14</sup> Department of Justice of Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (Ottawa: Department of Justice, 2018), <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

<sup>15</sup> British Columbia Public Service, "Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples" (Victoria: British Columbia Public Service, n.d.), [https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft\\_principles.pdf](https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf).

<sup>16</sup> Office of the Premier of British Columbia, "Government, First Nations Chart Path for Aquaculture in Broughton Archipelago," news release, December 14, 2018, <https://news.gov.bc.ca/releases/2018PR-EM0151-002412>.

## UNDERSTANDING FPIC

Alongside these limited formal developments, there has been a growing political and public dialogue about FPIC. Generally speaking, this dialogue has been relatively uninformed and not grounded in relevant international and domestic law. This is most notable in the tendency to conflate “veto” and “consent” – a practice that is grounded more in political rhetoric than legal principle.

The following four perspectives are foundational for understanding FPIC and how land-use planning may facilitate its implementation.

### 1) Consent is not new

There is a deep misperception that Indigenous consent is a new topic or standard in Indigenous-Crown relations – one that was somehow “created” by UNDRIP. Nothing could be further from the truth. In fact, it is one of the original foundations that common law insisted must guide Indigenous-Crown relations.<sup>17</sup> From the outset of these relations, common law required treaty-making, effectively a form of agreement and consent that recognized the Indigenous relationship with the land. This was made explicit by Chief Justice McLachlin in her description of the Royal Proclamation of 1763:

*The English in Canada and New Zealand took a different approach [from Spain, France and Australia], acknowledging limited prior entitlement of indigenous peoples, which required the Crown to treat with them and obtain their consent before their lands could be occupied. In Canada – indeed for the whole of North America – this doctrine was cast in legal terms by the Royal Proclamation of 1763, which forbade settlement unless the Crown had first established treaties with the occupants.<sup>18</sup>*

Moreover, the Royal Commission on Aboriginal Peoples concluded as follows:

*[T]he Royal Proclamation...initiate[d] an orderly process whereby Indian land could be purchased for settlement or development....In future, lands could be surrendered only on a nation-to-nation basis, from the Indian nation to the British Crown, in a public process in which the assembled Indian population would be required to consent to the transaction.<sup>19</sup>*

<sup>17</sup> R. Danesh, “Rhetoric Matters When Discussing First Nations’ Role in Resource Decisions,” *Globe and Mail*, April 11, 2017, <https://beta.theglobeandmail.com/news/british-columbia/rhetoric-matters-when-discussing-first-nations-role-in-resource-decisions/article33293082/?ref=http://www.theglobeandmail.com&service=mobile>.

<sup>18</sup> B. McLachlin, “Aboriginal Peoples and Reconciliation,” *Canterbury Law Review* 10, no. 9 (2003), <http://www.nzlii.org/nz/journals/CanterLawRw/2003/10.html>.

<sup>19</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Volume 1: Looking Forward, Looking Back* (Ottawa: Canada Communication Group, 1996), 209-10, <http://publications.gc.ca/site/eng/9.819007/publication.html>.

In addition to being an original foundation of Crown-Indigenous relations, consent is entrenched in the law of Indigenous title and rights under section 35 of the *Constitution Act, 1982*. This is noted by the courts in numerous places. It is most stark in the Supreme Court of Canada's *Tsilhqot'in Nation* decision in which the Court refers to the importance of consent both before and after a declaration of title from the courts: "Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."<sup>20</sup>

It is a significant misunderstanding of UNDRIP to suggest that it somehow "creates" any rights. UNDRIP restates already established international human rights norms. What UNDRIP accomplishes is to express these norms in the specific context of Indigenous peoples. To be clear, Canadians and Canada have long supported and endorsed these international human rights norms. They have been integral to the evolution of Canada's domestic law, including the *Constitution Act, 1982*.

## 2) Consent, like all rights, is not absolute

Another significant misunderstanding concerns the meaning of consent and the often unexamined presumption that consent is somehow an absolute right, often expressed inaccurately as a veto power.<sup>21</sup> Such a view ignores the text of UNDRIP itself. As article 46(2) states,

*In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. 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 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.*<sup>22</sup>

In effect, this clause is a form of limitation on how the rights expressed in UNDRIP may be implemented and exercised – an expression of how no rights are absolute.

Reflecting this, many experts have clarified how FPIC operates within a broader context of structuring proper relations between Indigenous peoples and the state, and ensuring processes and mechanisms are in place to safeguard the rights of Indigenous peoples.<sup>23</sup> For example, James Anaya, the former Special Rapporteur on the Rights of Indigenous Peoples, has highlighted how the FPIC standard is meant to ensure that all parties work together in good faith and make every effort to achieve mutually

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<sup>20</sup> *Tsilhqot'in Nation*, para. 97.

<sup>21</sup> M. Papillon and T. Rodon, *Indigenous Consent and Natural Resource Extraction*, IRPP Insight 16 (Montreal: Institute for Research on Public Policy, 2017), <https://irpp.org/research-studies/insight-no16/>.

<sup>22</sup> United Nations, Declaration on the Rights of Indigenous Peoples, 2007, [https://www.un.org/esa/socdev/unpfiidocuments/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfiidocuments/DRIPS_en.pdf).

<sup>23</sup> Danesh, "Rhetoric Matters."

acceptable arrangements; one focus should be on building consensus.<sup>24</sup> Experts have also identified how FPIC and veto rights differ.<sup>25</sup>

### 3) Consent is an expression of relations between governments and involves mechanisms to structure these relationships

Many leaders and experts say that the best lens for thinking about consent and how to implement it is as an aspect of how relations between different governments, jurisdictions and laws are structured. This is distinct, for example, from thinking about consent as an extension of the duty to consult and accommodate.

Jody Wilson-Raybould, then minister of justice and attorney general of Canada, emphasized this in the following terms:

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

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

*These mechanisms are diverse, and can range from shared bodies and structures, to utilizing the same information and standards, to agreeing on long term plans or arrangements that will give clarity to how all decisions will be made on a certain matter or in a certain area over time. Enacting these mechanisms is achieved through a multiplicity of tools – including legislation, policy, and agreements.<sup>26</sup>*

This approach to understanding consent has deep roots in both section 35 and UNDRIP. Douglas White III, for example, has delineated in some detail how the cardinal purpose of section 35, as defined by the Supreme Court of Canada, is the reconciliation

<sup>24</sup> J. P. Tasker, "Senate Committee Passes UNDRIP Bill, Tories Warn of an Indigenous 'Veto,'" CBC News, July 11, 2019, <https://www.cbc.ca/news/politics/senate-undrip-bill-tories-veto-1.5170618>.

<sup>25</sup> P. Joffe, "Veto" and "Consent" – Significant Differences (Toronto: Canadian Friends Service Committee, 2018), <https://quakerservice.ca/wp-content/uploads/2018/10/Veto-and-Consent-Significant-differences-Joffe.pdf>.

<sup>26</sup> Canada, Department of Justice, "The Recognition and Implementation of Rights Framework Talk," notes for an address by the Honourable Jody Wilson-Raybould, to the Business Council of British Columbia (Vancouver, April 13, 2018), <https://www.canada.ca/en/departement-justice/news/2018/04/the-recognition-and-implementation-of-rights-framework-talk-1.html>.

of sovereignties.<sup>27</sup> One implication of this is a focus on structures, including dispute resolution mechanisms, that govern how two or more sovereigns will address matters regarding lands and resources where both (or all) have decisions to make and legal orders that apply. Similarly, in addition to self-determination and the inherent right of self-government, UNDRIP emphasizes the importance of respecting the representative institutions of Indigenous peoples and the roles they must play.

The shift to strengthening collaborative mechanisms between governments is also seen in developments such as the Attorney General of Canada's *Directive on Civil Litigation Involving Indigenous Peoples* in January 2018. One understanding of this directive is as a move toward promoting greater collaboration, and creating space for Indigenous peoples and the federal government to increasingly work in a solutions-oriented manner.<sup>28</sup>

#### 4) Consent is a way of removing uncertainty

The three perspectives above support a fourth, which is in some respects the inverse of what is commonly asserted and believed. When discussing land and resource decision-making, one often finds suggestions that somehow Indigenous title and rights, and the strength of those rights as confirmed by the courts, are the source of complexity and uncertainty. Indeed, recent public debates about major projects such as the Trans Mountain expansion project and the LNG Canada project have often reflected this narrative.

But it is increasingly acknowledged that the opposite is true. The reason we must deal with such complexity is the lack of recognition and implementation of Indigenous title and rights. The results have been a culture of conflict, reliance on long and expensive court processes where Indigenous peoples are expected to “prove” that their constitutionally recognized rights exist, hundreds of court decisions and other obstacles to building patterns of working together. Indeed, in recent years, both the federal government and the British Columbia government have begun to express this understanding. As Wilson-Raybould stated,

*The uncertainty that we all experience today – Indigenous peoples, industry, governments and the Crown – whether...in relation to pipelines or any of a number of projects, has its roots directly in this history of denial and division.*

*Moving forward, this has critical implications for reconciliation. It means Indigenous nations – the proper title and rights holders – because of colonial imposition, may not be operating with political, economic, and social structures, or the resources necessary to fully discharge their responsibilities as caretakers of their lands, or a context for clear Indigenous governance, law-making, and decision-making.*

*The entrenchment of Indigenous and treaty rights in section 35 of the Constitution was supposed to break this pattern. However, the maintenance of a*

<sup>27</sup> D. White III, “Consent” (Vancouver and Kamloops, Union of British Columbia Indian Chiefs, forthcoming).

<sup>28</sup> Canada, Department of Justice, *The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples*, 2018, <https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

*“prove it” approach by governments after 1982 made success in transforming relations extremely difficult.<sup>29</sup>*

In addition, on February 14, 2018, in a historic address in the House of Commons on the recognition and implementation of Indigenous rights, Prime Minister Justin Trudeau stated:

*[T]he challenge – then and now – is that while Section 35 recognizes and affirms Aboriginal and treaty rights, those rights have not been implemented by our governments.*

*The work to give life to Section 35 was supposed to be done together with First Nations, Inuit, and Métis Peoples. And while there has been some success, progress has not been sustained, or carried out.*

*And so over time, it too often fell to the courts to pick up the pieces, and fill in the gaps.*

*More precisely, instead of outright recognizing and affirming Indigenous rights – as we promised we would – Indigenous Peoples were forced to prove, time and time again, through costly and drawn-out court challenges, that their rights existed, must be recognized and implemented.<sup>30</sup>*

All of this evidence suggests that considering how to implement consent is increasingly critical to addressing the challenges facing resource development in Canada and creating a climate of greater predictability, effectiveness and certainty. In this regard, the issue of land-use planning becomes particularly relevant.

## HISTORY OF LAND-USE PLANNING IN BRITISH COLUMBIA

Until the 1990s, land-use planning was typically conflict-driven: it took place in specific contexts of land and resource challenges. Such planning was often an internal government function with some limited opportunities for public input, but it was not a public planning process.

This situation began to shift because of several factors including high-profile land and resource disputes, changing environmental values and realities, the increasing evidence of the strength and importance of Indigenous rights, and concerns about the allocation of land and resource tenures and approvals to third parties. The “war in the woods” – particularly to protect areas from logging – was one catalyst. In response, the BC government established the Commission on Resources and Environment (CORE) to develop a provincial land use strategy and integrated land-use planning process. The intent was comprehensive planning through consensus-seeking models.

<sup>29</sup> Department of Justice, “Recognition and Implementation of Rights.”

<sup>30</sup> J. Trudeau, “Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework,” February 14, 2018, <https://pm.gc.ca/eng/news/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights-framework>.

By the mid-1990s, a few plans had been completed through CORE; however, this process was replaced by a focus on smaller, more regional planning in the form of Land and Resource Management Plans (LRMPs). Still intended to be grounded in consensus seeking, LRMP processes in one form or another carried on in many parts of the province until the mid-2000s. By the end of 2006, the province had developed “A New Direction for Strategic Land Use Planning in BC,” which was formally adopted and announced in 2008.<sup>31</sup> At the heart of the New Direction were two shifts:

*First, rather than engaging in comprehensive, provincial strategic land use planning, plans will only be undertaken where a need is demonstrated through a “business case.”*

*Second, the role of the public stakeholder has changed from that of one who is part of a consensus-building exercise to that of one who is consulted by plan preparers.<sup>32</sup>*

Indigenous participation and involvement in the CORE and LRMP processes varied. Although there were some instances where deep collaborative relationships between government officials, First Nations and other stakeholders resulted in significant success, First Nations involvement was for the most part quite limited. In many instances, the processes themselves were developed without systematic or appropriate consultation or agreement with First Nations. Similarly, they were not designed with clear roles for, or recognition of, Indigenous governments, laws, title or rights. First Nations were often “invited and encouraged” to participate. In earlier processes, they rarely participated “except as observers.”<sup>33</sup> Some of the later LRMP processes featured a few more examples of Indigenous participation and led to some successes through deep collaborative relationships with First Nations. However, plans were sometimes completed without First Nations involvement or input; the government primarily relied on input from others. After completion of draft plans, the government sometimes sought consultation or government-to-government engagement on the draft plans.

Other than specific exceptions, the reports from First Nations of their experiences with these processes illustrate predictable themes. Suffice it to say, the processes were generally not viewed as legitimate, nor were the plans that resulted from them seen as valid or applicable in a manner that respected section 35 or UNDRIP. Indeed, many First Nations were already doing their own planning – pursuant to their own Indigenous laws and systems of knowledge – and the province’s land-use planning processes only spurred them on to advance their own planning processes. For example, the Lil’wat experience of the province’s draft Sea to Sky LRMP has been described in the following terms:

<sup>31</sup> Ministry of Agriculture and Lands, *New Direction for Strategic Land Use Planning in BC: Initiating Planning Projects and Developing a Business Case: Policies and Procedures* (Victoria: Ministry of Agriculture and Lands, Integrated Land Management Bureau, 2007), [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/policies-guides/initiating\\_planning\\_projects\\_developing\\_business\\_case\\_policy\\_procedures.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/policies-guides/initiating_planning_projects_developing_business_case_policy_procedures.pdf).

<sup>32</sup> British Columbia Forest Practices Board, *Provincial Land Use Planning: Which Way from Here?* Special Report (Victoria: Forest Practices Board, 2008), 3, <https://www.bcfpb.ca/wp-content/uploads/2008/11/SR34-Provincial-Land-Use-Planning.pdf>.

<sup>33</sup> British Columbia Forest Practices Board, *Provincial Land Use Planning*, 5.

*The Lil'wat Nation was already anticipating a further round of land-use planning, but the Province's development of a Draft Sea to Sky Land [sic.] LRMP, of which a consultation draft was released in April of 2006, accelerated...the process. The Province developed its plan with input from stakeholders but not from First Nations. In an effort to complete the Draft Sea to Sky LRMP, the Province sought to engage in government to government discussions with potentially affected First Nations.*

*The Lil'wat Nation's response to the Province's overture for government to government discussions was that before it could have a reasonable discussion about the Province's plan, it needed to develop its own land use plan. With funding provided by the Province, the Lil'wat Nation developed the Lil'wat Land Use Plan, or LLUP.<sup>34</sup>*

Another example is that of the shíshálh Nation. In 2005, they were asked by the province to develop their own land use plan, and funding was provided to support this work. An LRMP process for the Sunshine Coast was then under way. However, it was causing significant conflict, and First Nations participation was limited. The shíshálh Nation worked with neighbouring nations to develop a collaborative set of land use plans, which were completed around 2008. At that point, however, the province informed shíshálh that it was no longer doing land-use planning – effectively an application of the New Direction.<sup>35</sup>

Around the time the LRMP process was ending and the New Direction was launched, the province also established the New Relationship vision (2005)<sup>36</sup> with the British Columbia Assembly of First Nations, First Nations Summit and Union of British Columbia Indian Chiefs (collectively the First Nations Leadership Council or FNLC). At the time, this was viewed as a landmark guide to help shift relations between First Nations and the province. Developed in the wake of the Supreme Court of Canada's historic *Haida Nation* decision, the New Relationship vision was an effort to advance a transformative change in relations and included a joint action plan to "develop new institutions or structures to negotiate Government-to-Government Agreements for shared decision-making regarding land-use planning, management, tenuring and resource revenue and benefit sharing."<sup>37</sup>

Alongside the New Relationship vision, there were some efforts to complete elements of land use plans in a handful of government-to-government agreements. Sometimes these were comprehensive efforts; in other instances, they focused on more specific areas or resources. The New Relationship vision was ostensibly one of

<sup>34</sup> Donovan & Company, "Implementing First Nations Land Use Plans: Challenges and Results" (Vancouver: Donovan & Company, Barristers and Solicitors, 2008), 2, <http://www.aboriginal-law.com/~aborig/uploads/documents/PDFs/events%20and%20pubs/Implementing%20First%20Nation%20Land%20Use%20Plans.pdf>.

<sup>35</sup> Personal communication with Jasmine Paul, shíshálh Nation, February 19, 2019.

<sup>36</sup> British Columbia, "The New Relationship" (Victoria: Province of British Columbia, 2005), [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/new\\_relationship\\_accord.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/other-docs/new_relationship_accord.pdf).

<sup>37</sup> British Columbia, "The New Relationship," 4.

the major drivers of the New Direction, which set out many high-level propositions and process elements about designing a new approach with First Nations. They included the idea of drafting a “statement of intent” with the FNLC that would then provide some principles and direction for the development of government-to-government planning models with First Nations.

Over a decade later, land-use planning facilitated by the New Relationship has not advanced far. While a few examples of discrete planning through agreement with First Nations have achieved success, including notable examples such as the Great Bear Rainforest plan and agreements, and the land-use plan agreed upon by the Taku River Tlingit First Nation and the BC government,<sup>38</sup> much of the work has stagnated. In some respects, this reflects understandings and perceptions of the New Direction’s actual outcome: to effectively halt efforts at land-use planning across British Columbia, except in very specific contexts.

The BC government’s decision in 2017 to restart land-use planning thus signals a potentially significant shift after almost a decade of planning dormancy. In designing new processes, it faces a very uncertain planning landscape as a result of this history.

The outcomes of the last three decades of land-use planning efforts are mixed at best.<sup>39</sup> While 85 percent of the province is covered by a regional land-use plan or LRMP, major areas, including the Lower Mainland, Sunshine Coast and Nicola Valley, have no land-use plans. In addition to the challenges posed by the lack of proper Indigenous roles and relationships with these plans, many other challenges have been identified. Where plans do exist, they were often developed with legal and policy limitations that render them irrelevant or unresponsive to the contemporary reality. For example, most plans did not appropriately consider the impacts of climate change. In addition, there are many limitations on the force and effect of existing land use plans. Sometimes they do not cover certain industries and forms of resource extraction; they may not establish linkages to environmental assessment of large-scale resource development; and they do not always provide for fully developed mechanisms to ensure the enforceability of management objectives that flow from them. More broadly, often there are no clear structures and mechanisms for the implementation of the plans.

## IMPLEMENTING FPIC THROUGH LAND-USE PLANNING

The limitations of previous attempts at land-use planning are also illustrated by the current challenges affecting land and resource decision-making and development in British Columbia. This complexity appears to be escalating daily. Increasingly, these

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<sup>38</sup> Taku River Tlingit First Nation, Province of British Columbia, *Wóoshtin wudidaa Atlin Taku Land Use Plan*, (July 19, 2011), [https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/skeena-region/atlintaku-slua/atlin\\_taku\\_lup.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/skeena-region/atlintaku-slua/atlin_taku_lup.pdf).

<sup>39</sup> For one analysis of land-use planning efforts in BC as of 2013, including a number of critiques, see J. Clogg and D. Carlson, “Land Use Planning for Nature, Climate and Communities: Taking Stock and Moving Forward” (Vancouver: West Coast Environmental Law Association, 2013), [https://www.wcel.org/sites/default/files/publications/WCEL\\_LandUse\\_report\\_web\\_0.pdf](https://www.wcel.org/sites/default/files/publications/WCEL_LandUse_report_web_0.pdf).

challenges are also taking on significant interjurisdictional or even international dimensions. Although there are many reasons for this complexity, a significant factor is the lack of proper processes grounded in recognition and respect of Indigenous title and rights, jurisdiction, laws and governments. One can only surmise how different processes, decisions and outcomes would be today if land-use planning had been done differently over the past 30 years.

Looking forward, it is clear that hopes are being placed on land-use planning as one key forum in which the UNDRIP standards, and particularly FPIC, can be upheld while making land and resource use and development clearer and more predictable. As Douglas White III has argued, “pursued coherently and in a principled manner, land-use planning can be pivotal for making consent a reality in ways that benefit all British Columbians and reduce the growing conflict that we are experiencing.”<sup>40</sup> He provided the following rationale for how FPIC could be operationalized through land-use planning:

*land-use planning is a process where critical, early decisions regarding free, prior and informed consent can be worked out, absent the highly charged and very complex context of specific project decisions. If land-use planning processes are properly co-designed as government-to-government decision-making processes between Crown and Indigenous governments; if joint decisions will be made and implemented about what kinds of activities may occur where in a territory; if we agree on what parameters, what values and interests must be protected, and what processes and measures must be met for proposals to proceed in each area, then the foundation for decisions based on consent is set. As well, such a strategic planning process also allows for the views of all stakeholders and sectors of the public to participate.*<sup>41</sup>

As we emphasized earlier, FPIC is best thought of as a process of structuring proper nation-to-nation and government-to-government Indigenous-Crown relations in which decisions and authorities are aligned, and there are established dispute resolution mechanisms when they are not. As well, respecting all human rights standards, including FPIC, implicitly entails working toward decisions together, based on appropriate and adequate information, and seeking common outcomes and resolutions.

All approaches to land-use planning involve a process whereby agreement is reached about the values that must be respected in particular areas or with respect to particular resources, including a strategic determination of whether or not certain activities may be permissible, and why and how certain actions may be prohibited or permitted. An effective, stable foundation for the implementation of FPIC can be laid by reaching such an understanding to guide all governments and stakeholders over the long term, without consideration of a particular project.

<sup>40</sup> D. White III, “Island Voices: Land-Use Planning Is a Path to Certainty,” *Times Colonist*, February 3, 2019, para. 11, <https://www.timescolonist.com/opinion/op-ed/island-voices-land-use-planning-is-a-path-to-certainty-1.23621005>.

<sup>41</sup> White, “Island Voices,” para. 10.

What are the principles and elements of how consent may be operationalized in a land-use planning process? What are the potential challenges that will need to be addressed? We will now present some of them.

A starting element is the issue of “co-designing” or “co-developing” a land-use planning process with Indigenous nations. As noted earlier, this was not present in the CORE or LRMP processes, even though the New Direction indicated it was necessary.

In the past few years, it has become commonplace to talk about co-design and co-development between the Crown and Indigenous peoples. These terms have been used consistently by the federal government, the BC government and Indigenous leaders with reference to new legislation and policy that relate to or impact Indigenous peoples. This emphasis on co-development and co-design has its roots in many political, legal and social developments. Two prominent ones are the Truth and Reconciliation Commission and UNDRIP. In several of its Calls to Action, the Truth and Reconciliation Commission emphasized the importance of the full participation, consent and involvement of Indigenous peoples in the development and implementation of measures to address the legacy of residential schools. In addition to the standard of consent, UNDRIP states that implementation must take place in “consultation and cooperation” with Indigenous peoples:

*States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.*<sup>42</sup>

While the current focus on “co-design” and “co-development” is strong, there is little consistency about what these terms mean and how they are being used. In the legislative development and policy context, they clearly mean different things to different people. For example, many Indigenous nations utilize the terms to mean that they are actively drafting the end products (legislation or policy) with their Crown counterparts. On the other hand, some governments use the terms to mean they are building the vision and elements of the end products through a shared or joint process, but that they maintain control of core aspects of drafting and finalizing end products. Understandings of these terms will continue to evolve.

Of course, co-design and co-development in any context are complicated by the reality of the impacts of colonialism on Indigenous systems of government and laws, and the state of the work of nation and government rebuilding that is now taking place. Challenges inevitably arise about whom to partner with in joint work, how to design that partnership, the roles that other Indigenous nations and governments may have to play, and processes for community involvement and participation.

Legislative and policy development, however, take place in unique contexts. Legislative development in particular engages complex legal matters related to such

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<sup>42</sup> United Nations, Declaration on the Rights of Indigenous Peoples, article 38.

principles as parliamentary supremacy and cabinet confidentiality, which limit or constrain how processes may be designed and operate. This was illustrated by the decision of the Supreme Court of Canada in *Mikisew Cree* (2018) regarding consultation and accommodation on legislation.<sup>43</sup>

Unlike legislative and policy development, land-use planning is a distinct context where co-development can take many forms. It allows for innovation and can succeed, even when complexities arise. Land-use planning is inevitably a long-term process in which success depends upon both formal outcomes (e.g., legally enforceable designations on the land) and informal ones (e.g., buy-in, a high degree of consensus, a sense of ownership). Absent both of these, planning may easily result in the same uncertainty and conflict that existed previously – or even more. Some might say this is currently the situation in British Columbia.

Consequently, joint development and ownership over the process is critical, and land-use planning by its very nature allows for this to be achieved in a number of ways. For example, one option in British Columbia would be to envision the co-design of land-use planning processes in two parts. A set of high-level principles and directions to inform and shape land-use planning processes between the Crown and Indigenous nations could be developed through province-wide and regional engagement, which could be reflected in specific approaches designed and implemented between First Nations and governments. There appears to be a foundation for this already. For example, the Commitment Document (2018) developed by the provincial government and the First Nations Leadership Council provides a pathway for near-term higher-level legislative and policy work to be done jointly.<sup>44</sup> Many elements of the Commitment Document are directly relevant to setting broader directions on how land-use planning may be advanced, including the following:

*First Nations and the Crown will work toward strong, sophisticated and valued government-to-government relationships, with clear principles, mutual and respective responsibilities, and accountabilities. This renewed and modernized relationship will clarify and include space for the exercise of our respective jurisdictions, governance, laws and responsibilities, including through new processes and institutions, with the aim of benefitting from and integrating, where appropriate, the strengths of Indigenous and Crown systems (inclusive of world views, values, processes, standards, policies, decision-making institutions or structures, and approaches), for the benefit of all British Columbians and in terms of environmental stewardship, sustainable resource development, appropriate needs-based service delivery, and a robust and sustainable economy.*<sup>45</sup>

<sup>43</sup> *Mikisew Cree First Nation v. Canada*, 2018 SCC 40, [2018] 2 SCR 756, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17288/index.do>.

<sup>44</sup> British Columbia Assembly of First Nations, “Joint Agenda: Implementing the Commitment Document. Concrete Actions: Transforming Laws, Policies, Processes and Structures” (Vancouver: BC Assembly of First Nations, 2018), [https://bcafn.ca/wp-content/uploads/2018/07/Concrete-Actions-distribution\\_Sept19.pdf](https://bcafn.ca/wp-content/uploads/2018/07/Concrete-Actions-distribution_Sept19.pdf); British Columbia Assembly of First Nations, “Joint Agenda: Implementing the Commitment Document. Shared Vision, Guiding Principles, Goals and Objectives.” (Vancouver: BC Assembly of First Nations, 2018), [https://bcafn.ca/wp-content/uploads/2018/07/Vision-distribution\\_Sept19.pdf](https://bcafn.ca/wp-content/uploads/2018/07/Vision-distribution_Sept19.pdf).

<sup>45</sup> British Columbia Assembly of First Nations, “Shared Vision,” 1.

*The best outcomes are achievable when Crown and First Nation decisions are aligned, in harmony, and an outcome of collaboration rather than conflict. As such, models of and approaches to shared and joint decision-making are needed which facilitate meaningful and collaborative approaches to how Aboriginal title and rights are implemented by First Nations, and are considered, addressed, accommodated, and respected.<sup>46</sup>*

*...We are committed to strong and valued government-to-government relationships, in the context of section 35 and the Declaration. New government-to-government relationships require new approaches and models to the co-existence and exercise of our respective jurisdictions, including strategic level planning, decision-making and management roles and responsibilities. This relationship is important for all levels of government, municipal, provincial and federal.<sup>47</sup>*

The Commitment Document goes on to describe the process of taking joint action to develop new models through the design and implementation of:

- *strategic planning, including land-use planning;*
- *decision-making approaches, models and structures;*
- *management; and*
- *intergovernmental relations and understanding of jurisdictions and accountabilitys that recognize [Indigenous] title and rights and the Declaration.<sup>48</sup>*

It is increasingly apparent that basic alignment already exists on many of the broader principles and values that would have to be a foundation for a renewed approach to land-use planning in accordance with UNDRIP and FPIC.

As noted earlier, consent is not new. It is grounded in the historic relationship between Crown and Indigenous sovereigns, including the Royal Proclamation of 1763. This is a basis for articulating how the operationalization of consent must be rooted in a proper nation-to-nation and government-to-government relationship with suitable structures and processes. In land-use planning, this would necessarily see both the province and the Indigenous nation adopting and authorizing a land-use planning process to be enacted through their own laws, jurisdiction and decision-making, and based on a recognition of the Indigenous relationship with the land and resources. In so doing, consent to the process would be confirmed at the commencement of the process; as a result, many of the challenges in both process and outcome that resulted from the CORE and LRMP processes could be avoided. Both the Commitment Document and the province's Draft Principles have many elements that clearly would support a land-use planning process that was explicitly structured and authorized by two jurisdictions to proceed in a particular way.

The related issues of co-design and the commencement of processes with explicit confirmation of consent by the Crown and Indigenous peoples would enable land-use

<sup>46</sup> British Columbia Assembly of First Nations, "Shared Vision," 5.

<sup>47</sup> British Columbia Assembly of First Nations, "Concrete Actions," 4.

<sup>48</sup> British Columbia Assembly of First Nations, "Concrete Actions," 4.

planning to be based on a proper footing aligned with UNDRIP and FPIC. Some other principles and important factors will also govern the structure of such a process.

There has always been a – justifiable and unsurprising – tendency to promote essentially “one size fits all” land use planning models across the province, though with some regional differences. Typically, these planning efforts have also aimed to be as “comprehensive” as possible. In implementing such models, some arbitrariness was sometimes accepted. For example, areas identified for the purposes of a plan were typically not based on criteria such as the territory of a First Nation, or geographic features, but more often on administrative criteria that were usually developed for other purposes.

Designing land-use planning processes compatible with FPIC, with the goal of upholding UNDRIP, requires a more nuanced, flexible and diverse approach. At the heart of UNDRIP is the standard of self-determination, which speaks to the necessity for Indigenous peoples’ priorities and visions to shape their political, economic and social structures, and the way they work with state governments to ensure basic human rights standards are met, including in relation to land and resources.<sup>49</sup> This standard has many implications for the land-use planning context, some of which we have already seen. For example, in recent agreements with the Crown, some First Nations have chosen to pursue staged approaches to planning, with certain resources or areas being priorities. In other words, an explicitly staged approach is pursued, as in the shíshálh Foundation Agreement. Similarly, hot-button land and resource issues were addressed in that way by the Tahltan and the province in the sensitive Klappan area.

There are also emerging examples of resource-driven planning that builds outward from a focus on a particular resource, such as how some Indigenous nations are addressing forestry, as a step toward other planning processes. At the same time, comprehensive approaches are being pursued in other places as part of establishing a territory-wide foundation for decision-making.

This raises another relatively obvious issue, which is that land-use planning processes need to have a degree of territorial integrity – meaning they are designed with Indigenous territories, or portions of territories (in a geographically staged approach), as a core frame. Of course, this can be complex, as in the case of overlaps. But again, the elements of co-design, flexible approaches, the possibility of staged and sequenced processes, and a respect for Indigenous law and jurisdictions, from the outset open up a realm of possibilities for navigating this challenge. The emphasis on self-determination also invites a flexible approach to considering the governance model that may be employed to guide and direct land-use planning.

<sup>49</sup> University of British Columbia, “Dialogue on Implementing the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia” Summary Report (Vancouver: University of British Columbia Residential School History and Dialogue Centre, 2018), [http://irshdc.ubc.ca/files/2018/12/IRSHDC\\_UNDRIP\\_Report\\_Dec2018.pdf](http://irshdc.ubc.ca/files/2018/12/IRSHDC_UNDRIP_Report_Dec2018.pdf); Union of British Columbia Chiefs and Canadian Centre for Policy Alternatives, “True, Lasting Reconciliation: Implementing the United Nations Declaration on the Rights of Indigenous Peoples in British Columbia Law, Policy and Practices” (Vancouver: Canadian Centre for Policy Alternatives, 2018), [https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2018/11/CCPA-BC\\_UBCIC\\_TrueLastingReconciliation\\_summary\\_181126.pdf](https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2018/11/CCPA-BC_UBCIC_TrueLastingReconciliation_summary_181126.pdf).

An understanding is beginning to emerge that, while models of consent-based decision-making may have countless iterations, all models fundamentally fall into three categories.<sup>50</sup> In the first, consent is achieved through understandings about jurisdictional authority: that is, on certain matters one party or the other will be the decision-maker. In the second, consent is achieved by both jurisdictions agreeing to designate a decision-maker regarding a specific matter. In the third, consent is achieved through processes and structures in which both Crown and Indigenous decisions will be rendered as an outcome, with agreed-upon mechanisms for addressing divergent outcomes or decisions when they arise.

Applied to land-use planning, there are many possible variations to each of these categories. For example, an application of the first model would be an upfront understanding that in a particular context the land-use plan developed by one or the other jurisdiction would govern. Of course, such a model is attractive for its relative simplicity. Although this may sound unlikely, in some contexts, the parties might agree that the land-use plan developed by the Indigenous nation would govern; the Crown would then take any additional steps needed under its laws to ensure that such a plan is implemented. Such a scenario could play out, for example, where there is an already established relationship between the Crown, and a nation on decision-making that also has broad support and trust from industry. One can also imagine such a scenario playing out in areas that were previously highly contested, where matters have been resolved and a long-term plan to maintain those resolutions is needed. Similarly, in areas where title has been formally and specifically recognized, either *de facto* or expressly, such an upfront clarification of the jurisdictional authority could be possible.

The second model could have many variations, but the common element would involve the Crown and a First Nation jointly authorizing a body to develop a lawfully binding land use plan. The nature, structure, roles, responsibilities and makeup of that body could vary massively. Such bodies can be structured to involve all stakeholders, have clear and transparent sets of values and guidance at the outset and allow for multiple types of processes in determining the plan. Such structures could also lend themselves to quite formal approaches to land-use planning, should that be desired, including, for example, opportunities for formal hearings and technical evidence and assessment.

Under the third model, the Crown and First Nation would each have their own decision-making processes and make their own decisions, with agreed-upon mechanisms for aligning decisions should they be inconsistent. This model may include shared structures and processes, including ones to encourage consensus. Ultimately, though, separate decisions would be made on the content and potential approval of a land use plan. Unlike the other two approaches, consent in this model comes at the end of the process rather than the beginning. In this sense, it fits with the predominant (though

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<sup>50</sup> There is some discussion of these models in Douglas White's forthcoming paper, "Consent." Roshan Danesh has also been developing and presenting the models as part of dialogues with government officials, First Nations leaders and industry representatives in British Columbia.

not necessarily correct) perspective of consent as something to be considered and achieved, if possible, at the end of a process. As for the operability of the process, the range of options for how this model could be structured is vast. A formal joint body to guide land-use planning could be developed to make nonbinding recommendations to the respective Crown and First Nation decision-makers. Potentially such bodies could include representation from stakeholders or have associated structures or bodies that include stakeholders. These bodies may be formal or informal and could be at the technical or more senior levels.

Critical to the success of the third model is how to deal with the potential for incompatible decisions, and what mechanisms for resolution – such as the use of arbitrators, or rules about whose decision will predominate in the event of incompatible decisions – might be put into place. Obviously, shared recommendations and consensus-building throughout the land-use planning process would lessen the likelihood of such decisions. There are mechanisms that could be employed to make that more likely, including stages when the Crown and First Nation decide whether or not to proceed. These stages would afford opportunities to adjust views, positions and approaches based on shared information, analysis and perspectives.

Success would also be fostered by establishing very clear, specific dispute-resolution criteria at the outset to determine how incompatible Crown and First Nation decisions may be harmonized at the end of the process. If the Crown and First Nation know throughout the land-use planning process that, for example, certain types of conflicts between decisions may be sent to an expert third party to assess and determine a binding outcome guided by particular criteria the parties have agreed to, there will likely be an increased incentive to work to achieve compatible decisions.

Despite these challenges, in the near term the application of the third model may be more likely – not because it is necessarily the best or most effective, but because it may be most familiar to the Crown and First Nations. For one thing, of the three options it is the most similar to models of shared or collaborative decision-making that already operate in some places in British Columbia. Some strategic engagement agreements and reconciliation agreements already acknowledge that both the Crown and First Nation have decisions to make and provide for a shared structure or process to make recommendations to both decision-makers.<sup>51</sup> What these models often lack, however, are effective, clear and binding mechanisms to resolve disputes over incompatible decisions. This can be expected to change as governments grapple more directly with how to implement consent and UNDRIP.

<sup>51</sup> Nlaka'pamux Nation Tribal Council and British Columbia, "Nlaka'pamux Nation Tribal Council – Province of British Columbia Political Accord on Advancing Recognition, Reconciliation, and Implementation of Title and Rights," June 2018, [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/nntc\\_final\\_27nov2017\\_accord\\_bc.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/nntc_final_27nov2017_accord_bc.pdf); shíshálh Nation and British Columbia, "shíshálh Foundation Agreement," October 4, 2018, [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh\\_nation\\_foundation\\_agreement\\_-\\_final\\_-\\_redacted\\_-\\_signed.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted_-_signed.pdf).

## CONCLUSION

This article highlights the need for serious exploration of the means for operationalizing free, prior and informed consent. The question of how land-use planning can be a vehicle for doing so, if structured and implemented properly, must also be further examined. British Columbia is an important testing ground for this proposition. There is an urgent need for new approaches to land and resource decision-making if the pace and scale of conflicts about land use are to be stemmed.

As British Columbia, and other jurisdictions, move to grapple with the complexities of this age of reconciliation and consider how UNDRIP can help guide the process, it is clear that legislative, policy and practice reforms are needed. Indeed, to undertake elements of the approaches to land-use planning we discussed here, legislative and policy space will likely be needed to enable new decision-making structures to be created with Indigenous peoples. One litmus test of government initiatives is how they facilitate models of decision-making and land-use planning that can build collaborative approaches to implementing FPIC, while advancing greater predictability regarding lands and resources.

In this regard, serious consideration should be given to piloting and promoting approaches to achieving FPIC in land-use planning models that affirm consent by confirming the respective jurisdictions of First Nations and the Crown or establishing joint structures and institutions with decision-making authority. Although establishing such structures requires extensive upfront work, they can provide a degree of clarity, effectiveness and predictability that current models cannot. Such models can also assist Indigenous peoples, Crown governments, industry, other stakeholders and the general public to feel increasingly confident that a stable long-term framework exists to manage the increasingly complex intersection of Indigenous rights, resource development and environmental stewardship.





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