BILL C-15'S SPECIAL STATUS: ASSESSING THE LIKELIHOOD THAT AN ACT RESPECTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES WILL BE TREATED AS QUASI-CONSTITUTIONAL

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Abstract

In 2021, *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples* (the *UNDRIP Act*), received royal assent. Despite the broad support for its passage, the impact of the *UNDRIP Act* and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) on Canadian law, including existing federal laws, remains unclear. Although neither the *UNDRIP Act* nor UNDRIP itself have been enshrined in the constitution, there is a possibility that the *UNDRIP Act* has, or will in the future, achieve quasi-constitutional status. Quasi-constitutionality is a well-established principle in Canadian law, which can elevate legislation into something

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akin to constitutional status, such that an inconsistency between these statutes and existing federal laws could result in existing laws being declared inoperable. This article is an attempt to determine whether the *UNDRIP Act* is a quasi-constitutional piece of legislation and, if so, what the implications for such a finding may be in terms of (1) the judicial interpretation of the *UNDRIP Act* and (2) the *UNDRIP Act*'s impact on other pieces of federal legislation. The article proceeds in five parts. First, it identifies the conflicting positions regarding the place of UNDRIP in Canadian law, considering the passage of the *UNDRIP Act*. Second, it summarizes the principle of quasi-constitutionality in Canadian law. Third, it examines whether there have been any cases commenting on the quasi-constitutionality of the *UNDRIP Act*. Fourth, it assesses whether, considering the standards set out in the jurisprudence, the *UNDRIP Act* may obtain quasi-constitutional status. Fifth, assuming the *UNDRIP Act* is quasi-constitutional, it examines the potential impacts of this finding. The article concludes that there is a high likelihood of the *UNDRIP Act* obtaining quasi-constitutional status and that the implications of this finding may have a significant impact on Indigenous rights in the years ahead.

I INTRODUCTION

On December 3, 2020, the government of Canada introduced Bill C-15,[1] *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples* (the *UNDRIP Act*).[2] The *UNDRIP Act* received royal assent on June 21, 2021, and was the culmination of years of advocacy work by Indigenous Peoples to see the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, or the Declaration) implemented in Canadian law.

The *UNDRIP Act* affirms that UNDRIP is "a universal international human rights instrument *with application in Canadian law*"[3] before proceeding to include the entirety of UNDRIP as a schedule to the *Act*.[4] The *UNDRIP Act* imposes obligations on the government of Canada to develop "an action plan to achieve the objectives of the Declaration"[5] and to

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1. Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples,* 2nd Sess, 43rd Parl, 2020, (assented to 21 June 2021).

2. SC 2021, c 14 [*UNDRIP Act*]. Note: There is similar legislation to the *UNDRIP Act* in British Columbia, the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019 c 44 [*DRIPA*] and in the Northwest Territories, the *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, SNWT 2023, c 36 [*NWT UNDRIP*]. Although this paper will focus primarily on the *UNDRIP Act*, much of the analysis would apply to these provincial laws as well.

3. *UNDRIP Act*, *ibid*, s 4(a) [emphasis added].

4. It is well established that schedules are an essential component of a bill. See Marc Bosc & Andre Gagnon, eds, *House of Commons Procedure and Practice* (Montreal: Éditions Yvon Blais, 2017) at Chapter 16: "The Legislative Process," online: <ourcommons.ca/procedure/procedure-and-practice-3/ch_16_4-e.html> [perma.cc/2N53-B8EJ]; and UK Parliament, "Schedules" (last accessed 25 September 2023), online: <https://www.parliament.uk/site-information/glossary/schedules/>. I would also echo the position that the inclusion of material in a schedule as opposed to an operative clause does not affect its legal significance. See James George, "The Use of Schedules in Legislation: Drafting Conventions, Constitutional Principle and Statutory Interpretation" (2022) 43:3 *Stat L Rev* at 243–267. The legal status of scheduled materials, including declarations like UNDRIP, is not always clear but is discussed in further detail in Section II below.

5. *UNDRIP Act*, *supra* note 2, s 6(1).

report to Parliament annually on the steps taken toward implementation.[6] It also requires the government of Canada "to ensure that the laws of Canada are consistent with the Declaration."[7] The *UNDRIP Act* also clarifies that nothing within the *Act* itself (including the need to formulate an action plan and to report back to Parliament) "is to be construed as delaying the *application of the Declaration in Canadian law.*"[8] After the *UNDRIP Act* received royal assent, the government of Canada began to develop an action plan, committing millions of dollars to supporting Indigenous communities in their engagement on this issue.[9] The government of Canada completed its action plan in June 2023.[10]

While reaction to both the *UNDRIP Act* and the development of the action plan was generally positive,[11] this praise was not universal.[12] Despite the broad support for its passage, the impact of the *UNDRIP Act* on Canadian law remains unclear.[13] Questions remain regarding the scope of the rights that the *UNDRIP Act* will protect, UNDRIP's place in

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6. *Ibid*, s 7.

7. *Ibid*, s 5.

8. *Ibid*, s 2(3) [emphasis added].

9. Department of Justice Canada, "Engagement on an Action Plan to Achieve the Objectives of the United Nations Declaration on the Rights of Indigenous Peoples" (last modified 19 April 2022), online: <https://www.justice.gc.ca/eng/declaration/engagement/form/index.html> [perma.cc/Z35W-XN7V].

10. Department of Justice Canada, *The United Nations Declaration on the Rights of Indigenous Peoples Act—Action Plan* (2023), online: <justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf> [perma.cc/RVC4-96RM] [*Action Plan*].

11. Perry Bellegarde, "The Passage of Canada's UNDRIP Bill Is a Triumph We Should All Celebrate," *Globe and Mail* (21 June 2021), online: <theglobeandmail.com/opinion/article-the-passage-of-canadas-undrip-bill-is-a-triumph-we-should-all/>; Canadian Human Rights Commission, "Justice Canada's Action Plan Promises an Independent Human Rights Process for Indigenous Peoples" (23 June 2023), online: <chrc-ccdp.gc.ca/resources/newsroom/justice-canadas-action-plan-promises-independent-human-rights-process-indigenous> [perma.cc/N926-Q9M6]; ITK, "ITK Ready to Work with Federal Government to Implement UN Declaration Act Action Plan" (21 June 2023), online: <itk.ca/itk-ready-to-work-with-federal-government-to-implement-unda-action-plan/?utm_source=rss&utm_medium=rss&utm_campaign=itk-ready-to-work-with-federal-government-to-implement-unda-action-plan>.

12. Canadian Press, "Senate Approves Bill to Implement UN Declaration on the Rights of Indigenous Peoples," *CBC News* (16 June 2021), online: <cbc.ca/news/politics/undrip-declaration-passes-senate-1.6068524> [perma.cc/2Z9W-MPUG]; Russ Diabo, "Federal UNDRIP Bill C-15 Is an Attack on Indigenous Sovereignty and Self-Determination: Opinion," *APTN News* (21 December 2020), online: <aptnnews.ca/national-news/undrip-bill-c-15-federal-government-soverignty-russ-diabo/> [perma.cc/P4L9-ULFV]; Stephanie Taylor, "Ottawa Releases Action Plan to Implement UNDRIP, Despite Calls for More Consultation," *CTV News* (22 June 2023) online: <ctvnews.ca/politics/ottawa-releases-action-plan-to-implement-undrip-despite-calls-for-more-consultation-1.6450450> [perma.cc/39SG-2P3M]; Ontario Federation of Indigenous Friendship Centres (OFIFC), "Friendship Centres Are UNDRIP in Action" (April 2023), online (pdf): <ofifc.org/wp-content/uploads/2020/03/2023-04-28-UNDRIP-OFIFC-Engagement-Report.pdf> [perma.cc/298Q-JDKF].

13. See Kevin Gray, "Change by Drips and Drabs or No Change at All: The Coming UNDRIP Battles in Canadian Courts" (2023) 11:2 *Am Indian LJ 1 at 3, online:* <digitalcommons.law.seattleu.edu/ailj/vol11/iss2/2> [perma.cc/Y3X7-56JP]; Nigel Bankes, "Implementing UNDRIP: An Analysis of British Columbia's Declaration on the Rights of Indigenous Peoples Act" (2021) 53:4 UBC L Rev 971 at 971 [Bankes]. See also Naiomi Metallic, "Breathing Life into Our Living Tree and Strengthening Our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act" in Richard Alpert et al, eds, *Rewriting the Canadian Constitution* (forthcoming), online (pdf): <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2177&context=scholarly_works> [Metallic]. [perma.cc/7WNA-8YMQ] 1 at 5 [Metallic]; Brenda L Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2021) 53:4 UBC L Rev 1065 at 1066 [Gunn].

Canadian law, the interpretation of the articles within UNDRIP, and what would occur if inconsistencies are identified between existing federal legislation and UNDRIP.

What if, for example, the *Impact Assessment Act*, which "outlines a process for assessing the impacts of major projects and projects carried out on federal lands or outside of Canada,"[14] is determined to be inconsistent with the article in UNDRIP requiring the government to "consult and cooperate in good faith with Indigenous peoples . . . in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or other resources"?[15] Might Canada's existing intellectual property (IP) laws (*Patent Act*, *Trade-marks Act*, *Copyright Act*, etc.), which many have argued failing to protect Traditional Knowledge,[16] need to be reformed to ensure consistency with the articles guaranteeing Indigenous Peoples a right to traditional medicines[17] as well as "the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions"?[18]

Although Canada's recent UNDRIP action plan does commit the government of Canada to implement a process for ensuring consistency between UNDRIP and federal bills/regulations, including Canada's IP laws (which might involve amendments),[19] the action plan commitments lack clarity on precisely what will happen in the event inconsistencies are identified. Is the government of Canada required to act? If no amendments are made, is the legislation invalid? Who will determine if there is in fact an inconsistency? The action plan does not provide a response to these sorts of questions.

On its face, section 5 of the *UNDRIP Act* appears to address this issue, as it requires the government of Canada to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[20] This would appear to invite judicial intervention if an inconsistency is identified. However, a recent British Columbia Supreme Court case dealing with a similar section in British Columbia's UNDRIP implementation legislation,[21] which is discussed further below, determined that this section of BC's legislation did not allow for judicial intervention.[22]

Against this backdrop, a subject that has been missing from the discourse regarding UNDRIP is an assessment of the constitutional status of implementation laws like the *UNDRIP Act*. This is surprising, given that a discussion of this topic has significant

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14. Canadian Environmental Assessment Agency, *Overview of the Impact Assessment Act,* draft (2019) online (pdf): <canada.ca/content/dam/iaac-acei/documents/mandate/president-transition-book-2019/overview-impact-assessment-act.pdf>. See also *Impact Assessment Act,* SC 2019, c 28.

15. *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 107th Mtg, UN Doc A/res/61/295 (2007) GA Res 61/295, arts 10-11, 19, 28-29, 32 [UNDRIP].

16. See the following for a detailed discussion of this topic: Adam Lakusta, "Reforming Canada's Intellectual Property Laws: The Slow Path to Reconciliation," *Canadian Bar Association* (24 July 2020), online: <cba.org/sections/intellectual-property/resources/winner-of-the-2020-ip-law-student-essay-competition/> [perma.cc/TGK8-C7K8].

17. UNDRIP, *supra* note 15, art 24.

18. *Ibid*, art 31.

19. *Action Plan, supra* note 10, at 25, 26, 46,

20. *UNDRIP Act, supra* note 2, s 5.

21. *DRIPA*, *supra* note 2, s 3.

22. *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 at paras 485–491 [*Gitxaala*].

implications for how the questions outlined above may be answered. Although neither the *UNDRIP Act* nor UNDRIP have been enshrined in the constitution via a constitutional amendment, there is a possibility that the *UNDRIP Act* has acquired, or will in the future acquire, quasi-constitutional status, which can elevate legislation into something resembling constitutional status. If this happens, it is possible that an inconsistency between these quasi-constitutional statutes and existing federal laws could result in existing laws being declared inoperable. This article will assess whether the *UNDRIP Act* is a quasi-constitutional piece of legislation and, if so, what the implications for that designation may be in terms of (1) the judicial interpretation of the *UNDRIP Act* and (2) its impact on other pieces of federal legislation. The article proceeds in five parts. First, I will identify the conflicting positions regarding the legal status of UNDRIP, considering the passage of the *UNDRIP Act*. Second, I will summarize the principle of quasi-constitutionality in Canadian law. Third, I will examine whether there have been any cases commenting on the quasi-constitutionality of the *UNDRIP Act*. Fourth, I will assess whether, considering the standards set out in the jurisprudence, the *UNDRIP Act* may obtain quasi-constitutional status. Fifth, assuming the *UNDRIP Act* is quasi-constitutional, I will examine the potential impacts of this finding.

II THE LEGAL STATUS OF UNDRIP IN CANADA

The legal status of UNDRIP and the implications of the *UNDRIP Act* have been the subject of significant academic debate in recent years.[23] Although this article is not an attempt to provide any definitive conclusions regarding the domestication or implementation of UNDRIP, it is important to address some of the existing scholarship and jurisprudence on the question of UNDRIP's place in Canadian law before examining how this topic relates to the assessment of the *UNDRIP Act*'s quasi-constitutional status.

A. UNDRIP: A Schedule to the *UNDRIP Act*

At the outset, it should be noted that UNDRIP itself is a non-binding declaration, as opposed to a convention or treaty.[24] Much has been written about the various ways in which international law can be implemented domestically,[25] but with respect to UNDRIP, both the federal and some provincial/territorial governments have elected to implement UNDRIP via various "implementation laws."[26] The government of Canada upheld its long-standing promise to introduce such legislation in 2021 by way of the *UNDRIP Act*, which affirms UNDRIP's application in Canadian law.[27] As noted above, the *UNDRIP Act* also includes the entirety of UNDRIP as a schedule. This leaves some question as to whether the *UNDRIP Act* makes UNDRIP a part of the *Act* itself by including it as a schedule in this manner.

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23. See Bankes, *supra* note 13; Metallic, *supra* note 13; Gunn, *supra* note 13; Kerry Wilkins, "So You Want to Implement 'UNDRIP'" (2021) 53:4 UBC L Rev 1237 [Wilkins].

24. UN, "Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples" (undated), online (pdf): <un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf> [perma.cc/BQ6M-DYLV] >.

25. See e.g. Gib van Ert, "The Domestic Application of International Law in Canada" in Curtis A Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law*, (New York: Oxford University Press, 2019).

26. These laws include *UNDRIP Act*, *supra* note 2; *DRIPA*, *supra* note 2; *NWT UNDRIP*, *supra* note 2.

27. *UNDRIP Act, supra* note 2, s 4(a).

The legal status of scheduled materials is not always clear. Ruth Sullivan points to three possible effects of including scheduled materials in a statute:

> (1) the scheduled materials is part of the enactment (*i.e.,* has been incorporated by reference in the enactment), in which case it has the same binding legal force as the rest of the enactment; (2) The scheduled materials has been approved or ratified but has not been made part of the enactment . . .; (3) The scheduled material is set out for convenience only.[28]

I would argue that UNDRIP itself has been incorporated into the *UNDRIP Act* for three reasons. First, Ruth Sullivan has noted that in statutory construction it is generally the case "that incorporation is obvious and explicit."[29] This was the case in *Hogan et al v Newfoundland,*[30] where language referencing that the schedule "shall have the force of law" was determined to be both "imperative and clear."[31] The language found in the *UNDRIP Act* is not this explicit, but the inclusion of the language "nothing in this Act is to be construed as delaying the application of the Declaration in Canadian law"[32] and "affirming the Declaration as a universal international human rights instrument with application in Canadian law"[33] is similar to the imperative and clear drafting from *Hogan* and is sufficient to establish incorporation by reference.[34]

Second, even if the language included in the *UNDRIP Act* is not perceived as explicit enough to incorporate UNDRIP by reference, incorporation can also be inferred,[35] with such inference being determined using the tools of statutory interpretation.[36] Concluding that UNDRIP is not incorporated into the *UNDRIP Act*, and instead suggesting that it is merely included for convenience or to signal approvement of the scheduled materials, runs contrary to some fundamental statutory interpretation principles. In statutory interpretation there is a presumption "that the legislature avoids superfluous or meaningless words . . . every word in a statute is presumed to make sense and have a specific role to play in advancing the legislative purpose."[37] Therefore, "courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant."[38] It is difficult to

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28. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: Lexis Nexis Canada, 2014) at 472 [Sullivan].

29. *Ibid* at 473.

30. *Hogan et al v Newfoundland (Attorney General) et al*, 1998 CanLII 18727 (NFCA) [*Hogan*].

31. *Ibid* at para 83.

32. *UNDRIP Act, supra* note 2, s 2(3).

33. *Ibid*, s 4(a).

34. I would note that this view is highly contentious and there are some scholars who might suggest that such language may be insufficient, meaning that the schedule would lack statutory force (See Gib van Ert, "The Impression of Harmony: Bill C-262 and the Implementation of the UNDRIP in Canadian Law" (2018) CanLIIDocs 252, online (pdf): <canlii.ca/t/2cvr> [van Ert].

35. Sullivan, *supra* note 28 at 473.

36. *Hogan, supra* note 30 at para 81.

37. Sullivan, *supra* note 28 at 211.

38. *Ibid*. See also *R c Montour*, 2023 QCCS 4154 at paras 1197–1199 [*Montour*], where the court stated that the *UNDRIP Act*'s purpose is not simply to provide a path toward implementation but to affirm its application in Canadian law.

see how any meaning can be given to the phrase affirming UNDRIP as applying in Canadian law[39] if the articles in UNDRIP fall outside the *UNDRIP Act*.[40]

Third, arguments over whether UNDRIP itself is a part of the *Act*, and therefore, is a part of Canadian law, might be rendered moot considering a recent Supreme Court of Canada decision on the topic. In *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*,[41] the court confirmed that as a result of the *UNDRIP Act*, UNDRIP (and all of its articles) have been "incorporated into the country's domestic positive law."[42] Although it is unclear what it means for UNDRIP to be incorporated into Canadian law, this statement, at a minimum, strongly suggests that UNDRIP itself forms a part of the *UNDRIP Act*.

B. UNDRIP's Place in Canadian Law: Differing Views[43]

Although UNDRIP's relationship to the *UNDRIP Act* has been addressed, it remains unclear what precisely it means for UNDRIP to be a part of Canadian law. Representatives of the government of Canada have taken the position that UNDRIP's place in Canadian law is that of an interpretive aid and that the passage of the *UNDRIP Act* does not empower the courts to invalidate existing Canadian laws. For example, speaking before the House of Commons in February 2021, then Justice Minister Lametti stated that the rights guaranteed by UNDRIP

> can provide relevant and persuasive guidance to officials and courts. While this does not mean that international instruments can be used to override Canadian laws, it does mean that we can look to the declaration to inform the process of developing or amending laws and as part of interpreting and applying them.[44]

Minister Lametti also stated, unequivocally, that section 4(a) of the *UNDRIP Act*, which affirms UNDRIP "as a universal international human rights instrument with application in Canadian law,"[45] was not included to give the Declaration itself *direct* legal effect in Canada.[46]

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39. *UNDRIP Act, supra* note 2, s 4(a).

40. This topic of statutory interpretation principles and judicial interpretations of UNDRIP implementation laws is addressed in detail in the following article: Jeffrey Warnock, "So, I Guess We're Going with Vacuous Political Bromide: A Commentary on *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680" (2025) 57:3 UBC LR, Article 7 [Warnock]

41. *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families,* 2024 SCC 5 [*Reference*].

42. *Ibid* at para 15.

43. Note: I discuss the issue of UNDRIP's place in Canadian law in further detail with respect to BC's UNDRIP implementation law, *DRIPA*, in Warnock*, supra* note 40.

44. "Bill C-15, An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples", 2nd reading, *House of Commons Debates*, 43-2, 150, No 60 (17 February 2021) at 1810 (Hon David Lametti), online: <ourcommons.ca/DocumentViewer/en/43-2/house/sitting-60/hansard> [perma.cc/8C4Z-KXHC] [*Hansard—43*].

45. *UNDRIP Act*, *supra* note 2, s 4.

46. *Hansard – 43, supra* note 44 [emphasis added]. However, I would note that Minister of Crown-Indigenous Relations Carolyn Bennett, in testifying before Parliament on the *UNDRIP Act*, noted that the bill "recognizes the role of the declaration as having application in Canadian law and as a source for interpreting Canadian law," suggesting that its effect was not solely limited to being an interpretive aid, See House of Commons, Standing Committee on Indigenous and Northern Affairs, Evidence, 43-2, No 28

The viewpoint expressed by Minister Lametti was echoed in submissions made to the Federal Court in *Chambaud v Dene Tha' First Nation*, where the attorney general of Canada stated that

> neither the UN Declaration nor the *UN Declaration Act* can displace the Constitution or clear statutory language, nor has any Canadian Court suggested that the UN Declaration itself has constitutional status. Giving the UN Declaration constitutional force would require a constitutional amendment.
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> . . .
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> While the UN Declaration is a persuasive source to aid in the interpretation of laws, the Court's interpretation of legislation must remain grounded in the legislative text.[47]

It is possible that Minister Lametti and the attorney general's interpretation is informed, at least in part, by the statement in the preamble of the *UNDRIP Act* that the Declaration is "a source for the *interpretation* of Canadian law."[48] This focus on UNDRIP as an interpretive aid would also be consistent with a number of court decisions that pre-date the passage of the *UNDRIP Act*. Over the past decade, Canadian courts have often noted that UNDRIP, despite its non-binding nature, could be relied on to assist in the interpretation of legislation.[49]

It is not just government representatives who have been commenting on UNDRIP's place in Canadian law. Judges and scholars have begun addressing this question, including Professor Brenda Gunn, who suggested that, to the extent UNDRIP represents customary international law, legislation like the *UNDRIP Act* is unnecessary:

> Where the rights contained within the UN *Declaration* express rules of customary international law, these protections are directly enforceable in courts even without any legislation implementing the UN *Declaration* in Canada.[50]

Others have suggested that the *UNDRIP Act* (and indeed UNDRIP itself) may be aspirational or forward looking, with the *UNDRIP Act* expressing an intention for UNDRIP to have some direct legal effect in the future.[51] Still others take a particularly nuanced approach and suggest that UNDRIP is applicable in Canada within the context of interpreting legislation or Canada's constitutional obligations (including the rights guaranteed by section

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(20 April 2021) at 1120 (Hon Carolyn Bennett), online: <ourcommons.ca/DocumentViewer/en/43-2/INAN/meeting-28/evidence> [perma.cc/AF4Z-8K9E].

47. *Chambaud et al v Dene Tha' Band Council et al*, 2022 FC T-1714-21 (Memorandum of Fact and Law of the Respondent, The Attorney General of Canada at paras 37–38), online: <aptnnews.ca/wp-content/uploads/2022/05/Memo-of-Argument-T-1714-2126.pdf> [perma.cc/7KZH-HGET] [*Chambaud*].

48. *UNDRIP Act, supra* note 2 at preamble [emphasis added].

49. See *Watson v Canada*, 2020 FC 129 at para 351; *Ross River Dena Council v Canada*, 2017 YKSC 59 at paras 301-310; *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at para 103.

50. Gunn, *supra* note 13 at 1080.

51. *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 at para 211 [*Rio Tinto*]. As noted above in footnote 38, this view was directly challenged in *Montour, supra* note 38 at paras 1197–1199.

35 of the *Constitution Act, 1982*).[52] Those adopting this perspective would seem to suggest that while UNDRIP has a substantive impact on Canadian law, UNDRIP itself is not directly enforceable.[53] In support of this conclusion, many have pointed to the fact that "UNDRIP implementation legislation [like the *UNDRIP Act*] . . . falls far short of the language adopted by the legislatures concerned to accord domestic legal status on international treaties or land claims agreements."[54]

Recent cases have lent support to the position that UNDRIP is not a part of Canadian law (other than to assist in the judiciary's interpretation of statutes or assessment of constitutional rights). In *R c Montour and White*,[55] the Superior Court of Quebec stated that they were "not convinced by the reference to the *UNDRIP* as the direct source of Aboriginal rights . . . [and that] the Applicants have not clearly pleaded nor shown that the rights contained in the UNDRIP are directly enforceable under Canadian law."[56] In *Gitxaala v British Columbia (Chief Gold Commissioner)*,[57] the first case to directly address the effects of a law implementing UNDRIP, Justice Ross concluded that DRIPA (British Columbia's equivalent to the *UNDRIP Act*) "did not implement UNDRIP into domestic law."[58] Justice Ross further concluded that DRIPA did not invite the courts to adjudicate whether or not an existing provincial law was consistent with UNDRIP.[59]

In contrast to these views, there are those who would suggest that UNDRIP does have direct legal effect and that it is a source of substantive rights, with the *UNDRIP Act* implementing those rights in Canadian law.[60] This would suggest that remedies must be available when governments pass or maintain legislation that violates those rights.[61] In other

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52. See Metallic, *supra* note 13; *Montour, supra* note 38; Warnock, *supra* note 40 at 947.

53. Wilkins, *supra* note 23 at 1244; Metallic, *supra* note 13 at 14–46.

54. Nigel Bankes and Robert Hamilton, "What Did the Court Mean When It Said that UNDRIP 'Has Been Incorporated into the Country's Positive Law'? Appellate Guidance or Rhetorical Flourish?" (28 February 2024), online: <ablawg.ca/2024/02/28/what-did-the-court-mean-when-it-said-that-undrip-has-been-incorporated-into-the-countrys-positive-law-appellate-guidance-or-rhetorical-flourish/> [perma.cc/8RR4-WM4F] citing van Ert, *supra* note 34; Nigel Bankes, "Implementing UNDRIP: Some Reflections on Bill C-262" (27 November 2018), online: <ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/> [perma.cc/E6FV-LWYT]; Bankes, *supra* note 13.

55. *Montour, supra* note 38.

56. *Ibid* at para 1287.

57. *Gitxaala, supra* note 22.

58. *Ibid* at para 464. See the full discussion at *ibid* at paras 444–466.

59. *Ibid* at paras 485–491.

60. *Rio Tinto, supra* note 51 at para 210. See also Warnock, *supra* note 40 at 947–948; Gordon S Campbell, "How 2021 Really Did Change Everything for Indigenous & Aboriginal Law in Canada: The Dramatic but Little Known UNDRIP Act" (17 December 2021), online: <acmlawfirm.ca/ontario-barrister-solicitor-law-blog/2021/12/17/how-2021-really-did-change-everything-for-indigenous-amp-aboriginal-law-in-canada> [perma.cc/4XE9-72C3]. For a discussion of the significance of recent Supreme Court of Canada jurisprudence and what it might mean for UNDRIP's place in Canadian law, see Senwung Luk, "UNDRIP Is Now a Part of Canada's 'Domestic Positive Law.' What Does This Mean?" *OKT Law* (4 April 2024), online: <oktlaw.com/undrip-is-now-part-of-canadas-domestic-positive-law-what-does-this-mean/> [perma.cc/HN96-GVKW].

61. Gitxaala Nation, "Gitxaała Nation Appeals Court's Refusal to apply UNDRIP and Stop Unconstitutional Mineral Tenures" (25 October 2023), online: <gitxaalanation.com/gitxaala-nation-appeals-courts-refusal-to-apply-undrip-and-stop-unconstitutional-mineral-tenures/> [perma.cc/QZ9P-JXL5] [Gitxaala Nation].

words, UNDRIP is truly a "part of Canadian law" in every sense of the phrase. It remains an unresolved question precisely which position outlined above will become the law of the land, as Justice Kent noted in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*:

> It remains to be seen whether the passage of *UNDRIP* legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, *UNDRIP* legislation has on the common law.[62]

This divergence of opinions is included to highlight that the question of UNDRIP's place in Canadian law is, in my view, unresolved. Despite this uncertainty, this article will operate under the assumption that it is at least possible that the effect of legislation like the *UNDRIP Act* is that UNDRIP is now a part of Canadian law, meaning (1) that UNDRIP has a direct legal effect and (2) that the rights expressed in the articles are substantive rights for Indigenous Peoples to invoke and rely on in challenging federal legislation or conduct. I would raise the following points to support such an assumption.

First, although the decisions in *Montour* and *Gitxaala* offer one answer to the question of what it may mean for UNDRIP to be a part of Canadian law, I do not believe that these decisions will be determinative of this matter. I would suggest they are non-determinative for four reasons:

1. The rulings represent non-appellate-level decisions on a matter of national legal and political significance. It remains to be seen what appellate courts will make of the courts' reasoning in these cases.

2. These decisions pre-date the Supreme Court of Canada's ruling in *Reference re An Act respecting First Nations, Inuit, and Métis children, youth and families*. As noted above, in that case the court stated that section 4(a) of the *UNDRIP Act* incorporated UNDRIP into Canada's "domestic positive law."[63] Although the implications of this finding are not discussed further by the Supreme Court of Canada, this conclusion requires us to reflect on whether these earlier decisions should still be considered good law.

3. The *Gitxaala* decision, which provides the most substantive commentary regarding UNDRIP's place in Canadian law, dealt solely with DRIPA and not the *UNDRIP Act*. Although the language of the two statutes is quite similar, there are some notable and important differences in its drafting that could lead a court examining the *UNDRIP Act* to come to very different conclusions on UNDRIP's impact on federal law.[64]

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62. *Rio Tinto*, *supra* note 51 at para 212.

63. *Reference*, *supra* note 41 at para 15.

64. Warnock, *supra* note 40 at 969–970.

4. The court in *Gitxaala* and *Montour* did not examine the quasi-constitutionality of DRIPA or the *UNDRIP Act*. As discussed below, the quasi-constitutional status of legislation has a significant impact on how the court exercises its interpretive function. If the courts in either of those cases had concluded that DRIPA or the *UNDRIP Act* was a quasi-constitutional law, the courts may have reached very different conclusions on the meaning of the legislations' key provisions.

In addition to issues with the existing case law, I would also point to comments made by former Justice Minister Lametti that support a finding that UNDRIP is a part of Canadian law. Minister Lametti has stated that the *UNDRIP Act* would "impose *obligations* on the federal government to align our laws with the Declaration over time."[65] How can Indigenous Peoples hope to ensure that these obligations are met if UNDRIP lacks direct legal effect and is instead relegated to the role of an interpretive aid? After the *Gitxaala* decision was released, it was obvious that there was a disconnect between the Crown's understanding of UNDRIP's place in Canadian law and the perspective of impacted First Nations. In examining some of the commentary surrounding the appeal of the *Gitxaala* decision, at least some of the parties were under the impression that DRIPA (much like the *UNDRIP Act*) was going to result in UNDRIP having some directly enforceable effects. In a press release announcing their appeal of the ruling in *Gitxaala*, the Gitxaala Nation stated:

> The provincial government fought us tooth and claw in Court to argue that DRIPA—the law BC itself enacted to uphold UNDRIP—is not legally enforceable . . . The Court's decision is a result of BC's efforts to score political points on DRIPA while avoiding any legal accountability—but DRIPA must be more than an empty political promise.[66]

This suggests that there is some expectation that an inconsistency between existing legislation and UNDRIP may be adjudicated and that inconsistencies should not be permitted to stand. However, if the courts were to determine definitively that UNDRIP has no direct legal effect and that the *UNDRIP Act* (much like DRIPA in the *Gitxaala* case) does not permit the judiciary to adjudicate inconsistencies between federal legislation and UNDRIP, the government of Canada would be free to identify inconsistencies between federal laws and UNDRIP and yet refuse to take steps to address them. If that were the case, what sort of relief would be available to Indigenous Peoples?[67]

The final point in support of my assumption regarding UNDRIP's place in Canadian law would be to highlight some of the flaws in the position that the *UNDRIP Act* does not result in UNDRIP having direct legal effect in Canada. To echo the sentiment expressed by Orlagh O'Kelly, lawyer for the Dene Tha' First Nation in *Chambaud v Dene Tha' First Nation*, if we were to accept the idea that UNDRIP is not directly applicable as law, and that UNDRIP is unenforceable, largely aspirational, or at best an interpretive aid, this could be viewed as an "impoverished interpretation" of the *UNDRIP Act*.[68] The government of Canada

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65. *Hansard–43*, *supra* note 44 at 1815 [emphasis added].

66. Gitxaala Nation, *supra* note 61.

67. Warnock, *supra* note 40 at 967–968.

68. Brett Forester, "Feds Call UNDRIP an 'Interpretive Aid Only' in Legal Battle over Alberta First Nation's Election Delay," *APTN News* (3 May 2022), online: <https://www.aptnnews.ca/national-news/feds-call-undrip-interpretive-aid-only-alberta-first-nation-election/>.

has referred to UNDRIP as aspirational for years[69] and, as was noted above, the courts have frequently invoked UNDRIP's use as an interpretive aid in the past.[70] It is difficult to see why the *UNDRIP Act* would be in any way necessary if the intention was to simply have it largely reassert the status quo.[71]

It may be suggested that UNDRIP's use as an interpretive aid was not fully endorsed in the cases that pre-date the passage of the *UNDRIP Act* and that additional clarity on this point was required.[72] Professor Naiomi Metallic, for example, has noted that there were

> cases where judges refused to apply the UN Declaration based on arguments like (1) it did not apply because it was not "ratified" by Canada; (2) it is "non-binding" and merely aspirational; or (3) that counsel had provided insufficient argument on how it ought to apply to Canadian law.[73]

This has led some to suggest that the inclusion of section 4(a) of the *UNDRIP Act*, rather than confirming UNDRIP as a source of substantive rights, is intended to affirm UNDRIP's role as an interpretive aid.[74] Respectfully, I would advise against concluding that this is all section 4(a) is intended to accomplish. If that were the case, why did the government of Canada's own UNDRIP action plan recommend that a provision be added to the federal *Interpretation Act* "that provides for the use of the UN Declaration in the interpretation of federal enactments."?[75] Similarly, if we look to British Columbia, DRIPA contains a section affirming "the application of the Declaration of the laws of British Columbia."[76] If we are to conclude that this language is also there to affirm UNDRIP's use as an interpretive aid, why did the government of British Columbia later amend the provincial *Interpretation Act* to add a section confirming that "[e]very act and regulation must be construed as being consistent with the Declaration"?[77] It would be strange for the federal and provincial governments to propose unnecessary amendments to the interpretation acts if the *UNDRIP Act* and DRIPA have clarified this interpretation question already.

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69. Cameron French, "C-15: What You Need to Know about Law That Could Redefine Indigenous-Government Relations in Canada," *CTV News* (21 May 2021), online: <ctvnews.ca/politics/article/c-15-what-you-need-to-know-about-law-that-could-redefine-indigenous-government-relations-in-canada/> [perma.cc/SAJ2-K57D]. See also Warnock, *supra* note 40 at 961, 964.

70. See also Warnock, *supra* note 40 at 952 and 961.

71. I have also addressed this point with respect to DRIPA in Warnock, *supra* note 40 at 964.

72. Wilkins, *supra* note 23; Bankes, *supra* note 13 at 977; Warnock, *supra* note 40 at 961.

73. Metallic, *supra* note 13 at 17 citing *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814; *Adoption—09201*, 2009 CarswellQue 14792; *Laboucan v The Queen*, 2013 TCC 357; and *Sackaney v The Queen*, 2013 TCC 303. *Snuneymuxw First Nation v Board of Education—School District #68*, 2014 BCSC 1173; *Sackaney v R., ibid; and Manitoba Metis Federation Inc. v The Government of Manitoba et al.*, 2018 MBQB 131; *Hupacasath First Nation v Canada (Foreign Affairs),* 2013 FC 900; and *Nunatukavut Community Council Inc. v Canada (Attorney General)*, 2015 FC 981.

74. Metallic, *supra* note 13 at 17–18; Wilkins, *supra* note 23 at fn 37. See also Bankes, *supra* note 13 at 997 and Warnock, *supra* note 40 at 961 for a discussion of this same point with respect to DRIPA.

75. *Action Plan, supra* note 10 at 26.

76. DRIPA, *supra* note 2, s 2(a).

77. *Interpretation Act*, RSBC 1996 c 238, s 8.1(3).

An argument in support of the position that the *UNDRIP Act* has not implemented UNDRIP domestically is that the *Act* contemplates future action or steps that need to be taken by government. For example, the *UNDRIP Act* states that one of its purposes is to provide a framework for implementation[78] and that an action plan will be created to achieve the objectives of the Declaration.[79] This argument is offered in support of the more aspirational or long-term vision of implementation and to counter any suggestion that UNDRIP has direct legal effect.[80] I would suggest that this position effectively concludes (incorrectly in my view) that because further government action is necessary to ensure that the rights expressed in UNDRIP are being upheld and respected, the rights themselves cannot be recognized as substantive and enforceable in Canadian law. I believe this mischaracterizes the need for further action as a prerequisite for Indigenous Peoples possessing the rights found in UNDRIP in the first place. The forward-looking elements of the *UNDRIP Act* are essential because governments inevitably need to take action to ensure that the rights in UNDRIP are being respected and to ensure that existing legislation is being amended to avoid infringements of those rights. However, this does not mean that until that process is completed Indigenous Peoples must simply wait for these rights to be respected. The idea that UNDRIP represents the minimum standards of the human rights of Indigenous Peoples,[81] but that these rights are not a part of Canadian law until the government chooses to take the steps necessary to ensure existing laws, policies, and institutions are respecting those rights is untenable in my view.

This article is not an attempt to establish definitively that UNDRIP has direct legal effect in Canada and that the rights expressed in UNDRIP are now substantive rights, nor is such a conclusion necessary for the purposes of this article. Rather, I have included the preceding commentary to establish that it is at least *arguable* that the *UNDRIP Act* has resulted in UNDRIP having direct legal effect and that further academic and judicial treatment of this issue is necessary moving forward. Regardless, a definitive conclusion regarding UNDRIP's place in Canadian law is not necessary for an assessment of the quasi-constitutional status of the *UNDRIP Act* to still be meaningful. As discussed below, if a law is identified as quasi-constitutional, this has a significant impact on the interpretation of said law and on the ability of courts to declare conflicting laws to be inoperable to the extent of the conflict.

Conclusions regarding the substantive effects of the *UNDRIP Act* may only come from judicial decision makers, who are required to engage in statutory interpretation exercises.[82] A finding regarding the *UNDRIP Act*'s quasi-constitutional status might result in courts taking an interpretative approach that materially impacts the judiciary's assessment of the meaning of section 4(a) of the *UNDRIP Act* and what it means for UNDRIP to apply in Canadian law. Similarly, the quasi-constitutional status of the *UNDRIP Act* might cause appellate courts to reconsider the approach taken in a case like *Gitxaala* where the court concluded that DRIPA

78. *UNDRIP Act, supra* note 2, s 4(b).

79. *Ibid*, s 6(1).

80. This was the position taken by the court with respect to DRIPA in *Gitxaala, supra* note 22 at 439, 465–466.

81. *UNDRIP Act, supra* note 2 at preamble. See also Dale Smith, "UNDRIP's Place in Canadian Law," *National Magazine* (16 December 2021), online: <nationalmagazine.ca/en-ca/articles/law/in-depth/2021/undrip-s-place-in-canadian-law> [perma.cc/35CN-UUQL], where lawyer Meryl Alexander stated that UNDRIP does not create rights but affirms existing ones.

82. As was the case in *Gitxaala, supra* note 22 at paras 444–491.

neither "commands or invites judicial intervention."[83] If DRIPA were found to be quasi-constitutional, perhaps the court would have reached a different conclusion.

Given these significant implications, lawyers, judges, and government officials should all have an interest in the question of whether the *UNDRIP Act* (and similar laws in British Columbia and the Northwest Territories) are quasi-constitutional. To reiterate, the relevance of this question does not depend on a definitive finding regarding UNDRIP's place in Canadian law. The remainder of this paper is dedicated to an assessment of the *UNDRIP Act*'s quasi-constitutional status.

III HOW TO IDENTIFY QUASI-CONSTITUTIONAL LEGISLATION

As Professor Vanessa MacDonnell has noted, "[s]ince the 1970s, the Supreme Court of Canada has treated a small number of statutes as quasi-constitutional".[84] The term "quasi-constitutional" was first invoked by the Supreme Court of Canada to describe the Canadian Bill of Rights.[85] Chief Justice Laskin, writing in dissent in *Hogan v The Queen*, suggested that the Bill of Rights was properly understood as something more than an ordinary statute,[86] instead resembling "a half-way house between a purely common law regime and a constitutional one."[87] Eventually the Supreme Court began identifying other laws as sharing a similar special status, "not quite constitutional but certainly more than . . . ordinary."[88]

Despite jurisprudence stretching back decades, academic treatment of this principle is somewhat limited. However, the recent work of Vanessa MacDonnell and John Helis has begun to explore the purpose of designating a statute quasi-constitutional and the effects of such a designation. Their work reviewed decades of jurisprudence to identify the types of laws that may be designated as quasi-constitutional. Based on this review, they have suggested that some laws are determined to be quasi-constitutional by the courts "because they are of fundamental importance, of fundamental value in our society, and indeed fundamental in the Canadian legal system."[89] They may also receive this designation because they are "implementing constitutional imperatives"[90] or "are closely linked to the values and rights

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83. *Ibid* at para 486.

84. Vanessa MacDonnell, "A Theory of Quasi-Constitutional Legislation" (2016) 53:2 Osgoode Hall LJ 508 at 508 [MacDonnell].

85. *Ibid* at 513.

86. *Ibid*.

87. *Hogan v R*, [1975] 2 SCR 574 at 597–598.

88. *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 at para 12; MacDonnell, *supra* note 84 at 509. See also *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at para 10.

89. John Helis, *Quasi-Constitutional Laws of Canada* (Toronto: Irwin Law, 2018) at 1 [Helis] citing *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 120; *R v Osolin*, [1993] 4 SCR 595 at para 21; and *Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para 24 [*Lavigne*]. See also MacDonnell, *supra* note 84 at 518.

90. MacDonnell, *supra* note 84 at 519.

in the constitution,"[91] including principles like "democracy, the protection of minorities, federalism, constitutionalism and the rule of law."[92]

The connection between quasi-constitutional legislation and Charter rights was echoed by the Supreme Court of Canada in *Lavigne v Canada (Office of the Commissioner of Official Languages)*. In its reasons, the court, in referring to the *Official Languages Act*, suggested that

> To the extent also that it is an extension of the rights and guarantees recognized in the Charter, and by virtue of its preamble, its purpose as defined in section 2 . . . it belongs to that privileged category of quasi-constitutional legislation which reflects "certain basic goals of our society" and must be so interpreted "as to advance the broad policy considerations underlying it."[93]

In her article, "A Theory of Quasi-Constitutional Legislation," Vanessa MacDonnell compiled a list of statutes that meet this standard and could be considered, either expressly or implicitly, to be quasi-constitutional, including the *Canadian Bill of Rights*, the *Quebec Charter of Rights and Freedoms*, the *Official Languages Act*, the *Elections Act*, the *Privacy Act*, the *Freedom of Information and Protection of Privacy Act*, and the *Access to Information Act*.[94] This is consistent with Helis' finding that

> The common thread among quasi-constitutional laws is that they are all rights-based regimes that cover the traditional civil liberties, the protection against discrimination, the right to privacy, the right to access government information, language rights, and the common law protection of a person's good reputation.[95]

It is also worth noting that the government of Canada has compiled a list of laws that it acknowledges are quasi-constitutional, including several of those listed by MacDonnell and Helis.[96] In summation, a court is likely to find a law to be quasi-constitutional if it is connected to furthering constitutional principles or rights (including Charter rights) or is otherwise perceived to be of fundamental importance in Canadian law.

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91. *Lavigne, supra* note 89 at para 25. See also Helis, *supra* note 89 at 178; MacDonnell, *supra* note 84 at 533.

92. Helis, *supra* note 89 at 179–180, citing *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 32. See also *Douez v Facebook*, 2017 SCC 33.

93. *Lavigne*, *supra* note 89 at para 23, citing *Rogers v Canada (Correctional Service)*, [2001] 2 FC 586 at 602–603.

94. MacDonnell, *supra* note 84 at 514–518.

95. Helis, *supra* note 89 at 4.

96. Canada, *Guide to Making Federal Acts and Regulations* (Ottawa: Department of Justice, 2001) online (pdf): <canada.ca/en/privy-council/services/publications/guide-making-federal-acts-regulations.html> [*Guide*].

IV HAS A CANADIAN COURT FOUND THE *UNDRIP ACT* TO BE QUASI-CONSTITUTIONAL?

As of April 2025, I have been unable to identify any court decision that has addressed whether the *UNDRIP Act* is quasi-constitutional.[97] I was able to locate two statements from government of Canada officials regarding the *UNDRIP Act*'s quasi-constitutional status. The first was an interview with former Justice Minister Lametti, who stated to the Canadian Bar Association's *National Magazine*, that the *UNDRIP Act* would "become one of the foundational documents in the constellation of our critically important constitutional and quasi-constitutional documents."[98] The second was from the Debates of the Senate regarding Bill C-262, which was a precursor to the *UNDRIP Act*.[99] During the Senate debates of this bill, Senator Joyal suggested that it was quite clear that the bill would make UNDRIP a Canadian law, and further that the bill was quasi-constitutional:

> Senator Joyal: If I may ask another question. I don't want to abuse you, senator, but when I read the bill, it's quite clear in section 2 and 3, which say the declaration on the rights of Indigenous people is hereby affirmed as a universal international human rights instrument with applications in Canadian law.
>
> This bill would make the UN declaration a Canadian law because, as you know, it is an annex to the bill. We vote on everything.
>
> Once it is introduced in Canadian law, I am of the opinion, and that's why I seek your views on this, this bill is quasi-constitutional inasmuch as the Official Languages Act and the Canadian Multiculturalism Act are used by the Supreme Court in interpreting other acts, decisions, legislation, government decisions, programs and so forth.
>
> My conclusion is this bill, being quasi-constitutional, will be interpreted by the court with a remedial and purposive objective. In other words, it's not just a statement; it has implications because anything we will legislate in the future could be measured on the basis of this act.[100]

Beyond these statements, I have been unable to identify any commentary of substance regarding the quasi-constitutional status of the *UNDRIP Act* from government officials or records. There has also been little to no treatment of this issue in the scholarship, except for

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97. I would also reiterate that although this article focuses on the federal *UNDRIP Act*, I have similarly found no court decisions confirming whether or not DRIPA in British Columbia or the NWT UNDRIP in the Northwest Territories are quasi-constitutional.

98. Yves Faguy, "Interview with Justice Minister David Lametti," *National Magazine* (4 February 2022), online <nationalmagazine.ca/en-ca/articles/people/q-a/2022/interview-with-justice-minister-david-lametti> [perma.cc/L2F9-ZAV4].

99. Bill C-262 was a private member's bill to implement UNDRIP. This bill never received royal assent, but its approach, structure, and much of its language is similar to what was eventually included in the *UNDRIP Act*.

100. "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," 2nd reading, *Debates of the Senate*, vol 150, No 254 (29 November 2018) at 7071 (Senator Joyal), online: <sencanada.ca/en/content/sen/chamber/421/debates/254db_2018-11-29-e?language=e>.

Kerry Wilkins' article "So You Want to Implement UNDRIP,"[101] where he discusses UNDRIP implementation legislation, and states "[i]t is arguable . . . that federal legislation giving domestic effect to a wide-ranging UN declaration would qualify as quasi-constitutional."[102]

Given the lack of judicial and scholarly treatment of this issue, the next section will explore the point raised by Kerry Wilkins and determine whether the *UNDRIP Act* is likely to be added to the list of quasi-constitutional legislation highlighted above.

V IS THE *UNDRIP ACT* QUASI-CONSTITUTIONAL?

The *UNDRIP Act* should be designated as quasi-constitutional for four reasons. First, the *UNDRIP Act* is analogous to established categories of quasi-constitutional legislation. As previously noted, the government of Canada has published a guide to making federal laws, in which it lists the *Canadian Human Rights Act* as a quasi-constitutional *Act*.[103] It is not surprising to see this *Act* included, given that, as Vanessa MacDonnell has noted,

> [p]rovincial and federal human rights codes are clear examples of fundamental law. No one would doubt that these statutes have as their goal the promotion of equality and the protection of civil liberties.[104]

UNDRIP is a declaration that

> is the most comprehensive international instrument on the rights of Indigenous Peoples. It establishes a universal framework of minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world and *it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous Peoples*.[105]

Given that UNDRIP is an instrument expressing fundamental human rights standards, it would be inconsistent for human rights legislation like the *Canadian Human Rights Act* to be designated quasi-constitutional while the *UNDRIP Act* is not. The *UNDRIP Act* is nothing if not a human rights act.

Second, the *UNDRIP Act* is directed toward implementing a series of "constitutional imperatives." Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of Canada's Aboriginal Peoples:

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

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101. Wilkins, *supra* note 23.

102. *Ibid* at 1297.

103. *Guide*, *supra* note 96.

104. MacDonnell, *supra* note 84 at 519.

105. UN Department of Economic and Social Affairs, "United Nations Declaration on the Rights of Indigenous Peoples" (last visited 27 January 2023), online: <social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples> [perma.cc/UW35-EA7G] > [emphasis added].

> **Definition of *aboriginal peoples of Canada***
>
> (2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada.[106]

Although this is not a Charter right, section 35 does form a part of Canada's constitution. Clearly, the rights of Indigenous Peoples are at the heart of Canada's constitutional order, which suggests that legislation aimed specifically at codifying the international standards for those rights would be fundamentally important enough for it to be designated as quasi-constitutional.

The Supreme Court of Canada has also repeatedly affirmed that legal concepts impacting Indigenous Peoples, such as the duty to consult,[107] the honour of the Crown,[108] and Métis rights pursuant to section 35 of the *Constitution Act, 1982*,[109] are constitutional imperatives. There are numerous articles contained in UNDRIP that are relevant to these imperatives, most notably (at least for the purposes of the duty to consult) the articles referencing the free, prior, and informed consent of Indigenous Peoples:

> **Article 10:** Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
>
> **Article 19:** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
>
> **Article 29(2):** States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
>
> **Article 32(1):** Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. (**2**) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[110]

The duty to consult "requires the Crown to consult . . . Aboriginal peoples before taking action that may adversely affect their asserted or established rights under s.35 of the *Constitution Act,* 1982."[111] This duty to consult is a well-established "constitutional

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106. *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

107. *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 24 [*Clyde River*].

108. *Mikisew Cree v Canada,* 2018 SCC 40 at para 55 [*Mikisew*].

109. *R v Powley,* 2003 SCC 43 at para 38.

110. UNDRIP, *supra* note 15, arts 10, 19, 29(2), 32(1).

111. *Mikisew, supra* note 108 at para 1.

imperative"[112] that nevertheless is subject to significant legal debate regarding its scope and content (something that will be discussed further in Section VI below). International law developments such as UNDRIP are quite relevant to these debates.[113] Since the *UNDRIP Act* is intended to ensure Canadian law is consistent with UNDRIP, which contains articles that address this established "constitutional imperative,"[114] it must be concluded that the *UNDRIP Act* is quasi-constitutional.

Third, the *UNDRIP Act* refers to the constitution in its preamble, something that the Supreme Court of Canada has found to be relevant to determining whether a law is quasi-constitutional. For example, in *Lavigne*, the Supreme Court noted that the preamble to the *Official Languages Act* (another quasi-constitutional statute)

> refers expressly to the duties set out in the Constitution. It cites the equality of status of English and French as to their use in the institutions of the Parliament and government of Canada and the guarantee of full and equal access in both languages to Parliament and to the laws of Canada and the courts. In addition, the preamble states that the Constitution provides for guarantees relating to the right of any member of the public to communicate with and receive services from any institution of the Parliament or government of Canada in English and French. The fact that the *Official Languages Act* is a legislative measure taken in order to fulfil the constitutional duty in respect of bilingualism is not in doubt.[115]

The preamble's reference to the constitution was clearly relevant to the determination that the *Official Languages Act* was quasi-constitutional. Similarly, the *UNDRIP Act* contains several references to the constitution throughout its preamble, notably the following:

> Whereas the protection of Aboriginal and treaty rights—recognized and affirmed by section 35 of the *Constitution Act, 1982*—is an underlying principle and value of the Constitution of Canada, and Canadian courts have stated that such rights are not frozen and are capable of evolution and growth;
>
> . . .
>
> Whereas respect for human rights, the rule of law and democracy are underlying principles of the Constitution of Canada which are interrelated, interdependent and mutually reinforcing and are also recognized in international law.[116]

This suggests that the *UNDRIP Act* is also a legislative measure taken to fulfil the principles of Canada's constitution, specifically, the rights of Indigenous Peoples.

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112. *Clyde River, supra* note 107 at para 24.

113. See Jeffrey Warnock, *Interpreting UNDRIP: Exploring the Relationship between FPIC, Consultation, Consent, and Indigenous Legal Traditions* (LLM, Western University, 2021) [unpublished, archived at Western University, *Electronic Thesis and Dissertation Repository*, 8058] [perma.cc/JU2D-A2ZW] [Warnock, UNDRIP].

114. *Clyde River, supra* note 107 at para 24.

115. *Lavigne*, *supra* note 89 at para 21.

116. *UNDRIP Act, supra* note 2 at preamble.

Finally, although the Supreme Court of Canada has not articulated a specific "test" for determining whether a statute is quasi-constitutional, the court has alluded to the fact that laws which promote human rights[117] and protect individuals from discrimination[118] become quasi-constitutional. The *UNDRIP Act* is intended to accomplish both these goals as demonstrated by (1) the fact it is implementing an international human rights standard; (2) the preamble's recognition that UNDRIP is based on the principle of non-discrimination[119] as reflected in its articles guaranteeing Indigenous Peoples "right to be free from any kind of discrimination";[120] and (3) the *UNDRIP Act*'s recognition that the implementation of UNDRIP must involve eliminating discrimination.[121]

Despite these arguments in favour of designating the *UNDRIP Act* as quasi-constitutional, some legal scholars have argued that a statute is only quasi-constitutional if this designation is entrenched by way of a clear provision noting that the statute would have primacy over any other inconsistent pieces of legislation. Even if a statute impacted constitutional imperatives, the inclusion of this primacy provision was essential. As Luc B Tremblay noted:

> "Quasi-constitutional legislation" may be defined as legislation enacted in accordance with the existing ordinary legislative process in respect of which a particular provision (enacted either in that statute or in other ordinary legislation) provides that the statute must have primacy over all other ordinary inconsistent enactments, even those enacted after it, unless those other enactments fulfil a certain number of specific conditions often referred to as manner and form requirements. Characterizing statutes as "quasi-constitutional" has nothing to do with the importance of their content, be they in relation to fundamental rights and freedoms or in relation to speed limits. The characterization is merely based on the fact that it is intended that the statute have supremacy over all other inconsistent ordinary enactments that do not fulfil the required conditions. A quasi-constitutional statute is accordingly "entrenched."[122]

Although I would note that at 104-107 of this book, Professor Tremblay also assesses what he calls "Special Nature" Legislation. The author suggests that this type of legislation does not require a primacy provision. If we accept the inclusion of a primacy clause as a prerequisite, then an argument can be made that the *UNDRIP Act* falls short of being quasi-constitutional, as it contains no express primacy provision. However, one of the operative provisions clearly states that the government of Canada is to take steps "to ensure the laws of Canada are consistent with the Declaration."[123] As a result, this may be sufficient to suggest that the intention of the legislature in passing the *UNDRIP Act* was to ensure that both the *UNDRIP Act* and UNDRIP have primacy over other inconsistent legislation.

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117. *Lavigne, supra* note 89 at para 24.

118. *Thibodeau v Air Canada,* 2014 SCC 67 at para 166.

119. *UNDRIP Act*, *supra* note 2 at preamble.

120. UNDRIP, *supra* note 15, art 2.

121. *UNDRIP Act*, *supra* note 2 at preamble.

122. Luc B Tremblay, *The Rule of Law, Justice, and Interpretation* (Montreal: McGill-Queen's University Press, 1997) at 88.

123. *UNDRIP Act*, *supra* note 2 at s 5.

However, even if the *UNDRIP Act* does not contain a primacy clause, the idea that the inclusion of such a clause is necessary for legislation to be found quasi-constitutional has been refuted by subsequent scholars and jurisprudence. John Helis in his book *Quasi-Constitutional Laws of Canada* noted that "[q]uasi-constitutional statutes *often* contain a primacy provision, but courts have recognized this function even in the absence of an express provision due to the fundamental nature of rights."[124] As John Helis suggests, this appears consistent with the Supreme Court of Canada's reasoning in *Insurance Corporation of British Columbia v Heerspink*,[125] where Justice Lamer noted that the *British Columbia Human Rights Code* was quasi-constitutional such that "short of [the British Columbia] legislature speaking to the contrary in express and unequivocal language . . . it is intended that the *Code* supersede all other laws when conflict arises."[126] The Supreme Court of Canada made this determination even though, as the Newfoundland and Labrador Court of Appeal noted, the Code did not have a primacy provision.[127] So while the inclusion of a primacy provision is common, it is not necessary, provided that the statute is a fundamental law.[128]

Based on the foregoing, it is likely that the *UNDRIP Act* will be determined to be quasi-constitutional. Although it does not contain a primacy clause, it is not clear that this is necessary. The *UNDRIP Act* is analogous to established categories of quasi-constitutional legislation, implements a series of constitutional imperatives, and is likely to be perceived as being fundamental law. A finding that the *UNDRIP Act* is quasi-constitutional would be consistent with Supreme Court of Canada precedents and would help establish another category of legislation that is recognized as quasi-constitutional—laws aimed at protecting the rights of Indigenous Peoples.

VI IMPLICATIONS FOR RECOGNIZING THE *UNDRIP ACT* AS QUASI-CONSTITUTIONAL

If we accept that it is likely that the *UNDRIP Act* will be designated as quasi-constitutional, what are the implications of this finding? Broadly speaking, there are four principles that apply to quasi-constitutional legislation that could have an impact on the *UNDRIP Act*.

A. Doctrine of Implied Repeal[129]

The doctrine of implied repeal establishes that "a later enactment is preferred to and repeals an earlier enactment where the two cannot stand together."[130] So, to the extent there

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124. Helis, *supra* note 89 at 11.

125. *Insurance Corporation of British Columbia v Heerspink,* [1982] 2 SCR 145 [*Heerspink*].

126. *Ibid* at 157–158.

127. *Human Rights Commission v Workplace Health, Safety and Compensation Commission*, 2005 CanLII 61 (NLCA) at 15.

128. Helis, *supra* note 89 at 170.

129. *Ibid* at 3, 174.

130. Asif Hameed, "Parliament's Constitution: Legislative Disruption of Implied Repeal" (2023) 43:2 Oxford J Leg Stud 429 at 430. See also Sullivan, *supra* note 28 at 367–368.

is in fact a conflict between multiple statutes/provisions, this doctrine allows the more recent statute/provision to prevail.[131] In the case of quasi-constitutional statutes, John Helis has noted that quasi-constitutional laws "are exempt from the doctrine of implied repeal"[132] and that these laws should prevail over the legislation that conflicts with it, regardless of which law was passed first.[133]

Kerry Wilkins has pointed out how this doctrine could pose a particular threat to UNDRIP implementation legislation:

> In brief, and other things equal, provisions in other federal legislation would supersede the rights and obligations given effect in federal *UNDRIP* legislation if the other legislation were the later of the two or if, regardless of the time they took effect, they dealt more specifically with the relevant subject matter.[134]

This implied repeal could be rebutted if the *UNDRIP Act* were found to be quasi-constitutional, and as a result the *Act* would be protected (to an extent) from changing political conditions. Its quasi-constitutional status would ensure it would not be displaced by any subsequently passed and inconsistent legislation simply because a new Parliament passed it after the fact. However, this does not prevent Parliament from repealing the *UNDRIP Act* in its entirety, a fact that has been acknowledged by Kerry Wilkins:

> But there are potential disadvantages to relying on ordinary legislation to implement UNDRIP rights . . . It is susceptible to frustration, and indeed to outright repeal, by a different government with a different policy agenda.[135]

So, while it would be correct to suggest that being designated as quasi-constitutional affords the *UNDRIP Act* certain protections, Parliament retains the ability to do away with the legislation at any time.

B. The Need for Clear Legislative Pronouncements to Alter, Amend, or Repeal[136]

Quasi-constitutional laws "supersede all other laws when conflict arises . . . they may not be altered, amended, or repealed nor may exceptions be created to . . . provisions, save by clear legislative pronouncement."[137]

As a result, if it were found to be quasi-constitutional, the *UNDRIP Act* would be afforded similar protection to that discussed in Section VI.A above. It could not be altered or repealed absent a clear pronouncement to that effect. There may be political pressure to avoid being seen as the political party working to undo the advancement of Indigenous rights, such that

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131. Sullivan, *supra* note 28 at 367–368.

132. Helis, *supra* note 89 at 3, 174.

133. *Ibid* at 3, 164–165

134. Wilkins, *supra* note 23 at 1293.

135. *Ibid* at 1286.

136. Helis, *supra* note 89 at 2.

137. *Ibid* at 1–2, citing *Heerspink*, *supra* note 125 at 158 and *Winnipeg School Division No I v Craton*, [1985] 2 SCR 150 at 156.

no party wishes to stake out this position publicly by either altering or repealing the *UNDRIP Act*. As previously stated, this does not prevent Parliament from repealing the *UNDRIP Act*, but its quasi-constitutional status would ensure that any attempts to unwind it would need to be the express intention of the government enacting the repeal. This would inevitably draw negative feedback from those affected. A desire to avoid this backlash might help to ensure that, despite Parliament's *ability* to repeal the *UNDRIP Act*, it may be hesitant to exercise this authority.

C. Rules of Interpretation[138]

There are specific rules of interpretation that apply to quasi-constitutional laws. For example, "regular statutes . . . must be interpreted in a manner that avoids conflict with quasi-constitutional statutes,"[139] whereas "the courts have adopted a broad, liberal, and purposive approach to the interpretation of quasi-constitutional statutes."[140] As a part of this interpretive exercise, "the Supreme Court of Canada has endorsed a narrow interpretation of the defences, exceptions, exemptions, exclusions and other limitations to the rights contained in these [quasi-constitutional] statutes."[141] The fact that quasi-constitutional legislation is afforded this generous interpretation, with only narrow limitations, is important to note in light of the significant disagreements that exist over the scope of the rights guaranteed in UNDRIP.

This article is not an attempt to predict precisely how the judiciary might interpret UNDRIP, but simply to suggest that *some* interpretation is going to be required. If, as argued above, the *UNDRIP Act* is a quasi-constitutional piece of legislation, this would impact the interpretive approach adopted by the courts in ways that might result in an understanding of what UNDRIP requires that differs from the conclusions that may have been reached if the *Act* were simply a regular statute. A more purposive approach may lead the courts to interpret certain UNDRIP articles in a more fulsome way than some legal scholars have approached them in the past.

Perhaps the best example to illustrate this point would be the very notable (and public) disagreements over the articles of UNDRIP referencing free, prior, and informed consent (FPIC).[142] Since UNDRIP was adopted in 2007, debate has raged over the meaning of FPIC.[143] In fact, one of Canada's initial grounds of opposition to UNDRIP was focused on

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138. Note: Portions of this section of the article are drawing on and adapting components of my LLM thesis, which can be found at Warnock, UNDRIP, *supra* note 113.

139. Helis, *supra* note 89 at 3.

140. *Ibid* at 3.

141. *Ibid* at 78.

142. UNDRIP, *supra* note 15, arts 10–11, 19, 28–29, 32.

143. See the following for examples of commentary on this issue: Brian L Cox, "Wet'suwet'en Supporters Should Stop Distorting Law to Promote Protest Agenda," *The Star* (28 February 2020), online: <thestar.com/opinion/contributors/wet-suwet-en-supporters-should-stop-distorting-law-to-promote-protest-agenda/article_bfd6cfa0-c4ce-51c3-acd4-bc316f2697c6.html>; Alicia Elliott, "A Pipeline Offers a Stark Reminder of Canada's Ongoing Colonialism," *Washington Post* (13 February 2020), online: <washingtonpost.com/opinions/2020/02/13/pipeline-offers-stark-reminder-canadas-ongoing-colonialism/>; *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 43-2, (31 May 2021) (Shannon Joseph); *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 43-2, (28 May 2021) (Mauro Barelli); *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 43-2, (14 May 2021) (Ross Montour);

concerns around the interpretation of FPIC. Canada's ambassador to the UN stated the following in 2007:

> Similarly, some of the provisions dealing with the concept of free, prior and informed consent were unduly restrictive, he said. Provisions in the Declaration said that States could not act on any legislative or administrative matter that might affect indigenous peoples without obtaining their consent. While Canada had a strong consultative process, reinforced by the Courts as a matter of law, the establishment of complete veto power over legislative action for a particular group would be fundamentally incompatible with Canada's parliamentary system.[144]

The disagreements over FPIC

> [have] largely focused on whether the articles requiring FPIC grant Indigenous communities a "veto" over things like resource projects if UNDRIP is made part of Canadian law. In other words, many have asked whether UNDRIP recognizes the right of Indigenous peoples to say no and forestall certain projects that may impact Aboriginal or Treaty rights.[145]

Professor Dwight Newman has correctly pointed out the importance of these interpretive disagreements over FPIC and has told the Canadian Senate that "the Court's interpretation of FPIC is . . . subject to uncertainties that have enormous implications for Canada."[146]

The *UNDRIP Act*'s possible designation as quasi-constitutional suggests that the interpretive approach taken by the courts when examining the principle of FPIC will be purposive and will ensure that any limits on FPIC will be narrowly interpreted. This has the potential to significantly impact the judiciary's interpretation of articles 19 and 32(2) of UNDRIP, which read as follows:

> **Article 19:** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[147]
>
> **Article 32(2):** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in

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Proceedings of the Standing Senate Committee on Aboriginal Peoples, 43-2, (10 May 2021) (Sheryl Lightfoot).

144. UN General Assembly, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President," GA/10612, UNGAOR 61st Sess (13 September 2007), online: <un.org/press/en/2007/ga10612.doc.htm> [perma.cc/BAV2-JVT5].

145. Warnock, UNDRIP, *supra* note 113 at 2–3.

146. Canada, *Submission to Senate Standing Committee on Aboriginal Peoples Re Bill C-262*, (by Dwight Newman), Senate of Canada (26 May 2019), online (pdf): <sencanada.ca/content/sen/committee/421/APPA/Briefs/D.Newman_UofSask_e.pdf>.

147. UNDRIP, *supra* note 15, art 19.

> connection with the development, utilization or exploitation of mineral, water or other resources.[148]

Much has been written about the differing interpretive schools of thoughts regarding FPIC, and an in-depth exploration of these interpretive positions is beyond the scope of this article.[149] However, it is important to highlight some of the most notable interpretations that emerge from the scholarship.

First, some have suggested that these articles, which include the phrase "in order to obtain" the FPIC of Indigenous Peoples, might "be thought of more as a requirement to have certain types of processes in operation,"[150] where obtaining consent is simply a goal rather than a strict requirement.[151] Some arguments in favour of this interpretation have adopted a positivist approach that relies on the drafting history of the Declaration[152] or other textual analysis.[153]

Other interpretations suggest that the consent of Indigenous Peoples is only required in circumstances where "there is a potential for a profound or major impact on the property rights of an indigenous people or where their physical or cultural survival may be endangered."[154] These arguments similarly rely on a textual analysis of UNDRIP[155] rather than the more purposive approach[156] demanded of quasi-constitutional legislation.

Lastly, others interpret FPIC as requiring consent "for *any project or activity* affecting [Indigenous Peoples'] lands, territories and resources or their well-being"[157] as opposed to narrower conceptions of consent as a goal or as only required in a narrow set of circumstances.[158]

If the courts, considering the *UNDRIP Act*'s quasi-constitutional status, engage in the exercise of identifying the purpose behind the *UNDRIP Act*, UNDRIP, and the articles

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148. *Ibid*, art 32(2). These articles can be referred to as the "FPIC Articles."

149. For a full discussion of these interpretive schools of thought see Warnock, UNDRIP, *supra* note 113.

150. Dwight Newman, "Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada" (August 2017), online (pdf): <macdonaldlaurier.ca/files/pdf/MLIAboriginalResources13-NewmanWeb_F.pdf> [perma.cc/2LSY-UHUF] at 7 [Newman].

151. *Ibid* at 13–14.

152. *Ibid* at 13; Warnock, UNDRIP, *supra* note 113 at 58.

153. *Ibid* at 13–14; Warnock, UNDRIP, *supra* note 113 at 59–60.

154. Jeremie Gilbert & Cathal Doyle, "A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011) at 317 [Gilbert & Doyle]. See also Mauro Barelli, "Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead" (2012) 16:1 Int'l JHR 1 at 11 ; UNHRC, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, Study of the Expert Mechanism on the Rights of Indigenous Peoples, 39th Sess, UN Doc A/HRC/39/62 at para 35 [EMRIP]; Warnock, UNDRIP, *supra* note 113 at 62.

155. Mauro Barelli, "Free, Prior, and Informed Consent in the UNDRIP" in Jessie Hohmann and Marc Weller, eds, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford, UK: Oxford University Press, 2018) at 252; Warnock, UNDRIP, *supra* note 113 at 67–68.

156. *Ibid*.

157. Gilbert & Doyle, *supra* note 154 at 44 [emphasis added]. See also: Warnock, UNDRIP, *supra* note 113 at 67–68.

158. EMRIP, *supra* note 154 at para 3; Newman, *supra* note 150 at 13–14.

requiring FPIC, they may find themselves adopting an interpretation of FPIC that corresponds to the last approach mentioned above. The reason why the courts might come to this conclusion is primarily due to the consistency between this interpretation and the principle of self-determination that is at the heart of UNDRIP.[159] Scholars like Phillipe Hanna and Frank Vanclay have gone so far as to suggest that FPIC can only be properly understood through its connection to the concept of self-determination:

> FPIC is intrinsically connected to the idea of self-determination, which basically argues that 'human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly'.[160]

This sentiment is also echoed in the preamble of the *UNDRIP Act*, which states that "the Government of Canada recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination, including the right of self-government."[161]

This raises the question: What interpretation of the articles requiring FPIC would be most consistent with the principle of Indigenous self-determination? Some scholars "like Cathal Doyle have suggested that an interpretation of FPIC that requires state actors to obtain consent for all activities that may impact the lands, territories, resources, or well-being of Indigenous people is more consistent with the principle of self-determination that is at the heart of UNDRIP."[162] A strong case can and has been made by others that interpretations of FPIC that don't allow Indigenous Peoples to withhold consent, limits Indigenous Peoples' ability to negotiate with government or industry on a level playing field,[163] disregards the existence of a nation-to-nation relationship,[164] and "denies Indigenous peoples the capacity to exercise control over some of their most fundamental interests."[165] It is certainly possible that some of the interpretations of FPIC I have previously described, which would allow governments to maintain significant control over when and how consent could be withheld, would be at odds

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159. Warnock, UNDRIP, *supra* note 113 at 54, 65–66.

160. Philippe Hanna & Frank Vanclay, "Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent" (2013) 31:2 Impact Assessment & Project Appraisal 146 at 146 citing James Anaya,. "The right of Indigenous peoples to self-determination in the post-declaration era" in Claire Chartres & Rodolfo Stavenhagen, eds, *Making the declaration work: The United Nations Declaration on the Rights of Indigenous peoples* (Copenhagen: Iwgia, 2009) 184 at 187.

161. *UNDRIP Act*, *supra* note 2 at preamble.

162. Warnock, UNDRIP, *supra* note 113 at 69, citing Gilbert & Doyle, *supra* note 154 at 312–314 and Cathy M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (New York: Routledge, 2015) at 147.

163. Gilbert & Doyle, *supra* note 154 at 326; Brant McGee, "The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development" (2009) 27:2 BJIL 570 at 634; Brant McGee, "Participation with a Punch: Community Referenda on Dam Projects and the Right to Free, Prior, and Informed Consent to Development" (2010) 3:2 Water Alternatives 162–184; Warnock, UNDRIP, *supra* note 113 at 69.

164. Martin Papillon & Thierry Rodon, "Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach," *Choice* (4 July 2017), at 5–6, online (pdf): <irpp.org/research-studies/insight-no16/> [perma.cc/45PC-63JP]; Warnock, UNDRIP, *supra* note 113 at 69.

165. Dominique Leydet, "The Power to Consent: Indigenous Peoples, States, and Development Projects" (2019), 69:3 U Toronto LJ 371 at 399.

with a robust understanding of Indigenous self-determination[166] and the purposive approach to interpretation required of quasi-constitutional legislation.

This purposive interpretive approach, consistent with the *UNDRIP Act*'s quasi-constitutional nature, could carry over into the judiciary's approach to assessing the place for Indigenous legal traditions in understanding the scope of the rights in UNDRIP.[167] This approach might even impact established legal precedents by, for example, narrowing the grounds upon which the courts will justify the infringement of Indigenous rights,[168] since, as noted above, the exceptions to these rights are to be construed narrowly because of the *UNDRIP Act*'s quasi-constitutional status. This is something that scholars, government officials, Indigenous Peoples, and the judiciary should be aware of moving forward.

D. Conflicts and Inoperability

If a conflict emerges between regular statutes and quasi-constitutional laws, courts have the power "in some instances [to] declare the impugned provision inoperable or devise a comparable remedy."[169] The result being that quasi-constitutional laws will supersede regular laws when a conflict arises. As the Supreme Court of Canada stated in *Insurance Corporation of British Columbia v Heerspink*,[170] when describing human rights legislation:

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, . . . then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and. [*sic*] the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.[171]

As previously noted, the attorney general of Canada has taken the position that "neither the UN Declaration nor the UN Declaration Act [*UNDRIP Act*] can displace the Constitution or clear statutory language."[172] However, despite this statement (and former Justice Minister Lametti's emphasis on UNDRIP's role as an interpretive aid),[173] the quasi-constitutional nature of the *UNDRIP Act* might mean that its effects go beyond aiding interpretation and could result in the courts making a finding of inoperability.[174] This article is not going to speculate

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166. Warnock, UNDRIP, *supra* note 113 at 65.

167. *Ibid* at 36.

168. *Ibid* at 46, 67, 107. For a discussion of the impact that UNDRIP may have on s 35 rights, see Metallic, *supra* note 13.

169. Helis, *supra* note 89 at 3.

170. *Heerspink*, *supra* note 125 at 157–158.

171. *Ibid* at 157–158.

172. *Chambaud*, *supra* note 47.

173. *Hansard—43, supra* note 44.

174. Helis, *supra* note 89 at 3, 266; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2015 FC 398 at para 70; *Northwest Territories v Public Service Alliance of Canada*, 2001 FCA 162 at para 60.

on precisely whether (or when) such a finding would be made, but this does become another tool that the courts could avail themselves of should a claim be made that certain federal laws are in conflict with the *UNDRIP Act*. This might prove to be particularly important in light of Justice Ross's ruling in *Gitxaala* that DRIPA did "not call upon the courts to adjudicate the issue of consistency."[175] As noted above, perhaps if Justice Ross had considered DRIPA to be a quasi-constitutional law, the ruling on this point would have differed.

There are some who might suggest that the possibility of a statute being declared inoperable on the basis of the quasi-constitutional nature of the *UNDRIP Act* is immaterial given that the *UNDRIP Act* specifically requires the government of Canada to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[176] It is possible that a court might find that the government of Canada has violated the *UNDRIP Act* by, for example, continuing to enforce legislation that is in violation of UNDRIP. However, despite the government of Canada's commitment to consistency between UNDRIP and existing federal legislation, there is nothing in the *UNDRIP Act* that addresses the possible consequences for failing to ensure that this consistency is achieved. A finding that the *UNDRIP Act* is quasi-constitutional would mean that Indigenous Peoples have a legal argument to support having laws in conflict with UNDRIP to be declared inoperable.

VII CONCLUSION

Although the attorney general is correct that neither the *UNDRIP Act* nor UNDRIP have constitutional status in Canada, a strong argument can be made that they have *quasi*-constitutional status. Given that the *UNDRIP Act* implements UNDRIP, a human rights instrument that is directly tied to Indigenous rights, something that is at the heart of Canada's constitutional framework, a compelling argument can be made that the *UNDRIP Act* is quasi-constitutional. This finding could have significant implications, as it will (1) afford the *UNDRIP Act* greater protection from repeal; (2) ensure that the *UNDRIP Act* supersedes other legislation in the event of a conflict; (3) require judges to interpret the *UNDRIP Act* in a broad and purposive manner, which may affect judicial assessments of the scope and content of the rights protected by UNDRIP; and (4) allow the courts to make a finding that certain other federal laws are inoperable. Both the government of Canada and the courts should be mindful of the possibility of the *UNDRIP Act*'s quasi-constitutional status and recognize that such a finding may have a significant influence on Indigenous rights in this country for years to come.

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175. *Gitxaala, supra* note 22 at para 490.

176. *UNDRIP Act*, *supra* note 2, s 5.