llj Lakehead
LAW JOURNAL
Volume 7 Issue 1

Bill C-15's Special Status

Professor Jeffrey Warnock

Decision Making in Nunavut's Impact Review Process

Matthew Austman and Christopher Debicki

Missed Opportunities for Meaningful Self-Government

Michaela Hill

Book Review

The Walls Have Eyes: Surviving Migration in the Age of Artificial Intelligence

Review by Natasha Latina

Lakehead UNIVERSITY

LAKEHEAD LAW JOURNAL
EDITORIAL TEAM

Acknowledgements

Layout Design: Sawyer Paul

Copyediting: Leanne Rancourt

NOTICE OF CORRECTION

The following article from an earlier issue has been corrected: Cheyenne Neszo, "The Section 87 Tax Exemption as a Tax Expenditure" (2020) 4:1 Lakehead Law Journal 50, at 51–52.

This article has been corrected to update the footnote content in the introduction. The correction is a major correction, and the original published paper has been updated to reflect this correction.

Text correction date: 1 April 2025

Professor Tenille E Brown

Editor-in-Chief 2024–25

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

*Professor Jeffrey Warnock**

CONTENTS

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

* Jeffrey Warnock is an assistant professor at Western Law. His research focuses on Aboriginal law, Constitutional law, Indigenous legal traditions, and Public International law (particularly as it pertains to Indigenous Peoples). Many thanks to Sara Fuller (Western Law, JD, 2024) and Morgan Kearns (Western Law, JD, 2024) for their research assistance on this article and to my colleagues at Western Law and the anonymous peer reviewers for their feedback and comments.

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

---

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

---

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

---

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.

---

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

---

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]

---

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.
>
> . . .
>
> 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

---

(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

---

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]

---

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

---

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.

---

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

---

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.

---

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

---

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.

---

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

---

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.

---

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.

---

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

---

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

---

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

---

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

---

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

---

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

---

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

---

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.

---

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

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

DECISION MAKING IN NUNAVUT'S IMPACT REVIEW PROCESS: SEARCHING FOR ANSWERS IN A NOVEL LEGAL LANDSCAPE

Matthew Austman and Christopher Debicki

CONTENTS

Abstract

Nunavut's environmental impact review regime is situated in a unique legal context that raises unresolved questions about the relationship between the Nunavut Impact Review Board (NIRB) and the federal (and soon to be territorial) government. The Nunavut Land Claims Agreement (Nunavut Agreement)—one of Canada's modern treaties—and the *Nunavut Planning and Project Assessment Act* (NuPPAA) entrust the NIRB with carrying out environmental impact reviews and making "determinations" about project impacts, but assign final decision-making authority to a responsible minister (primarily the federal Minister of Northern Affairs). In this article, we apply a purposive analysis of the Nunavut Agreement and NuPPAA and account for relevant constitutional principles to explain the limitations on the Minister's decision-making authority. In our view, the Minister's decision-making powers are intended to serve as oversight of NIRB-led processes and determinations, despite a plain reading of the decision-making provisions suggesting the Minister's power is largely unfettered. Using the Mary River iron ore mine on Baffin Island as a case study, we offer a nuanced interpretation of the NIRB and the Minister's duties and powers. The NIRB, as a co-management body made up of Inuit and Crown representatives, is responsible for

carrying out impact reviews and related processes and determining whether a project should be approved. Through these processes, the NIRB carries out consultation with Inuit on behalf of the Crown, and its findings must be deeply considered by the Minister. In turn, the Minister must justify a decision in light of the terms and purposes of the Nunavut Agreement and NuPPAA, as well as constitutional principles including the Honour of the Crown and the duty to consult. While the Minister has the final word, the Minister's discretion is bound by these legal principles and should demonstrate respect for the NIRB's authority in furtherance of reconciliation. This purposive analysis helps explain and support the NIRB's function and credibility as a co-management board and the importance of respecting Inuit participation in decision making through NIRB-led processes.

I INTRODUCTION

Nunavut's environmental impact review regime is situated in a unique legal context that raises unresolved questions about the relationship between the Nunavut Impact Review Board (NIRB) and the federal (and soon to be territorial) government. The Nunavut Land Claims Agreement (Nunavut Agreement)[1]—one of Canada's modern treaties (i.e., post *Calder*)[2]—and the *Nunavut Planning and Project Assessment Act* (NuPPAA)[3] entrust the NIRB with carrying out environmental impact reviews (including consultation with Inuit) and making "determinations" about project impacts, but assign final decision-making authority to a responsible minister (primarily the federal Minister of Northern Affairs) ("Minister").[4] A plain reading of the decision-making provisions suggests that the Minister's power is largely unfettered. However, such a narrow view is inconsistent with the complex governance regime established under the Nunavut Agreement, including the NIRB's function as a credible co-management institution and Inuit rights to meaningful participation in decision making regarding land use and natural resource development.

In this article, we apply a purposive analysis of the Nunavut Agreement and NuPPAA to argue that the Minister's decision-making powers are intended to serve as oversight over NIRB determinations and impact review processes, not a de facto veto or cudgel. We examine explicit and implied limitations on ministerial discretion by accounting for principles of statutory and treaty interpretation, the duty to consult, and the Honour of the Crown. We account for the purpose and function of the NIRB as a co-management board and key regulator of development projects, and the Minister's role in ensuring NIRB-led consultation is conducted honourably and consistently with section 35 of the *Constitution Act, 1982*. If the Minister decides to reject or vary an NIRB determination that is otherwise consistent with the Nunavut Agreement and NuPPAA, the greater the burden on the Minister to justify how

---

1. *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada*, 25 May 1993, online: <gov.nu.ca> [perma.cc/J38P-FAMC] [Nunavut Agreement].

2. *Calder et al v Attorney-General of British Columbia*, 1973 CanLII 4, [1973] SCR 313 (SCC). Julie Jai discusses the impact of *Calder* on the negotiation of modern treaties (see Julie Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 105 at 115–18, [Jai]).

3. *Nunavut Planning and Project Assessment Act*, SC 2013, c 14, s 1 [NuPPAA].

4. Nunavut Agreement, *supra* note 1, art 12.1.1; NuPPAA, *ibid*, s 73.

the decision upholds the terms and purposes of the Nunavut Agreement and the applicable constitutional principles.

We use the Mary River iron ore mine ("Mary River"), principally located on "Inuit Owned Lands" called Nuluujaat on Baffin Island, as a case study to explain the importance of understanding the legal meaning or durability of NIRB authority, including determinations and how they limit ministerial discretion. Mary River is a highly controversial project because of its tremendous economic potential, evidence of its adverse environmental impacts, and ongoing uncertainty about the development trajectory of the mine and related shipping port infrastructure. Review processes have been protracted and expensive, exposing tensions between Inuit organizations, local communities, environmental groups, and Baffinland Iron Mines Corporation. Given the high degree of public scrutiny in relation to the mine and its impacts, and the size and value of this resource, Mary River is arguably the most important project with which the NIRB has ever wrestled as a regulator.

This article consists of three parts. In Section II, we provide an overview of Nunavut's legal framework, including its environmental impact review process, the historical context of the Nunavut Agreement, and the significance of the NIRB as a co-management institution. In Section III, we use Mary River as a case study to demonstrate the importance of the topic and illustrate how the NIRB and the Minister interact through Nunavut's impact review regime. In Section IV, we use the context from Sections II and III to examine the relevant decision-making provisions of the Nunavut Agreement and NuPPAA to explain how and why NIRB determinations limit ministerial discretion. In the absence of specific case law on the NIRB, we discuss other cases on the duty to consult, modern treaties, and the Nunavut Agreement to discern the legal meaning of NIRB determinations and constraints on ministerial decision making.

II THE LEGAL FRAMEWORK OF NUNAVUT'S IMPACT REVIEW REGIME

On its face, Nunavut's legal framework is similar to other Canadian jurisdictions. Nunavut enjoys a public government with an elected legislative assembly.[5] The Commissioner of Nunavut serves as the functional equivalent to a provincial lieutenant governor by approving legislation, and federal law applies equally to Nunavut as it does to the rest of Canada.[6] Further, since Nunavut was carved from the Northwest Territories and inherited most of its statute book, many of its laws were imported from its territorial neighbour.[7]

As a territory, Nunavut is distinct from the provinces and does not enjoy the same constitutional status. Territories are to an extent a "creature of the federal government" by

---

5. Nunavut Agreement, *supra* note 1, art 4.1.1.

6. *Nunavut Act*, SC 1993, c 29, s 5(1) [*Nunavut Act*]; *Interpretation Act*, RSC 1985, c I-21, s 8(1) [*Interpretation Act*]; Daniel Dylan, "Wildlife Management, Privative Clauses, Standards of Review, and Inuit Qaujimajatuqangit: The Dimensions of Judicial Review in Nunavut" (2021) 34:3 Can J Admin L & Prac 265 at 268–69 [Dylan, "Wildlife Management"].

7. Nunavut Agreement, *supra* note 1, art 4.1.1; *Nunavut Act*, *supra* note 6, s 29; Dylan, "Wildlife Management," *ibid* at 269; Courthouse Libraries of BC, "Nunavut: Origins of Statues and Regulations" (20 April 2023), online: <courthouselibrary.ca> [https://perma.cc/757L-JDPS].

deriving its status and powers from federal law.[8] However, the Government of Nunavut's autonomy from the federal government is expanding, including over natural resource management, as it assumes greater powers from the federal government through a devolution process, following similar developments in Yukon and the Northwest Territories. The Nunavut Devolution Agreement includes a Lands and Resources Devolution Negotiation Protocol that commits the Government of Nunavut to becoming "more accountable for decisions related to the management and the pace of development of lands and resources in Nunavut."[9] According to the final Lands and Resources Devolution Agreement, the Government of Nunavut will formally assume jurisdiction over natural resource management by April 1, 2027. For example, a territorial Minister will assume responsibilities currently held by the federal Minister of Northern Affairs under NuPPAA. The federal government remains responsible for overseeing these matters until then.[10]

Unlike Yukon and the Northwest Territories, Nunavut enjoys a modern treaty that applies to the entirety of the territory and is an integral part of Nunavut's legal framework.[11] The Nunavut Agreement guarantees Inuit treaty rights in exchange for the surrender of Aboriginal title.[12] Many treaty rights apply to all of Nunavut, such as rights to wildlife harvesting, co-management of wildlife and natural resources, water management, and economic rights through procurement policies and a designated impact benefit agreement process.[13] In the event of inconsistency with other law, the Nunavut Agreement is paramount.[14]

Inuit enjoy specific treaty rights to "Inuit Owned Lands," which are parcels of land with significant renewable or non-renewable natural resources, are of archeological, historical or cultural importance, or are areas of commercial value.[15] Inuit Owned Lands are held in fee simple and may include natural resources within, upon, or under the lands, or specified substances.[16] Inuit Owned Lands account for approximately 18 per cent of Nunavut land. Inuit hold subsurface rights to approximately 2 per cent of Nunavut land, or 10 per cent of Inuit Owned Lands.[17]

---

8. *Fédération Franco-ténoise v Canada (CA)*, 2001 FCA 220 at para 39; *Nunavut Act*, supra note 6, ss 3, 7, 11, 12, 13, 23.

9. Government of Canada, "Land and Resources Devolution Negotiation Protocol: Between the Government of Canada and the Government of Nunavut and Nunavut Tunngavik Incorporated" (2008), online: <rcaanc-cirnac.gc.ca> [perma.cc/4UXG-SFTH].

10. Government of Canada, "Nunavut Devolution" (5 March 2024), online: (Government Agreement) <rcaanc-cirnac.gc.ca> [perma.cc/QX6W-8R85]. As discussed in s IV.A, the territorial minister will confront the same limitations and constraints as described in this article with respect to the federal Minister.

11. Nunavut Agreement, *supra* note 1, art 3.1.1; Dylan, "Wildlife Management," *supra* note 6 at 268–69.

12. Nunavut Agreement, *supra* note 1, Preamble, art 2.7.1; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 2 [*Clyde River*]; Jai, *supra* note 2 at 131.

13. Nunavut Agreement, *supra* note 1, arts 5, 6, 10, 11, 12, 13, 24.3, 26.

14. *Nunavut Land Claims Agreement Act*, SC 1993, c 29, s 6(1).

15. Nunavut Agreement, *supra* note 1, art 17.1.2.

16. *Ibid*, art 19.2.1.

17. Wayne Johnson, "Inuit Owned Lands; Mining and Royalty Regimes" (25 November 2009) slide 2, online (PowerPoint slides): <tunngavik.com> [perma.cc/9GTY-3HXW] [Johnson].

Mary River is located on Inuit Owned Land.[18] Subsurface rights are vested in Nunavut Tunngavik Inc (NTI), and surface rights are vested in the Qikiqtani Inuit Association (QIA), one of the three regional Inuit associations, including the Kivalliq Inuit Association and Kitikmeot Inuit Association (these are "Designated Inuit Organizations" under the Nunavut Agreement). In effect, Inuit Owned Lands are held by NTI and the regional Inuit associations on behalf of Inuit. While serving distinct functions, both groups hold mineral and surface rights at Mary River and represent Inuit interests under the Nunavut Agreement.[19] And while subsurface rights are particularly important for generating revenue from mining, surface rights are also valuable and allow Inuit to exert a degree of control over development activity. For example, a public access easement was required to establish the Milne Inlet Tote Road connecting Milne Inlet to Mary River, and Baffinland must lease surface rights from the QIA.[20]

NTI represents all Nunavut Inuit as rightsholders, represents their interests under the Nunavut Agreement, and administers subsurface mineral rights on Inuit Owned Lands on behalf of Inuit beneficiaries. The regional Inuit associations perform similar duties to NTI, representing and promoting Inuit interests and handling surface rights.[21]

The Nunavut Agreement provides that the "primary purpose" of Inuit Owned Lands is to "promote economic self-sufficiency through time, in a manner consistent with social and cultural needs and aspirations."[22] Inuit pushed for inclusion of Inuit Owned Lands during treaty negotiations to ensure they benefited fairly from resource development.[23] Negotiators were well aware of the Berger Inquiry of the Mackenzie Valley Pipeline, which found that Indigenous Peoples were not benefiting fairly from resource development.[24] This is why the Nunavut Agreement guaranteed Inuit a "maximum opportunity" to identify Inuit Owned Lands, an exercise that included extensive community consultations and geological surveys of culturally important and resource-abundant areas.[25]

---

18. *Ibid* at 43; Nunavut Tunngavik Incorporated, "Inuit Owned Lands in Nunavut" (2011), online: <tunngavik.com> [perma.cc/9GLF-M9VU].

19. Robert McPherson, *New Owners: Minerals and Inuit Land Claims in Their Own Land* (Calgary: University of Calgary Press, 2003) at 131-32 [McPherson]; Daniel W Dylan, "The Complicated Intersection of Politics, Administrative and Constitutional Law in Nunavut's Environmental Impacts Assessment Regime" (2017) 68 UNB LJ 202 at 205–06 [Dylan, "Complicated Intersection"]; Dylan, "Wildlife Management," *supra* note 6 at 269.

20. Nunavut Agreement, *supra* note 1, art 21.4.1, schedule 21-2; Johnson, *supra* note 17 at slides 6, 43.

21. Dylan, "Wildlife Management,," *supra* note 6 at 269; Dylan, "Complicated Intersection," *supra* note 19 at 205–06; NTI, "Inuit and Land Claims Organizations in Nunavut" (2025), online: <tunngavik.com> [perma.cc/73HF-2ZVJ].

22. Nunavut Agreement, *supra* note 1 at art 17.1.1.

23. McPherson, *supra* note 19 at 141, 153, 208–09, and see generally 208–68.

24. *Ibid* at 69, 121. For a discussion of the Berger Inquiry, see Chris Southcott & David Natcher, "Extractive Industries and Indigenous Subsistence Economies: A Complex and Unresolved Relationship" (2017) 39:1 Can J Dev Stud 137 at 141 [Southcott & Natcher].

25. McPherson, *supra* note 19 at 141–42; Nunavut Agreement, *supra* note 1, art 18.1.1.

A. The Basics of Environmental Impact Review Processes

An environmental impact review is a "regulatory instrument used to improve decision-making by improving the planning of activities, evaluating potential environmental impacts and determining mitigation measures before development projects commence."[26] As a process for identifying and predicting the impacts of current or proposed actions, it is an inherently *ex ante*, future-oriented practice with degrees of uncertainty and risk.[27] Scientific and policy experts assist administrative review boards in assessing risks, including environmental and socioeconomic impacts, project efficiency, predictability, and costs.[28]

While impact review processes vary across Canada,[29] they generally include a few key steps: screening, scoping, impact analysis, impact evaluation, decision making, and monitoring.[30] The process is conducted by administrative review boards (such as the NIRB), with oversight by responsible federal, provincial, or territorial ministers. The impact review informs a minister's final decision and is a collaborative exercise between government, project proponents, the public, and increasingly Indigenous Peoples.

The purpose of the initial step (screening) is for the review board to determine whether a proposed project will likely result in sufficiently significant adverse environmental impacts to justify an impact review. If so, the project proceeds to scoping to determine the project's geographic, temporal, and activity-related boundaries. Scoping sets boundaries of impact analysis,[31] which compares evaluation of the existing or "business as usual" scenario to a scenario that includes project impacts and possible mitigation measures. In turn, a review board turns to impact evaluation to identify the residual environmental impacts of a project after mitigation measures are accounted for. Typically, impact analysis and evaluation are based on the review board's analysis of a proponent's environmental impact statement (EIS). The review board then compiles its analysis in an assessment report that includes a recommendation as to whether the project should proceed and, if so, what terms and conditions should apply. The review board's recommendation is formally subject to a final ministerial decision. If approved, the proponent receives a licence or certificate, and activities are monitored by government regulators for compliance with terms and conditions. Monitoring includes information collection and sharing and, if necessary, enforcement

---

26. Gordon M Hickey, Nicolas Brunet & Nadege Allan, "A Constant Comparison of the Environmental Assessment Legislation in Canada" (2010) 12:3 J Env'l Pol & Plan, 315 at 316 [Hickey et al.].

27. Sanne Vammen Larsen, "Uncertainty in EIA" in Alberto Fonseca, ed, *Handbook of Environmental Impact Assessment* (Northampton, MA: Edward Elgar Publishing, 2023) 220 at 220 [Larsen].

28. Hickey et al, *supra* note 26 at 316.

29. Patricia Fitzpatrick & Byron J Williams, "EIA in Canada: Strengthening Follow-Up, Monitoring and Evaluation" in *Handbook of Environmental Impact Assessment* in Alberto Fonseca, ed, *Handbook of Environmental Impact Assessment* (Northampton, MA: Edward Elgar Publishing, 2023) 352 at 352–53 [Fitzpatrick & Williams]; Hickey et al, *supra* note 26 at 316.

30. Larsen, *supra* note 27 at 223; Steve Bonnell, "Environmental Assessment of Forestry in Canada" (2003) 79:6 Forestry Chronicle 1067 at 1067 [Bonnell].

31. Urmila Jha-Thakur, Fatemeh Khosravi & David Hoare, "The Theory and Practice of Scoping: Delivering Proportionate EIA Reports" in Alberto Fonseca, ed, *Handbook of Environmental Impact Assessment* (Northampton, MA: Edward Elgar Publishing, 2023) 111 at 111–12; Bonnell, *ibid* at 1068.

measures.[32] Data collected from monitoring exercises may be used to assess the accuracy of predicted impacts and help inform future assessments.[33]

B. Co-Management and Nunavut's NIRB-Led Impact Review Process

Like other jurisdictions, administrative boards in Nunavut oversee natural resource development, land-use planning, and water use.[34] The Nunavut Agreement establishes an impact review process that resembles other jurisdictions, although there are differences based on the NIRB's role and duties as a co-managed institution.[35]

Co-management is a term subject to varying definitions and interpretations.[36] Generally it refers to a practice of shared decision making and jurisdiction over matters within a geographic region.[37] Co-managed institutions are usually subject to an agreement outlining the rights and duties of those responsible for the co-managed resources, rules for triggering decisions, and procedures for making decisions.[38] In the Indigenous–Crown context, co-management is a sharing of powers and responsibilities and recognition of each party's respective authority.[39] Co-management boards are often made up of Indigenous and non-Indigenous representatives "who make resource management decisions through the sharing of power and application of both Western and Indigenous science approaches."[40]

Co-management is often confused with cooperative management (i.e., cooperating in work toward achieving shared objectives) or collaborative management (i.e., carrying out work as partners).[41] While it includes those components, a key component is that a state entity and Indigenous government (or other representative organization) enter a formal agreement to exercise shared decision making in a specific context over issues such as wildlife harvesting and land use.[42] Although there are different critical approaches, co-management can be understood as a legal instrument for Indigenous Peoples to assert control over their land and resources.[43]

---

32. Fitzpatrick & Williams, *supra* note 29 at 356–57.

33. Larsen, *supra* note 27 at 223, 225; Bonnell, *supra* note 30 at 1067.

34. Nunavut Agreement, *supra* note 1 at art 10.1.1; Dylan, "Complicated Intersection," *supra* note 19 at 207–08.

35. For a discussion on co-management of wildlife in Nunavut, see Dylan, "Wildlife Management," *supra* note 6 at 268.

36. Graham White, *Indigenous Empowerment through Co-Management: Land Claims Boards, Wildlife Management, and Environmental Regulation* (Vancouver: UBC Press, 2020) at 10–14 [White].

37. Thierry Rodon, "Co-Management and Self-Determination in Nunavut" (1998) 22:2 Polar Geo 119 at 120 [Rodon].

38. Trevor Swerdfager & Derek Armitage, "Co-Management at a Crossroads in Canada: Issues, Opportunities, and Emerging Challenges in Fisheries and Marine Contexts" (2023) 8 Facets 1 at 1 [Swerdfager & Armitage]; Rodon, *ibid* at 121.

39. Rodon, *supra* note 37 at 122.

40. Jesse N Popp, Pauline Priadka & Cory Kozmik, "The Rise of Moose Co-Management and Integration of Indigenous Knowledge" (2019) 24:2 Hum Dimensions Wildlife 159 at 160.

41. Swerdfager & Armitage, *supra* note 38 at 2.

42. *Ibid*; Jai, *supra* note 2 at 138.

43. Rodon, *supra* note 37 at 124.

Co-management encourages knowledge co-production from Western and Indigenous sources. Co-production helps address knowledge gaps between theory (knowledge) and practice (action) in environmental management, helping policymakers take more effective actions.[44] Knowledge gaps tend to occur because of distrust and differences in cultural context between knowledge holders and policymakers.[45] The practice of knowledge co-production has also been observed in Nunavut in the context of fisheries management.[46]

In 1979, the federal government accepted the Nunavut land claim for negotiation.[47] Inuit negotiators considered the NIRB to be a key component of Nunavut Agreement negotiations as they aimed to secure a co-management role for Inuit in natural resource management that went beyond an advisory role and addressed issues raised by the Berger Inquiry.[48] Similar to other modern treaties, the Nunavut Agreement enshrined co-management with respect to EIA.[49]

Inuit negotiators were successful in establishing the NIRB as a co-management institution split between Inuit and government-appointed representatives.[50] Of the NIRB's nine members, four are Inuit representatives that are nominated by the NTI (three of whom are nominated by regional Inuit associations, who are then formally appointed by the Minister). The others include two federal appointees, two territorial government appointees, and one chairperson who is nominated by the other eight appointees.[51] The NIRB has been considered a "profound achievement" for Inuit and contributed to advancing co-management in Canada.[52]

The NIRB is the key regulator over natural resource development in Nunavut. It controls the pace of development projects, carries out consultation with Inuit through its impact review process, and relies on Traditional Knowledge and scientific methods.[53] Inuit input is ensured through consultation processes as well as decision making at the board level through Inuit-appointed representatives. In effect, the NIRB manages access and use of natural resources, including mitigation of negative impacts from resource development on wildlife and the environment.[54]

---

44. Stephan Cooke et al, "Knowledge Co-Production: A Pathway to Effective Fisheries Management, Conservation, and Governance" (2021) 46:2 Fisheries 89 at 90.

45. *Ibid* at 90.

46. *Ibid* at 93.

47. Rodon, *supra* note 37 at 124.

48. Mcpherson, *supra* note 19 at 142, 153.

49. Swerdfager & Armitage, *supra* note 38 at 3.

50. The Nunavut Wildlife Management Board and Nunavut Water Board also have equal representation with four NTI appointees, and two territorial and two federal appointees (see Nunavut Agreement, *supra* note 1, arts 5.2.1, 13.3.1; see also Jai, *supra* note 2 at 139).

51. Nunavut Agreement, *supra* note 1, art 12.2.6; McPherson, *supra* note 19 at 153; Nunavut Impact Review Board, "Board Members" (last accessed 28 April 2025), online: <www.nirb.ca> [perma.cc/Q4JE-5A5F].

52. McPherson, *supra* note 19 at 154.

53. Southcott & Natcher, *supra* note 24 at 143. Note that some observers disagree with the degree to which Inuit Traditional Knowledge is integrated into NIRB processes; see Daniel Dylan & Spencer Thompson, "NIRB's Inchoate Incorporation of Inuit Qaujimajatuqangit in Recommendation-Making under Nunavut's Impacts Assessment Regime" (2019) 15:1 McGill J Sust Dev L 54 at 63 [Dylan & Thompson].

54. Southcott & Natcher, *supra* note 24 at 143.

On this basis, the establishment of the NIRB altered the colonial regulatory context in Nunavut that existed before the Berger Inquiry. Inuit, through treaty right protections and designated representation on the NIRB, have a significant degree of control over land-use planning and many of the most significant mineral deposits in the territory, especially those located on Inuit Owned Lands (e.g., Mary River). This context is quite different from other parts of Canada subject to historic treaties, and arguably has increased the possibility that resource development supports rather than diminishes treaty rights, such as wildlife harvesting.[55]

1. The Nirb-Led Impact Review Process

The Nunavut Planning Commission (NPC) and NIRB both have important roles in reviewing project proposals, and have a mandate to protect and promote the well-being of current and future residents and the "ecosystemic integrity" of Nunavut.[56] As institutions of public government,[57] the NPC and NIRB must be attentive to the public interest and Inuit rights and perspectives.[58]

Nunavut's impact review process begins when a project proponent submits a proposal to the NPC. The NPC screens the project proposal to determine compliance with the regional land-use plan.[59] If the NPC determines the project is not compliant with the land-use plan, the proponent may apply to the Minister for an exemption order.[60] If the Minister grants an exemption order, the Minister must refer it to the NIRB for screening. Certain projects are exempt from screening,[61] however, if the NPC has concerns about exempted activities' cumulative ecosystemic or socioeconomic impacts, the NPC may refer the project proposal to the NIRB for further screening.[62] If the NPC determines the project is compliant, the NPC must verify whether it is exempt from screening.[63] If it is not exempt, the NPC must forward the project proposal to the NIRB for screening[64] to determine whether the project has "significant impact potential,"[65] including significant ecosystemic or socioeconomic impacts,[66] in which

---

55. *Ibid* at 143–144. Note that there is scholarship challenging the effectiveness of NIRB reviews in protecting wildlife populations and integrating Indigenous knowledge; see e.g. Emilie Cameron & Sheena Kennedy, "Can Environmental Assessment Protect Caribou? Analysis of EA in Nunavut, Canada, 1999–2019" (2023) 21:2 Conservation & Society 121. For a broader discussion about co-management boards, see White, *supra* note 36.

56. Nunavut Agreement, *supra* note 1, arts 11.2.1, 12.2.5; McPherson, *supra* note 19 at 153.

57. Nunavut Agreement, *supra* note 1, art 10.1.1.

58. *Ibid*, arts 11.2.1(b)–(c), 11.8.2, 12.2.5, 12.4.2.

59. *Ibid*, art 11.5.10; NuPPAA, *supra* note 3, s 77; Dylan, "Complicated Intersection," *supra* note 19 at 207–08.

60. Nunavut Agreement, *supra* note 1, art 11.5.11; NuPPAA, *supra* note 3, s 82.

61. NuPPAA, *supra* note 3, s 78(2), schedule 3.

62. Nunavut Agreement, *supra* note 1, art 12.3.3; NuPPAA, *supra* note 3, s 80(1).

63. NuPPAA, *supra* note 3, s 78(1).

64. Nunavut Agreement, *supra* note 1, arts 11.5.10, 11.5.11, 12.3.1; NuPPAA, *supra* note 3, s 79.

65. Nunavut Agreement, *supra* note 1, art 12.4.1.

66. *Ibid*, art 12.4.2; NuPPAA, *supra* note 3, s 88.

case an impact review is required.[67] The NIRB must account for a variety of factors, including cumulative environmental effects of the project combined with other projects and the impact on wildlife and Inuit harvesting activities, in its assessment of the significance of potential impacts.[68] The NIRB issues a report to the Minster containing a description of the project and indicating whether a project review is required.[69]

If the NIRB determines an impact review is required, and the Minister agrees and refers it back to the NIRB,[70] the NIRB must proceed to determine the scope of the project and include any work or activity it considers sufficiently related to the project.[71] If the NIRB expands the scope of the project, the process is suspended until the NPC and Minister ensure compliance with the land code and exercise powers allowing the project to proceed to a review.[72] Otherwise, the project proceeds to an impact review.

After scoping, the NIRB must issue guidelines to the proponent to prepare an EIS.[73] After the proponent submits an EIS, the NIRB must provide an opportunity for the public to provide written feedback, and it may allow for oral submissions at a public hearing.[74] In its assessment of the EIS, the NIRB must consider various factors,[75] such as whether the project will "unduly prejudice the ecosystemic integrity" of Nunavut; the cumulative effects of past, current, and future projects;[76] and whether the proposal reflects the priorities and values of the residents of Nunavut.[77]

In its final report based on the assessment of the EIS and public feedback, the NIRB must issue a report to the Minister setting out its assessment of project impacts and its "determination" regarding whether the project should be approved and, if so, what terms and conditions should apply to a project certificate; this report must be submitted to the Minister within 45 days after completing the review.[78] The Minister must decide, within 150 days of receiving the NIRB's report, to approve, reject, or vary the NIRB's determination—the Minister may reject the determination based on the regional or national interest. Alternatively, the

---

67. Nunavut Agreement, *supra* note 1, arts 12.4.1, 12.4.2; NuPPAA, supra note 3, s 89(1); Dylan, "Complicated Intersection," *supra* note 19 at 208–10. Note that art 12.4.2 of the Nunavut Agreement states that the NIRB "generally" must determine an impact review is required in these instances, while NuPPAA omits the word "generally." If the NIRB finds the project will cause significant public concern or involves technology for which effects are unknown and may have significant adverse socioeconomic effects, both the Nunavut Agreement and NuPPAA trigger an impact review (see Nunavut Agreement, *supra* note 1, art 12.4.2; NuPPAA, *supra* note 3, s 88).

68. Nunavut Agreement, *supra* note 1, art 12.4.2; NuPPAA, *supra* note 3, s 89(1), 90.

69. Nunavut Agreement, *supra* note 1, arts 12.4.4; NuPPAA, *supra* note 3, s 92.

70. Nunavut Agreement, *supra* note 1, art 12.4.7(c); NuPPAA, *supra* note 3, s 94(1)(a)(iv).

71. NuPPAA, *supra* note 3, s 99(1). Note the Nunavut Agreement does not include articles regarding scoping.

72. NuPPAA, *supra* note 3, s 99(3); the NPC and Minister must exercise power under ss 77, 81, and 82.

73. Nunavut Agreement, *supra* note 1, art 12.5.2; NuPPAA, *supra* note 3, s 101(1); see also s 101(3) for the required content of the EIS.

74. Nunavut Agreement, *supra* note 1, art 12.5.3; NuPPAA, *supra* note 3, s 102(2).

75. Nunavut Agreement, *supra* note 1, art 12.5.5; NuPPAA, *supra* note 3, s 103.

76. NuPPAA, *supra* note 3, s 103(1)(f). Note the Nunavut Agreement does not include a requirement for the consideration of cumulative effects.

77. Nunavut Agreement, *supra* note 1, art 12.5.5(c).

78. Nunavut Agreement, *supra* note 1, art 12.5.6; NuPPAA, *supra* note 3, s 104(1).

Minister may vary terms and conditions if they are insufficient to address ecosystemic and socioeconomic impacts, or so onerous that they undermine project viability.[79] The Minister may refer the report back to the NIRB to conduct further consultation if the Minister finds it does not sufficiently address ecosystemic or socioeconomic impacts.[80]

The Minister must provide written reasons to the NRIB for every decision (including, as noted below, reconsideration decisions).[81] If the Minister approves the project, the NIRB must issue a project certificate to the proponent.[82] The project certificate may include terms and conditions, including a monitoring program to measure the environmental and socioeconomic impacts of the project.[83]

The NIRB may reconsider the terms and conditions of a project certificate at its own initiative, the request of a designated Inuit organization (i.e., one of the regional Inuit associations), the proponent, or any interested person if the terms and conditions are not having their intended effect, the circumstances of the project have significantly changed, or technological developments allow for a more efficient method of achieving the purpose of the terms and conditions.[84] This reconsideration process of project certificate terms and conditions is relatively simple and expedited compared to a full impact review. Through the reconsideration process as outlined in section 112 of NuPPAA and article 12.8 of the Nunavut Agreement, the NIRB typically accepts submissions from the project proponent, community members, and intervenors and evaluates information from monitoring programs. The NIRB then submits a report to the Minister, who may accept or reject the NIRB's reconsideration report. As explained in Section III, reconsideration has been used to review significant amendments to Baffinland's project certificate, including the total allowable volume of resource extraction and associated shipping traffic.

III THE MARY RIVER PROJECT: TIMELINE AND CONTROVERSIES

Mary River is the largest industrial development project in the history of the Canadian Arctic and exploits one of the richest iron ore deposits in the world.[85]

---

79. Nunavut Agreement, *supra* note 1, art 12.5.7; NuPPAA, *supra* note 3, ss 105–06, 107.

80. Nunavut Agreement, *supra* note 1, art 12.5.7(e) (which concerns decision making if the NIRB is required to submit a revised report, and and thereafter the Minister makes a decision regarding the revised NIRB report. See also Dylan, "Complicated Intersection," *supra* note 19 at 210–11.

81. Nunavut Agreement, *supra* note 1, art 12.5.10.

82. *Ibid*, art 12.5.12; NuPPAA, *supra* note 3, s 111(1).

83. Nunavut Agreement, *supra* note 1, arts 12.7.1–12.7.2; NuPPAA, *supra* note 3, ss 135(1), 135(3).

84. Nunavut Agreement, *supra* note 1, art 12.8.2; NuPPAA, *supra* note 3, s 112. Note that pursuant to art 12.8.3 of the Nunavut Agreement and s 112(2) of NuPPAA, the NIRB must reconsider terms and conditions if the Minister determines that these circumstances apply.

85. *CBC News*, "Nunavut Braces for Massive Mary River Mine" (13 September 2012), online: <cbc.ca> [perma.cc/MZ6B-D9YP].

In 1986, Baffinland started exploring and developing Mary River, located approximately 160 kilometres southwest of Pond Inlet.[86] Baffinland has long planned to extract 30 million tonnes per annum (mtpa) of iron ore, and to ship 18 mtpa via Steensby Inlet to the south and 12 mtpa via Milne Inlet to the north.[87] However, Baffinland did not submit a proposal based on the full 30 mtpa scope at once and has instead split the application into phases.

Baffinland submitted its first proposal (Phase 1) to the NIRB in 2008 for the construction, operation, and reclamation of an 18 mtpa mine with transport to markets via a roughly 150-kilometre railway line to Steensby Inlet.[88] The federal government approved Phase 1 in December 2012 following a positive determination from the NIRB.[89]

In 2013, Baffinland significantly scaled back its plans with its "Early Revenue Phase" (ERP) proposal for a 3.5 mtpa mine (with operational flexibility to 4.2 mtpa) and corresponding allowances for transportation and shipping via Milne Inlet. Despite the significant change to the project's scope, transportation, and shipping routes, the NIRB did not apply a full impact review to the ERP and instead undertook a "reconsideration" process, including a public hearing and a technical review.[90] In 2014, the NIRB determined that the ERP should proceed with its terms and conditions. The Minister accepted the NIRB's determination, and Baffinland began mining operations the following year.[91]

In 2014, Baffinland submitted its Phase 2 project proposal to expand operational capacity to 12 mtpa. The original Phase 2 proposal included truck transportation via a tote road to Milne Inlet but was amended to propose a 110-kilometre railway.[92] The proposal was subject to a reconsideration process, but a final determination and decision was not made until years later.

In 2017, Baffinland submitted its "Production Increase Proposal" (PIP) to expand mining operations and shipping to 6 mtpa.[93] The NIRB determined the project should not proceed, reasoning that Baffinland already applied for and received operational flexibility to 4.2 mtpa

---

86. Baffinland, "Mary River Mine" (undated, last accessed 17 April 2025), online: <https://www.baffinland.com/operation/mary-river-mine/> [perma.cc/V87X-5KS7].

87. Nunavut Impact Review Board, "Annual Report 2021–2022" (2022) at 23, online (pdf): <www.nirb.ca/sites/default/files/NIRB_AR_2021-22%20English_final.pdf> [perma.cc/BQ88-CRZU]; Baffinland Iron Mines Corporation, "2021 Annual Report to the Nunavut Impact Review Board" (31 March 2022) at 3–4, online (pdf): <baffinland.com> [perma.cc/G5MW-Y5XJ].

88. Nunavut Impact Review Board, "2017–18 Annual Report" (2018) at 24, online (pdf): <https://www.nirb.ca/sites/default/files/2017-18_NIRB_web_ENG.pdf> [perma.cc/M9EF-KSGW] [NIRB "2017–18 Annual Report"]; Nunavut Impact Review Board, "Final Hearing Report: Mary River Project," NIRB File No. 08MN053 (2012) at 1, online (pdf): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=286425&applicationid=123910&sessionid=if1qvv7hvmbbg9r8g7thl7f0c1> [perma.cc/2U4U-PDW6].

89. *Ibid*.

90. *Ibid*; Nunavut Impact Review Board, "Public Hearing Report, Mary River Project: Early Revenue Phase Proposal," NIRB File No. 08MN053 (2014) at xi, 6, online (pdf): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=291199> [perma.cc/HR6A-BQCZ].

91. NIRB "2017–18 Annual Report," *supra* note 88 at 24.

92. *Ibid* at 24–25; Nunavut Impact Review Board, "Reconsideration Report and Recommendations for Baffinland's Phase 2 Proposal" (2022) at iv, 10–11, online (pdf): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=339558> [perma.cc/PYS5-E779].

93. NIRB "2017–18 Annual Report," *supra* note 88 at 24.

under the ERP to address economic concerns and had failed to sufficiently address ongoing concerns related to ecosystemic effects, including impacts of increased shipping on marine wildlife. However, the Minister overruled the NIRB and approved the PIP. In September 2018, acting under article 12.8.3 of the Nunavut Agreement and section 112(6) of NuPPAA, the responsible Ministers approved operations at 6 mtpa with additional terms and conditions to address the NIRB's concerns.[94]

After the PIP expired in December 2020, Baffinland applied to extend operations until the end of 2021 (PIP Extension), which received approval from the NIRB and Minister. In 2022, Baffinland applied for another extension (PIP Renewal) several months after the PIP Extension project certificate expired and while its Phase 2 proposal was still under review by the Minister. After another truncated reconsideration process, the Minister approved the PIP Renewal in September 2022 but rejected Phase 2 two months later. Both decisions were highly anticipated and ultimately upheld the NIRB's determinations.[95]

It is noteworthy that in May 2022, during the PIP Renewal, Baffinland requested that the Minister use his emergency powers under section 152(1) of NuPPAA to approve the PIP Renewal due to potential job losses from economic uncertainty. The emergency authorization would have exempted the project from the required NIRB-led reconsideration process. To determine an emergency, the Minister must consider the public interest and whether such a finding is required to protect property or the environment.[96] Shortly after the request was received, the Minister refused the request on the basis he did not have the power to do so and instructed Baffinland to submit a project proposal to the NIRB for reconsideration.[97]

In July 2022, the Minister identified the project as a priority and "indicated" pursuant to section 114 of NuPPAA that the NIRB expedite and complete its reconsideration of the PIP Renewal by August 26, 2022.[98] The NIRB agreed to the request in part, held no public hearings, and limited submissions to intervenors only. However, the NIRB did not follow the requested timeline, issuing their reconsideration report on September 22. The NIRB justified

---

94. Nunavut Impact Review Board, "Reconsideration Report and Recommendations: Production Increase Proposal" (2018) at iv, online (pdf): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=319640&applicationid=124702&sessionid=uifocl4vopg4dqbbnub58ejcg0> [perma.cc/3MQX-9KZK]; Letter from MP Dominic Leblanc & MP Carolyn Bennett to Chairperson of the Nunavut Impact Review Board (30 September 2018), online: <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=320546&applicationid=124702&sessionid=if1qvv7hvmbbg9r8g7thl7f0c1> [perma.cc/ZQ38-G8GY] ["Letter from Leblanc & Bennett to NIRB"].

95. Canadian Press, "Nunavut Review Board Recommends Temporary Production Increase for Iron Ore Mine on Baffinland," (23 September 2022), online: <theglobeandmail.com> [perma.cc/4CRM-WZAN]; Emily Blake, "Federal Cabinet Ministers OK Nunavut Iron Ore Mine Temporary Production Increase," (4 October 2022), online: <theglobeandmail.com> [perma.cc/39NW-PQ2K]; "Northern Affairs Minister Says No to Baffinland Mine Expansion," (16 November 2022), online: <cbc.ca> [perma.cc/W2GA-KW67].

96. NuPPAA, *supra* note 3, s 152(1)(c).

97. David Venn, "No Emergency Order for Baffinland" (1 June 2022), online: <nunatsiaq.com> [perma.cc/KST2-JZ7Y]; *CBC News*, "Minister Rejects Baffinland's Request for Emergency Order" (2 June 2022), online: <cbc.ca> [perma.cc/9ANF-7P75].

98. NuPPAA, *supra* note 3, s 114. See also, Paul Tukker, "Nunavut Reviewers under Pressure to Speed up Baffinland Review," (14 July 2022), online: <cbc.ca> [perma.cc/LQ8N-4CDV].

the extension on the basis that it required additional time to properly assess the application.[99] The Minister did not take any further action on the matter.

In 2023, Baffinland applied to continue operations at 6 mtpa in its Sustaining Operations Proposal (SOP) for two years instead of one year, triggering yet another reconsideration process by the NIRB.[100] The NIRB declined to hold public hearings but received written comments from the public and held community roundtable sessions in Iqaluit and Pond Inlet.[101] Despite ongoing disagreements among stakeholders regarding the project's impacts on marine animals, the NIRB issued a positive determination in September 2023,[102] and the Minister approved the project the following month.[103]

At time of writing, Baffinland abandoned its reapplication for 6 mtpa and has reverted to the 4.2 mtpa licence terms as it seeks financing for its previously approved Phase 1 plans for the Steensby route.[104] This marks yet another major departure from its previous plans and could trigger a reconsideration process or full impact review. In the interim, Baffinland has abandoned its plan to renew the SOP and is scaling back down to its pre-existing approval to operate at 4.2 mtpa.[105]

Figure 1 summarizes the procedural history of the Mary River project and each impact review determination, reconsideration assessment, or decision. The Minister has deferred to NIRB determinations in every case except the PIP. This pattern of decision making suggests that the Minister will not interfere lightly with NIRB processes, and the Minister understands there are limitations on their discretion and should offer deference and oversight to NIRB determinations.

---

99. Nunavut Impact Review Board, "Updated Procedural Guidance Regarding the Nunavut Impact Review Board's Assessment of Baffinland Iron Mines Corporation's 'Production Increase Proposal Renewal' Project Proposal" (25 August 2022), online: <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=341496&applicationid=125710&sessionid=v7pblniln9pd52ib7tkl2nplh5> [perma.cc/C44M-YEWA].

100. April Hudson, "Baffinland Again Asks to Ship More Ore from Mary River in Nunavut, Says Jobs Are on the Line," (24 April 2023), online: <cbc.ca> [perma.cc/N7CD-KYSS]; *CBC News*, "Public Roundtables Begin on Baffinland's Latest Request to Ship More Ore from Nunavut" (27 July 2023), online: <cbc.ca> [perma.cc/LY9V-P8J6].

101. Nunavut Impact Review Board, "Reconsideration Report and Recommendations for Baffinland's Sustaining Operations Proposal" (2023) at vi, online (pdf): <nirb.ca> [perma.cc/RH3Z-JZQD].

102. *Ibid* at vii, ix–xi.

103. Letter from MP Dan Vandal to Chairperson of the Nunavut Impact Review Board (October 17, 2023), online: <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=347422&applicationid=125767&sessionid=ijo2ottud23iqjufgb4dtn0vg7> [https://perma.cc/EXL8-LJK2

104. Nehaa Bimal, "Layoffs, Scaled-Back Shipping as Baffinland Refocuses on Steensby Railway" (18 October 2024), online: <nunatsiaq.com> [perma.cc/E2NJ-P9A4] [Bimal]. Note that Baffinland announced the Steensby plans in February 2023 (see *CBC News*, "So Long Milne Inlet: After Expansion Rejection, Baffinland Turns to Steensby Rail" (17 February 2023), online: <cbc.ca> [perma.cc/AKE4-CHD4].

105. Bimal, *ibid*.

Figure 1: Summary of Mary River Project Scope, Determinations, and Decision Making

Proposal	3.5–4.2 mtpa	6 mtpa	12 mtpa	18 mtpa	30 mtpa
Phase 1 ^Y ('12)					
ERP ^Y ('14)					
PIP *X ('18)					
PIP Extension ^Y ('21)					
Phase 2 *Y ('22)					
PIP Renewal ^Y ('22)					
SOP ^Y ('23)					
Steensby resubmission (TBD)					

Orange = Steensby Route | Green = Milne Route | Horizontal Lines = NIRB Impact Review | Vertical Lines = NIRB Reconsideration | No Lines = Process TBD | ^ = NIRB positive determination/assessment |* = NIRB negative determination/assessment |Y = Minister accepted NIRB determination/assessment | X = Minister rejected NIRB determination/assessment

Based on the immense interest and controversy around NIRB determinations, it appears the public understands them to be credible and influential on the Minister's final decision.[106] Nonetheless, Mary River has exposed the legal tension between the NIRB and the Minister's authority, and in light of recent and heated disputes over the project,[107] it illustrates the importance of clarifying the limits of the Minister's discretion.

The Minister's 2018 decision with regard to the PIP appears to have been the most controversial with respect to impacts on Inuit harvesting rights. As illustrated in Figure 2, the decision correlates with a sharp decrease in the narwhal population in Eclipse Sound—a species with special cultural and food security significance to Inuit—by nearly 80 per cent from 2016 to 2021. Many Inuit, including the Mittimatalik Hunters & Trappers Organization, have expressed deep concerns about the environmental impacts of increased shipping vessel traffic on narwhal populations.[108] While narwhal abundance increased in 2023, the narwhal population remains roughly half of what was observed before mining production and shipping began.

106. Jillian Kestle-D'Amours, "Inuit Voices Grow Louder in Fight over Nunavut Mine Expansion," (27 February 2021), online: <aljazeera.com> [perma.cc/XHF8-ETHU].

107. In 2021, protestors concerned with project impacts to the environment and treaty hunting rights blocked the Milne Tote Road and airstrip, which resulted in an injunction (See *Baffinland Iron Mines v Inuavek et al*, 2021 NUCJ 22 at para 4 and *Baffinland Iron Mines Corporation v Naqitarvik*, 2023 NUCA 10 at para 4).

108. David Venn, "Community Reps Oppose Mine Expansion at Final Day of Baffinland Hearing" (6 November 2021), online: <nunatsiaq.com> [perma.cc/VML5-74ZV].

Figure 2: Decline in Narwhal Population in Eclipse Sound[109]

SURVEY YEAR	ABUNDANCE ESTIMATE
2004	20,225
2013	10,489
2016	12,039
2019	9,931
2020	5,018
2021	2,595
2022	4,592
2023	10,492

Inuit harvesting rights are protected under article 5 of the Nunavut Agreement. Decreased narwhal in Eclipse Sound impact these rights by reducing their total allowable wildlife harvest and requiring them to travel further to hunt. Due to the significant importance of narwhal to Inuit in the region, it is arguable whether the Minister's decision to vary the terms and conditions resulted in sufficient accommodation of Inuit harvesting rights.[110] At a minimum, the Minister's decision has proven highly controversial in light of ongoing impacts on narwhal.[111]

IV PURPOSIVE ANALYSIS: EXAMINING CONSTRAINTS ON MINISTERIAL DISCRETION

In this section we examine the constraints on ministerial discretion based on a purposive analysis of the Nunavut Agreement and NuPPAA as well as the application of relevant constitutional principles.

In our view, a purposive analysis, grounded on the modern principle of statutory interpretation, supports the idea that the Minister's decision-making powers are intended to serve as oversight rather than as a de facto veto. The modern principle stipulates that "words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of

---

109. See Baffinland, "Appendix G.6.15: Rationale and Methodology for Averaging Abundance Estimates from Aerial Replicate Surveys" (22 March 2024) at 4, online (PDF): <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=349793> [https://perma.cc/4M7E-4DLQ]. At time of writing, 2024 data is not available. Baffinland did not conduct narwhal abundance surveys in 2024 (Nunavut Impact Review Board, "2023-2024 Monitoring Report: Mary River Project Certificate No. 005" (11 March 2025) at 76, online (PDF): https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=353538 [https://perma.cc/KA38-9YEG]).

110. Nunavut Agreement, *supra* note 1, art 5.1.2.

111. Julien Gignac, "Massive Increase in Nunavut Mine Shipping Traffic Puts Narwhals at Risk: Study" (19 February 2021), online: <https://thenarwhal.ca/massive-increase-in-nunavut-mine-shipping-traffic-puts-narwhals-at-risk-study/>; see also Dylan, "Complicated Intersection," *supra* note 19 at 228 (Dylan argues that Inuit rights are "fragmented" by complex legal proceedings and processes).

Parliament."[112] This means interpreters should look beyond the text's provisions and undertake an analysis in conjunction with the scheme's context and purpose to explain legal meaning. This approach is applied even where provisions may not be ambiguous at first glance, as language cannot be interpreted separately from context and purpose.[113]

Application of this modern principle alone does not necessarily resolve interpretive ambiguity. Genuine ambiguity "arises between two or more plausible readings, each equally in accordance with the intentions of the statute."[114] If a modern reading of the text does not resolve ambiguity, interpreters may apply additional interpretive techniques to resolve it.

The purposive approach is a staple concept of the modern principle.[115] Purposes and context are critical for resolving ambiguity in statutory and treaty provisions, help to establish the meaning of text, and should be considered at every stage of interpretation. As a general rule, interpretations that promote purposes are preferred over those that do not. This principle is reflected in the federal *Interpretation Act*, which requires that every statutory enactment be "deemed remedial, and shall be given such fair, large and liberal construction and interpretation".[116] Further, federal policy requires modern treaties "to be interpreted in a reasonable and purposive manner which requires giving effect to the common intention of the parties at the time the treaties were made."[117] Both federal law and policy reflect the importance of a purposive approach and the modern principle in the interpretation of statutes and modern treaties.

Courts presume that legislatures intend to comply with the constitution.[118] Interpreters of Canadian law should consider constitutional principles established through common law, such as the Honour of the Crown, when interpreting treaties and statutes affecting Indigenous Peoples (see discussion of these principles in Section IV.D).[119]

Reconciliation is a highly relevant principle for the interpretation of statues and treaties. The question of how to promote reconciliation through treaty interpretation has been a matter of long-standing debate.[120] The law encourages the Crown to fulfil treaty promises, which are "of a very solemn and special, public nature."[121] Further, honourable interpretation of Crown obligations "cannot be a legalistic one that divorces the words from their purpose" and instead

---

112. *Canada (Minister of Citizenship & Immigration) v Vavilov,* 2019 SCC 65 at para 117 [*Vavilov*]; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 .

113. *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 47.

114. *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 29.

115. Ruth Sullivan, *Statutory Interpretation* (Toronto: Irwin Law Inc, 2016) at 185–87 [Sullivan].

116. *Interpretation Act*, *supra* note 6, s 12.

117. Crown-Indigenous Relations and Northern Affairs Canada, "Statement of Principles on the Federal Approach to Modern Treaty Implementation" (last modified 28 February 2023), online: <rcaanc-cirnac.gc.ca> [perma.cc/47GR-B7H9].

118. Sullivan, *supra* note 115 at 307.

119. *Ibid* at 252–55, 257–58; see also, *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at paras 77–87 [*Tsilhqot'in Nation*].

120. See generally Kent McNeil, "Reconciliation and the Supreme Court of Canada: The Opposing Views of Chief Justices Lamar and McLachlin" (2003) 2:1 Indigenous LJ 1.

121. *R v Badger*, [1996] 1 SCR 771 at para 76 [*Badger*]. See also *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 79 [*MMF*]; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 19 [*Haida Nation*]; Sullivan, *supra* note 115 at 252.

must be given "broad, purposive interpretation" that is consistent with the Honour of the Crown.[122] Reconciliation underlies the legal application of treaty rights and the purpose of treaties.[123] Interpretation must account for and give effect to an agreement as a whole and address the inherent tension between the assertion of Crown sovereignty and Indigenous Peoples' prior inherent legal authority.[124] An approach to interpretation that disregards this tension "is contrary to the purpose of treaties and undermines their ability to act as a vehicle to advance reconciliation."[125]

In *Mitchell*, the Supreme Court of Canada suggested that consideration of historical harms through statutory interpretation is only required if other interpretive techniques fail to resolve ambiguity.[126] However, courts have gravitated toward actively promoting reconciliation throughout interpretive analysis.[127] In *Nowegijick*, the court emphasized that treaty ambiguity should be resolved in favour of Indigenous Peoples and that "[A]boriginal understandings of words and corresponding legal concepts . . . are to be preferred over more legalistic and technical constructions."[128] This principle was affirmed in *Badger*, which found any restrictions on treaty rights should be narrowly construed.[129] In effect, the *Nowegijick* principle promotes reconciliation throughout the interpretive process by accounting for harms perpetuated by the Crown against Indigenous Peoples.[130]

The *Nowegijick* principle was first applied to historical treaties but has since been considered in the interpretation of modern treaties. Interestingly, the Nunavut Agreement states there shall be no presumption that doubtful expressions be resolved in favour of government or Inuit.[131] Courts have taken a slightly different approach in applying the *Nowegijick* principle in the modern treaty context. Generally, courts provide deference to the text out of respect for the intentions of the parties who negotiated agreements that are relatively clear about intentions and enhance continuity, transparency, and predictability while emphasizing the importance of upholding the Honour of the Crown.[132]

In short, key principles of statutory and treaty interpretation require a liberal construction of text that accounts for the purpose and the broader legislative and constitutional context. Articulated purposes help establish the meaning of a given text and should be considered at

---

122. *MMF, ibid* at para 77.

123. *Ibid* at para 71; Kate Gunn, "Towards a Renewed Relationship: Modern Treaties & the Recognition of Indigenous Law-Making Authority" (2022) 31:2 Constitutional Forum 17 at 18–19 [Gunn]; *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at paras 67, 70.

124. Gunn, *ibid* at 19, 21.

125. *Ibid* at 20.

126. *Mitchell v Peguis Indian Band,* [1990] 2 SCR 85 at 143.

127. Sullivan, *supra* note 115 at 252–53;*Nowegijick v The Queen,* [1983] 1 SCR 29, at 30, 36 [*Nowegijick*]; See also Aimée Craft, "Treaty Interpretation: A Tale of Two Stories" (4 June 2011) at 4–5, 11, online (pdf): <ssrn.com/abstract=3433842> [perma.cc/ML23-FXJ5].

128. *Mitchell*, *supra* note 126 at 88.

129. *Badger, supra* note 121 at paras 41, 52.

130. Sullivan, *supra* note 115 at 254–55.

131. Nunavut Agreement, *supra* note 1, art 2.9.3.

132. Sullivan, *supra* note 115 at 253; Gunn, *supra* note 123 at 21–22; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 12 [*Beckman*]; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paras 36–37 [*Nacho Nyak Dun*]; *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 7.

every interpretation stage, as interpretations that promote purposes are generally preferred over those that do not. These principles should be applied when interpreting the Nunavut Agreement and NuPPAA.

A. Purposes of the Nunavut Agreement and NuPPAA

1. Nunavut Agreement

There are several objectives of the Nunavut Agreement, including to provide Inuit with wildlife harvesting rights, to promote economic opportunities and self-sufficiency, and to ensure a fair share of financial compensation and means of participating in economic opportunities.[133] Further, the treaty aims to "provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to *participate in decision-making* concerning the use, management and conservation of land, water and resources."[134]

The right to participate in decision making is most explicit in articles 11 and 12 of the Nunavut Agreement. Article 11 requires that "special attention" must be paid to Inuit and Inuit Owned Lands interests through land-use planning, and that the land-use planning must include "active and informed participation of Inuit and other residents affected by the land use plans."[135] Article 12 does not include explicit language speaking to Inuit participation in impact reviews, but it can be inferred that meaningful participation in NIRB-led impact review processes is important as it is related to the management and use of land and resources. Article 12 stipulates the NIRB's primary objective "shall be at all times to protect and promote the existing and future well-being" of Nunavut residents and communities, and "to protect the ecosystemic integrity" of Nunavut (while also taking into account the well-being of Canadians outside of Nunavut).[136] Similarly, when reviewing project proposals, the NIRB must consider "whether the project would enhance and protect the existing and future well-being of the residents and communities" of Nunavut, and "whether the proposal reflects the priorities and values" of Nunavut residents.[137] While these articles speak generally to "residents and communities" of Nunavut (i.e., Nunavummiut), the vast majority of the population are Inuit.[138] Read together with the objectives of the Nunavut Agreement, this implies that the way for the NIRB and the Minister to consider the well-being of Inuit, and whether a project reflects their priorities and values, is to include them in the NIRB-led impact review and decision-making process. Further, in our view, participation is ensured through the NIRB itself, which consists of Inuit representatives, which speaks to the importance of its determinations and the need for the Minister to respect and offer deference to its findings.

The Nunavut Agreement does not prescribe to what degree the NIRB and Minister must consider Inuit input. We do know, as legal scholar Daniel Dylan emphasizes, that Inuit rights

---

133. Nunavut Agreement, *supra* note 1, preamble.

134. *Ibid* [emphasis added].

135. *Ibid*, art 11.2.1(b), (d).

136. *Ibid*, arts 11.2.1(b), 12.2.5; Dylan, "Complicated Intersection," *supra* note 19 at 207, 229.

137. Nunavut Agreement, *supra* note 1, art 12.5.5 (a) and (c); NuPPAA, *supra* note 3 at s 103(1).

138. Nunavut Agreement, *supra* note 1, art 12.2.5. As of 2021, 85.8 per cent of the Nunavut population is Inuit; see Statistics Canada, "Focus on Geography Series, 2021 Census of Population, Nunavut, Territory" (2021), online <statcan.gc.ca> [perma.cc/YF7V-A5UP]. See also Jai, *supra* note 2 at 131.

to participation in decision making is not equivalent to final "decision-making" authority, which rests with the Minister.[139] However, in our view, we can glean from the purposes of the Nunavut Agreement that it contemplates (1) meaningful participation of Inuit in decision making through the impact review process and (2) for those views to be deeply considered by the NIRB and the Minister. While it's important to acknowledge the Minister's final decision-making authority, we suggest these purposes speak to limitations on ministerial discretion. At minimum, they indicate that it would not be consistent with the purposes of the Nunavut Agreement for the NIRB or the Minister to not allow a meaningful opportunity for Inuit input in the impact review and decision-making processes.

2. NuPPAA

The Nunavut Agreement stipulates that legislation will be implemented to clarify the impact review process, including the powers, functions, objectives, and duties of the NIRB.[140] This is the purpose of NuPPAA, which details land-use planning and impact review processes and the powers and duties of the NPC, NIRB and the Minister.[141] In case of conflict, the Nunavut Agreement prevails over NuPPAA, but NuPPAA prevails over other federal and territorial laws.[142]

Parliamentary proceedings regarding NuPPAA provide insight into the legislative intent of the legislation and how law makers understood the NIRB and Minister's duties and powers and how Parliament understood the purposes of the Nunavut Agreement. During the bill's second reading, John Duncan, then Minister of Aboriginal Affairs and Northern Development, said that "[a]n improved regulatory regime will allow aboriginals (*sic*), communities and others to better participate in decision-making concerning the use, management and conservation of land, water and natural resources in the north."[143] He noted that former Nunavut Premier Eva Aariak called the legislation "an important milestone in establishing an effective and streamlined regime for Inuit and government to *manage resource development in Nunavut together*."[144] These comments suggest that NuPPAA was intended to further refine the NIRB-led process established by the Nunavut Agreement, allowing Inuit to participate as equal partners in land and natural resource management.

Duncan's successor, Leona Aglukkaq, described the bill slightly differently. During the report stage, Aglukkaq emphasized that NuPPAA would empower the "people of Nunavut" with tools to "manage" and "make decisions" regarding land and resource development:

> [T]he Nunavut planning and project assessment act . . . I believe will provide the *people of Nunavut* with the tools to plan and assess land, water and resource use in a responsible and sustainable manner. I believe the bill will empower *the people of Nunavut to manage their own land and resource development* to fuel strong, healthy and self-reliant communities.

---

139. Dylan, "Complicated Intersection," *supra* note 19 at 229.

140. Nunavut Agreement, *supra* note 1, art 10.2.1.

141. Dylan, "Complicated Intersection," *supra* note 19 at 220.

142. *Ibid* at 221; NuPPAA, *supra* note 3, ss 3(1)–(2).

143. *House of Commons Debates*, 41-1, No 185 (26 November 2012) at 1205 (Hon John Duncan), online: <ourcommons.ca> [perma.cc/LW5N-7LS5].

144. *Ibid* at 1205 [emphasis added].

> Indeed, I am convinced that the bill would *help the people of Nunavut make planning and project assessment decisions* that would not only lead to greater economic development of the territory's land and resources but also enable them to protect their environment and preserve a precious and unique natural heritage for future generations.[145]

Aglukkaq's reference to the "people of Nunavut" is noteworthy in so far as it reminds us that the NIRB process is not exclusive to Inuit. While the vast majority of Nunavut are Inuit, and the NIRB is co-managed by Inuit representatives, the NIRB is ultimately an institution of public government and is tasked with acting in the public interest.[146]

More importantly, the former Ministers' comments explicitly state the purpose was to empower the people of Nunavut to manage their land and resources and help them make "project assessment decisions." Since the NIRB is the body through which the people of Nunavut have input in such decisions, these statements imply that NuPPAA entrenches the NIRB's role and authority in assessing projects and determining whether they should proceed. Since the NIRB leads the process that must account for potential adverse impacts on Inuit rights, the Minister must not interfere with the NIRB's role or its determinations lightly. And while NuPPAA affirms the Minister's final decision-making power, Aglukkaq's comments indicate that Parliament never intended the Minister's power to be used as an unconstrained veto or cudgel to override NIRB determinations.

This intent is reflected in some of the provisions of NuPPAA that are not included in the Nunavut Agreement. For example, if the NIRB determines an impact review is not required for a proposed project, NuPPAA requires the Minister to accept or reject that determination within 15 days of receiving notice of that determination.[147] The Minister may order the NIRB to conduct an impact review even if the NIRB determines a review is not required.[148] However, if the NIRB determines a review *is* required, the Minister *cannot* exempt the project from the impact review process. Instead, the Minister may agree that an impact review is required and authorize the NIRB to conduct an impact review, or reject the project entirely by deeming it not in the national or regional interest.[149] In effect, the Minister can increase, but not decrease, scrutiny of a project (although the Minister can cancel the project entirely if it is deemed not in the regional or national interest).

In our view, this example supports the inference that NuPPAA furthers the purposes of the Nunavut Agreement to ensure meaningful participation of Inuit in decision making and to protect Inuit rights to harvesting and the ecosystemic integrity of Nunavut. Since the NIRB is the key regulator and body that carries out consultation with Inuit, the purposes imply the Minister is by extension required to provide some deference to NIRB determinations while also ensuring rigorous consideration of ecosystemic impacts and the broader public interest. In other words, the Minister's duty is to oversee NIRB determinations to ensure compliance with the Nunavut Agreement, including the participation of Inuit in decision making,

---

145. *House of Commons Debates*, 41-1, No 218 (4 March 2013) at 1200 (Hon Leona Aglukkaq), online: <ourcommons.ca> [emphasis added].

146. Nunavut Agreement, *supra* note 1, art 10.1.1.

147. NuPPAA, *supra* note 3, s 93(1).

148. *Ibid*, s 93(1)(a)–(b).

149. *Ibid*, s 94.

and ensure adequate consideration of possible ecosystemic and socioeconomic impacts. The Minister may then operationalize an NIRB determination, if the Minister decides it is compliant with the Nunavut Agreement and the public interest, by accepting the determination and, if necessary, varying the terms and conditions.

On this basis, it is important to consider whether any of this may change in a post-devolution Nunavut. As noted, on April 1, 2027, a territorial Minister of the Government of Nunavut will step into the shoes currently worn by the federal Minister, assuming responsibility for making decisions under NuPPAA and overseeing the NIRB-led impact review process. In our view, the territorial Minister, as a representative of public government, will be tasked with making final decisions on behalf of Nunavummiut while also navigating the same legal considerations and principles as the current federal Minister with respect to Inuit rights and interests and the role of the NIRB as a co-management institution. The transfer of decision-making power to an elected representative of Nunavummiut may have significant political implications and may result in different decisions than would otherwise be made by the federal Minister. Regardless, the territorial Minister will confront the limitations on ministerial discretion described in this article.

B. The Legal Authority of NIRB Determinations and Ministerial Decisions

As noted, article 12 of the Nunavut Agreement describes the impact review process and the respective duties and powers of the NIRB and the Minister. The Minister is "the federal or territorial minister having the jurisdictional responsibility for authorizing a project to proceed."[150] NuPPAA defines the "federal minister" and "responsible minister" as the Minister of Northern Affairs, except when a different minister has explicit jurisdiction.[151] If multiple ministers have jurisdictional authority, they jointly administer the duties and functions of the "responsible minister". For example, in the Mary River context, the Minister shares regulatory jurisdiction with the federal Minister of Intergovernmental Affairs & Trade; Transport; Environment and Climate Change; Natural Resources; and Fisheries, Oceans and the Canadian Coast Guard.[152]

Further, it's important to emphasize that the primary objective of the NIRB is "at all times to protect and promote the existing and future well-being of *residents and communities of the Nunavut Settlement Area*, and to protect the *ecosystemic integrity*" of Nunavut (and account for the well-being of Canadians outside of Nunavut).[153] This objective is reflected in section 23 of NuPPAA. The consideration of residents and communities generally is consistent with

---

150. Nunavut Agreement, *supra* note 1, art 12.1.1.

151. NuPPAA, *supra* note 3, ss 2(1), 73(1). For a discussion on this topic, see Dylan, "Complicated Intersection," *supra* note 19 at 219–20.

152. NuPPAA, *supra* note 3, ss 149(1). See Minister of Northern Affairs, "221116-08MN053-Ltr from Minister Re Phase 2 Development Decision-IT4E.pdf" (16 November2022), online: <https://www.nirb.ca/portal/dms/script/dms_download.php?fileid=342156&applicationid=124701&sessionid=v7pblniln9pd52ib7tkl2nplh5> [perma.cc/4CEM-BUE9].

153. Nunavut Agreement, *supra* note 1, art 12.2.5 [emphasis added].

the NIRB's status as a "co-management institution of public government."[154] However, the people of Nunavut are predominantly Inuit, who enjoy treaty rights that are inextricably tied to ecosystemic integrity (e.g., wildlife harvesting). In brief, we feel it is reasonable to infer that a broad, purposive reading of article 12 makes consideration of Inuit well-being a paramount consideration for the NIRB.

On this basis, we can explore the meaning of an NIRB "determination" through the immediate context provided in article 12. The NIRB's "primary functions" are to (1) "screen proposed projects to *determine* whether or not a review is required"; (2) "gauge and define the extent of the regional impacts . . . to be taken into account by the Minister in making his or her *determination* as to the regional interest"; (3) "review the ecosystemic and socio-economic impacts of project proposals"; (4) "*determine*, on the basis of its review, whether project proposals should proceed, and if so, under what terms and conditions, and then report its *determination* to the Minister"; and (5) monitor projects for compliance with project certificate terms and conditions.[155]

Here, the words "determine" or "determination" are used to refer to the Minister's finding of whether the project is in the regional interest, the NIRB's finding regarding whether an impact review is required, and whether, based on an impact review, a project should proceed. However, other provisions limit the use of the word "determination" to the NIRB in the impact review process. The word is used in reference to the NIRB's screening process and its finding of whether an impact review is required or whether the project must be modified or abandoned because it may result in unacceptable adverse socioeconomic and ecosystemic impacts.[156] That determination must be communicated in a written report that indicates whether a project should be subject to an impact review.[157] The word is also used in reference to the NIRB's finding as to whether a project should proceed and, if so, according to what terms and condition.[158] However, it is not used in the context of the reconsideration process.

Notably, the Nunavut Agreement distinguishes NIRB determinations that account for ecosystemic factors from determinations that account for exclusively socioeconomic factors. Article 12.2.2 stipulates that NIRB determinations during screening regarding socioeconomic impacts that are "unrelated to ecosystemic impacts shall be treated as *recommendations* to the Minister."[159] Article 12.2.3 restricts the NIRB's mandate from establishing requirements for socioeconomic benefits.[160] Further, article 12.5.11, in explaining the Minister's duties upon reviewing the NIRB's determination under articles 12.5.7 and 12.5.9, stipulates the Minister may accept, reject, or vary exclusively socioeconomic determinations "without limitation" to the grounds set out in those articles.[161] NuPPAA affirms the Minister's final decision-making power over NIRB determinations and that the Minister "may reject, or vary in any manner

---

154. Note that art 10.1.1 of the Nunavut Agreement does not mention "co-management," but the NIRB describes itself as such. See Nunavut Impact Review Board, "Proponent's Guide" (February 2020) at 9, online (pdf): <nirb.ca> [perma.cc/DHR5-QVZA].

155. Nunavut Agreement, *supra* note 1, art 12.2.2 [emphasis added].

156. *Ibid,* art 12.4.2; NuPPAA, *supra* note 3, s 91.

157. Nunavut Agreement, *supra* note 1, art 12.4.4; NuPPAA, *supra* note 3, s 92.

158. Nunavut Agreement, *supra* note 1, art 12.5.6; NuPPAA, *supra* note 3, ss 104–06.

159. Nunavut Agreement, *supra* note 1, art 12.2.2(d) [emphasis added].

160. *Ibid*, art 12.2.3.

161. *Ibid*, art 12.5.11.

that that Minister considers appropriate, any recommended term or condition that is related to the socio-economic impacts of the project and that is not related to its ecosystemic impacts."[162]

In our view, these provisions of the treaty and statute support an inference that NIRB determinations involving ecosystemic impacts constrain ministerial discretion to a greater degree than recommendations based on exclusively socioeconomic impacts. However, neither clarify to what degree an ecosystemic "determination" must inform a ministerial decision.

The Minister has the final say over whether a project should proceed, following receipt of the NIRB's determination and assessment report. Nonetheless, the express classification of the NIRB's discretion regarding socioeconomic impacts as recommendations suggests the NIRB's discretion concerning ecosystemic impacts is to be understood differently. In our view, it is reasonable to infer that the Minister must consider aspects of an NIRB determination that account for ecosystemic impacts more deeply than a recommendation. While an NIRB determination concerning exclusively socioeconomic impacts may be treated strictly as recommendations, NIRB determinations regarding ecosystemic impacts are seemingly intended to carry more weight. On this basis, it can be inferred that determinations with respect to ecosystemic factors are intended to constrain ministerial discretion to a greater degree. This would be consistent with the purposes of the Nunavut Agreement and the NIRB's mandate, which prioritizes the protection of the ecosystemic integrity of Nunavut. Further, this ties into the requirement for the Minister to deeply consider Inuit rights and interests in wildlife harvesting, which are deeply tied to ecosystemic integrity.

Figure 3 summarizes our interpretation of the meaning of a decision, determination, and recommendation under the Nunavut Agreement and NuPPAA. In our view, this interpretation is consistent with the purposes and intent of the Nunavut Agreement, which places special emphasis on the protection of ecosystemic integrity and Inuit wildlife harvesting rights. It also recognizes the importance of deference to the NIRB with respect to ecosystemic matters, and respect for the views of Inuit representatives on the NIRB.

Figure 3: Contrasting Decisions, Determinations, and Recommendations

Act	Actor	Authority
Decision	Minister	The Minister accepts, rejects, or varies an NIRB determination or recommendation.
Determination	NIRB	A view on whether a project should be approved (screening and final decision) that takes into account ecosystemic impacts.
Recommendation	NIRB	A view based exclusively on socioeconomic impacts that concerns its assessment of terms and conditions for a project certificate.

We wish to emphasize that in the context of an impact review, this is only one added limitation on ministerial discretion. As discussed in Section IV.D, ministerial decisions that implicate Inuit treaty rights—throughout impact reviews and reconsideration processes—should respect the NIRB's role as a co-management board with primary responsibility to regulate development in the territory, and take seriously its findings with regard to ecosystemic impacts and Inuit harvesting rights.

---

162. NuPPAA, *supra* note 3, s 108.

C. *UNDRIP Act*

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is an international legal instrument that addresses a wide range of Indigenous Peoples' political, economic, social, cultural, spiritual, and environmental rights.[163] Its preamble and 46 articles affirm long-standing, broadly accepted international human rights norms in the context of Indigenous Peoples. Among its most notable articles are its affirmations of Indigenous Peoples' right to self-determination, including a right to autonomy or self-government.[164] In regard to lands and resources, UNDRIP affirms Indigenous Peoples have a right to those lands they traditionally owned and occupied, and have a right to own, use, develop, and control lands and resources they possess through traditional ownership.[165] UNDRIP also requires states to consult and cooperate in good faith through their own representative institutions to obtain the free, prior, and informed consent of Indigenous Peoples in relation to the development, use, or exploitation of mineral, water, or other resources.[166]

The federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, passed into law in 2021, affirms UNDRIP "as a universal international human rights instrument with application in Canadian law" and provides "a framework" for federal implementation.[167] The law requires the federal government to consult and cooperate with Indigenous Peoples and "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[168] While the language of section 5 and the requirement for an action plan delay the full implementation of the law, section 2 expressly states that "nothing in the Act is to be construed as delaying the application of the Declaration in Canadian law."[169] Further, the preamble affirms UNDRIP "as a source of interpretation of Canadian law."[170]

The fact that the Nunavut Agreement and NuPPAA assign the Minister final decision-making authority is problematic because, on its face, it is not consistent with the core principles of UNDRIP.[171] Further, while NuPPAA requires the NIRB to take into account Inuit knowledge in,[172] it does not expressly require the Minister to integrate Inuit knowledge into decision making,[173] and there is neither requirement in the Nunavut Agreement.[174] However, observers

---

163. *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 107th Mtg, UN Doc A/res/61/295 (2007).

164. *Ibid,* arts 3, 4.

165. *Ibid,* art 26.

166. *Ibid,* art 32(2).

167. *United Nations Declaration on the Rights of Indigenous People Act*, SC 2021, c 14, s 4 [*UNDRIP Act*]; *R c Montour*, 2023 QCCS 4154 at para 1197 [*Montour*].

168. *UNDRIP Act*, *ibid* at s 5.

169. *Ibid*, s 2(3); *Montour*, *supra* note 167 at para 1196.

170. *Montour, supra* note 167 at para 1195.

171. Dylan & Thompson, *supra* note 53 at 57–58; see also John Borrows, "Canada's Colonial Constitution" in Borrows & Coyle, *supra* note 2, 17 at 32–37; Borrows discusses the need for removal of federal oversight in relation to Indigenous decision making and opportunities and limitations of the advancement of Indigenous interests within the section 35 legal framework.

172. NuPPAA, *supra* note 3, s 103(3); Dylan & Thompson , *supra* note 53 at 63.

173. Dylan & Thompson , *supra* note 53 at 63.

174. Dylan & Thompson, *supra* note 53 at 63, 67, 84.

expressed these views prior to the *UNDRIP Act* coming into effect. Since then, courts have considered its legal effect on federal law.

For example, in *R c Montour*, the Superior Court of Quebec observed that in light of reconciliation being a key purpose of section 35 and the *UNDRIP Act*, treaty interpretation "must be aligned with that goal"[175] and that it is "an interpretive tool of Canadian law having the weight of a binding international instrument."[176] Further, the court found that the presumption of conformity (i.e., the presumption that Parliament did not pass laws to contradict one another) should be applied to the *UNDRIP Act* because it endorses UNDRIP without qualification.[177]

As federal law, the *UNDRIP Act* applies to NuPPAA. In our view, the *UNDRIP Act* encourages interpretations of decision-making provisions that emphasize the purposes of the Nunavut Agreement, the protection of ecosystemic integrity and treaty rights (e.g., wildlife harvesting), and Inuit knowledge and participation in decision making. This supports our effort to contextualize the purpose of the Minister's duties and decision-making powers as one of oversight, rather than the exercise of a de facto veto without regard to Inuit views and treaty rights.

D. The Constitutional Context: The Honour of the Crown and the Duty to Consult

It is imperative to account for the constitutional principles of the duty to consult and the Honour of the Crown when assessing the legal meaning of an NIRB determination and ministerial decision. That is because in all dealings with Indigenous Peoples, the Crown must act honourably, including through the implementation of treaties.[178] The Honour of the Crown arises from its assumption of sovereignty over Indigenous lands and recognizes that colonial law and customs were imposed on people, which gives rise to a special relationship that requires honourable dealings.[179] It is engaged in situations involving the reconciliation of Aboriginal treaty rights with Crown sovereignty, including the interpretation of treaty and statutory provisions.[180] That includes a requirement of the Crown to avoid sharp dealing and to "pursue the purposes behind the promises."[181] Ultimately, what determines honourable conduct will vary based on the circumstances, but its key aim is to advance reconciliation

---

175. *Montour*, *supra* note 167 at para 595.

176. *Ibid* at para 1194.

177. *Ibid* at para 1202. See also the dissent of Justices Martin and O'Bonsawin in *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 317 (where the justices were willing to state that the UNDRIP can trigger the presumption of conformity).

178. *Haida Nation*, *supra* note 121 at para 17; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24 [*Taku River*].

179. *MMF, supra* note 121 at para 67; *Haida Nation, supra* note 121 at para 32.

180. *Badger, supra* note 121 at paras 68–72.

181. *MMF, supra* note 121 at paras 73, 80; Michael Coyle, "As Long as the Sun Shines: Recognizing that Treaties Were Intended to Last" in Borrows & Coyle, *supra* note 2, 39 at 63–64 [Coyle]; as noted by Coyle, the aforementioned duties of the Honour of the Crown, such as the duty to avoid sharp dealing, has not been fully fleshed out by the courts.

in a manner that fosters a respectful long-term relationship between the Crown and Indigenous Peoples.[182]

The Crown's duty to consult flows from the Honour of the Crown, although it is only one component.[183] The Crown must carry out its duty to consult Indigenous Peoples in a manner that fosters reconciliation whenever the Crown or its agents has knowledge of Aboriginal and treaty rights and contemplate action that may adversely impact those rights.[184] It is an ongoing obligation throughout the time of an activity, requiring the Crown to provide notice of further decisions that may be made in relation to the action.[185] If the duty is triggered, it carries procedural safeguards that may vary from notice and disclosure of information, to opportunities to make submissions and receive written reasons for a decision.[186] The depth of consultation depends on the strength of the claimed or proven Aboriginal rights and potential severity of impact on those rights. The more severe the potential impact of a proposed Crown action, the deeper the duty to consult and, if necessary, accommodate.[187]

The duty to accommodate means taking into account Indigenous concerns by modifying the contemplated conduct to avoid impacts to Aboriginal rights.[188] The duty may include consideration of environmental impacts of a proposed activity, but must focus on the impact on Aboriginal and treaty rights themselves.[189] While consultation and accommodation must be "meaningful" with the goal of substantially addressing concerns,[190] and the Crown must be willing to make changes based on what it hears during the consultation process, it does not necessarily mean the Crown must ultimately agree with the Indigenous perspective.[191]

While the Crown may delegate its duty to consult to regulatory agencies (such as review boards), it remains accountable for ensuring the consultation is adequate.[192] If the regulatory process does not achieve adequate consultation or accommodation, the Crown must take further measures to meet the duty, such as requesting reconsideration of the decision or postponing an order for further consultation before a decision is made. If an Aboriginal group that is party to a modern treaty perceives the process to be insufficient, they should request direct Crown engagement "in a timely manner," as they are responsible for advancing their interests.[193]

---

182. *MMF*, *supra* note 121 at para 74; Richard Ogden, "Williams Lake and the Mikisew Cree: Update on Fiduciary Duty and the Honour of the Crown" (2020) 94:8 SCLR 207 at 221 [Ogden].

183. *MMF*, *supra* note 121 at para 73; *Clyde River*, *supra* note 12 at paras 38, 61; Coyle, *supra* note 181 at 63.

184. *Haida Nation, supra* note 121 at para 35; Coyle, *supra* note 181 at 41; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 33 [*Mikisew*].

185. *Rio Tinto Alan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 91–93.

186. *Haida Nation*, *supra* note 121 at paras 41, 43–45; *Beckman*, *supra* note 132 at paras 46.

187. *Haida Nation*, *supra* note 121 at paras 37, 43–45; *Tsilhqot'in Nation*, *supra* note 119 at paras 78–80.

188. *Haida Nation*, *supra* note 121 at para 47.

189. *Clyde River*, *supra* note 12 at para 45.

190. *Haida Nation*, *supra* note 121 at para 42; *Mikisew*, *supra* note 184 at 67.

191. *Taku River*, *supra* note 178 at paras 2, 25.

192. *Clyde River, supra* note 12 at paras 21–24.

193. *Clyde River*, *supra* note 12 at para 22; *Beckman, supra* note 132 at para 12.

As noted, the interpretation of modern treaties should respect the "handiwork" of parties to the treaty.[194] However, the treaty must be understood as a whole and in a generous manner in light of it's objectives.[195] A treaty exists within a special relationship that requires the Crown to act honourably in all its dealings with Indigenous Peoples in a manner that fosters reconciliation.[196] The Crown cannot contract out its duty to act honourably, as itapplies independently of the expressed or implied intention of the parties.[197] Through application of these interpretive principles, courts can advance reconciliation by encouraging fulfillment of modern treaties that were intended to create "the legal basis to foster a positive long-term relationship".[198]

1. Application of Key Constitutional Principles to the NIRB's Determinations and Minister's Decisions

The Honour of the Crown and the duty to consult apply to Nunavut's impact review process. In our view, these principles require the Minister to respect the NIRB's duties and responsibilities as a co-management institution made up Inuit and Crown representatives. While deference should be provided to the text of the Nunavut Agreement and NuPPAA, we cannot ignore these purposes and the function of the NIRB as a co-management institution and the important role it plays in involving Inuit in the decision-making process.

The duty to consult and the Honour of the Crown is engaged as soon as the Crown becomes aware of a project proposal that may impact treaty rights, and it is engaged throughout the life cycle of a project. The NIRB, as the key regulator, is tasked with carrying out honourable consultation with Inuit regarding project proposals and amendment applications through processes set out in the Nunavut Agreement and NuPPAA. Once the consultation process is complete, the NIRB issues a report and determination to the Minister. In its report, the NIRB must explain how it integrated comments from Inuit, as consideration of that feedback is a key component of involving Inuit in the decision-making process. The report should also explain how its determination ensures the protection of ecosystemic integrity and Inuit harvesting rights, and any terms and conditions should provide for accommodation of any potential impacts to treaty rights.

Through the NIRB-led process, the Crown does not relinquish its constitutional obligations. The Minister, as a representative of the Crown, must oversee NIRB-led processes to ensure the processes comply with the treaty and statute and are conducted honourably. The Minister must consider whether the NIRB adequately consulted Inuit and considered any potential impacts on treaty rights in its determination and carried out a process that upholds the Honour of the Crown. The Minister must also consider whether it would be honourable to approve, vary, or reject an NIRB determination, and whether additional consultation and accommodation measures are required (as per article 12.5.7(c)(i) and (e) of the Nunavut Agreement).

---

194. *Nacho Nyak Dun, supra* note 132 at para 37; *Beckman*, *supra* note 132 at para 54.

195. *Nacho Nyak Dun, supra* note 132 at para 37; *Beckman, supra* note 132 at paras 10; Gunn, *supra* note 123 at 21.

196. *Haida Nation, supra* note 121 at para 17; *Nacho Nyak Dun, supra* note 132 at para 37.

197. *Beckman, supra* note 132 at paras, 38, 61.

198. *Ibid* at para 10; *Nacho Nyak Dun, supra* note 132 at para 38, quoting *Beckman*, *supra* note 132 at para 10

Further, the Minister must justify any decision that has the potential to adversely impact Inuit rights by ensuring accommodation of that right (e.g., through terms and conditions attached to the project certificate). Determining whether the NIRB and the Minister have met their respective duties will always require a highly fact-specific and contextual inquiry of the process and reasons for the determination and decision. In any case, the Minister clearly cannot run roughshod over Inuit rights and interests, and if treaty rights are infringed, the justification burden must be "high" and "clear and convincing."[199]

In our view, the Minister's justification burden is heightened where it varies or rejects NIRB determinations that are otherwise consistent with the purposes and terms of the Nunavut Agreement and may further limit a treaty right (e.g., through impacts on wildlife harvesting). An infringement of a treaty occurs where the limitation is found to be unreasonable, whether it imposes undue hardship, and whether it denies the rightsholder the preferred means of exercising their right.[200] If an infringement is established, the Crown must justify the limitation of a treaty right by showing it is in furtherance of a compelling and substantial objective that upholds the fiduciary relationship and the Honour of the Crown.[201]

In effect, to uphold the Honour of the Crown the Minister must ensure the NIRB carried out an honourable consultation process and complied with the Nunavut Agreement and NuPPAA. Further, the Minister must consider NIRB determinations with a level of care and attention to its special role as a co-management institution, designed to encourage shared decision-making power between Inuit and Crown representatives. Ignoring or simply overriding an NIRB determination by exercising a de facto veto would not be respectful conduct nor consistent with the principle of reconciliation. The Minister must act honourably in final decision making by ensuring appropriate accommodation of any potentially impacted Inuit treaty rights. These considerations are not limited to full impact reviews but also apply to the reconsideration processes of existing project certificate terms and conditions, as these principles are engaged on an ongoing basis by contemplated actions that may implicate Inuit treaty rights. In any case, if the Minister exercises a de facto veto by disregarding the NIRB-led consultation process and its reasons for determinations and recommendations, that would be incompatible with the process of reconciliation and the Honour of the Crown, and would therefore be unlawful.

With this nuance in mind, it remains true that the written description of the Minister's decision-making power in the Nunavut Agreement and NuPPAA is problematic, because it does not explicitly discuss these considerations. In the absence of any enumerated requirements, the treaty language suggests the Minister's authority is entirely discretionary, despite the fact that such an interpretation is inconsistent with the purposes of the treaty. As noted by legal scholar Daniel Dylan, "[a]lthough the final decision is by design meant to rest with Ottawa, a decision that is incongruous with Inuit desires and interests has the real possibility of thwarting the promotion and protection of rights which the NPC and the NIRB aim to ensure."[202] We agree

---

199. See e.g. *Corporation Makivik c Québec (Procureure générale)*, 2014 QCCA 1455 at paras 85, 96–98. This case discusses a breach of the duty to consult and failure of the Minister to justify decisions under the *James Bay and Northern Quebec Agreement* with respect to co-management of wildlife (*Act approving the Agreement concerning James Bay and Northern Québec*, CQLR c C-67).

200. *Yahey v British Columbia*, 2021 BCSC 1287 at para 95.

201. *Ibid* at paras 98, 455; *Badger*, *supra* note 121 at paras 41, 78.

202. Dylan, "Complicated Intersection," *supra* note 19 at 229.

with the fact that final decision making resting with the Minister risks undermining the NIRB's role as a co-management board. However, it is important to appreciate that there are in fact constitutional checks and balances on the Minister's decision-making power. Decisions that are exercised as a de facto veto would not be justifiable, reasonable, or honourable. The Minister's decision-making power, while ostensibly unfettered, must be interpreted with a purposive analysis and constitutional overlay that accounts for the broader context and purpose of the Nunavut Agreement, the duty to consult, and the Honour of the Crown.

2. Fiduciary Duties of the Minister

A separate question is whether the Minister may owe fiduciary duties to Inuit under the Nunavut Agreement. We raise this point for consideration by those who may reject our core argument and argue that the Minister does in fact have discretion to wield their decision-making power as a de facto veto over NIRB determinations. In our view, if that is true, that would mean the Minister has unilateral, unconstrained authority over a group of people whose legal interests are vulnerable to the Minister's discretion. In trust law, the existence of such unilateral discretionary power over a beneficiary is a crucial element for identifying a fiduciary.[203] If the Minister has unilateral authority to exercise a de facto veto over NIRB determinations, this would give rise to an ad hoc fiduciary duty, as they would hold a scope of discretion that could be exercised unilaterally to impact the legal and practical interests of Inuit.[204]

There is a pre-existing, *sui generis* relationship between the Crown and Indigenous Peoples that is "trust-like" in character and also applies to Aboriginal treaties.[205] Not every aspect of this relationship gives rise to fiduciary duties,[206] but they can arise each time the Crown assumes discretionary control—whether by statute, agreement, or unilateral undertaking—over specific or cognizable Aboriginal interests.[207] Fiduciary duties may account for broader obligations to Indigenous Peoples to protect their Aboriginal rights and use of their lands.[208] This *sui generis* fiduciary duty gives rise to "general duties of good faith, loyalty, and full disclosure."[209]

Fiduciary duties are distinct from the *Haida Nation* duty to consult, but both concepts are rooted in the Honour of the Crown and provide protection for Aboriginal rights and interests. Where the Honour of the Crown gives rise to fiduciary duties, the Crown must act in the best interests of the beneficiary. Thus, to some extent, and depending on the circumstances, the application of fiduciary duties may also have an effect of limiting ministerial discretion.

---

203. *Guerin v The Queen*, [1984] 2 SCR 335 at 384 [*Guerin*].

204. Ogden, *supra* note 182 at 209–10; see also *Nunatsiavut Government v Newfoundland and Labrador*, 2020 NLSC 129 (the province had assumed unilateral control over a mining development, but in doing so placed itself in the role of a fiduciary, and the court held that the province breached its fiduciary duties and contractual obligations to Inuit by failing to inform them of mineral taxation revenues).

205. *Guerin, supra* note 203 at 386; Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (Saskatoon: Purich Publishing Ltd, 2001) at 58–59 [Mainville].

206. Mainville, *ibid* at 55; *Guerin*, *supra* note 203 at 386–87; *Haida Nation*, *supra* note 121 at para 18, quoting *Wewaykum Indian Band v Canada*, 2002 SCC 79 at para 81 [*Weywaykum*].

207. *Weywaykum*, *ibid* at para 79; Mainville, *supra* note 205 at 55.

208. *Haida Nation*, *supra* note 121 at paras 18, 54; Mainville, *supra* note 205 at 5.

209. Ogden, *supra* note 182 at 209–10.

In *Beckman*, the Supreme Court of Canada acknowledged *in obiter* that fiduciary duties may arise in a modern treaty context but did not detail its reasoning.[210]

In the Nunavut context, there is an open question of whether the Crown has in fact assumed such discretionary control to the extent that it becomes a fiduciary. In a 2014 case, the Nunavut Court of Appeal declared it was unnecessary to "superimpose a fiduciary cloak over what is essentially a contractual relationship."[211] The court did not say it was impossible for the Crown to assume parallel fiduciary duties to the terms of the Nunavut Agreement—the court only held they did not apply to the specific facts of that particular case. The ruling suggests fiduciary duties may be considered on a case-by-case basis and separately from issues of breach of a treaty term or the duty to consult.

This case reflects a tendency of Canadian courts to construe treaties as contracts and to apply similar remedies to protect against violations of treaty rights. However, the framing of treaties as contracts fails to account for the fact that treaties are distinct agreements aimed at reconciling Indigenous and non-Indigenous legal orders.[212] Also, common law remedies available for breach of contract are not necessarily well suited for finding remedies aimed at upholding the spirit and purposes of a treaty.[213] Breaches of fiduciary duty may be remedied using principles of equitable compensation, but it's an open question of whether that will or could be applied to resolve a dispute involving the exercise of ministerial discretion under the Nunavut Agreement.

E. Case Law Regarding Administrative Decision Making Under the Nunavut Agreement

In Nunavut, "anyone directly affected" by an NPC or NIRB-related matter may apply to a court to seek a determination of the implementation of project certificate terms and conditions, to obtain a court order for enforcement of terms and conditions, or to seek judicial review and orders made under article 12.[214] Through judicial review, Nunavut courts may quash a decision if it is unreasonable, arbitrary, illegal, or based on improper motives, such as bad faith. Courts will review the record that was before a decision maker[215] to determine whether a decision is

---

210. *Beckman*, *supra* note 132 at paras 9, 12, 142–44; *Nunavut Tunngavik Inc. v Canada (Attorney General)*, 2014 NUCA 2 at para 201 [*NTI*].

211. *NTI, ibid* at para 76, see also generally paras 70–77. In this case, Inuit applicants sought judicial review of the federal government's failure to implement an informational monitoring as required under article 12.7.6 of the Nunavut Agreement. The applicants argued that this was a breach of contract—which Canada admitted—and a breach of fiduciary duty. The trial court had held there was a breach of contract and fiduciary duty, but the Court of Appeal overturned that latter finding (see trial decision at *Inuit of Nunavut v Canada (Attorney General),* 2012 NUCJ 11). The Court of Appeal held the damages to restitution and found that the applicant failed to demonstrate that parallel fiduciary duties applied. The dissent argued for a more in-depth treatment of the question and for it to not be settled summarily (see paras 195–201, 209).

212. Coyle, *supra* note 181 at 45–47.

213. *Ibid* at 53.

214. Nunavut Agreement, *supra* note 1, art 12.10.5; NuPPAA, *supra* note 3, s 220; Dylan, "Wildlife Management," *supra* note 6 at 277.

215. *Vavilov*, *supra* note 112 at paras 108, 137.

reasonable[216] or correct in law.[217] That means Inuit may apply for judicial review to determine whether the NIRB or Minister has complied with the Nunavut Agreement or NuPPAA as well as related constitutional obligations, such as the duty to consult.

To date, there has yet to be a judicial review of an NIRB determination or corresponding ministerial decision,[218] despite the NIRB's record of hundreds of determinations.[219] Nonetheless, case law involving the Nunavut Agreement provides indicators of how a court may read and enforce its terms and purposes vis-á -is an NIRB determination and ministerial decision.

Clyde River is a well-known case that considered the Crown's duty to consult when contemplating actions that have a high potential for adverse impacts on the environment and Inuit rights to marine mammal harvesting. The National Energy Board (NEB) approved an application for seismic testing for oil and gas exploration near the community of Clyde River. The testing posed significant threats to marine life, such as narwhal, which implicated Inuit rights to marine harvesting. The court confirmed the Crown can rely on administrative bodies, such as the NEB, to undertake consultation.[220] But the court also held the NEB only undertook "surface-level" consultation despite the potential for significant impacts on Inuit treaty rights. The severity of the potential adverse impacts triggered a deep duty to consult, which was not met by the NEB,[221] and its decision was quashed with an order to undertake a new process.[222]

Clyde River confirms that where the Crown relies on a regulatory body to undertake its consultation obligations, the Crown is still responsible for ensuring adequate consultation and accommodation to uphold the Honour of the Crown.[223] While that does not mean the Crown must consider throughout every part of a process whether the duty is met or participate directly, the Crown must take measures to ensure it is met.[224] This reaffirms the role of the Crown, as represented by the Minister, in ensuring consultation and, if necessary, accommodation is undertaken adequately and honourably. Where the Crown relies on a regulatory body, such as NIRB, to carry out consultation, the Crown must ensure the process is honourable and consistent with the duty to consult.

In a 1998 case, NTI challenged a decision by the Minister of Fisheries to impose fishing quotas in the Davis Strait that did not follow the advice of the Wildlife Management Board (WMB).[225] Under the *Fisheries Act*, the Minister of Fisheries has absolute discretion to make licensing decisions.[226] However, under the Nunavut Agreement, the Minister is required

---

216. *Ibid* at paras 10, 15, 23.

217. *Ibid* at paras 17, 69.

218. Dylan, "Complicated Intersection," *supra* note 19 at 222.

219. Dylan, "Wildlife Management," *supra* note 6 at 277.

220. *Clyde River*, *supra* note 12 at para 16; *Haida Nation*, *supra* note 121 at para 41.

221. *Clyde* River, *ibid* at paras 43–52.

222. *Ibid* at paras 22, 30, 32–34. A distinguishing factor is that the governing statute empowers the NEB as the final decision maker, whereas the NIRB's power to make "determinations" is more ambiguous in terms of its legal authority.

223. *Ibid* at paras 22–23.

224. *Ibid* at para 22.

225. *Nunavut Tunngavik Inc v Canada (Minister of Fisheries & Oceans)*, [1998] 4 FCA 405 [*NTI FCA*].

226. *Ibid* at para 13; *Fisheries Act,* RSC, 1985, c. 14, s 7(1).

to consider the views of the WMB and pay special attention to adjacency and economic dependence of Nunavut communities on marine resources.[227]

The motions judge held that the Minister of Fisheries failed to consider the views of the WMB because the Minister failed to provide reasons, but the Federal Court of Appeal overturned that finding because there is no requirement for the Minister to provide written reasons to the WMB, as the Nunavut Agreement is explicit when reasons are required (e.g., in response to the NIRB).[228] However, in the absence of reasons, the court could not discern whether the decision was lawful, leading the court to a reasonable inference that the Minister did not give special consideration to the required factor of adjacency and economic dependency.[229] Further, despite the Minister's "absolute discretion" under the *Fisheries Act*, the court of appeal observed it is not absolute under the Nunavut Agreement, which puts in place a regime for the management and harvesting of wildlife, including both procedural and substantive requirements that affect the decision-making process.[230] This case indicates that while courts will emphasize respect for the text of the Nunavut Agreement, they will apply limitations on ministerial discretion based on a purposive reading of the Nunavut Agreement as a whole.

In a 2003 case, NTI sought judicial review of a decision by the Minister of Indian Affairs to refuse the issuance of a water licence that the Nunavut Water Board had approved.[231] The issue was whether the *Northern Inland Waters Act* (NIWA), which permitted the Minister to override the Water Board, conflicted with the Nunavut Agreement, which did not expressly afford the Minister such power. NTI argued that where the Nunavut Agreement requires ministerial approval, it does so in clear terms, such as in articles describing the authority of the WMB and the NIRB. The court held that the Minister has authority to make a final decision despite not having explicit authority under the treaty, because the power was already established in a pre-existing and workable regime under the NIWA.[232] This ruling suggests a court may offer similar deference to ministerial authority where the authority is not clearly expressed in the Nunavut Agreement but is expressed through statute. This could mean that where the Nunavut Agreement is silent on ministerial power, but NuPPAA is explicit, the courts will defer to NuPPAA to fill the gap.

V CONCLUSION

In our view, a purposive reading of the Nunavut Agreement and NuPPAA, in light of applicable constitutional principles, supports a view that the Minister's decision-making power is to ensure oversight of NIRB determinations rather than to wield a de facto veto or cudgel.

The Nunavut Agreement and NuPPAA expressly assign final decision-making authority over a project proposal to the Minister. However, in our view, ministerial discretion is limited

---

227. *NTI FCA*, *supra* note 225 at paras 29–31, 43; Nunavut Agreement, *supra* note 1, arts 5.7.27, 15.3.7, 15.4.1.

228. *NTI FCA*, *supra* note 225 at para 36.

229. *Ibid* at paras 55, 64.

230. *Ibid* at paras 15–16.

231. *Nunavut Tunngavik Inc v Canada (Attorney General),* 2003 FCT 654.

232. *Ibid* at paras 26–28.

by the purposes of the Nunavut Agreement, the duty to consult, and the Honour of the Crown—these constitutional duties of the Crown are not contracted out by the treaty.

The NIRB is a co-management board, split between Inuit and Crown representatives, and is responsible for reviewing natural resource development and carrying out impact review processes. The NIRB carries out consultation with Inuit and is obligated to prioritize in its considerations the protection of ecosystemic integrity of Nunavut and the well-being of the people of Nunavut (the vast majority of whom are Inuit). Through impact review processes, the NIRB is responsible for ensuring consultation is carried out in compliance with the Nunavut Agreement and NuPPAA and making a determination about whether a project should proceed past screening and ultimately be approved. While the Minister may accept, vary, or reject NIRB determinations, it would be inconsistent with the Honour of the Crown and reconciliation for the Minister to ignore the NIRB's authority as a co-management institution. Correspondingly, the Minister is also responsible for ensuring the NIRB-led consultation process is undertaken honourably and is consistent with the duty to consult, and they must justify their decisions accordingly.

Further, a purposive reading of the Nunavut Agreement strongly indicates that NIRB determinations that account for ecosystemic factors constrain ministerial discretion to a greater extent than those based on socioeconomic factors. In our view, the Minister is required to place greater weight on determinations with regard to the protection of Nunavut's ecosystemic integrity—and by extension, the protection of wildlife harvesting rights.

In effect, while the NIRB and Minister both play key roles in the impact review process, the Minister's role is one of oversight and should be deferential to the NIRB's authority and determinations, while also ensuring compliance with the Nunavut Agreement, NuPPAA, and constitutional obligations. To ensure the Minister is attentive to these requirements, the Nunavut Agreement requires the Minister to justify a decision by supplying the NIRB with reasons for every decision. Those reasons should demonstrate compliance with the treaty, statute, and constitution. In our view, where the NIRB fulfils its duties and upholds terms and purposes of the Nunavut Agreement in its determination, and the Minister chooses to reject or vary that determination, the greater is the burden on the Minister to justify the decision. This is because to act honourably, the Minister should offer deference to the NIRB's determinations and respect for its role as a co-management institution. In our view, deference is a form of reconciliation and is consistent with the intent of the Nunavut Agreement and NuPPAA to entrust the NIRB with a mandate to regulate natural resource development in Nunavut.

The importance of this topic transcends the relationship between the NIRB and the Minister. There is great public interest in promoting credibility and respect for NIRB authority as a co-management institution. As mineral exploration continues in Canada's largest territory, it is imperative to ensure that NIRB and ministerial powers are interpreted and exercised consistently with the purposes and terms of the Nunavut Agreement and the constitution. If the NIRB is not afforded significant deference and latitude to operate as a co-management board, the body's legitimacy will become increasingly imperilled and public confidence in the Nunavut Agreement will be undermined. As evidenced by the Mary River mine, protracted review processes can result in fragmented decisions that can have significant and consequential impacts on Inuit and wildlife. In an ideal world, current and future ministers will appreciate this legal nuance and take a deferential approach to the NIRB unless otherwise necessary to ensure the Nunavut Agreement is upheld. If not, Inuit have legal tools at their disposal to

hold the NIRB and the Minister accountable, protect their rights and interests, and ensure the purposes of the Nunavut Agreement are upheld.

MISSED OPPORTUNITIES FOR MEANINGFUL SELF-GOVERNMENT: A CASE COMMENT ON *DICKSON V VUNTUT GWITCHIN FIRST NATION*

Michaela Hill[*]

CONTENTS

Abstract

Despite Indigenous Peoples having been the first practitioners of law in the land we now call Canada, Indigenous laws have largely been ignored and overruled by state law since the time of Crown sovereignty. Even with growing recognition of Indigenous laws and pathways to recognizing self-government, Indigenous laws still largely remain embedded in state systems, subject to state approval, challenge, and review. Given the connection between self-government and the well-being of Indigenous Peoples, enabling meaningful self-government should be a priority for all state institutions, especially Canadian courts. In practice, enabling meaningful self-government means treating the sole source of self-government as organic (i.e., arising only from inherent rights) and trusting Indigenous laws as equals, capable of standing alone without the oversight of state law and courts. This case comment analyzes the majority reasons in the recent Supreme Court of Canada decision of *Dickson v Vuntut Gwitchin,* which had serious implications for self-government. The crux of the argument is that the majority's application of the Charter missed an opportunity to enable meaningful self-government, first by tethering authority for self-government to state action, and then by failing to defer to an available Indigenous-created rights-protection mechanism, showing a lack of trust in Indigenous laws.

[*] Michaela Hill, JD 2025. Thank you to Professor Naiomi Metallic for her brilliant teaching and Dr. Kim Brooks and Alison Balcom for their fantastic editing support.

I INTRODUCTION

The inherent right of Indigenous Peoples to self-govern is "grossly underdeveloped" in Canada.[1] Unquestionably, Indigenous Peoples have had vibrant legal systems since time immemorial.[2] From laws regulating trade between nations to the governance of internal relations to systems of dispute resolution, Indigenous Peoples were the earliest practitioners of law within the country.[3] Yet since the time of assertion of Crown sovereignty, Indigenous laws have largely been ignored or overruled by state law.[4] Today, despite emerging pathways for self-government and growing recognition of Indigenous laws, state legal systems continue to have significant purview over Indigenous governments.[5] In other words, instead of being treated as external to the state by nature of inherent rights, Indigenous laws and exercises of self-government are still commonly treated as existing under the state's umbrella, open to challenge and review by state law and dependent on the state's approval.[6]

With a clear connection between governance under Indigenous laws and the well-being of Indigenous Peoples, enabling meaningful self-government should be a key priority for all state institutions.[7] In practice, enabling meaningful self-government means two things. First, state institutions must treat Indigenous laws as purely organic, recognizing their sole source as historical occupation as opposed to state grants of authority or approval processes.[8] Second, state institutions must trust Indigenous laws as equals instead of subordinating them to state law.[9] In other words, Indigenous laws should be allowed to stand alone, eliminating state

---

1. Sarah Morales, "A'lha'tham: The Re-Transformation of s. 35 through a Coast Salish Legal Methodology" (2017) 37:2 NJCL 145 at 167 [Morales].

2. *Ibid* at 146.

3. *Ibid* at 162–63.

4. *Ibid* at 163.

5. Kerry Wilkins, "Take Your Time and Do It Right: *Delgamuukw,* Self-Government Rights and the Pragmatics of Advocacy" (2000) 27:2 Man LJ 241 at 250–51 [Wilkins, "Take Your Time"]; Jorge Luis Fabro-Zamora, "The Conceptual Problems Arising from Legal Pluralism" (2022) 37:1 CJLS 155 at 161, DOI: <10.1017/cls.2021.39>; Brenda L Gunn, "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws within the Canadian Legal System" (2007) 6:1 Indigenous LJ 31 at 33; Darcy Lindberg, "*UNDRIP* and the Renewed Application of Indigenous Laws in the Common Law" (2022) 55:1 UBC L Rev 51 at 54; Kelty McKerracher, "Relational Legal Pluralism and Indigenous Legal Orders in Canada" (2023) 12:1 Global Constitutionalism 133 at 141, DOI: <10.1017/S2045381722000193>.

6. McKerracher, *ibid*; Kenji Tokawa, "Indigenous Legal Traditions and Canadian *Bhinneka Tunggal Ika:* Indonesian Lessons for Legal Pluralism in Canada" (2016) 48:1 J Leg Pluralism & Unofficial L 17 at 35, DOI: <07329113.2015.1072387> [Tokawa].

7. Mary Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in Kenneth McRoberts & Patrick Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 117 at 120 [Turpel]; Naiomi Walqwan Metallic, "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's *Aboriginal Nation Recognition and Government Act*" in Karen Drake & Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre, 2019) 243 at 264–65 [Metallic, "Ending Piecemeal Recognition"].

8. Matthew VW Moulton, "Framing Aboriginal Title as the (Mis)Recognition of Indigenous Law" (2016) 67 UBC L Rev 336 at 341 [Moulton]; Tokawa, *supra* note 6 at 27, 33.

9. Moulton, *ibid* at 352.

power to oversee their application and accepting that self-governing Nations are bound to make mistakes, which are not the state's business to correct without invitation.[10]

Treating Indigenous laws as organic and capable of standing alone does not mean treating Indigenous and Canadian legal systems as entirely separate. In a multi-juridical place like Canada, legal systems are intertwined—and will continue to be as the state considers what it means to reconcile with Indigenous Peoples through law. If state institutions are going to meaningfully engage in reconciliatory efforts, a body of legal doctrine is needed to provide structure to the interaction between legal systems.[11] Courts play a key role in creating this structure because they are empowered to interpret pathways to self-government and set boundaries on state law's purview over Indigenous laws. I am merely suggesting that, as this body of legal doctrine develops, enabling meaningful self-government requires that courts prioritize treating Indigenous laws as organic and capable of standing alone. As Canada's highest court, decisions of the Supreme Court of Canada (SCC) related to self-government are particularly impactful and should be carefully scrutinized for their impact on Indigenous Peoples.

This case comment analyzes the SCC's decision in an important recent case that had significant implications for self-government. The case, *Dickson v Vuntut Gwitchin First Nation,* was the first to address whether the laws of a self-governing Indigenous Nation can be challenged under the Canadian *Charter of Rights and Freedoms* (the Charter), presenting a ripe opportunity for the SCC to rule on the source(s) of self-government and the role of state laws and courts in overseeing Indigenous laws.[12] In turn, the *Dickson* decision is highly revealing of the extent to which the SCC is enabling meaningful self-government. Focusing on the majority reasons in *Dickson,* as they are now the law in Canada, this case comment argues that the SCC missed an important opportunity to put meaningful self-government into practice, both in terms of treating Indigenous laws as organic and trusting Indigenous laws to stand alone without state oversight.

To achieve this purpose, the comment is divided into four parts. Section II provides a brief overview of the case facts and history. Section III assesses the majority's reasons for applying the Charter, arguing that their careful but determined finding of state mechanisms as a source of authority for self-government is a failure to treat Indigenous laws as purely organic. In effect, the decision transforms negotiated self-government agreements, one of the most attractive methods of inherent rights recognition on its face, into another form of delegated authority, leaving Indigenous Nations with few viable options for meaningful self-government. The third part of the commentary, Section IV, examines what the majority could have done instead of applying the Charter, arguing that the SCC missed an opportunity to reflect on its role in reviewing Indigenous laws and set a new precedent of deference to Indigenous laws. The effect of Charter application instead of deferring to an available Indigenous rights-protection mechanism is an exhibition of lack of trust in Indigenous laws and continued privileging of state legal systems. The fourth and final part of the case comment, Section V, addresses the counterargument that applying the Charter was the only way to guarantee protection for

---

10. Turpel, *supra* note 7 at 135–36; Wilkins, "Take Your Time," *supra* note 5 at 251–52.

11. Ryan Beaton, "Doctrine Calling: Inherent Indigenous Jurisdiction in Vuntut Gwitchin" (2022) 31:2 Const Forum Const 39 at 41, DOI: <10.21991/cf29444>.

12. *Dickson v Vuntut Gwitchin First Nation,* 2024 SCC 10 [*Dickson*].

vulnerable peoples, highlighting other options available to the SCC that would have exhibited greater respect for Indigenous laws.

II CASE SUMMARY

In 1993, the Vuntut Gwitchin First Nation (VGFN) concluded a land claim Final Agreement and Self-Government Agreement with the federal and Yukon governments.[13] The agreements were "approved and given effect by federal and territorial" implementing legislation.[14] Importantly, the text of the agreements and implementing legislation were silent regarding the application of the Charter.[15] Instead, the VGFN "enacted [its] own *Constitution*, which" included rights-protection provisions in line with the Self-Government Agreement's requirement that some such protection be provided.[16] Article IV of the VGFN Constitution, for example, established the right of all citizens "to be equal before and under the laws of the VGFN."[17] Mirroring the language of the Canadian Charter, the constitution further set out that VGFN rights can only be limited by what can be "demonstrably justified in a free and democratic Vuntut Gwitchin society."[18] Notably, the VGFN Constitution also established that the validity of a VGFN law can be challenged in the Yukon Supreme Court for violating other VGFN laws, including article IV.[19]

The *Dickson* case came about because of a provision in the VGFN Constitution that required all chiefs and councillors to reside on settlement land in the village of Old Crow ("the residency requirement").[20] The VGFN described this residency requirement as an "expression of their longstanding land-based governance system."[21] For VGFN citizen Cindy Dickson, however, the residency requirement meant moving away from Whitehorse, where her son was receiving medical care.[22] Wanting to stand for office, Ms. Dickson challenged the requirement as an infringement on her equality rights under section 15 of the Charter, and in the alternative under article IV of the VGFN Constitution.[23] Despite the VGFN urging the Yukon Supreme Court to resolve the issue through their own constitution, the court decided the case solely under the Charter, refusing to entertain the idea of using Indigenous law to resolve the complaint.[24] The decision required answering three questions: (1) Does the Charter apply to the

13. *Ibid* at paras 17, 19.
14. *Ibid* at para 23.
15. *Ibid* at para 22.
16. *Ibid* at paras 22, 517.
17. *Ibid* at para 24.
18. *Ibid* at para 25.
19. *Ibid* at para 27.
20. *Ibid* at para 26.
21. *Ibid* at para 13.
22. *Ibid* at paras 2, 10.
23. *Ibid* at para 10.
24. Kerry Wilkins, "I Can't See Clearly Now: Standing in the Shadow of *Dickson*" (2024) [unpublished draft, archived with author] [Wilkins, "I Can't See"]; Naiomi Metallic, "Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments" (2022) 31:2 Const Forum Const 3 at 3–4 [Metallic, "Checking Our Attachment"].

VGFN? (2) If so, is the residency requirement an infringement of section 15? (3) If there is an infringement, does section 25 of the Charter, which requires that the Charter not be construed to "abrogate or derogate" from Aboriginal, treaty, or other rights pertaining to Aboriginal Peoples, shield the claim from Charter application? [25]

The Yukon Supreme Court and Yukon Court of Appeal held that the Charter applies to the VGFN but found the claim to be shielded by section 25.[26] Ms. Dickson appealed to the SCC on the application of section 25, while the VGFN cross-appealed on the question of Charter application. In a split decision, the SCC dismissed both the appeal and cross-appeal. The majority (Justices Wagner, Coté, Kasirer, and Jamal) agreed that the Charter applies but found the claim to be shielded by section 25. The dissent on appeal (Justices Martin and O'Bonsawin) also applied the Charter, though for different reasons than the majority, but held that section 25 did not shield the claim. The dissent on cross-appeal (Justice Rowe) disagreed with all of his colleagues, ultimately finding that the Charter does not apply to the VGFN.

III MISSED OPPORTUNITY TO TREAT INDIGENOUS LAWS AS PURELY ORGANIC

Dickson presented the SCC with an opportunity to give effect to meaningful self-government by ruling that the only source of Indigenous law-making authority is inherent, even when recognized through negotiations with the state. Unfortunately, the majority failed to treat VGFN law in this way. Despite their careful word choice, the majority ultimately "tethered" the VGFN's exercise of self-government to state mechanisms instead of finding its only source to be inherent.[27] In finding that the Charter applies, the majority held that the VGFN is both government by nature and carrying out a specific government activity.[28] While acknowledging that the VGFN has inherent rights, the majority reached their conclusion by relying on the fact that the VGFN's self-government powers came about through an exercise of Parliament's legislative authority under section 91(24) of Canada's Constitution, enabled by state implementing legislation.[29] Regardless of the majority's acknowledgement that the VGFN has "been self-governing since time immemorial," the ultimate holding was that at least some of the VGFN's law-making powers come from state authority.[30] In the majority's view, this was sufficient for the Charter to apply.[31]

The troubling effect of the majority's reasoning is that it takes the self-government negotiation process, one of the most promising methods of recognizing self-government, and transforms it into a form of subjugation, detracting from the inherency of the right. Negotiations for self-government are guided by the Inherent Right Policy (IRP). The IRP was

---

25. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 25,.

26. *Dickson v Vuntut Gwitchin First Nation,* 2020 YKSC 22 at paras 131, 212; *Dickson v Vuntut Gwitchin First Nation,* 2021 YKCA 5.

27. *Dickson*, *supra* note 12 at para 101.

28. *Ibid* at para 94.

29. *Ibid* at para 84.

30. *Ibid* at para 82.

31. *Ibid* at para 86.

released by the Liberal government in the 1990s after a nationwide referendum shot down the Charlottetown Accord, which would have recognized an inherent right to self-government as part of section 35 of Canada's constitution.[32] Following the Charlottetown Accord's failure, the IRP set out a framework for tripartite self-government negotiations between Indigenous Nations and relevant provincial and federal governments.[33] Importantly, the IRP was the first time the Canadian government explicitly acknowledged Indigenous Peoples' inherent right to self-government.[34] The text of the IRP clearly states this recognition, calling self-government an "existing Aboriginal right under section 35 of the *Constitution Act, 1982*."[35] This statement was particularly important in light of the courts' hesitancy to recognize such a right.[36]As such, the IRP was seen as a step forward, aimed at recognizing inherent rights through a process that leaves Indigenous Nations with law-making jurisdiction over their own lands and peoples.[37]

Unfortunately, the majority's decision in *Dickson* detracts from the progressive language of the IRP. By focusing their reasons on the authority flowing from state powers, the majority overshadows the history and marketing of the process as recognizing inherent rights. The focus on state involvement puts the need to treat Indigenous laws as purely organic in deep trouble, drawing a straight line between state authority and one of the most meaningful ways of achieving self-government currently available. The resulting precedent leaves Indigenous communities with very few promising avenues to exercise their rights outside of the state's umbrella.

To act on inherent rights to self-government, Indigenous Nations essentially have three choices: negotiate a self-government agreement, prove self-government over a specific activity under the *Pamajewon* framework,[38] or, as Naiomi Metallic calls it, "just do it" (i.e., exercise sovereignty without any recognition from other governments).[39] Satisfying *Pamajewon* requires an Indigenous group to show that self-government over a particular activity was "integral to the[ir] distinctive culture" prior to European contact.[40] Notably, under the *Pamajewon* test, self-government cannot be claimed generally; it must be tied to a specific practice.[41] Not only is the *Pamajewon* approach piecemeal in this way, the steps required to prove the right are themselves a form of subordination of Indigenous laws. Proving that a practice is "integral to [a] distinctive culture" requires forcing traditions that may not comport with Western ideas

---

32. Jennifer E Dalton, "Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 CJLS 11 at 23–24 [Dalton, "Aboriginal Self-Determination"]; Sari Graben, "The Nisga'a Final Agreement: Negotiating Federalism" (2007) 6:2 Indigenous LJ 63 at 71; Morales, *supra* note 1 at 160.

33. Dalton, "Aboriginal Self-Determination," *ibid* at 29.

34. Jennifer E Dalton, "Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?" (2006) 22 Windsor Rev Legal Soc Issues 29 at 64.

35. Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (last modified March 1, 2023), online: <rcaanc-cirnac.gc.ca> [perma.cc/X87M-6FZP].

36. Dalton, "Aboriginal Self-Determination," *supra* note 32 at 25–26.

37. Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2018) 51:1 UBC L Rev 105 at 143.

38. *R v Pamajewon,* 1996 CanLII 161 (SCC) [*Pamajewon*].

39. Metallic, "Ending Piecemeal Recognition," *supra* note 7 at 272.

40. *Pamajewon, supra* note 38 at para 25.

41. *Ibid* at para 27.

into boxes that are digestible to the Canadian common law and ultimately approved by state-appointed judges.[42] The *Pamajewon* process is thus a prime example of how Indigenous law-making powers are subjected to state approval instead of being recognized as organic.

On the other hand, the "just do it" option, while truly organic, is highly risky. Though some scholars argue that any need for recognition from the state is problematic for inherent rights, it is hard to deny that some form of recognition is of practical importance.[43] Ultimately, a state cannot operate effectively unless it is recognized by others.[44] Without external recognition, "just doing it" would expose Indigenous Nations to the risk of litigation from state institutions and close them off from funding and resources that enable effective self-governance, as well as any established recourse if the state infringes on their inherent rights.[45]

The problems with these other two pathways for recognizing self-government highlight the appeal of IRP negotiations. Much of that appeal, however, is now lost in the majority's decision in *Dickson*. While negotiating self-government still requires agreement with the state, the result pre-*Dickson* appeared to be jurisdiction to make laws outside the state's purview, alongside resources and respect to give effect to that jurisdiction. In some ways, negotiating self-government seemed to be as inherent as it gets without being exposed to the risks of "just doing it." The *Dickson* majority now makes clear, however, that even after negotiations conclude, exercises of self-government remain tied to state laws. By applying the Charter, the majority decision transforms an imperfect, yet seemingly meaningful, self-government process into the continued subjugation of Indigenous laws. This statement may seem alarmist, but it is not. If all it takes is federal legislation that recognizes a right to self-government to trigger Charter application, how will the state ever truly see Indigenous laws as purely organic? Knowing, as described above, that recognition is important to give practical effect to self-government, most ways of achieving self-government could create this "tethering" effect. Based on the majority's reasons, the only way to truly detach from the tether would be to take the risky "just do it" approach or the problematic and piecemeal *Pamajewon* approach, neither of which are easy roads. While the majority explicitly "make[s] no comment on whether" the Charter applies to exercises of "untethered" inherent rights, these exercises have been made all the more rare by their decision.[46] The result is a Canadian society in which most exercises of self-government will be subject to state law, at least in terms of rights protection.

Notably, the majority's decision was not inevitable. Nothing about the process of negotiating self-government necessarily required viewing state involvement as a *source* of authority for self-government. To illustrate this point, consider the dissenting decisions. Closely aligned with the central arguments in this paper, Justice Rowe's dissent makes clear that the instruments used by the majority to "tether" VGFN law to the Canadian state do not

---

42. Moulton, *supra* note 8 at 346–347.

43. John Griffiths, "What Is Legal Pluralism?" (1986) 18:24 J Leg Pluralism & Unofficial L 1 at 8, DOI: <10.1080/07329113.1986.10756387> [Griffiths]; Ralf Michaels, "Law and Recognition—Towards a Relational Concept of Law" in Nicole Roughan & Andrew Halpin, eds, *In Pursuit of Pluralist Jurisprudence* (Cambridge: Cambridge University Press, 2017) 90 at 98 [Michaels].

44. Michaels, ibid at 106–08.

45. Metallic, "Ending Piecemeal Recognition," *supra* note 7 at 272; Nicole Spadotto, "Jurisdiction Devolution: An Interim Transitional Arrangement on the Road to Indigenous Self-Government" (2024) 47:2 Dal LJ 682 at 689.

46. *Dickson, supra* note 12 at para 91.

establish the kind of connection needed for Charter application.[47] In Justice Rowe's analysis, these instruments merely confirm powers that exist inherently, ensuring that state governments respect the promises they make in their negotiations with Indigenous Peoples.[48] While the dissent on appeal is arguably even more hostile to Indigenous laws than the majority in its analysis of the scope of Charter application and the framework for section 25, Justices Martin and O'Bonsawin at least align with Justice Rowe in holding that VGFN law does not derive its authority through delegation or transfers of power from other levels of government.[49] Looking at these dissents, it is evident that the majority's decision on the source of authority for self-government is not how it had to be. There were ways of reasoning, embedded in the text and jurisprudence of section 32 and alive to the realities of state involvement, that would have respected Indigenous laws as entirely organic. Unfortunately, these reasons were not the majority's.

IV MISSED OPPORTUNITY TO TRUST INDIGENOUS LAWS TO STAND ALONE

In addition to presenting an opportunity for the SCC to rule that the sole source of self-government is inherent rights, the *Dickson* case also presented an opportunity for the SCC to trust Indigenous laws to stand alone by setting boundaries on state law's purview. By applying the *Charter* instead of giving deference to article IV of the VGFN Constitution, the majority reasons imply a reluctance to fully trust Indigenous laws. Admittedly, the application of article IV was not strictly before the court, as the majority explained:

> As for Ms. Dickson's equality claim under Article IV of the VGFN Constitution, which was pleaded in the alternative before the Supreme Court of Yukon, we take due note of Newbury J.A.'s observation in the Court of Appeal reasons that, having pursued her claim under the *Charter*, *Ms. Dickson may elect hereafter to pursue a similar claim under the VGFN Constitution. Since the application of Article IV was not addressed in this Court, we refrain from further comment on this issue.*[50]

Although article IV was not strictly before the court, the facts of the *Dickson* case posed an opportunity for the SCC to establish new precedent by exercising its discretion to defer to the jurisdiction of an Indigenous governing body whose own constitution provided recourse. Such a finding could have come about through deep reflection on what gives the SCC power to assess an Indigenous law through state law. After all, a commitment to decolonizing law requires confronting the difficult question of where state law gets its authority to be invoked.[51] Had this question been asked, it is hard to imagine an answer that would not have been grounded in problematic doctrines like the presumption of Crown sovereignty and the doctrine of discovery. Indigenous Peoples exercised law-making powers long before

---

47. *Ibid* at para 496.

48. *Ibid* at para 482.

49. *Ibid* at para 243.

50. *Dickson, supra* note 12 at para 230 [references omitted; emphasis added].

51. Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 CJLS 145 at 146, DOI: <10.1017/cls.2014.5>.

European contact; what other than problematic doctrines can explain why state law applies to assess their validity? *Dickson* provided the SCC with an opportunity to engage in this kind of reflection. Had they done so, the majority could have refused to apply the Charter as an act of respect for inherent rights, deferring instead to article IV as an Indigenous-made rights-protection mechanism.

Notably, reflecting on the court's purview over Indigenous laws would not have been novel in the context of Canadian courts.[52] Take for example, the recent Federal Court case of *George v Heiltsuk First Nation*.[53] In that case, Justice Grammond dismissed an application for judicial review on the basis that the court lacked jurisdiction because the decision under review was made exclusively pursuant to Indigenous law.[54] In sharp contrast to the Federal Court's jurisdiction to review decisions of councils acting pursuant to delegated powers (particularly through the *Indian Act*), Justice Grammond found that the council in question derived its authority solely from Indigenous laws, with nothing in the enforcement of the council's decision relying on Canadian law for assistance.[55] Justice Grammond further held that state recognition of Indigenous laws is not enough to give the Federal Court jurisdiction over the matter, commenting that he "fail[s] to see why th[e] Court should assume jurisdiction based on Canadian law's recognition of Indigenous law where the Council is not seeking such recognition."[56] In other words, recognition of Indigenous laws by the state is not enough to give a Canadian court jurisdiction over a matter internal to a First Nation made pursuant to their laws.

Although the SCC's purview over Indigenous laws is more a matter of discretion than jurisdiction as compared to the Federal Court, their approach to cases centring on Indigenous laws should involve the same first step of grappling with their relationship to such laws. Where Indigenous laws provide recourse and state law merely recognizes inherent rights, courts should exercise their discretion by refusing to apply state legal frameworks. In the *Dickson* case, the majority could have refused to apply the Charter, interpreting the implementing legislation as a mere act of recognition and considering that article IV provided alternative recourse. As Kerry Wilkins questions: Why consider the Charter issue at all when Ms. Dickson had recourse under the VGFN Constitution and when the VGFN was asking for its own law to be applied?[57]

Unlike in *George,* refusing to apply the Charter would not have removed the case from the Canadian courts entirely. Because the VGFN Constitution sets out the right of the Yukon Supreme Court to review VGFN laws in light of their own constitution, the case could have been remitted back to the lower court to be decided under article IV. Such a decision would have demonstrated significantly more trust in Indigenous laws.

Instead, the majority applied the Charter, implying distrust in VGFN law that cannot be smoothed over by their suggestion that article IV exists as another avenue for Ms. Dickson's claim. While it could be argued that the majority repeating Justice Newbury's comments at the court of appeal about article IV is a demonstration of trust in VGFN law as an alternative

---

52. *George v Heiltsuk First Nation*, 2023 FC 1705 at para 26–27.

53. *Ibid.*

54. *Ibid* at paras 22, 74.

55. *Ibid* at paras 37–40, 60, 67.

56. *Ibid* at para 73.

57. Wilkins, "I Can't See," *supra* note 24 at 13.

rights-protection mechanism, their finding on Charter application negates this trust. If the majority truly believed article IV could protect rights, why would the Charter route need to be left open? A court that had full confidence in VGFN law should have held that article IV is the only appropriate avenue for the claim. The hesitancy of the court to find as such sends the message that the Charter is a necessary fall-back, ready to swoop in when Indigenous laws fail. Such a decision, regardless of its intention, is incompatible with full trust in Indigenous laws because it perpetuates the stereotype that Indigenous societies are lawless or have inferior legal systems.[58]

Further, the implication of distrust underlying the majority's decision cannot be saved by the application of section 25. Despite Ms. Dickson's claim ultimately being shielded by section 25, the damage to trust in Indigenous laws was done when the majority applied the Charter, as it is Charter application that gives state law continued purview over Indigenous laws. Everything that comes after Charter application, including section 25, requires Indigenous laws to justify their existence to state law. In Justice Rowe's dissenting words, citing Naiomi Metallic, section 25 makes a Nation like the Vuntut Gwitchin "subject to having its legal order intensely scrutinized by standards foreign to it."[59] Framed this way, section 25 is not a mechanism of genuine trust and empowerment; it is another legal framework that subjects Indigenous laws to state oversight, preventing a reality in which Indigenous laws are trusted to stand on their own and, in turn, perpetuating a history of Canadian decision makers forcing Canadian ideas, processes, and institutions on Indigenous Peoples.[60] As such, the only way to truly demonstrate trust in Indigenous laws in this case was to defer to VGFN law. By declining to do so, the majority further solidified state law's purview over exercises of self-government.

V SQUARING TRUST IN INDIGENOUS LAWS WITH CONCERNS ABOUT RIGHTS PROTECTION

In arguing that the court should have deferred to article IV of the VGFN Constitution instead of applying the Charter, I recognize that many Indigenous Peoples advocate for the Charter to apply to their governments, particularly in light of concerns about sexism and violence against women. I share their concerns about the treatment of women and other vulnerable peoples. At the same time, I agree with scholars like Mary Ellen Turpel that the answer does not lie in the continued oversight and oppression of Indigenous Peoples by state institutions, who created many of the patriarchal systems that exist today.[61] There are other ways of protecting rights beyond the Charter that show greater trust in Indigenous laws and nationhood.

As article IV of the VGFN Constitution demonstrates, Indigenous laws, when given the trust they deserve, are capable of building workable rights-protection mechanisms. While some Indigenous groups may choose to opt into Charter application or use it as a model, non-Charter rights-protection mechanisms can be equally effective. It is important to remember that the Charter is a value-laden document that was designed to meet the needs of mainstream

58. Metallic, "Checking Our Attachment," *supra* note 24 at 9.

59. *Dickson, supra* note 12 at para 503.

60. Metallic, "Checking Our Attachment," *supra* note 24 at 5.

61. Turpel, *supra* note 7 at 134.

Canadian society.[62] As Turpel argues, "[t]o say that the Charter accepts or reinforces individual dignity and is the only way this principle is assured is hardly supportable, and is indeed ignorant of the customs, traditions, and approaches that Aboriginal peoples bring to self-governance."[63] Thus, where Indigenous rights-protection mechanisms exist, courts should show them deference.

In the United States, for example, the US Supreme Court and lower courts have consistently held that the Bill of Rights, which functions like our Charter, has no application to tribal governments.[64] On issues of gender-based violence, US tribes have successfully enacted domestic violence codes and created tribal courts that address violence against women without causing the breaking up of the country.[65] This state of affairs in the United States highlights what could have been possible in *Dickson*, further rebutting the Charter's necessity.

Even where Indigenous rights-protection mechanisms have yet to develop in Canada, the answer need not be the application of state law. If Indigenous Nations are to be respected as distinct entities, then why not subject their laws to international human rights standards, just as we do with all other recognized nations? Although international law is itself an imperfect system, it is more justifiable than applying domestic law given its respect for Indigenous nationhood.[66] Importantly, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which sets out the right to self-government, anticipates the application of international human rights norms. Built on the understanding that self-determination is not absolute, UNDRIP is premised on being exercised "in conformity with international law."[67] Solidifying this notion, article 46(2) sets out that self-government must respect the "human rights and fundamental freedoms of all," allowing for limits on Indigenous rights where "strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others."[68] Moreover, many Indigenous leaders were proponents of UNDRIP, creating even greater responsibility to align their laws with its principles.[69]

Looking at international law and UNDRIP specifically makes clear that the majority in *Dickson* could have addressed concerns about rights protection without subsuming Indigenous laws within state legal frameworks. By failing to give deference to VGFN law or engage with international law, the majority declined the opportunity to reflect on the limits of state law and show full trust in Indigenous laws.

---

62. Kerry Wilkins, "...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49:1 UTLJ 53 at 78, DOI: <10.2307/826053> [Wilkins, "The Eggs"].

63. Turpel, *supra* note 7 at 136.

64. Wilkins, "The Eggs," *supra* note 62 at 120.

65. John Borrows, "Creating an Indigenous Legal Community" (2005) 50:1 McGill LJ 153 at 160; Griffiths, *supra* note 43 at 169; Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593 at 624.

66. Sam Grey, "Self-Determination, Subordination, and Semantics: Rhetorical and Real-World Conflicts over the Human Rights of Indigenous Women" (2014) 47:2 UBC L Rev 495 at 514–15 [Grey].

67. *Ibid* at 526–527; *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 107th Mtg, UN Doc A/res/61/295 (2007) GA Res 61/295, Annex agenda item 68 at 3 [*UNDRIP*].

68. *UNDRIP*, *ibid* at art 46(2).

69. Grey, *supra* note 66 at 528.

VI CONCLUSION

This case comment analyzes the majority reasons in *Dickson* to understand the extent to which the SCC is enabling meaningful self-government through their decision making. Looking at two specific ways to enable meaningful self-government in practice, the comment argues that the *Dickson* majority fails on both accounts. With regard to treating Indigenous laws as purely organic instead of finding their source in state grants of authority, the comment argues that the majority's "tethering" of self-government to the state is highly problematic. The effect of this tethering is the transformation of a negotiation process that was touted as recognizing inherent rights into another method of subsuming Indigenous laws within state systems. Given the problems with proving self-government through any other means, the majority's decision in *Dickson* creates a reality in which most exercises of self-government will be subject to the Charter, detracting from their true inherency.

The majority's decision is equally disappointing with regard to the second means of enabling meaningful self-government: allowing Indigenous laws to stand alone without state oversight. Though article IV of the VGFN Constitution was not strictly before the SCC, it was open to the court to reflect on their role and exercise discretion to defer to VGFN law. By instead applying the Charter, even while commenting that article IV remains available and shielding the claim under section 25, the majority signalled a reluctance to fully trust Indigenous legal systems and continued their subjection to state oversight.

While refusing to apply the Charter would have been a significant move for the SCC, relinquishing the power to oversee Indigenous laws without explicit permission is the hallmark of trust, reconciliation, and meaningful legal pluralism. Though some judges and law makers may subconsciously believe that no other legal order could possibly step in to make effective laws when the state leaves a gap, Indigenous legal systems can and have governed effectively for centuries.[70] What Indigenous laws need now is the space to revitalize, unconstrained by state law. If given that space, with international law as a fall-back, rights protection will not be in jeopardy; on the contrary, it will be strengthened. Restricting the autonomy of Indigenous laws not only harms Indigenous Peoples but also deprives Canadian society of alternative methods of governance. Perhaps, if allowed to flourish, Indigenous laws could spark even better ways of achieving "peace, justice, and fairness."[71] Is the humility it would take the courts to exercise discretion not to apply state law worth the price of repressing that potential?

---

70. Tokawa, *supra* note 6 at 27.

71. Kirsten Manley-Casimir, "Incommensurable Legal Cultures: Indigenous Legal Traditions and the Colonial Narrative" (2012) 30:2 Windsor YB Access Just 137 at 151.

BOOK REVIEW

The Chilling Future of AI and Immigration: A Book Review of Petra Molnar's *THE WALLS HAVE EYES: SURVIVING MIGRATION IN THE AGE OF ARTIFICIAL INTELLIGENCE*

Review by Natasha Latina[*]

CONTENTS

I INTRODUCTION: RESISTANCE AND STORYTELLING AT THE BORDER

Technology is constantly evolving; while it offers many benefits,[1] there is a darker side that must also be acknowledged: its connection to structures of oppression, labour exploitation, and forms of imperialism, such as settler colonialism.[2] Lawyer and anthropologist Petra

* JD 2025, Bora Laskin Faculty of Law, Lakehead University; BA (Hons) French Studies, York University.
Special thanks to Professor Tenille E Brown and Professor David Rosenberg for their support.

1. Heather Grabbe & Tomáš Valášek, eds, *Refocus the European Union: Planet, Lifetime, Technology,* (Washington: Carnegie Endowment for International Peace, 2019) at 26, online (pdf): <carnegie-production-assets.s3.amazonaws.com/static/files/files__refocus-the-european-union.pdf>. Some benefits include "reducing the need for humans to conduct menial tasks; playing an essential role to care for the elderly and people with disabilities; health checks; connectivity; and building more sustainable economies."

2. Petra Molnar, *The Walls Have Eyes: Surviving Migration in the Age of Artificial Intelligence* (New York: The New Press, 2024) at xiii.

Molnar[3] addresses these concepts through her ethnographic research and legal analysis in North America, Europe, Asia, and East Africa. Based on over four years of fieldwork,[4] her book, *The Walls Have Eyes: Surviving Migration in the Age of Artificial Intelligence,* uses an interdisciplinary lens to show how these vulnerabilities are heightened when "migration management technologies" are deployed in regions populated with vulnerable people,[5] often with limited legal safeguards and oversight mechanisms.[6]

From cover to cover, the book spans 277 pages and is well suited to law students and academics whose chosen field of interest is law and technology, privacy law, immigration law, refugee law, international law, or any combination of the foregoing. Practising lawyers, policymakers, community workers, and advocates would also enjoy the book because of its insights, which can be used in their everyday work. Similarly, the book would be useful to researchers or advocates in the fields of political science and human rights, particularly those interested in those areas from an international perspective.

The language of the book is simple and not overcomplicated with legal jargon. By using an interdisciplinary lens of law and anthropology, the author tends to move between storytelling and fact-based accounts. This is done quite successfully, as the author's experiences are juxtaposed with social and economic realities. For instance, Molnar notes that Chapter 3 was one of the most difficult chapters to write because of the visceral trauma and memories that transpired while in Greece.[7] This is followed by a contextualization of the European Union's "priorities to deter, detain, and deport."[8]

A. A Note on Methodology

Molnar's book begins with a short foreword, author's note, and introduction. Recognizing that the intersection of technology and immigration law is rapidly evolving, Molnar seeks to provide the most current information (circa publication in 2024), but acknowledges that there may be some gaps due to newer politics and technologies.[9] The author's note, "The Power of Storytelling as an Act of Resistance," sets the tone for the book, as Molnar outlines her inspiration, the discomforts endured, and her methodology. This methodology is described as a "slow and trauma-informed ethnographic methodology, one which requires years of being present in order to begin unraveling the strands of power and privilege, story and

---

3. Lawyer and anthropologist, specializing in migration and human rights. See Molnar, *ibid,* "About the Author" at 279 for a full biography.

4. Molnar, *ibid* at xii.

5. *Ibid* at xix.

6. Petra Molnar & Lex Gill, *Bots at the Gate: A Human Rights Analysis of Automated Decision-Making in Canada's Immigration and Refugee System* (Toronto: International Human Rights Program and the Citizen Lab, 2018) at 5.

7. Molnar, *supra* note 2 at 73.

8. *Ibid* at 83.

9. *Ibid* at xviii.

memory, through which people's lives unfold."[10] Molnar also relies on a mixture of law and anthropology to depict the "global story of power, violence, and technology."[11]

Throughout the book, technology and borders are often referred to as "violent," intending to illuminate the real harms that border technologies create and perpetuate through means such as surveillance, dehumanization, and systemic harms.[12] The author further highlights that any language used in the book was deliberate—terminology such as "people on the move" or "people crossing borders" was purposefully used, rather than rigid categories that often reduce much of the story to "refugees, migrants, and asylum seekers."[13] This is notable because the author chooses to use inclusive language that returns some agency to those on the move and does not dehumanize people crossing borders.[14] Molnar's main message is that *people* are at the centre of these stories, a concept she weaves throughout the entire book by using a combination of facts and storytelling.[15]

In her introduction, "The Growing Panopticon of Border Technologies," Molnar includes a photograph of a "high-tech refugee camp on the Greek island of Kos."[16] The introduction provides background information on technology and borders, as well as discusses the impacts on people's lives technological interventions at borders have. It also highlights the "theses" of the book:

> My [Molnar's] desire to understand how the interconnected systems of power, history, labor, politics, and economics underpin these technologies and their impacts throughout a person's migration journey is what ultimately brought me to the world's borders to get a firsthand look.[17]

Molnar also focuses on the experiences of people on the move, which are often caught in the border crises, as well as analyzes those who can "provide shelter, assistance, and spaces of solidarity."[18] The introduction sets the stage for the entire book: It uses storytelling to depict the lives of people and their experiences at the border. Further, it includes references to big players funding the technologies used at borders, such as Airbus, Accenture, Palantir, and Thomson Reuters.[19] At their core, borders are the product of political institutions,

---

10. *Ibid* at xvii. Molnar notes that this methodological practice has often faced scrutiny about its efficacy, accuracy, and validity "in the field" (*ibid* at xviii). Additionally, the author highlights that this methodology is "incomplete, and for every story, space, and context that is included here, there are missing pieces, silences" (*ibid*).

11. *Ibid* at xvii.

12. *Ibid* at xii–xiii.

13. *Ibid* at xvii–xix.

14. *Ibid* at xvii, xix.

15. The "power of stories" is often used to describe and critique culture: see Tony E Adams, Stacy H Jones & Carolyn Ellis, *Autoethnography: Understanding Qualitative Research* (Oxford: Oxford University Press, 2014) at 103 for more information on "storytelling." Molnar uses this technique when describing the real-life accounts of people on the move. Conversely, "facts" are used to represent information such as statistics, laws/regulations, and so on.

16. Molnar, s*upra* note 2 at 1.

17. *Ibid* at 3, 11.

18. *Ibid* at 7.

19. *Ibid*.

where migration and corporate values of investing intersect,[20] often disregarding the realities of violence, solidarity, and dispossession.[21] Given this, as well as the rise of "anti-migrant xenophobic sentiments" and extreme right-wing political organizations, migration management technologies are heavily influenced by the agendas of global political organizations.[22]

Despite marginalized communities (such as refugees and asylum seekers) being the most impacted by migration management technologies, the author highlights that everyone is impacted.[23] Molnar hopes to use one of oldest forms of technology—books—to combat the violence of new technologies and raise awareness of its impacts on individual humans.[24] For the reasons that follow in this book review, it is my opinion that Molnar has achieved this goal.

II WHO IS ALLOWED TO MOVE FREELY? THE IMPACT OF BORDER MANAGEMENT TECHNOLOGY ON CONTINENTAL IMMIGRATION EXPERIENCES

The book structure and main themes are focused on storytelling as a commitment to capture immigration as an experience and the distinct role of technology at various borders. The book is divided into eight chapters, each of which examines a different region and is accompanied by a photograph taken by the author.[25] Although each chapter primarily focuses on one region, there is sometimes overlap between the chapters. This book review has therefore been divided by continent to capture the main takeaways from each region.

While it might be unconventional to begin this book review with an overview of the afterword, this is one of the most evocative parts of the book. The afterword, "Zaid Ibrahim (collected and translated through WhatsApp messages)," brings together the aspects of immigration, technology, and storytelling to illustrate the impact of border technology on immigration. What, perhaps, began as banal WhatsApp messages became an incredible conclusion to the book, depicting the realities of immigrants crossing borders: "Death was chasing us from one place to the next, and returning us back to Turkey."[26] Zaid Ibrahim describes his life as a refugee during the Syrian war, his experiences at the Turkish border and the Greek border, and his overall search for a better life.[27] Twenty-six days, nine attempts, and multiple brutal assaults: the raw stories described by Zaid Ibrahim finally reaching the European Union serve as a powerful end to the book by demonstrating the resistance endured

20. *Ibid*.

21. *Ibid* at 9.

22. *Ibid* at 175.

23. *Ibid* at xix.

24. *Ibid* at 10.

25. *Ibid* at xvii. Molnar notes that each photograph was "carefully selected [to not] replicate problematic depictions of racialized bodies that are so common in representations of migrants." Additionally, these photographs are not meant to dehumanize—"[r]ather, it is meant to return at least some agency to people on the move" (*ibid*).

26. *Ibid* at 213.

27. *Ibid* at 210–14.

by many migrants trying to navigate the ever-changing technological landscape at various border crossings.[28]

The overarching theme in Molnar's book is the premise that some groups can move easier than others in our world,[29] which is due to "migration management technolog[y's]" roots in discriminatory practices such as racial profiling.[30] In efforts to represent movements of persons as they experience migration violences, Molnar has undertaken a careful selection of contexts and stories to explore. As such, the author brings the reader on a journey through North America, Europe, Asia, and East Africa, highlighting that each continent poses a distinct barrier for migrants with their migration management technology. Notably, the migration stories are not always contained geographically, though the laws are. For instance, when describing the European Union's policies, much of the stories are centred on migration flows from Turkey, into Europe through Greece. This approach centralizes the experiences of people on the move such as Zaid Ibrahim, who was finally reunited with his family after years of travelling and waiting.[31]

A. Exploiting Vulnerable Populations: The Global North's Approach to Border Technology

> Mr. Alvardo must have been walking for days, if not weeks, and died just three miles (five kilometres) from a major highway that would have connected him to the town of Gila Bend in Arizona.[32]

When addressing border technology in North America, Mr. Alvardo's story is unfortunately quite common. With the implementation of new border technologies at the US–Mexico border, deaths have doubled over the past two decades.[33] Molnar provides anecdotes regarding the US–Mexico border and some of the Canadian government's policies in Chapter 1, "'The Wall Bleeds Rust': Robo-Dogs in the Sonoran Desert'" and Chapter 4, "'Recognizing Liars': AI Lie Detectors, Voice Printing, and Digital Incarceration."

Beginning with the United States, the author describes "smart-border technologies" designed to replace other inhumane alternatives such as "building walls [and] placing children in cages";[34] these technologies include drones, surveillance towers, facial recognition cameras,

---

28. *Ibid* at 213. Zaid Ibrahim recalls Greek border guards, commandos, and mercenaries (armed and working with the guards) demanding them to remove their clothing, despite the frigid weather. The commandos searched the men's underwear, as well as grabbed women by their breasts, in search for money. One young refugee was asked if they had any money in English: not understanding English, the boy did not respond. As a result, the guards began beating him with their batons until he was covered in blood coming from his head, ears, and mouth.

29. *Ibid* at 173.

30. *Ibid* at xix, 26. An example being deployed in the United States and New Zealand is automated facial recognition to identify "future 'troublemakers'" (ibid at 26).

31. *Ibid* at 214.

32. *Ibid* at 15.

33. *Ibid* at 19. In fact, the highest death rates were found in 2021, with at least 650 found dead in the Sonora. Anthropologist Jason De León has called this a "land of open graves" (*Ibid*).

34. *Ibid*.

licence plate readers, highway checkpoints, and fibre-optic sensor systems.[35] Most recently, the addition of "robo-dogs" has been included in these surveillance techniques, meant to hunt for people after dark.[36] Despite these harsh technologies, Molnar emphasizes that "dragnets are not a deterrent when the alternative is watching your family starve."[37] This is critical to the author's main focus of this section, which is to stress that "[t]ailoring technology to pursue punitive immigration enforcement measures is rooted in the racist, xenophobic, and ethnonationalist vision of immigration."[38] Molnar also outlines that similar technologies are used in Canada: launched in March 2018, project "Chinook" was meant to aid Immigration, Refugees and Citizenship Canada (IRCC) with temporary resident applications.[39] This technology was designed to render decisions, including whether to approve or refuse an application.[40] By comparing both North American countries, Molnar seeks to highlight how migration management technology can be troublesome due to "bias, error, or system failure," each of which "can result in irreparable harm."[41]

B. Reducing the Flow of Migrants: Exploring the "Fringes of Europe" and the European Union's Policies

A resting place for unidentified, perished people on the move in Sidero, the Evros region of Greece, is included in the book.[42] "Little Nasr," a fourteen-year-old who looks seven and whose mother remains in Syria, has finally crossed the Meriç River into Greece.[43] Little Nasr suffers from severe scoliosis, impeding his ability to move at the same pace as the others.[44] He "is running out of food and water in the forest."[45] Will Little Nasr perish in the same resting place? Molnar decides to rent a car and drive up north to find Little Nasr, despite the possibility that she could face deportation and criminal charges. After all, unlike those whose stories she tells, Molnar has the freedom to live elsewhere.[46]

Through Little Nasr's story, the author discusses the European Union's (EU) clear intentions regarding migration: "to reduce the flow[...] [of migrants]."[47] An increasingly common practice is to deter people from entering the EU through Greece by pushing them back to Turkey (the "Fringes of Europe") using various violent methods, such as physical

35. *Ibid* at 18.

36. *Ibid* at 21.

37. *Ibid* at 24.

38. *Ibid* at 26.

39. *Ibid* at 98.

40. *Ibid* at 99.

41. *Ibid* at 101.

42. *Ibid* at 40.

43. *Ibid* at 40–43.

44. *Ibid* at 39, 43.

45. *Ibid* at 42.

46. *Ibid*. As part of her human rights monitoring work, Molnar has a "special dispensation letter allowing [her] to move around" (*ibid*).

47. Molnar, *ibid* at 73.

pushing, beating, stripping, and creating dangerous waves for boats.[48] As such, Molnar focuses Chapter 2, "'Smart Borders Kill': Technological Violence at the Fringes of Europe," and Chapter 3, "'If We Go There, We Will Go Crazy': Refugee Camps as Digital Prisons," on refugee camps located in Europe, namely Greece. These camps are described as a location of surveillance, barbed wire, and segregation.[49] A detailed description of these areas further categorizes them as places that "dehumanize people seeking protection."[50] The uncertainties of refugee camps are contextualized by Molnar during her journey in Poland's Białowieża Forest, in search of a border crossing to Belarus.

Molnar also introduces the EU's *AI Act*[51] early on and provides explanations regarding its substance and/or potential application at the end of the book (Chapter 8). Recognizing that *people* are at the centre of these stories, it is worth mentioning that the purpose of the book is to interrogate the intersection of storytelling, immigration, and growing technology practices, rather than serving as a book of legal information. The main focus of these chapters is to thus highlight one common thought: "There is a profound fear of mobility and of the uncontrollable migrant that motivates the proliferation of border technologies."[52] Through the EU's policies, it is necessary to note that the "very concept of a 'border' has shifted . . . to stop unwelcome migration to Europe."[53]

C. "Accept All Cookies": Creating Surveillance Technology at the Expense of Civilians' Privacy in Asia

> "My number is 20055 at the computer. We are numbers, we are not humans."[54]
>
> —Ahmad

Molnar's next location is the city of Hebron, which is described as the laboratory for technology and violence by Ori Givati, a former Israeli soldier.[55] Ahmad, an activist, is familiar

---

48. *Ibid* at 41.

49. *Ibid* at 84.

50. *Ibid.*

51. The EU's *AI Act* lays the foundation for the regulation of artificial intelligence in the EU. See especially EU, Regulation 2024/1689 of the European Parliament and of the Council of June 13, 2024, laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139, and (EU) 2019/2144, and Directives 2014/90/EU, (EU) 2016/797, and (EU) 2020/1828 (*Artificial Intelligence Act*), [2024] OJ, L 2024/1689 [AI Act]. *Cf* Bill C-27, *An Act to enact the Consumer Privacy Protection Act, the Personal Information and Data Protection Tribunal Act and the Artificial Intelligence and Data Act and to make consequential and related amendments to other Acts,* 1st Sess, 44th Parl, 2022 (second reading April 24, 2023); Canada's draft *Artificial Intelligence and Data Act* (AIDA)—modelled after the EU's *AI Act*—is a "new regulatory system designed to guide AI innovation in a positive direction, and to encourage the responsible adoption of AI technologies by Canadians and Canadian businesses": Canada, Innovation, Science and Economic Development, "The Artificial Intelligence and Data Act (AIDA)—Companion document," March 13, 2023, online: <ised-isde.canada.ca> [perma.cc/EN9W-DUAZ].

52. Molnar, *supra* note 2 at 174.

53. *Ibid* at 178.

54. *Ibid* at 143.

55. *Ibid* at 139.

with surveillance.[56] As quoted above, Ahmad explains his experiences of being stopped and interrogated by officers for one to three hours at a time.[57] The city of Hebron was specifically selected by Molnar because privacy is virtually non-existent: There are cameras in every bedroom and courtyard.[58] This advances the main focal point of Chapter 6, "'All Roads Lead to Jerusalem': A Lucrative Border Industrial Complex": surveillance technology.[59]

The author explains that "[t]he Israeli occupation of Palestine has been a breeding ground for technologies like drones, facial recognition, and Al-operated weapons—technologies that are exported and repurposed around the world."[60] This technology exists as mobile apps like "Pegasus," which is used to infiltrate phones and extract data and activate a camera or even a microphone.[61] Molnar highlights that this technology was also used in Arizona by the US Border Patrol to put "[Indigenous] American reservations . . . under constant surveillance, including surveillance cameras and drones."[62] This chapter thus advances the notion that countries with large defence and security systems (such as the United States, Israel, and China) are trying to transfer surveillance technology all over the world.[63] Although the concept of surveillance is not new, with the rise of "surveillance capitalism" and the normalization of increased surveillance and data collection, society must be wary of its widespread application.[64]

D. Trading Fingerprints for Meals: Data Colonialism in East Africa

> "Without an ID card and identification number," he said, "you are totally a living dead."[65]
>
> —Ahmed Khalil Kafe

The reader's final destination is Kenya, where Molnar describes migration management technology as "data colonialism."[66] This account is seen in Chapter 5, "'Data Is the New Oil': The Silicon Savanna and Data Colonialism in East Africa." As Molnar explains "the Huduma Namba, or "Service Number" in Swahili, is a controversial attempt by the government to create digital identities for all Kenyans."[67] Described by seventy-three-year-old Ahmed Khalil Kafe above, when he was denied registration, his life was turned "upside down" because "access[ing] government services like voting or paying taxes, or even being able to sell his

---

56. *Ibid* at 143.

57. *Ibid*.

58. *Ibid* at 142.

59. *Ibid* at 141–42. "Surveillance relies on collecting vast amounts of data to make predictions in order to remove and detain people" (*Ibid* at 150).

60. *Ibid* at 139.

61. *Ibid* at 144.

62. *Ibid* at 148. Over the span of ten years, this technology cost at least $500 million.

63. *Ibid* at 150.

64. "Surveillance capitalism" is a concept whereby Professor Shoshana Zuboff argues that all our data is being used for profit (*ibid* at 158).58).

65. *Ibid* at 119.

66. *Ibid* at 120.

67. *Ibid* at 118.

land" were restricted.[68] As Kenya has become increasingly digitalized, millions of minorities (ethnic, religious, and racial) have experienced similar stories.[69] As a result, many cannot access social services or even relocate throughout the country.[70]

In comparison to the previous continents, "[m]aking people trackable . . . is one of the ways in which the EU and the U.S. are able to maintain a form of neo-colonial control over global migration management."[71] The author explains that powerful actors in the Global North collect information from vulnerable populations because of a lack of regulation and oversight.[72] Beyond a lack of accountability, East African refugee camps are being transformed into "pilot project[s] for a biometric system involving retinal scanning and fingerprint analysis."[73] One major concern is the lack of data protection: Without appropriate safeguards, centralizing these data in UN High Commissioner for Refugees (UNHCR) facilities can make it vulnerable to hacking, data sharing,[74] and data selling.[75] It is important to note that data sharing can result in grave consequences: For example, the UNHCR inadvertently shared sensitive data about Rohingya refugees with Bangladesh, which then shared it with Myanmar.[76] Additionally, the migration management technology in East Africa has become a quasi-requirement: If an individual does not provide their fingerprints, they will not receive general food distribution points—meaning they cannot eat.[77]

III WHO REGULATES BORDER TECHNOLOGY? QUESTIONS TO CONSIDER

Despite each continent posing different challenges for migrants through the use of new technologies, Molnar highlights one consistent theme: the European Union and the United States' desire to control migration patterns through technology by predicting and limiting migration "from the source."[78] The author advances this premise by discussing the implementation of technologies such as AI, surveillance, and data colonialism.

Molnar's book also raises many interesting issues such as "legal black holes in migration management technologies," private and public sector disputes, and liability,[79] which are mentioned in Chapter 7, "The Politics of Exclusion and Fear," and Chapter 8, "Strategies

---

68. *Ibid* at 119. "Ahmed Khalil Kafe is of Nubian descent and was born in Kenya's capital, Nairobi, where he worked as a police officer and member of the presidential guard. . . . [H]e tried to register for the Huduma Namba in April 2019. . . .[O]n October 14, 2021, the High Court of Kenya struck down the government's decision to roll out Huduma Cards, because they violated the country's Data Protection Act of 2019."

69. *Ibid*.

70. *Ibid*.

71. *Ibid* at 121.

72. *Ibid*.

73. *Ibid* at 124.

74. *Ibid* at 125.

75. *Ibid* at 132.

76. *Ibid* at 125.

77. *Ibid* at 127.

78. *Ibid* at 130–31.

79. *Ibid* at 65, 67, 103.

of Resistance." Although these are not discussed in depth, the author highlights the public sector's lack of technical capacity, which can result in an overreliance on private technologies; despite private players having a legal responsibility to not violate international and domestic regulations, there is neither regular oversight, nor clarity on the development of these technologies because of gaps in intellectual property legislation.[80] For instance, further research regarding facial recognition in Canada demonstrates that there is no specific legal framework that governs the use of this technology.[81] Here, the question becomes: *how do we "pin down" liability?*[82] This is a particularly intriguing question, especially when an individual's migration status can be based on an algorithm.[83] Notably, the question of liability is not unique to the migration management technologies discussed by Molnar. However, the implications of such technologies are serious when considering the impact on vulnerable migrants in search of safety.[84] Given the rise of technology in decision-making roles, potential remedies will likely intersect with numerous areas of law, such as administrative law, international law, immigration and refugee law, intellectual property law, and constitutional law, to name a few.

These questions are central to the author's call to resist border management technologies. For now, Molnar discusses the notion of "resistance" and "storytelling" as frameworks for furthering conversations of technology at the border.[85] In particular, the author describes her form of resistance as "choosing to remain vulnerable."[86] As a reader, this theme is evident throughout the book through the author's tone, structure, and linguistic choices.

IV CONCLUSION: FINAL THOUGHTS ON MOLNAR'S EXCEPTIONAL PIECE

This book is an excellent read. The author cleverly weaves ethnography and legal analysis with chilling realities of AI developments within the immigration and refugee landscape. As a reader, Molnar's book was convincing and clearly conveyed the experiences and facts regarding border issues across many continents. By using storytelling as a methodology and

---

80. *Ibid* at 67.

81. Office of the Privacy Commissioner of Canada, "Privacy Guidance on Facial Recognition for Police Agencies," May 2, 2022 at para 41, online: <priv.gc.ca> [perma.cc/UN44-JRH8]. Instead, there is a framework created by a mixture of federal and provincial privacy laws (i.e., statutes and Charter jurisprudence). Note: The province of Quebec is an exception to this framework, as they have legislation governing biometrics (*ibid* at para 39).

82. Molnar raises many questions to be considered: "Unfortunately, liability can be difficult to pin down: Does liability lie with the designer, the coder, the immigration officer, or the algorithm itself? Should algorithms have legal personality, as a corporation does? How will judges parse out where automated decision-making ends and human decision-making begins, and when automation bias, or our predisposition to consider algorithms' decisions to be more objective and truthful, begins to color how human officers make decisions?" Molnar, *supra* note 2 at 103.

83. *Ibid* at 102.

84. Increased border technologies often result in higher amounts of violent and harmful experiences: *ibid* at xix. Molnar has seen the violence first-hand: "[P]eople have been beaten, stripped of their clothes, sexually assaulted, and sent back" (*ibid* at 54).

85. *Ibid* at 206–07.

86. *Ibid* at 207.

introducing it as a component of substantive analysis, Molnar ensures that the authentic experiences of people crossing borders is never lost.

In an era of digital technology sweeping the nation through facial recognition at airports;[87] social media screening;[88] international DNA sharing;[89] and automatic immigration triaging,[90] it is essential to question the technologies that are becoming increasingly prevalent worldwide. Moreover, the creation of these legal black holes in migration management technology[91] raises broader questions regarding liability and accountability. Molnar's book brings attention to the lack of regulation for these technologies, as well as the violence against migrants that occurs at various borders.

Overall, Molnar reminds readers that at the heart of every migration story is a *person* who is often experiencing violent interactions and near-death experiences on the journey to a better life. As new information management technologies continue to exacerbate violence at borders through technological experiments, it is time to bear witness to these realities in hopes of creating a better world.[92]

---

87. See e.g. Air Canada, "Protecting Your Privacy" (last modified November 26, 2024), online: <aircanada.com> [https://perma.cc/DW35-HV57]: "Air Canada's providers process your personal information, including your biometric information, strictly in accordance with Air Canada's instructions."

88. Molnar, *supra* note 2 at 31.

89. *Ibid* at 30.

90. *Ibid* at 98.

91. *Ibid* at 65.

92. *Ibid* at 10–11.