

**First Nations Energy and Mining Council
Implementing Consent for Mining on Indigenous Lands Project**

**Broughton Fish Farm Agreements and Shíshálh Foundation Agreement:
Approaches Supporting Consent in Relation to Mining**

Paul Joffe, Member of Québec and Ontario Bars

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I have been requested by First Nations Energy and Mining Council (FNEMC) to explore and **make recommendations** regarding issue A.4 of the Project Overview which poses the following questions:

What is the role of recent natural resource and governance agreements that may inform and support implementation of FPIC in relation to mining? In particular, **are there provisions in the Broughton fish farm agreements and the Shishálh agreement that can support approaches to consent in relation to mining?** [emphasis added]

This paper will examine the *Broughton fish farm Agreements*¹ and the *shíshálh Foundation Agreement*.² Both of these agreements were entered into with the government of British Columbia and both are highly significant. As requested by FNEMC, the central purpose of my paper is to highlight approaches that can serve to support Indigenous “consent” in relation to mining and its impacts.

I. Legal Precepts in Support of Indigenous Peoples’ Consent

Prior to analyzing the above Agreements, it is important to highlight some legal precepts in international law and Canadian law that are relevant to both the *Broughton fish farm Agreements* and the *shíshálh Foundation Agreement*.

Both of these Agreements refer explicitly to the *United Nations Declaration on the Rights of Indigenous Peoples*³ (or “UNDRIP”). In the *Broughton fish farm Agreements*, there are 10 references to the *UN Declaration* and in the *shíshálh Foundation Agreement*, there are 22 references.

The *UN Declaration* is a universal international human rights instrument that elaborates on the economic, social, cultural, political, spiritual and environmental rights of Indigenous peoples throughout the world.⁴ To date, the *Declaration* has been reaffirmed nine times by the UN

¹ British Columbia, “Letter of Understanding regarding a government-to-government process to address finfish aquaculture in the Broughton Area, including recommendations on Provincial Tenure Replacement Decisions”, June 27, 2018 (including Attachment 1 – Letter of Understanding re British Columbia – First Nations Collaborative Solutions for Finfish Aquaculture Farms in the Broughton Area) [*“Broughton fish farm agreements”*]

² *shíshálh Foundation Agreement*, entered into by Government of British Columbia (the “Province”) and Sechelt Indian Band (“shíshálh Nation”), October 4, 2018.

³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (13 September 2007), Annex.

⁴ There are “over 476 million [Indigenous] individuals spread across 90 countries in the world”: see Permanent Forum on Indigenous Issues (Chair Anne Nuorgam), “Message to Ensure Indigenous Peoples are Informed, Protected and Prioritized During the Global Covid-19 Pandemic”, April 20, 2020,

General Assembly by consensus. No country in the world formally opposes the *UN Declaration*. This reinforces its legal status and effect.

In addition, British Columbia has enacted by consensus the *Declaration on the Rights of Indigenous Peoples Act*.⁵ Section 3 affirms: “In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.” This would necessarily include article 3 of the *UN Declaration*, which affirms: “Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.” The *shíshálh Foundation Agreement* specifically refers to the right of self-determination, in preambular paras. C and E.

As affirmed in the *UN Declaration*, “Indigenous peoples are equal to all other peoples”⁶ and “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law”.⁷

As enshrined in identical article 1(1) of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*: “All peoples have the right of self-determination.”⁸ This right includes the right to say “yes”, the right to say “no” and the right to say “yes, with conditions”.

In accordance with article 1(3), Canada has affirmative obligations to “**promote** the realization of the right of self-determination, and ... **respect** that right, in conformity with the provisions of the Charter of the United Nations.” Canada’s ratification of the two Covenants also binds other levels of government in Canada.⁹

In the context of resource development, the adverse impacts that may affect Indigenous peoples can be severe and far-reaching. Such situations reinforce the need to obtain the “free, prior and

https://www.un.org/development/desa/indigenous-peoples-es/wp-content/uploads/sites/34/2020/04/UNPFII-Chair-statement_COVID19.pdf.

⁵ *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 (assented November 28, 2019).

⁶ *UN Declaration*, 2nd preambular para. See also article 2: “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights”.

⁷ *Ibid.*, 17th preambular para.

⁸ *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (1966), adopted by the UN General Assembly on December 16, 1966 and entered into force March 23, 1976, accession by Canada 1976 and *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, adopted by the UN General Assembly on December 16, 1966 and entered into force 3 January 1976, accession by Canada 1976, identical article 1(3).

⁹ *International Covenant on Economic, Social and Cultural Rights*, art. 28 and *International Covenant on Civil and Political Rights*, art. 50: “The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.” [emphasis added]

informed consent" of Indigenous peoples.¹⁰ **Such consent is not the same as a veto.**¹¹ “Veto” implies an absolute power, regardless of the facts and law in any given case. The term “veto” is not included in the *UN Declaration*.

In an August 2018 study by the Expert Mechanism on the Rights of Indigenous Peoples, the significance of the right of Indigenous peoples to self-determination is elaborated as follows: “The concepts of being free, being fully informed, having the right to say yes or no and having control over their own lands and resources as nations or peoples are not ... new in international human rights law. **These concepts derive from the elements of the right to self-determination**, on which the [UN] Declaration bases its provisions on free, prior and informed consent, as a way of operationalizing the right to self-determination, taking into account the particular historical, cultural and social situation of indigenous peoples.”¹²

The Expert Mechanism added: “Free, prior and informed consent ... constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources. Pursuant to the Declaration, free, prior and informed consent cannot be achieved if one of these components is missing.”¹³ The minimum standard in the *UN Declaration* is “consultation and cooperation”.¹⁴ The term “cooperation” adds an essential consensual element.

Prior to examining further the issue of consent, it is worth noting that, in 2012, Canada highlighted to the UN Committee on the Elimination of Racial Discrimination the relevance of

¹⁰ See, e.g., Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc. E/C.12/COL/CO/5 (21 May 2010), para. 9: “The Committee is concerned that infrastructure, development and mining mega-projects are being carried out in the State party without *the free, prior and informed consent* of the affected indigenous and afro-colombian communities.” [emphasis added]

¹¹ For an opposing view, see International Council on Mining and Metals, “Indigenous Peoples and Mining”, Position Statement, 2013, <file:///C:/Users/Paul/Documents/2%20Int'l/ICMM%20-%20Indigenous%20Peoples%20and%20Mining%20-%20Position%20Statement%20-%202013.pdf>, at 3: “Some countries have made an explicit consent provision under national or sub-national laws. In most countries however, ‘neither Indigenous Peoples nor any other population group have the right to veto development projects that affect them’, so FPIC should be regarded as a ‘principle to be respected to the greatest degree possible in development planning and implementation’.” [footnote omitted]

¹² Human Rights Council, *Free, prior and informed consent: a human rights-based approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/39/62 (10 August 2018), para. 7 [emphasis added].

¹³ *Ibid.*, at para. 14. In regard to FPIC, see also See also Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada: Note by the Secretariat*, UN Doc. A/HRC/38/48/Add.1 (23 April 18), para. 76 (Conclusions): “Areas in which the Government needs to intensify efforts include the need for a holistic environmental impact assessment strategy, the need to meet the **requirement for free, prior and informed consent** when holding meaningful consultations with indigenous peoples ...”; and Committee on the Elimination of Racial Discrimination, *Concluding observations on the twenty-first to twenty-third periodic reports of Canada*, UN Doc. CERD/C/CAN/CO/21-23 (13 September 2017), para. 19(b); “(b) **Costly, time-consuming and ineffective litigation is often the only remedy**, in place of seeking free, prior and informed consent — resulting in the State party continuing to issue permits which allow for damage to lands.” [emphasis added]

¹⁴ *UN Declaration*, art. 38.

the *UN Declaration*: “While it had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, *including the Constitution*.”¹⁵ This interpretive rule is not new.

As former Chief Justice Dickson of the Supreme Court stressed in 1987: “The various sources of international human rights law - *declarations*, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms - must, in my opinion, be *relevant and persuasive sources for interpretation* of the Charter's provisions.”¹⁶

Since this rule applies to human rights in the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*), then the same rule must apply to the human rights of Indigenous peoples in Part II (section 35).¹⁷ To conclude otherwise, would be a discriminatory double standard. In *Tsilhqot'in Nation v. British Columbia*, the Supreme Court of Canada emphasized in 2014: “The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. *Parts I and II are sister provisions*, both operating to limit governmental powers, whether federal or provincial.”¹⁸

Both the *Broughton fish farm Agreements* and the *shishálh Foundation Agreement* are principled and effective Agreements. Both also include references to British Columbia's “Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples”.¹⁹

These Draft Principles copy Canada's Ten Principles²⁰ and include some very useful content. However, these Principles also raise two key concerns. Contrary to a consent-based approach in both Agreements, **Principle 6** indicates that B.C. “**aims to secure** [Indigenous peoples'] free, prior and informed consent when B.C. proposes to take actions which impact them and their rights, including their lands, territories and resources”. **Principle 7** adds: “any **infringement** of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.”

The *UN Declaration* and other international human rights law allow “limitations” of rights, since human rights are generally relative and not absolute. Such instruments do not allow

¹⁵ Committee on the Elimination of Racial Discrimination, "Consideration of reports, comments and information submitted by States parties under article 9 of the Convention (*continued*): *Nineteenth and twentieth periodic reports of Canada* (*continued*)", Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39. [emphasis added]

¹⁶ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting). [emphasis added] Cited with approval in *United States of America v. Burns*, [2001] 1 S.C.R. 283, para. 80.

¹⁷ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 142: “The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. *Parts I and II are sister provisions*, both operating to limit governmental powers, whether federal or provincial.” [emphasis added] The Court is referring here to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

¹⁸ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 142. [emphasis added]

¹⁹ See *Broughton fish farm Agreements*, paras. 2.8 and 3.1(h); and the *shishálh Foundation Agreement*, preamble D.

²⁰ Government of Canada, “Principles respecting the Government of Canada's relationship with Indigenous peoples”, <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

“infringements”. Draft Principles 6 and 7 do not appear to be sufficient to seriously dilute the content in the rest of the two Agreements. However, it would be prudent to exercise some caution going forward.

Each of the two Agreements are analyzed in turn below.

1.1 Broughton fish farm Agreements

In the *Broughton fish farm Agreements*, the Attachment affirms: “The First Nations' laws, customs and traditions include sacred responsibilities to past, present and future generations, including the lands, waters and resources on which their food security, societies and cultures depend.”²¹ Such sacred responsibilities of the First Nations governments involved would include addressing real and potential adverse impacts of mining.

Although primary jurisdiction in relation to fisheries remains with the federal government, the BC government can play an important role through its *Land Act*.²² In the *Broughton fish farm Agreements*, para. 1.0 of the Attachment provides for a “**consent-based process**”:

This document outlines the context and **consent-based** process to be undertaken by the Province of British Columbia, as represented by the Ministry of Forests, Lands and Natural Resource Operations and Rural Development, in cooperation with the BC Ministry of Agriculture and the BC Ministry of Indigenous Relations and Reconciliation (the “**Provincial Agencies**”), and Kwikwasut’inuxw Haxwa'mis, 'N̓amgis, and the Mamalilikulla Nations (the “**First Nations**”), (and collectively “the **Parties**”) for finfish aquaculture in the Broughton Area, including applications for Provincial replacement tenures under *the Land Act*.

Para. 2.9 is the sole reference to the adverse effects of **mineral** resource exploitation, but it is far-reaching. It emphasizes the State obligation to obtain “free and informed consent prior to the approval of any project” affecting Indigenous territories and resources:

... the articles of UNDRIP benefit from being read comprehensively, and without restricting the application of UNDRIP to the work under this Letter of Understanding: ...

Article 32(2) of UNDRIP states that “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

²¹ Attachment, para. 2.3. In regard to Indigenous peoples’ governance and laws, see *UN Declaration*, arts. 3, 4, 5 and 34; and *Pastion v. Dene Tha’ First Nation*, 2018 FC 648, para. 10. See also *Environmental Assessment Act*, S.B.C. 2018, c. 51, s. 2(2)(ii)(B): “recognizing the **inherent jurisdiction of Indigenous nations** and their right to participate in decision making in matters that would affect their rights, through representatives chosen by themselves” [emphasis added]

²² *Land Act*, RSBC 1996, c. 245.

development, utilization or exploitation of mineral, water or other resources”.
[emphasis added]

In October 2012, the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (“Cohen Commission Report”) cautioned:

... placer mining appears to have the **highest potential to reduce early freshwater survival of Fraser River sockeye**. ... The researchers reported that only one active metal mine in the Fraser River drainage is close to habitat occupied by juvenile sockeye salmon
...²³
...

The Cohen Commission Report added: “It was beyond the scope of this Inquiry to examine the underlying causes of climate change and how society can address those causes. However, I heard enough evidence about **warming waters and the impact on Fraser River sockeye salmon** to reach the uncomfortable conclusion that many of my recommendations, and DFO’s efforts to implement them, will not improve the fate of the Fraser River sockeye fishery if climate change continues unabated.”²⁴

While it is increasingly evident that much too little is being done to address climate change,²⁵ Cohen’s warning of the impending dangers to sockeye salmon means that this species is much more vulnerable than studies have shown. Fish farms also pose a threat to wild Pacific salmon.²⁶ All such **increases in vulnerability**²⁷ need to be taken into account, when assessing the foreseeable impacts of mining and other industrial activities.

²³ Hon. Bruce I. Cohen, Commissioner, “Causes of the Decline”, Vol. 2, *The Uncertain Future of Fraser River Sockeye Final Report* – October 2012, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (Canada), http://www.watershed-watch.org/wp-content/uploads/2013/02/CohenCommissionFinalReport_Vol02_Full.pdf, vol. 2, at 25.

²⁴ Hon. Bruce I. Cohen, Commissioner, “Recommendations – Summary – Process”, Vol. 3, October 2012, Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (Canada), at 102. [emphasis added]

²⁵ See, e.g., General Assembly, *Protection of global climate for present and future generations of humankind*, UN Doc. A/RES/74/219 (19 December 2019) (adopted without vote), preamble: “**Reaffirms that climate change is one of the greatest challenges of our time**, expresses profound alarm that the emissions of greenhouse gases continue to rise globally, remains deeply concerned that all countries ... are vulnerable to the adverse impacts of climate change and are already experiencing an increase in such impacts, including **persistent drought and extreme weather events, land degradation, sea level rise, coastal erosion, ocean acidification and the retreat of mountain glaciers**, further threatening food security, water availability and livelihoods, and efforts to eradicate poverty in all its forms and dimensions and **achieve sustainable development**, recognizes the substantial risks posed by climate change to health, and emphasizes in this regard that mitigation of and adaptation to climate change represent an immediate and urgent global priority”. [emphasis added]

²⁶ See, e.g., Robert Fife and Steven Chase, “Ottawa is playing down risks of fish farms: scientist”, *Globe and Mail* (16 October 2020) A4.

²⁷ See also Intergovernmental Panel on Climate Change (H.-O. Pörtner, D.C. Roberts, V. Masson-Delmotte, P. Zhai, M. Tignor, E. Poloczanska, K. Mintenbeck, A. Alegría, M. Nicolai, A. Okem, J. Petzold, B. Rama, N.M. Weyer (eds.)), *Special Report on the Ocean and Cryosphere in a Changing Climate*, IPCC, 2019, https://www.ipcc.ch/site/assets/uploads/sites/3/2019/12/SROCC_FullReport_FINAL.pdf, at 167: “In northwest North America, where salmon are important in native subsistence as well as commercial and sport fisheries, all species will potentially be affected by reductions in glacial runoff from mountain glaciers over time.”

Since this Report was released in 2012, it would be important to rely as well on more recent research to determine the challenges faced from mining in the territories covered by the Broughton Fish Farm Agreements. For example, the Pacific Salmon Commission cautioned in its September 4, 2020 “Weekly Report”: “The Fraser River run size was increased slightly to 293,000 which is still the **lowest run size on record** ... Further minor changes to total sockeye run size estimates may occur later in the season following the completion of the salmon’s migration into the Fraser River.”²⁸

In Para. 2.16 of the Broughton Fish Farm Agreements, the Province of British Columbia “acknowledges that the First Nations hold Aboriginal Title and Rights within their respective Territories”. However, there is one limitation on invoking “Aboriginal Rights or Title and Crown Rights or Title” as follows:

While the Province acknowledges that the First Nations hold Aboriginal Title and Rights within their respective Territories, *neither this document, nor any acts performed in connection with it, are to be used, construed or relied on by anyone* as evidence or admission of the nature, scope or content of any Aboriginal Rights or Title and Crown Rights or Title. [emphasis added]

At the same time, the Broughton Fish Farm Agreements make clear from the outset in the Letter of Understanding: “Parties confirmed a willingness to engage in a **consent-based process consistent with the United Nations Declaration** on the Rights of Indigenous Peoples with respect to wild salmon and existing open-pen aquaculture operations in the Broughton Area.” The UN Special Rapporteur on the right to food had emphasized in 2012 to Canada the importance of FPIC and called for concerted measures “with the goal towards strengthening indigenous peoples’ own self-determination and decision-making over their affairs at all levels.”²⁹

As described in this paper, the right of Indigenous peoples to self-determination in international law includes the right to give or withhold consent as a core element. In regard to self-determination, the two human rights Covenants further provide: “**In no case may a people be deprived of its own means of subsistence.**”³⁰ The *UN Declaration* affirms: “Indigenous peoples have the right ... to be secure in the enjoyment of their own means of subsistence and development”.³¹ Therefore, as salmon remains crucial to the First Nations in the Broughton

²⁸ Pacific Salmon Commission, “Weekly Report”, No. 9, September 4, 2020, <file:///C:/Users/Paul/AppData/Local/Temp/September-4-2020.pdf>.

²⁹ *Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Mission to Canada*, UN Doc. A/HRC/22/50/Add.1 (24 December 2012), para. 67. See also *Human Rights Council, Report of the Special Rapporteur on the right to food on her mission to Philippines*, UN Doc. A/HRC/31/51/Add.1 (29 December 2015), para. 37: “the Special Rapporteur [Hilal Elver] stresses the importance of the principle of free, prior and informed consent to any change to the lands and territories of indigenous peoples, as also provided for in the United Nations Declaration on the Rights of Indigenous Peoples.”

³⁰ Identical article 1(2) of the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*.

³¹ *UN Declaration*, article 20(1).

Agreements, no one can compel these Nations to forego salmon and instead fish or hunt some other species.

In addition, the *American Declaration on the Rights of Indigenous Peoples* affirms: “Indigenous peoples have the right to maintain and determine their own priorities with respect to their political, economic, social, and cultural development in conformity with their own cosmovision. They also have **the right to be guaranteed the enjoyment of their own means of subsistence and development, and to engage freely in all their economic activities.**”³²

In 2009, the UN Committee on Economic, Social and Cultural Rights elaborated on the “right of everyone to take part in cultural life”.³³ In Indigenous and other contexts, the Committee stressed that “States parties have the following *minimum core obligations* applicable with **immediate effect**”.³⁴

To eliminate any barriers or obstacles that inhibit or restrict a person’s access to the person’s own culture ... without discrimination and without consideration for frontiers of any kind;³⁵

States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.³⁶

The UN Special Rapporteur on the right to food had emphasized in 2012 to Canada the importance of FPIC and called for concerted measures “with the goal towards strengthening indigenous peoples’ own self-determination and decision-making over their affairs at all levels.”³⁷

³² *American Declaration on the Rights of Indigenous Peoples*, AG/RES. 2888 (XLVI-O/16), adopted without vote by Organization of American States, General Assembly, 46th sess., 15 June 2016, art. XXIX, para. 1. [emphasis added] In para. 5, it is added: “Indigenous peoples have the right to effective measures to mitigate adverse ecological, economic, social, cultural, or spiritual impacts of the implementation of development projects that affect their rights.”

³³ Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009).

³⁴ *Ibid.*, para. 55. [emphasis added]

³⁵ *Ibid.*, para. 55(d).

³⁶ *Ibid.*, para. 55(e).

³⁷ *Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Mission to Canada*, UN Doc. A/HRC/22/50/Add.1 (24 December 2012), para. 67. See also Human Rights Council, *Report of the Special Rapporteur on the right to food on her mission to Philippines*, UN Doc. A/HRC/31/51/Add.1 (29 December 2015), para. 37: “the Special Rapporteur [Hilal Elver] stresses the importance of the principle of free, prior and informed consent to any change to the lands and territories of indigenous peoples, as also provided for in the United Nations Declaration on the Rights of Indigenous Peoples.”

On crucial issues of "consent", Canada cannot selectively³⁸ ignore key aspects of the rulings of its highest court, as well as international human rights law, to the detriment of Indigenous peoples. Such actions are inconsistent with the principles of justice, equality, rule of law and respect for human rights.

1.2 *shishálh Foundation Agreement*

The *shishálh Foundation Agreement* takes a somewhat different approach to addressing current and future issues and challenges for First Nations in their traditional territory.

This Agreement includes a great deal of detail. It ensures that the parties are explicitly committed to working together through a range of diverse processes that are outlined in the Agreement. The five parts of this Agreement include: Purpose (Part 1); Structure of this Foundation Agreement (Part 2); Joint Vision and Principles (Part 3); Immediate Measures (Part 4); and Milestones (Part 5). There are also 17 Schedules addressing different issues and concerns.

Examples of this joint approach and related commitments include the following – many of which include a **consensual element**:

The Province recognizes that shishálh Nation's Title and Rights exist in the shishálh swiya, and it is in our respective interests to **continue to foster a deeper collaborative relationship** in relation to the land, resources, and economic development opportunities within the shishálh swiya ... (preamble, C)

The Province introduced Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples on May 22, 2018 to help guide the Province on a path of respect, partnership and collaboration, as the Province implements the **UN Declaration and the Truth and Reconciliation Commission of Canada's Calls to Action** (preamble, D)

The UN Declaration is a statement of the rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world. Among other things, the UN Declaration recognizes the right to **self-determination and self-government**, and to the preservation, practice and revitalization of Indigenous cultures and traditions (preamble, E)

Implementation of the *UN Declaration* requires transformative change in the Province's relationship with Indigenous people, including with shishálh Nation ... (preamble, G)

The Province is committed to true, lasting reconciliation with shishálh Nation through a renewed Government-to-Government relationship based on **recognition of rights, respect, cooperation and partnership**, and as part of that commitment will be fully adopting and implementing the

³⁸ *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), Part I, para. 32: "The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues." [emphasis added]

UN Declaration, the Calls to Action of the Truth and Reconciliation Commission, and the Supreme Court of Canada's decision in *Tsilhqot'in Nation* (preamble, H)

Part I sets out the purpose of this Foundation Agreement and includes, *inter alia*:

(a) **establish a long-term relationship** between shíshálh Nation and the Province through which substantial progress in reconciliation consistent with section 35(1) of the *Constitution Act, 1982* and the UN Declaration will be advanced;

(b) **set out the Province's commitment to provide Immediate Measures to shíshálh and identify Milestones** that we will strive to achieve over a longer term;

...

(d) **allow for transformative change in the relationship** between the Province and shíshálh Nation to take place in a staged, structured, and shared manner that is transparent, includes all critical stakeholders and the public as required, and allows for learning to occur as that relationship unfolds over time.

As we are addressing mining issues in this paper, it is worth noting that the Agreement envisages the shíshálh Nation participating in gravel and other mine operations in the medium (5-10 yrs) and long term (10-25 yrs).³⁹

Based on all of the above, the shíshálh Nation could – if there were breaches of the Agreement – institute legal proceedings that a specific mining project violated the right of self-determination of the shíshálh people, undermined its means of subsistence, and overall well-being. In this regard, the Agreement stipulates:

We are committed to taking multiple and diverse steps to transform and evolve our relationship with each other and for all people, organizations, and communities in the shíshálh swiya over the long term. Through this transformed relationship, we will systematically advance individual, community, **cultural, environmental and economic well-being**. (Para. 3.5)

Through reconciliation, our goals are to: ... (b) ensure that the lands and resources in the shíshálh swiya are managed and used in ways that are **respectful of, and align with, the cultural, ecological, and social values critical for shíshálh people**, as well as the values shared by all residents in the shíshálh swiya ... (Para. 3.11)

Conclusions

By way of conclusions, I highlight the following key recommendations.

³⁹ *shíshálh Foundation Agreement*, at 75.

1. Use *American Declaration on the Rights of Indigenous Peoples* together with *UN Declaration*⁴⁰ since, on any given issue, the instrument with the higher standard applies.

Article XLI of the *American Declaration* provides: “The rights recognized in this Declaration and the United Nations Declaration on the Rights of Indigenous Peoples constitute the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the Americas.” The *American Declaration*, article XL affirms: “Nothing in this Declaration shall be construed as diminishing or extinguishing rights that **indigenous peoples now have** or may acquire in the future.”

Thus, in any given situation, if the *UN Declaration* has a higher standard than that in the *American Declaration*, the standard in the *UN Declaration* would apply. Article 43 of the *UN Declaration* affirms: “The rights recognized herein constitute the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world.”

Article 45 of the *UN Declaration* affirms: “Nothing in this Declaration may be construed as diminishing or extinguishing the rights that indigenous peoples have now or **may acquire in the future.**” While the *American Declaration* reaffirms some rights of Indigenous peoples in the Americas in exactly the same wording as in the *UN Declaration*, other rights are elaborated differently. Should such rights in the *American Declaration* include a higher standard than what is in the *UN Declaration*, they would constitute new minimum standards in both the *UN Declaration* and the *American Declaration*.

2. In addressing development in or affecting Indigenous territories, “sustainable development” should be the minimum standard.

The most significant international instrument on this issue is “Transforming Our World: The 2030 Agenda for Sustainable Development”,⁴¹ which provides: “We resolve, between now and 2030, to end poverty and hunger everywhere; ... to **protect human rights** and promote gender equality and the empowerment of women and girls; and to ensure the **lasting protection of the planet and its natural resources.**”⁴²

To date, the 2030 Agenda has been reaffirmed by consensus by the UN General Assembly over 80 times. The UNGA has also repeatedly stressed the “need to ensure that **no one is left behind** and to **reach the furthest behind first, including indigenous peoples**, who should participate

⁴⁰ See also *Case of Indigenous Communities Members of the Lhaka Honhat (Our Land) Association v. Argentina*, I/A Court H.R., Merits, Reparations and Costs, (Judgment) 6 February 2020, para. 154. Both the *UN Declaration* and the *American Declaration on the Rights of Indigenous Peoples* are mentioned in the context of the right of self-determination and right not to be deprived of one’s own right to subsistence.

⁴¹ General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1 (25 September 2015) (without vote),

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1.

⁴² *Ibid.*, at 3 (Declaration), para. 3.

in, contribute to and benefit without discrimination from the implementation of the 2030 Agenda”⁴³.

While the 11th preambular para. in the *UN Declaration* refers to “sustainable and equitable development”, a more extensive provision is affirmed in the *American Declaration*, article XIX:

1. Indigenous peoples have the right to live in harmony with nature and to a **healthy, safe, and sustainable environment**, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision, and collective well-being.
2. Indigenous peoples have the right to conserve, restore, and protect the environment and to **manage their lands, territories and resources in a sustainable way**.

3. The climate crisis needs to be more fully incorporated in current Indigenous strategies. In addition to the previous references in my paper, an in-depth October 2020 Human Rights Watch Report cautions:

Climate change also affects key habitable areas for salmon in Canada, as their river and/or oceans migration, spawning, incubation, and rearing are sensitive to temperature increases and changes in water levels. In simple terms, less hospitable habitable areas for salmon—less salmon. In British Columbia, scientific studies have found that salmon populations have been negatively affected by increasing temperatures in rivers. **Many provincial salmon stocks are considered at moderate to high risk of extinction, and further threatened by climate change impacts.**⁴⁴

4. In addressing the Indigenous peoples’ right to their own means of subsistence, it is useful to also consider such related issues as “food sovereignty” and “food security”. For example, the UN Permanent Forum on Indigenous Issues notes that “indigenous peoples’ right to food and food sovereignty is inextricably linked with the collective recognition of rights to land and territories and resources, culture, values and social organization. Subsistence activities such as hunting, fishing, traditional herding, shifting cultivation and gathering are essential not only to the right to food, but to nurturing their cultures, languages, social life and identity. The right to food depends on access to and control over their lands and other natural resources in their territories. The Forum notes that displacement, **resource development such as mining**, monoculture, natural disasters and other activities have an impact on food sovereignty ... without

⁴³ Most recently, see General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/74/135 (18 December 2019) (without a vote), preamble. [emphasis added]

⁴⁴ Human Rights Watch, “*My Fear is Losing Everything’: The Climate Crisis and First Nations’ Right to Food in Canada*”, United States of America, October 21, 2020, https://www.hrw.org/sites/default/files/media_2020/10/canada1020_web_0.pdf, at 34 [footnotes in quote omitted].

indigenous peoples' access to forests, oceans, rivers, lakes and lands for cultivation and food source sustainability, food sovereignty is impossible to achieve.⁴⁵

5. In current Indigenous strategies, when relying upon section 35 of the *Constitution Act 1982*, it is important to emphasize that this key provision includes a “full box of rights”. For example, this is the conclusion in the *Principals' Accord*, entered into by Canada, British Columbia and First Nations Summit in 2018:

THEREFORE, THROUGH THIS ACCORD, THE PRINCIPALS:

Agree that **section 35 of the *Constitution Act 1982* contains a full box of rights** and that **Aboriginal title and rights are not contingent on recognition** by the Crown, government action, court declarations or agreements for their existence. **Treaties, agreements and other constructive arrangements** are a preferred means to support the exercise and implementation of Aboriginal title and rights and to advance legal and political reconciliation.⁴⁶

Such a “full box” of rights must include Indigenous rights related to governance. As the Royal Commission on Aboriginal Peoples concluded in 1996, there are “three orders of governments” in Canada’s Constitution.⁴⁷

Also, as indicated in Canada’s *Principles* in 2018:

Indigenous peoples have a special constitutional relationship with the Crown. This relationship, including existing Aboriginal and treaty rights, is recognized and affirmed in section 35 of the *Constitution Act, 1982*. **Section 35 contains a full box of rights**, and

⁴⁵ Permanent Forum on Indigenous Issues, *Report on the eleventh session (7 – 18 May 2012)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2012/43-E/C.19/2012/13, para. 56. [emphasis added]

⁴⁶ *Principals' Accord*, entered into by Canada, British Columbia and First Nations Summit, December 1, 2018, https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/principals_accord_for_signature.pdf, para. 2. A careful reading of this *Accord* suggests that its contents would generally apply to all Indigenous peoples in British Columbia, unless the context in some situations necessarily indicate otherwise. See also Minister of Indigenous and Northern Affairs (Carolyn Bennett), “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10”, May 10, 2016, http://news.gc.ca/web/article-en.do?nid=1064009&tp=970&_ga=1.84170458.291599297.1462200129: “By adopting and implementing the Declaration, we are excited that **we are breathing life into Section 35 and recognizing it now as a full box of rights** for Indigenous peoples in Canada. Canada believes that **our constitutional obligations serve to fulfil all of the principles of the declaration, including “free, prior and informed consent.”** [emphasis added]

⁴⁷ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Canada Communication Group, 1996), vol. 2(1), para. 168: “[Section 35 of the Constitution Act, 1982] serves to confirm the status of Aboriginal peoples as equal partners in the complex federal arrangements that make up Canada. It provides the basis for recognizing **Aboriginal governments as constituting one of three orders of government in Canada** ...”. [emphasis added]

holds the promise that Indigenous nations will become partners in Confederation on the basis of a fair and just reconciliation between Indigenous peoples and the Crown.⁴⁸

6. In addressing approaches to consent in mining, it is also useful to refer to the UN Global Compact’s *Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples*.⁴⁹ See, for example:

The concept of **free, prior and informed consent** (“FPIC”) is fundamental to the UN Declaration as a measure to ensure that indigenous peoples’ rights are protected. The UN Special Rapporteur on the Rights of Indigenous Peoples clarified that consultation and consent together are a special requirement safeguarding substantive human rights firmly enshrined in international law,⁵⁰ **including the right to self-determination.**

...
The concept of a **State’s FPIC obligation is well enshrined in international law.**⁵¹

Endnotes

⁴⁸ Canada (Justice), “Principles respecting the Government of Canada’s relationship with Indigenous peoples”, 2018, <https://www.justice.gc.ca/eng/cs/sj/principles-principes.html>, at 3. [emphasis added]

⁴⁹ UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (New York: UN Global Compact, 2013), http://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf, at 25. The UN Global Compact is the world’s largest corporate responsibility initiative, with over 9,500 business and non-business participants in 135 countries <https://www.unglobalcompact.org/what-is-gc>.

⁵⁰ Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012).

⁵¹ *Case of the Saramaka People v. Suriname*, Judgment, IACHR, Series C. No. 172 (28 Nov. 2007).