RESOLVING JURISDICTIONAL CONFLICTS

As Indigenous nations exercise their inherent rights and sovereignty, and as both Indigenous and BC governments give effect to the Declaration on the Rights of Indigenous Peoples Act, is there a conflict of laws issue? How should prevailing laws concepts be interpreted in light of Article 34 of the UN Declaration? How can the BC action plan account for and incorporate differing legal frameworks such as the doctrine of discovery, relevant provisions of Canada's constitution, and conflicts of laws principles? Are there other legal interpretive principles that should be considered in balancing legal frameworks?

Article 34:

> *Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.*

Introduction

In British Columbia, the *Declaration on the Rights of Indigenous Peoples Act* is intended to chart a new course towards reconciliation, and to bring provincial laws into alignment with the Declaration. It is also intended to give better effect to the constitutional recognition of Indigenous rights within Indigenous territories across the province, including the rights recognized as flowing from Aboriginal title.

This paper contends that rights recognition, while necessary, is not a sufficient condition for achieving the project of reconciliation and the objects of the Declaration, particularly in the mining sector. Rights recognition has, at best, a mixed record of protecting Indigenous lands from mining exploration and development or advancing the interests of Indigenous peoples in that sector. Instead, the Declaration requires the recognition of Indigenous jurisdiction and the application of Indigenous law within their territories. Leading scholars argue that such recognition is already part of Canada's *Constitution*, but it has thus far been either overlooked or avoided in Canadian Aboriginal rights law, at least by our courts.[1]

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[1] See *inter alia* John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall LJ 537; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001); Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701; Mark D Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44:3 McGill LJ 711.

Recognizing Indigenous jurisdiction and Indigenous law would not only be consistent with the Declaration, the common law, and the spirit of reconciliation that underpins s. 35 of the *Constitution Act*, it would also avoid the conflicts that perennially occur when unauthorized development goes forward in Indigenous territories. Such recognition would not amount to a veto – all exercises of jurisdiction and all laws in Canada are subject to limitation. But it would give due regard to the place of the first governments in these lands and the first laws that governed them in the constitutional order of Canada.

Recognizing Indigenous jurisdiction and Indigenous law as part of the law of the land can help to avoid the problem of conflict of laws entirely. Conflict of laws is designed to navigate conflicts of foreign laws, not overlapping and intersecting domestic laws. For the latter, there is a robust constitutional framework for navigating the intersection of provincial and federal laws that relate to the same subject matter, as well as municipal laws. Interpretive principles such as cooperative federalism and subsidiarity have been employed by the courts of Canada to avoid, to the greatest extent possible, operational conflicts between overlapping legislation. They recognize the imperative of interpreting overlapping laws harmoniously wherever possible, and thereby giving due regard to the jurisdiction and expertise of federal and provincial governments in their heads of power, and also to the most local level of government, which is best capable of responding to local circumstances. In many cases, First Nations are that local level of government, responding to issues on the ground as they arise.

Fixing our Constitutional Foundation

In Canada, it has long been clear that there are significant gaps in the colonial legal and regulatory systems for managing lands and resources that we have inherited, and the constitutional recognition of Indigenous rights promised under s. 35 of the *Constitution Act, 1982.* Addressing these gaps must necessarily involve something more than trying to simply paper over the gaps with new promises. This is particularly the case when we turn to the issues of mineral tenure, exploration and mine development that we are considering here. There is no doubt that significant legal reforms—both legislatively and within the common law—will be required to give full effect to the principles set out in the *Declaration on the Rights of Indigenous Peoples* in this sector.

We've been asked to consider this question in light of how conflicts of law might be resolved in circumstances where an Indigenous government has made a rule or a determination, in the context of an exercise of inherent rights and sovereignty over Indigenous title lands, and where the Province of BC has made a rule or a determination that conflicts with that made by the Indigenous government.

Although such questions might be readily addressed in certain areas where modern treaties provide guidance both on the division of powers between the Province and an Indigenous self-government over different categories of land, and on the rules that will apply in situations where conflicts of law arise, this is not the case in most of the Province of BC. Like fixing a leaky

basement in an old house, to address the issues of conflicts of law as they might arise outside of the modern treaty context, we will need to dig down to the constitutional foundations.

Here, we will quickly discover that the old colonial constructions on which the Province's archaic mining legislation rely have never been on a solid footing. The legal fictions on which Canadian society has long relied to magically explain away the fact that when settlers arrived on these shores, they ignored the pre-existing systems of land tenure, regulation and governance of Indigenous peoples and instead substituted their own, have become increasingly incredulous.

From an Indigenous perspective, this has always been obvious. But now, even to ordinary Canadians, it is increasingly clear that reconciliation clearly demands – as the Truth and Reconciliation Commission's Call to Action #46 states succinctly – that governments "repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the Doctrine of Discovery and *terra nullius*, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts."[2]

For the purposes of this paper, we will first examine two tendencies in Canadian law that are at the root of these problems. The first is a tendency to treat Indigenous law as either invisible or inapplicable to present circumstances. The second is a failure to take Indigenous jurisdiction seriously when resolving contests over resources. It is important to first understand that these tendencies in Canadian law are now without any defensible legal foundation. The continuing existence and force of Indigenous law must be recognized as the starting place for any real attempt to reconcile the inherent rights of Indigenous peoples with the assertion of Canadian sovereignty in practice.

If these tendencies were rectified, and Indigenous law and jurisdiction were treated as the laws of the land, there would be no need for a conflict of laws analysis. Instead, the tools already available in the federal constitutionalism tool chest, modified to the unique constitutional position of First Nations, can provide a way forward. We therefore go on to provide a preliminary view of how these interpretive tools can best be applied to promote cooperative federalism with First Nation governments, respecting their local level expertise on the circumstances they are attempting to regulate. Such an interpretive approach endeavours to avoid conflict wherever possible, and strive for harmonious interpretation of overlapping and intersecting laws. Only where there is a demonstrable operational conflict and impossibility of dual compliance does the issue of what law prevails arise. As we note below, this is a problem that should be the subject of an intergovernmental agreement or modern treaty between Indigenous and public governments. Only when such agreements cannot otherwise be achieved should the justification analysis in *Tsilhqotin* be engaged to require the federal government or province to justify its attempted override of Indigenous law or jurisdiction.

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[2] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation*, *The Final Report of the Truth and Reconciliation Commission of Canada,* vol 6 (Montreal: McGill-Queen's University Press, 2015) at 32–33, online (pdf): <nctr.ca/assets/reports/Final%20Reports/Volume_6_Reconciliation_English_Web.pdf>

Agreements should always be preferred, and any justification of an infringement should be the exception, rather than the rule.

First Step: Making Indigenous Law Visible

The first problem is the tendency to make Indigenous laws invisible. This is not only bad policy and an affront to the first laws of Canada; it is also simply bad law. British Imperial law and the English common law both recognized the continuing application of Indigenous laws after the assertion of Crown sovereignty. This is called the "Doctrine of Continuity" and both the Law Lords of the Privy Council and Canada's own Supreme Court have recognized that this Doctrine provides the basis for the ongoing recognition of the laws and customs of Indigenous peoples, even in the face of imperial domination and colonization. In *Mitchell v Canada (MNR)*, Chief Justice McLachlin summarized this Doctrine succinctly:

> … aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them…Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.[3]

Early colonial courts in Canada recognized and applied this Doctrine to customary marriage and adoption, finding that the English common law did not "supersede or abrogate the laws, usages and customs of the Aborigines".[4] Moreover, the recognition of the continuity and application of Indigenous laws and customs forms the basis at common law for the recognition of Aboriginal title.[5]

Although recently the courts and governments have become more comfortable with the proprietary claims of Indigenous peoples under the banner of Aboriginal title, they have also been less comfortable accepting the legal-juridical claims that undergird them.

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[3] 2001 SCC 33, [2001] 1 SCR 911 at para. 10 [Mitchell]

[4] Connolly v Woolrich (1867), 17 RJRQ 75 (Qc SupCt); R v Nan-e-quis-a Ka (1889), 1 Terr LR 211 (NWT SC); Re Adoption of Katie E7-1807, [1961] NWTJ No 2, 32 DLR (2d) 686 [Re Katie]. In Re Beaulieu's Petition (1969), 64 WWR 669 (NWT TerrCt), Mr. Justice Morrow followed Re Katie to recognize a Dogrib Indian customary adoption. In an appeal of another Justice Morrow decision, Re Deborah (1972), 28 DLR (3d) 483 (NWT CA) [Re Deborah], the Northwest Territories Court of Appeal confirmed a custom adoption that the natural parents had been trying to set aside.

[5] In the Supreme Court of Canada decision *Calder v BC (AG)*, [1973] SCR 313, [1973] SCJ No 56 [Calder], Justice Hall, after tracing jurisprudence both back from *Johnson v M'Intosh* (1823), 21 US 240, 8 Wheaton 542, to the earlier *Campbell v Hall* (1774), 1 Cowp 204, 98 ER 1045 (which cites an even earlier common law decision, *In Re Calvin's Case* (1608), 77 Eng Rep 377 (KB)) and forward through *St. Catherines Milling and Lumber Co v The Queen* (1888), 14 App Cas 46 and other later Commonwealth and Canadian jurisprudence, asserted at 388-389, "that the laws of a … country [discovered by] and subject to [British sovereignty] continue in force, until they are altered by the [British sovereign]."

The Honourable Justice Sebastien Grummond observes in *Terms of Coexistence: Indigenous Peoples and Canadian Law*, that while the Doctrine of Continuity in British Imperial law provides for the continuation of laws applicable to a territory prior to British colonization, the Doctrine has not been employed to recognize any Indigenous legal systems on a large scale in Canada. Rather, there have only been small exceptions such as Indigenous marriages and adoptions.[6] This is despite the fact that this Doctrine – and the laws it protects and gives force to at common law – undergirds the Aboriginal rights and title claims that have become well-known quantities in Canadian law.

Despite the fact that according to British Imperial law, the Indigenous laws of Canada continued to apply "as part of the law of Canada", Canadian courts have been generally uncomfortable with treating them as law, let alone part of the common law. This discomfort of the courts with Indigenous laws is perhaps most famously exemplified by the findings of the trial judge in *Delgamuukw*, who characterized the Gitksan and Wet'suwet'en legal system as a "most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves".[7]

Such an attitude is not a relic of the past. In 2019, a judge of the *same court* made essentially the *same finding* with respect to the *same people*. In rejecting a claim by the Wet-suwet'en that their laws had not been complied with in authorizing work on a gas pipeline and that the proponent was trespassing, the BC Supreme Court held that:

> ...indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as aboriginal title or rights jurisprudence or statutory provisions... There has been no process by which Wet'suwet'en customary laws have been recognized in this manner...While Wet'suwet'en customary laws clearly exist on their own independent footing, they are not recognized as being an effectual part of Canadian law.[8]

In other words, the BC Supreme Court ruled that the Wet'suwet'en laws are simply another form of evidence for the court to consider in the case, rather than applying as law.

Such an approach is simply not correct. Under the Doctrine of Continuity, Indigenous laws continue as part of the Canadian common law, unless "(1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them." They do not require additional legal or statutory recognition, but rather apply *ex priorio vigore* ("of their own force") as part of the Canadian common law.

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[6] Sebastien Grummond, Terms of Coexistence: Indigenous Peoples and Canadian Law, translated by Jodi Lazare (Toronto: Carswell, 2013) at 375-376

[7] *Delgamuukw*, [1991] 185 B.C.S.C. at p. 379

[8] *Coastal GasLink*, at para 127-128

Giving Effect to Indigenous Jurisdiction

If there is to be any effective resolution of conflicts of laws issues on the ground, the conceptualization and treatment of Indigenous laws in our courts as something other than law must change. Indigenous law is *law*. More than that, it is not foreign law – *it is the law of Canada*. As the Federal Court recently stated in *Pastion v Dene Tha' First Nation* that: "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land."[9]

Similarly, the Ontario Court of Appeal in *Beaver v. Hill* rejected an interpretation of Indigenous family law as "foreign law" to be considered within the conflict of law analysis that would be applicable determining the proper forum for the consideration of a child custody and support claim involving foreign jurisdictions, finding:

> [conflict of laws principles] do not provide an apt framework for reconciling Aboriginal rights with the family law of Ontario. For the purpose of applying s. 35 of the *Constitution Act, 1982*, Aboriginal rights or Indigenous law do not constitute "foreign law", even conceptually.[10]

However, even when Indigenous laws are recognized, they are rarely applied. The failure to recognize Indigenous jurisdiction as having a place within Canada's constitutional order and division of powers is the second, and in many ways, more significant problem that must be resolved.

Second Step: Making Indigenous Law Applicable

One root of this problem is the tendency of courts and governments to continue to consider all legislative power to be exhaustively allocated between the federal government in s. 91 and the provinces in s. 92 of the *Constitution Act*, *1982.* This interpretation leaves Indigenous governments—indisputably the first governments of this country—with virtually no legislative space in which to exercise their authority. This is a fundamental impediment to reconciliation, as it effectively excludes Indigenous government from Canada's federation.

This tendency of the courts to not recognize Indigenous jurisdiction is again best exemplified in the lower court decisions in *Delgamuukw*. The trial judge found that when British Columbia was united with Canada, "all legislative jurisdiction was divided between Canada and the province, and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts".[11] The majority of the Court of Appeal agreed, finding that the rights of self-government and jurisdiction are inconsistent with the constitutional division of powers,

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[9] [2018] 4 FCR 467, at para 8.

[10] Beaver v. Hill, 2018 ONCA 816 at para 17

[11] *Delgamuukw v. British Columbia,* 1991 CanLII 2372 (BC SC*)* at p. 386

that the Crown imposed English law on all the inhabitants of the colony and when British Columbia entered Confederation, and that the aboriginal people became subject to Canadian (and provincial) legislative authority.[12]

Despite this, it is important to note the lost opportunity in the *Delgamuukw* case when it went to the Supreme Court. The two dissenting judges at the Court of Appeal would have granted a declaration that the Gitksan and Wet'suwet'en peoples had rights of self-government and self-regulation, that such rights were not inconsistent with British sovereignty, natural justice, equity or good conscience, and had not been extinguished.[13] Nevertheless, while the Supreme Court was willing to overturn the majority of the Court of Appeal on its findings about Aboriginal title, it did not decide the issue of self-government. In two short paragraphs Chief Justice Lamer essentially deferred the issue to the political realm, or otherwise to resolution in a new trial:

> The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc. We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be imprudent for the Court to step into the breach. In these circumstances, the issue of self-government will fall to be determined at trial.

In *Delgamuukw*, the Court also referenced its recent decision in *Pamajewon*, which significantly narrowed the way in which claims of self-government could be advanced and determined through the litigation of s. 35 rights.[14] And that, unfortunately, is where things have been left by the courts for the past quarter century.

Recently, these unresolved issues reasserted themselves most recently with respect to the same peoples in the *Coastal GasLink* case. The court found that there was simply no room for the exercise of Indigenous jurisdiction and allowed provincial access permits to trump the denial of authorization of the people who owned and cared for the land. We view this as a lost opportunity to try to resolve the intersecting and overlapping nature of these claims and authorizations.

Indeed, in the Canadian mainstream, regulatory approvals often overlap and intersect, often within one level of government itself, as between its own departments and agencies or with other levels of government. Canada's legal and regulatory systems have proven capable of

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[12] *Delgamuukw v. British Columbia,* 1993 CanLII 4516 (BC CA) paras 44-45
[13] *Delgamuukw v. British Columbia,* [1997] 3 SCR 1010 at paras 52-65, 70-71
[14] [1996] 2 SCR 821

navigating a multitude of overlapping and intersecting approvals, none of which is of itself legally sufficient to allow a project to go forward, but all of which may be necessary. But in *Coastal GasLink*, the trial court considered only the necessity of obtaining Crown government approvals, and treated Indigenous approvals as irrelevant. That cannot be a satisfactory solution.

These recent decisions underscore the urgency of addressing these two foundational problems – the invisibility of Indigenous law and the failure to recognize Indigenous jurisdictions. It is clear that these problems have been plainly recognized at the political level. Beginning in 1982 and continuing with the Meech Lake and Charlottetown Accords, the Royal Commission on Aboriginal Peoples, the Apology to Residential School Survivors, and the responses to the Truth and Reconciliation Commission, there have been multiple attempts to address them. It is also clear that much more must be done.

One promising development in this regard is the recent adoption by the Province of BC of principles (following the lead of the Government of Canada) acknowledging the "inherent right of self-government as an existing Aboriginal right within section 35 of the *Constitution Act*, 1982", and that "recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws."[15]

This is also the thrust of Article 34 of the UN Declaration, which again holds that "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards."

However, given the significant imbalance that presently exists between the recognition of inherent jurisdiction and legal orders of Indigenous nations affirmed in the *Declaration on the Rights of Indigenous Peoples Act* and the Principles adopted by the current BC government; and the vast accumulated weight of existing legislation and regulation (including the *Mineral Tenure Act*, the *Mines Act*) that are rooted in the now-discredited colonial denial of Indigenous rights, leadership and deliberate legislative action is clearly required to remedy the situation.

Moving Beyond Infringement to Recognition

Regrettably, litigation alone cannot effectively address this matter. Canadian courts have been cautious in how they have considered foundational questions such as Indigenous jurisdiction at the time of British assertion of sovereignty. They have generally demonstrated significant restraint in granting declarations that might have consequences beyond the judicial recognition

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15 https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf

of Indigenous rights. As the Supreme Court wryly observed in *Clyde River:* "true reconciliation is rarely, if ever, achieved in courtrooms."[16]

Even in *Tsilqhot'in*, a transformative case establishing Aboriginal title, the Supreme Court considered the issues narrowly. Having found that Aboriginal title includes "all of the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used"[17]—and the right to require users to the land "to obtain the consent of the Aboriginal title holders", and to otherwise "proactively manage the land", the Court then went on to assume that Provincial laws of general application continued to apply to Tsilqhot'in Aboriginal title lands as though there was a jurisdictional vacuum that only Crown legislation could fill.[18]

Given how narrowly the issues were drawn in *Tsilqhot'in,* it is perhaps not surprising that the Supreme Court stayed close to its own precedents, and provided guidance only on the question of "how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal Title". It did so in the context of a justified infringement of a s. 35 right under *Sparrow* and *Delgamuukw* tests, noting that this was necessary to "reconcile general legislation with Aboriginal rights in a sensitive way."[19] Having framed the issue narrowly, the Court chose to speak only of the division of powers in relation to the federal and provincial governments, noting that:

> effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved.[20]

It therefore follows that the *Tsilqhot'in* approach does not provide a full answer to the question of how the intersection and overlap of jurisdictions might be reconciled, and must be understood only to apply to a situation in which there is an otherwise irreconcilable gap or conflict between Indigenous laws and Crown laws.

Going forward, we would argue that considering the issue of how Indigenous legal orders operate within Canada's confederation cannot be addressed from the perspective of legal doctrines developed to justify the infringements of Aboriginal rights. As *Pamajewon* makes abundantly clear, framing Indigenous legal orders and the inherent right of self-government in

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[16] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 at para 24, [2017] 1 SCR 1069, quoted with approval in *Mikisew Cree* 2018, *supra* note 2 at para 142
[17] *Tsilqhot'in,* at para 75
[18] *Tsilqhot'i*n, at para 94
[19] *Tsilqhot'in,* at para 150
[20] *Tsilqhot'in*, at para 148

the same way as an Aboriginal or Treaty right to fish or hunt might be validly limited by regulation is a pitfall. [21]

If the starting point is not infringement, the question of the divisions of power between the Province and Indigenous peoples must be re-conceived, and new guidance must be given to resolve apparent conflicts between these jurisdictions. Decision-makers could look to cooperative federalism jurisprudence of the Supreme Court of Canada, which has continued to bring forward new interpretative principles that apply to overlapping regulatory regimes between federal and provincial jurisdictions in a harmonious way to avoid interpretative and operational conflicts, particularly in regard to economic activity.

In multiple cases, the Supreme Court has shown that Canada's legal system can flexibly accommodate a regulatory regime in which federal and provincial governments have scope to legislate and regulate. A recent example of how cooperative federalism can resolve potential conflicts between jurisdictions is *Orphan Well Association v. Grant Thornton Ltd*, in which the majority of the Supreme Court reversed the decisions of both lower courts, finding that a provincial regulatory regime did not frustrate the purpose or create operational conflicts with the federal bankruptcy and insolvency regime.[22]

Even where there are apparent conflicts between the regimes at different levels of government, the courts have interpreted them in ways that strive for harmony and to avoid all but the most demonstrable conflicts, such as the impossibility of dual compliance. This respects the ability of the federal government to regulate matters of national concern, preserves the ability of provincial governments to make general laws about matters in their jurisdiction, while at the same time protecting local governments from unnecessary intrusion or override of their tailored solutions to local problems. This has even included municipalities, as in the *Spraytech* decision. The need for such a cooperative, harmonious, and locally deferential approach to interpretation is particularly acute in the case of First Nations, who have constitutionally protected and pre-existing inherent rights to govern themselves and their territory.

Implementing Indigenous Law over Mineral Regulation

As we have argued above, there is no principled basis for continuing to ignore Indigenous jurisdictions or their role in regulating mineral activity in BC. Accordingly, if the starting point of the analysis is not how to "justify an infringement", but rather to ensure the recognition of Indigenous jurisdictions within Canada's federation, the right way to approach the question is

[21] As noted by Ken McNeil in "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty." Tulsa Journal of Comparative and International Law 5.2 (1998): 253-298 at pg. 282: "If applied to all self-government claims, this narrow approach to identification of the claimed right will effectively close the door to broadly-based Aboriginal jurisdiction over a range of activities in a modem-day context. Inherent self-government rights, even if accepted by the Court, will have to be established on an item-by-item basis, in accordance with the claimant group's specific history and culture."

[22] [2019] 1 SCR 150

to first consider how to meaningfully incorporate Indigenous governments and indigenous jurisdictions into the fabric of how land and resource decisions are made.

However, implementing Indigenous laws over mineral regulation is clearly not something that could or should be left to the courts. As we have noted, such broad and significant questions have not fared well before judges. Even when the courts have accepted that Indigenous jurisdictions exists, judges are generally reluctant to rule on the particulars of how such jurisdictions should broadly apply in a particular context, and have generally only done so narrowly. Judges are typically ill-equipped to consider the policy issues involved in regulating mineral activities, much less the degree to which technical debates about mineral policy should be informed or shaped by environmental, cultural and economic objectives and considerations.

Such work must be done by Indigenous and provincial legislators and policy-makers. The *Declaration on the Rights of Indigenous Peoples Act* provides pathways for the renewed commitments to reconciliation that can be achieved by the political leadership to be translated into legislative and policy changes that can give effect to the recognition of Indigenous jurisdiction over key aspects of mineral tenure and regulation in areas of the province where Aboriginal title has been established or is likely to exist. Political leadership and legislative action by the Province and Indigenous peoples can give full scope to meaningful jurisdictional cooperation between Indigenous governments and the Province over mineral regulation. There may have never been a better opportunity to deliberately design a modern regime for the regulation of mineral exploration and development for the specific benefit of directly affected Indigenous peoples as well as the people of the province more generally.

But we must also stress that the courts have an important role as arbitrators in this process. At the same time that the Supreme Court of Canada recognized the value of judicial forbearance in *Nacho Nyak Dun*, it qualified that "judicial forbearance should not come at the expense of adequate scrutiny of Crown conduct to ensure constitutional compliance."[23]

Judicial recognition of Indigenous law as applying in areas of the province where Aboriginal title has been established or may exist in ways that are <u>not contingent</u> on additional legal or statutory recognition by Crown governments, but rather apply of their own force is a powerful remedy to viewing reconciliation as merely a political posture, rather than a constitutional obligation. Appellate courts must conclusively reject decisions such as *Coastal Gaslink* that do not properly characterise Indigenous law as a valid and effective part of Canadian law, as well as approaches that would merely make the recognition of Indigenous jurisdictions the prelude to a "justified infringement" by a Crown government. Such approaches continue to rely on the discredited Doctrine of Discovery, and are clearly inconsistent with reconciliation.

As we discuss below, such recognition does not give First Nations a dreaded "veto" power over development. Such a veto is not contemplated by the Declaration. Indeed, all laws and all exercises of jurisdiction are subject to constitutional and Rule of Law constraints. Indigenous

[23] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 34.

law and jurisdiction are no different, though there needs to be special attention to the special and constitutionally protected nature of Indigenous government, rights protection and land tenure.

Rights Recognition and Consent Requirements Are Not A Veto

Virtually every attempt to adopt and implement the Declaration and its requirements for free, prior and informed consent have met with opposition on the basis that it would give Indigenous peoples a "veto" and the functioning of the economy would grind to a halt. Canada ignominiously raised this objection when the Declaration was first adopted by the UN General Assembly. When Canada reversed itself and started to try to incorporate the Declaration into its own laws, the opposition parties again raised this spectre of a "veto".

Casting the requirement to seek consent of the first peoples as a "veto" is wrong in law and wrong in principle. Former UN Special Rapporteur on Indigenous Rights and internationally recognized expert on Indigenous rights, Dr. James Anaya prepared a report on the principles of the Declaration and their application to extractive industries.[24] As Special Rapporteur, Dr. Anaya observed that:

> the business model that still prevails in most places for the extraction of natural resources within indigenous territories is not one that is fully conducive to the fulfilment of indigenous peoples' rights, particularly their self-determination, proprietary and cultural rights in relation to the affected lands and resources…the prevailing model of resource extraction is one in which an outside company, with backing by the State, controls and profits from the extractive operation, with the affected indigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to profits gained by the corporation.[25]

The Declaration and its principles of consent and self-determination, particularly Article 32, were intended to set this right:

> In contrast to the prevailing model in which natural resource extraction within indigenous territories is under the control of and primarily for the benefit of others, indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources. This alternative of indigenous-controlled resource extraction, by its very nature, is more conducive to the exercise of indigenous peoples' rights to self-determination, lands and resources, culturally appropriate development and related rights, in accordance with the United Nations

[24] James Anaya, Extractive industries and indigenous peoples (2013) UN Human Rights Council A/HRC/24/41 ("Anaya")
[25] Anaya, paras 4-5.

> Declaration on the Rights of Indigenous Peoples and other international sources of authority.[26]

Indigenous peoples also have the right to oppose extractive activities,[27] to be free from reprisals or violence (including state violence),[28] to be free from undue pressure to accept extractive proposals, and to be from state pressure to engage in consultations about projects that they have already clearly opposed.[29]

Dr. Anaya then discussed the principle of the requirement for free, prior and informed consent of Indigenous peoples to extractive activities in their territory. The Special Rapporteur was careful to make it clear that this was a general principle, but it was subject to exceptions and limitations:

> The general requirement of indigenous consent for extractive activities within indigenous territories may be subject to certain exceptions, but only within narrowly defined parameters. First, consent may not be required for extractive activities within indigenous territories in cases in which it can be conclusively established that the activities will not substantially affect indigenous peoples in the exercise of any of their substantive rights in relation to the lands and resources within their territories – perhaps mostly a theoretical possibility given the invasive nature of extractive activities, especially when indigenous peoples are living in close proximity to the area where the activities are being carried out. More plausibly, consent may not be required when it can be established that the extractive activity would only impose such limitations on indigenous peoples' substantive rights as are permissible within certain narrow bounds established by international human rights law.
>
> Within established doctrine of international human rights law, and in accordance with explicit provisions of international human rights treaties, States may impose limitations on the exercise of certain human rights, such as the rights to property and to freedom of religion and expression. In order to be valid, however, the limitations must comply with certain standards of necessity and proportionality with regard to a valid public purpose, defined within an overall framework of respect for human rights. The United Nations Declaration on the Rights of Indigenous Peoples, in its article 46, paragraph 2, identifies the parameters of permissible limitations of the rights therein recognized with the following minimum standard:
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> > The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect

[26] Anaya, para 8.
[27] Anaya, para 19
[28] Anaya, paras 20-23
[29] Anaya, para 24.

> for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

Clearly, the right to oppose and withhold consent to extractive activities is not unlimited. When considered as an exercise of Indigenous jurisdiction and self-determination, determining how mineral activities should be responsibly regulated under Indigenous law is not a veto. Neither can a well-reasoned decision by an Indigenous government not to approve a project pursuant to an Indigenous law be construed as a veto. To suggest otherwise would be to cast doubt on the lawfulness of any regulatory activity.

It goes without saying – but here it must again be said – that every regulatory decision is subject to the rule of law. Every jurisdiction must be subject to judicial review and must operate within constitutional limitations, including Indigenous jurisdictions. But given the importance of the constitutionally protected rights and international principles at issue in relation to Indigenous jurisdictions, there should only be narrow circumstances where it can be circumvented.

Here, we note that the courts have played an important role in arbitrating the constitutional division of powers between the federal government and the provinces. Throughout Canada's history, the boundaries between federal and provincial authorities have continued to evolve and have been reconceived in accordance with the changing characteristics of Canadian society.

The same principles hold true for determining the limits of authority as between Crown and Indigenous jurisdictions. As a general principle, the courts should strive for harmonious interpretation between the laws of the Province and those of First Nations. Of course, there may be cases (as in *Coastal GasLink*) where the Province says "yes" to a project and the First Nation says "no". But that does not of itself create an impossibility of dual compliance. Impossibility of dual compliance only arises when one government is saying "You must" and the other is saying "You must not." Rather, in a case like *Coastal GasLink*, both approvals may necessary, but neither may be sufficient on its own.

This preserves the general principle that consent of Indigenous peoples is required, but leaves open the possibility that in certain cases where there is clear conflict, exceptions to that principle may apply. We note that the exceptions outlined by Dr. Anaya above are along the same lines as those set out by the Supreme Court in *Tsilhqot'in*. Essentially, if the Province seeks to override the First Nation in its exercise of its inherent jurisdiction and law-making powers, Dr. Anaya notes that the "limitations must comply with certain standards of necessity and proportionality with regard to a valid public purpose". This aligns with the Supreme Court's rulings in *Tsilhqot'in* that the Crown must show "(1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group."[30]

[30]Tsilhqot'in at para 71

BALANCING THE TABLE

As we have noted, as the Province of British Columbia and Indigenous peoples continue the process of reconciling and resolving how mineral tenure and mineral development should pursuant to the *Declaration on the Rights of Indigenous Peoples Act*, it will be the political leadership, and not the courts, who will be at the table.

However, the courts must be willing partners in ensuring that those tables are balanced. BC has an impressive history of innovative recognition agreements, but those have been largely achieved in a context of legal uncertainty.[31]

We believe that much more will be achieved through legal certainty. Much more would be accomplished at government-to-government negotiation tables in the Province if it was clearly understood that the recognition of Indigenous law is not contingent on the exercise of a Crown jurisdiction. Clarity that Aboriginal title includes the ability to administer and control the lands to which Aboriginal title applies for the purposes of regulating mineral tenure, exploration and development, as well as the ability to administer and enforce those laws, creates far greater scope, opportunity and incentive for all parties to design a modern mineral regime that takes a principled and purposive approach to s. 35 than the previous status quo, in which such authorities were simply assumed not to exist until proven in the courts.

An imperfect model for such an approach is set out in the recent federal child and family services legislation (Bill C-92), which affirms the inherent right of Indigenous peoples to legislate in this area. C-92 expressly recognizes Indigenous jurisdictions, but also provides for coordination agreements as a mechanism for implementing the shared responsibilities among Indigenous, provincial and federal authorities. Significantly, the legislation also sets out conflicts rules in which Indigenous laws will prevail over federal and provincial laws of general application, subject to certain conditions.[32]

This is a model that we believe can be adopted by the BC legislature to govern the exercise of Crown jurisdiction. As we have noted, rather than attempting to give effect to an Indigenous jurisdiction through Crown law, it is far more appropriate for a provincial legislature to provide a framework within which the recognition of Indigenous jurisdictions can be reconciled with provincial law. Clear conflict rules provide for the concurrent recognition and operation of both Indigenous and Provincial law in situations where there is no operative conflict, while determining which law is intended to prevail in situations where operative conflicts arise.

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[31] James Tully, "Consent, Hegemony, and Dissent in Treaty Negotiations" in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Communities and the Meaning of Consent* (Vancouver: UBC Press, 2010) 233 at 248–49.

[32] *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 < https://laws.justice.gc.ca/eng/acts/F-11.73/index.html>

Such an approach will require principled interpretation by the courts to ensure that the law is implemented in a manner consistent with s. 35. We note that this approach has the advantage of being consistent with how conflicts between the exercise of federal and provincial jurisdictions are determined. It is well settled that if otherwise valid laws enacted by federal and provincial jurisdictions can generally function without operational conflict they will be permitted to do so.[33] This also accords with the preferred approach of setting out conflict rules in modern treaties to describe how federal, provincial and indigenous laws apply to particular subject matters.

Conclusion

We propose that new foundations in which divisions of powers of federal, provincial and Indigenous governments, informed by s. 35 of the *Constitution Act, 1982* and UNDRIP where the rights of Indigenous peoples and their legislative systems are integrated, rather than excluded, from Canada's federation are required. BC's action plan should be focused on this foundational work.

The way forward should include the acknowledgement that doctrines such as that of "Discovery" amount to legal fictions that governments of Canada must retreat from where the laws appear to have relied on them in its expansion of the common law. This can be achieved by first giving effect to the *United Nations Declaration on the Rights of Indigenous Peoples* as the BC government has done, and then breathe life into the Declaration by Canadian governments acknowledging and relying on such things as the non-fiction "Doctrine of Continuity" to make Indigenous laws visible. This approach will amount to a powerful act of reconciliation which recognizes Canada's constitutional obligations and the original Indigenous legal foundations of this country.

[33] *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC).