Indigenous Voices on Self-Determination, FPIC, and Canada's Evolving Duty to Consult and Accommodate Framework: An Empirical Study

by

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Abstract

Inspired by decolonial and Indigenous researchers, this study problematizes extant research on engagement practices between resource development project proponents and the Indigenous peoples affected by such projects, by interrogating the underlying assumptions of prior studies. Within the context of Canada, the Duty to Consult and Accommodate (DTCA) framework is currently applied to engagement practices rather than Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). However, shortly after the passage of the UNDRIP Act of 2021, the federal government commenced a three-year consultation project with Indigenous nations on how to ensure that a revised DTCA framework is more consistent with the rights affirmed by the UNDRIP.

This qualitative study, based on interviews with Indigenous lawyers who have negotiated on behalf of Indigenous communities with resource development proponents, explores how current practices may be improved to better align with the UNDRIP and honour the rights of Indigenous peoples to meaningfully participate in projects that align with their development priorities. Findings point to the importance of respecting the rights of Indigenous peoples; allowing time, space, and capacity for Indigenous decision-making institutions to flourish; and to rebuild relationships based on early engagement, partnership, and respect for Indigenous peoples as rightsholders rather than stakeholders with an aim toward substantive outcomes instead of procedural box-checking.

Keywords: Indigenous rights; Self-determination; Decolonial Perspectives in Management; Stakeholder Theory; Rightsholders; UNDRIP: FPIC

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Dedication

This work is dedicated to those who have fought — and those who were unable to fight — against systemic injustices and oppression. Although your wings were clipped, you dared to soar and strove to show us a better way.

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Chapter I INTRODUCTION

During my time as a Master of Business Administration (MBA) student I became quite interested in bridging my passion for advancing reconciliation between Indigenous and non-Indigenous peoples with my studies. I sought to do so through independent study as well as through two consecutive *industry projects* for course credit wherein I worked with a faculty member to produce a video series on Indigenous matters relevant to business. While there are many sources of intersection between Indigenous matters and the world of business and management, the most salient and interesting topic for me was the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) — including Article 32, which expressly affirms the right of Indigenous peoples to provide or withhold their Free, Prior, and Informed Consent (FPIC) in relation to resource development projects.

During the latter stages of my MBA and early stages of my doctoral studies, I discovered scant literature about negotiations between affected Indigenous peoples and the resource development project proponents. The few articles about the UNDRIP, FPIC, and negotiations always presented a transactional and reductionistic point-of-view from the perspective of the firm. The perspectives, aspirations, and economic priorities of the affected Indigenous peoples were generally invisible. This lack of focus on the perspective, aspirations, and economic priorities of the affected Indigenous peoples was deeply puzzling to me. How was it that management literature remained largely blind to the consent-giving partner in this relationship? As an *ethinew* person, the articles generally did not sit right with me.

A vital contribution made by Graebner and Eisenhardt (2004) was to highlight and detail "the seller's side of the story" in relation to mergers and acquisitions. Management literature had

hitherto focused on theorizing about the acquiring party and not the acquired party. I aim to take a similar approach in relation to the UNDRIP, and FPIC.

To do so, I will employ an Indigenous methodology that is informed by decolonial and human rights literatures to make visible the perspectives, aspirations, and economic priorities of Indigenous peoples affected by resource development projects. I believe that this research is forward-looking and timely. While consultation under the auspices of the Duty to Consult and Accommodate (DTCA) is the current standard for engagement with Indigenous peoples affected by resource development projects, history tells us that the normative, legislative, and constitutional frameworks that guide relations between Indigenous and non-Indigenous peoples in Canada are dynamic and not static in nature.

As a result of continued efforts by Indigenous nations and actors — including political leaders and activists — the individual and collective rights of Indigenous peoples have become increasingly accepted. Were it not for the direct-action associated with the Constitutional Express, Section 35 of the Constitution of Canada – which recognizes and affirms Aboriginal and treaty rights – would not have materialized (Manuel et al., 2015). In 2021, federal legislation was passed to ensure that Canada's laws are harmonized with the United Nations Declaration on the Rights of Indigenous Peoples (Department of Justice, 2023). I anticipate that this legislation will create opportunity to enhance the engagement standard toward one which affirms the self-determination of affected Indigenous peoples.

I welcome you to join me as I explore and present underexamined perspectives of the variety of Indigenous peoples affected by resource development projects in Canada. It is my intent honour the diversity of Indigenous peoples who were gifted the lands of Turtle Island from Creator and were given laws to govern relations between nations as well as our animal relatives.

It is also my intent to explore the common experiences faced by affected Indigenous peoples as they negotiate with or interface with resource development project proponents whose operations directly impact their livelihoods, families, societies, and relationships they enjoy with the lands that sustain them. This dual approach of honouring diversity while exploring commonality is a delicate dance, and I appreciate your patience as I hew a path through this new academic territory. I approach this research with humility and recognize that I am but only one person with one perspective. I commit to a critically reflexive approach to this research to ensure that I am held accountable to my relations as well as to future generations. Thank you for beginning this journey with me.

Before I begin, it is important to share a few notes on terminology used throughout this dissertation. Notably, you will observe inconsistency in whether Indigenous is capitalized or not. Consistent with the guide *Elements of Indigenous Style* (Younging, 2018), I choose to capitalize Indigenous as it denotes respect as peoples in the same spirit as you would capitalize Egyptian, Canadian, or Indonesian peoples. Passages in which Indigenous is not capitalized are direct quotes from authors who have not done so. For ease of reading, I choose to not parenthesize their capitalization choice to be consistent with mine.

While I recognize the term Indigenous should be used sparingly (and that best practices involve identifying the specific nation, using the name that the respective people refer to themselves), I fear that this may not be possible throughout my dissertation for two reasons. First, my dissertation aims to explore the common experiences faced by many Indigenous peoples in Canada as it relates to their interactions with resource development project proponents. Second, following this best practice may compromise their anonymity and have implications for the relationship an affected Indigenous people may have with a project

proponent. Finally, a glossary of terms that immediately follows this introduction will provide you with a list of important terms and abbreviations relevant to my research. I have striven to be as thorough as possible in the creation of this glossary and appreciate your understanding if a term was not included.

Thank you. Ekosi!

GLOSSARY

CSR	Corporate social responsibility refers to voluntary responsibilities undertaken by corporations to address a social or environmental issue
DTCA	Duty to consult and accommodate is Canada's current framework that guides engagement practices between project proponents and Indigenous peoples
FPIC	Free, prior, and informed consent is a right of Indigenous peoples to provide or withhold consent in relation to activities with state or corporate actors
IBA	Impact benefit agreement is an agreement between project proponents and Indigenous peoples that outline responsibilities and benefits of each party in relation to a resource development project
ILO	Indigenous legal orders are a set of laws given to an Indigenous nation by Creator to guide the relationships between people at micro and macro levels and also the relationship between people and the lands
ILO 107	Indigenous and tribal populations convention number 107
ILO 169	Indigenous and tribal peoples convention number 169
MBA	Master of Business Administration
NGO	Non-government organization
NRTA	Natural Resources Transfer Agreement is an agreement to transfer authority over natural resources from the federal to provincial governments
SCC	Supreme Court of Canada
SLO	Social license to operate is a tacit, intangible license that grants a corporation legitimacy to conduct business activities
TCPS	Tri-Council Policy Statement is a set of ethics identified by Canada's regulatory body that oversees research activities — particularly research involving human research participants
TRCC	Truth and Reconciliation Commission of Canada was established in tandem with the settlement of a class-action lawsuit associated with abuses and trauma experienced by Indigenous students who were compelled to attend Indian Residential Schools
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples is an international human rights instrument that affirms the rights of Indigenous peoples
WGIP	Working Group on Indigenous Peoples was established to provide a forum for Indigenous peoples to participate in various UN bodies, including the human rights council: the UNDRIP had emerged from the work undertaken by WGIP

1.1 Location of Self

"It all begins with the first fold," I answered my roommate who inquired how I created a paper crane with such sharp and clean features. It was March 16, 2021, and I had been in the hospital for a couple of weeks for symptoms related a hitherto undiagnosed autoimmune disease of immune thrombocytopenia (ITP). Mine was a shockingly near-fatal and stubbornly difficult case that all my attending physicians and specialists referred to as "once-in-a-career" case that could easily have doubled as a script for an episode of House.

For the duration of my hospital admission, I had busied myself with origami to pass the time. Having cycled through a variety of roommates, I found a rare gem of a roommate; "William" had been admitted earlier that day and was a wonderful conversationalist who respected my need for space but also engaged with me in conversation to pass our time together. Our days were mingled with mutual silence, conversing with each other, and conversing with our spouses over the telephone (and pretending to not listen to each other's conversations). I had overheard a couple of conversations he had with his wife throughout the late afternoon and into the evening. She was concerned for his health outcome and well-being. After supper, I offered him an origami tulip to give his wife the next time they were able to visit. Given that our hospital admissions were during height of the third wave of COVID-19, neither of us knew when - or if - that visit would occur. Nonetheless, I thought that the tulip would give him an anchoring point toward a happy future and prevent his mind from dwelling in the present. He graciously accepted my gift and inquired about the various origami pieces I had created, which were strewn about my patient bay.

He asked me to show him how to fold a paper crane. Over the course of fifteen minutes, we chatted as I showed him, step by step, how to turn an ordinary four-inch square piece of paper into a simple, but elegant paper crane. At the end of my lesson, noting that his paper crane was

not as defined as mine, William asked how I was able to make my paper crane with such clean lines and precision. “It all begins with the first fold,” I replied, sharing with him that if you are willing to settle for less than perfect folds early in the folding process, it will affect the quality of your final output. Having previously shared with William my status as a PhD student in business administration, he immediately drew parallels to how “beginning with the first fold” may provide metaphors to understand a variety of aspects of business and management.

As I begin to write my dissertation, this conversation serves as an important reminder for me to ensure that my first fold is one marked with care, precision, and with the end goal in mind. While I am not embarking on a journey to transform a square piece of paper into a three-dimensional crane, tulip, or other object, I will use the following pages to offer a new perspective that I hope will inspire fellow management researchers to examine the world differently. As an Indigenous researcher, it is important to begin with situating oneself in relation to the work they wish to undertake. This is my first fold.

Margaret Kovach (2009) stressed the importance of reflexivity (particularly self-location) for Indigenous researchers on two grounds: first, cultural protocols require it and, second, it serves as a preparatory foundation that lays bare the motivations, biases, and lived experiences that inform their research agendas. In respect to cultural protocols, Absolon and Willett (2005) observe that self-location and positionality is such an integral component for an Indigenous researcher’s work that it is done at the outset; self-location is a first fold, if you will. “The actual research cannot take place without the trust of the community, and one way to gain trust is to locate yourself” (Absolon & Willett, 2005). Consistent with the familiar protocols within Indigenous circles, you must always identify yourself, your relations, and your community.

It is as an Indigenous person that I research and write. Through my research and writing, I hope to affect change that will be instrumental in equalizing the disparity of outcomes witnessed between Indigenous and non-Indigenous peoples in Canada. This motivation is derived from my lived experiences, portions of which I will share below. These lived experiences, in turn, have informed the type of research questions I pursue as well as the means through which I seek to answer them.

By way of introduction, my name is Peter Pomart. At the age of 22, I was given my spirit name: Pipon Asiw (Winter Hawk). I am a father, son, brother, nephew, and grandson. I am of mixed ancestry; my mother is a Cree-German woman from Mathias Colomb First Nation at Pukatawagan, Manitoba, and my father is Ukrainian and Polish from a rural area nearby Camperville, Manitoba. I was born in Winnipeg, Manitoba, and have lived my life in urban centres while being raised by my parents. I am the youngest of five children. While I have mixed ancestry, I primarily identify as an urban Indigenous person on account of my lived experiences. During the summer breaks in between school years, my family spent a significant amount of our summers visiting my mother's home reserve, Mathias Colomb First Nation, and my great grandfather's trapline (situated approximately 20 miles north of Mathias Colomb via rail). This time spent up north — as well as having more frequent visits with my mother's side of the family — cemented my identity as an Indigenous person.

Life as a child was blissful in the sense that I had only known my family. I had four older siblings; two parents; many aunts, uncles, and cousins. It was these relations that provided a loving and secure base for me to explore the world around me. In Winnipeg, I lived in a culturally diverse neighborhood. I loved to explore the bustle of the city with my siblings. Visiting our family up north in the summer provided a break from city life and recharged the

soul. As I reflect on these times, I immediately recall long sunny days that never seemed to end on account of the high latitudes of my mother's ancestral lands. I recall the ever-present hum of insects permeating the golden skies of summer. I recall the soft, lush moss that carpeted the floor beneath my feet as I explored the magical forests of spruce trees. I recall the experience of living off the land and connecting with nature.

My great-grandfather's trapline consisted of a clearing in the forest —– seemingly in the middle of nowhere, and accessible only by train. His log cabin was situated about two-thirds the distance between the train tracks and an adjacent lake that warmly embraced the setting sun every night. The forests that flanked the clearing were rich in walking paths that led to the many snares scattered throughout his trapline. My great-grandfather sometimes took me to inspect his snares, and we would occasionally discover a rabbit or a muskrat.

The reservation was small, population-wise, but expansive. Adjacent homes were often hundreds of feet apart. Most of the time was spent visiting one house after another with my mother. With each new visit, another pot of Red Rose tea greeted us. My siblings and I played with other children while our parents visited. Often, we would climb into a large rain barrel and roll down the modest hills. Both at the res and the trapline, our family often boarded a motorboat or two and navigated through the rich waterways to one of the many active fishing spots. After our fish fry dinners, we huddled by the fire as our extended family told us stories about the many mysteries abundant in the land up north. As I watched the flames dance around and consume successive logs, I would grow tired and fall asleep. Wake up and repeat the next day.

These experiences of growing up in the city while having connections to my mother's traditional territory offered exposure to two vastly different physical worlds; the urban world in which I was primarily raised and the northern world that bridged my successive school years in

elementary school. My mixed ancestry also meant that I lived in two worlds, identity-wise. As I got older, I came to realize that regardless of which physical world in which I walked, I was always the outsider looking in. This did not matter much when I attended my culturally diverse school. However, this dual identity became exceptionally salient as I attended weekly church service with my family at a congregation that was overwhelmingly white. In fact, we were the only source of diversity among congregants seated in those church pews. Visits with both sides of the family were similarly marred with outsider feelings: we were always too brown to be white, and too white to be brown. The only fully familiar and comfortable environment was my home.

However, the familiarity and comfort of home was uprooted many times throughout my childhood. We relocated. Frequently. This is consistent with research that Indigenous peoples are more likely than non-Indigenous peoples to relocate their usual residence within five years prior to the reporting period (Goodman, Snyder, & Wilson, 2018). By the time I graduated high school, I had attended seven different schools in five different provinces in the previous five school years. It was not until I was older that I learned the reason that I had attended culturally diverse elementary schools is because I had grown up in poverty. Many of my classmates were children of refugees from conflict zones in Africa and Asia.

It was not until I was older that I learned that my mother had attended one of Canada's Indian Residential Schools — along with all her siblings and cousins in her generation. My mother told stories about residential school when I was a teenager. Her experiences at residential school led to intergenerational trauma that was experienced by my siblings and cousins within my generation. My connection to extended family as well as my mother's community has been negatively affected by this collective intergenerational trauma. Our community has experienced

too many losses on account of addictions, violence, and suicide. Too many matriarchs in my extended family are numbered among the missing and murdered Indigenous women and girls in Canada. It was not until I was older that I had come to learn that the traumatic experiences and losses were disproportionately borne by my family because of our identity as Indigenous people.

These experiences are difficult to share, as I am certain they are difficult to read. I share them not to make the reader uncomfortable but to honour the resilience of the generations that came before me and to honour the sacrifices made by my parents that helped shape the man I have become. These experiences have shaped my identity and how I perceive and interact with the world. I am an urban Indigenous person who walks in two worlds. It is as a walker of two worlds that I was able to escape the poverty that I was seemingly fated by virtue of my birth as an Indigenous person.

To be clear, despite the obstacles I faced in life, I have also benefitted from privilege – relatively speaking. In the later years of my childhood, my stepfather's career trajectory necessitated frequent relocation while providing a comfortable living. In each of the three provinces I lived, I attended middle-class high schools and received quality education. I thrived and earned respectable grades. While in high school I volunteered at a paediatric ward and was encouraged by many to become a paediatrician. My grades allowed me to be admissible to university where I took courses towards pre-medicine. The education authority of my home reserve had decided to sponsor my university education because of my high graduation grades and the fact that they had never sponsored a doctor. Had it not been for this sponsorship, I do not know if I would have attended university. Many cousins within my generation did not graduate from high school; among those who did, few had the opportunity to attend post-secondary

education as the demand for sponsorship outstrips available resources and funding. I am privileged to have had the opportunity to attend university.

In my first year of university, I had shifted academic goals from pre-medicine to psychology as I began to realize that my aspirations to become a paediatrician were more motivated by a desire to please those who wanted to see me become a doctor, as well as by the accompanying prestige and salary of becoming a doctor. Instead, I took a variety of courses in psychology, history, sociology and religion with a goal of "helping people" as a psychologist. Toward the end of my degree, I worked at our university's summer camp (Mini-University) and had an experience that forever changed me. During the year that I was hired, the camp had received a grant from the Aboriginal Healing Foundation to provide positive post-secondary education experiences for Indigenous youth from First Nations located in Manitoba. Having been sponsored to attend university, this opportunity not only provided summer employment, but also a means to pay-it-forward.

Our five-week training included a variety of workshops facilitated by Indigenous Elders and Knowledge Keepers to help prepare all staff — whether Indigenous or not — create a welcoming environment for the anticipated First Nation participants. During one such workshop, an Elder challenged us to create a mission statement for our life. She counselled that as we develop our mission statement, we should consider its impact on others as well as to span the domains of our personal, professional, and spiritual lives; it could be one statement for each, or one to encompass all three domains. After careful consideration, I drafted the following as a mission statement to encompass my personal, professional, and spiritual lives: *To continually challenge myself and others to think about the self, other people, and the world around us in a different manner that is freed from our inherited assumptions*.

This mission statement has anchored my professional career path decisions since I articulated it. I have always accepted positions that allow me to help others in a manner that challenges the way they see me, themselves, other people and the world in a different manner. This has been important to me because I had to free myself from the inherited assumptions I had about myself, other people, and the world to get to where I am today. I recently left my position as Director for an Indigenous services unit at the business school in which I am enrolled — a position I held while balancing doctoral studies. In total, I had a fifteen-year career at the university, twelve of which were spent at the business school serving Indigenous students. Through this position, I not only challenged the assumptions of Indigenous students whom I served and played a small but meaningful role in their educational journeys but also challenged successive decanal administrations to move toward decolonization as the business school pursues Reconciliation through Indigenous Business Scholarship as one of its strategic priorities.

While working at the business school, I earned my Master of Business Administration with several courses clustered around sustainability. It took me longer than I had planned on account of my father's health; in my third year of part-time studies, he was diagnosed with late-stage cancer. His oncology team treated it aggressively and eliminated any trace of cancer. However, after a short period of testing cancer-free, it returned. Due to the aggressive nature of his first treatment, the team advised that he would be physically unable to tolerate further treatment and that his recurrent cancer was terminal. We laid him to rest in November 2016.

In the final days of the university's activities before the holiday break a few weeks later, I welcomed a professor into my office who had a project in mind to create a series of videos on Indigenous matters for use in the classroom. The conversations that ensued over the following months evolved from me identifying Indigenous undergraduate students in the program (for

which I was Director) to help with the project, to working on the project with him directly (along with two other Indigenous MBA students). Two of the final three courses in my MBA degree were dedicated to the creation of five videos and involved qualitative interviews with Indigenous business leaders. The first video was completed in December 2017 and was focused on providing historical context for Canada's Truth and Reconciliation Commission and the 92nd Call to Action for business to advance reconciliation.

Near the end of the holiday break between my final two terms, I received news from my mother that the younger of my two older brothers, Charlton, had completed suicide on January 01, 2018. He was survived by his daughter, who was seven years old at the time of his passing. He was severely impacted by the intergenerational trauma related to residential school as well as identity issues that I described above — the sense of being an outsider always looking in. Although my family will never fully know all the factors that weighed down on him, we know that his life was shortened on account of the intergenerational trauma of my family's residential school history. In the immediate aftermath of his passing, I was not sure whether I had the wherewithal to complete my MBA: while still mourning the loss of my father, my family now had to bury my brother. As I considered whether to continue my degree, I recalled one of the last conversations I had had with Charlton. He told me that he was proud of what I had accomplished in life, including the near completion of my MBA. I decided to carry on. For Charlie.

After a few months — during a regular supervisory meeting — the business school dean (to whom I directly reported) encouraged me to pursue a doctoral degree to transition from student support management to an academic researcher role. Further, he did not want to lose my service as Director of our Indigenous services unit, and so he offered to temporarily reclassify my position to a half-time status. Upon discussing this with my spouse —– who is a tenured

professor of law at the university — I began my journey as a PhD student. The positive experience of working with the professor to create videos had cemented my decision and he graciously accepted my invitation to become my advisor.

At the end of my first semester of studies in the doctoral program, my spouse and I welcomed our first (and only) child into the world. Within the span of one year, I had mourned the loss of my brother, graduated with my MBA, embarked upon doctoral studies, and welcomed my first child into the world. The passing of my brother and the welcoming of my daughter serve as powerful motivators for the research agenda that I wish to pursue. I want to honour my brother's legacy by pursuing education while also striving to be the best possible father to my daughter. By providing for her, I will strive to ensure that she has every opportunity to realize her gifts and talents to its fullest potential.

In closing, I am an urban Indigenous person who has experienced intergenerational trauma related to the fractured relationship between Indigenous and non-Indigenous peoples. This fractured relationship culminated with Canada's residential school system, of which I am a second-generation residential school survivor. I walk in two worlds. I have a mission statement that guides my professional, personal, and spiritual lives: I will *continually challenge myself and others to think about the self, other people, and the world around us in a different manner that is freed from our inherited assumptions*.

1.2 Journey Toward Studying Indigenous Rights

My journey to study the intersectionality of Indigenous peoples' rights and business — in particular, resource development projects — began quite a few years ago. In 2005, my mother had signed onto the Indian Residential School class-action lawsuit, which had reached an agreement in May, 2006 (Canada, n.d.). Around this time, I became interested in news reports

that occasionally referenced a draft resolution on the rights of Indigenous peoples that was being debated at the United Nations. While the Human Rights Council adopted its passage in June, 2006, it failed to be accepted by the General Assembly in November of that year (Eide, 2009). After considerable negotiations and political maneuvering between Indigenous groups, ambassadors, and diplomats, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on September 13, 2007 (Eide, 2009; United Nations, 2007).

The following year, I met my partner who had recently returned from a year-long placement in Guatemala (funded by the Canadian International Development Agency) to provide technical and legal advice on a human rights case with the local Indigenous peoples. She had completed her Master of Laws (LLM) prior to that and was very much interested in the rights of Indigenous peoples and social justice. In 2009, she accepted a tenure-track appointment at the University of Manitoba's Faculty of Law and built a research agenda around the UN Declaration of the Rights of Indigenous Peoples, among other topics. Over the intervening years, the UNDRIP had been the topic of many discussions between the two of us. She frequently travelled to United Nations sites at both New York and Geneva. While her interest was both personal and academic, mine was at that time only a personal interest.

Societally, the UNDRIP was a peripheral topic that was largely only known to Indigenous peoples and academics. However, it rose to prominence with the release of the Truth and Reconciliation Commission of Canada's Calls to Action (TRCC, 2015a) and Final Report (TRCC, 2015b) in 2015. Later that year, the federal Liberal party had been elected with a strong majority and the UNDRIP was featured prominently in the mandate letters issued to cabinet ministers. In the final two years of my MBA, I began to focus on it academically and examined

its intersectionality with sustainability courses I had taken. Of relevance to the business sector is the 32nd article which affirms:

> *Article 32*
> *1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
>
> *2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*
>
> *3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*
>
> United Nations, 2007

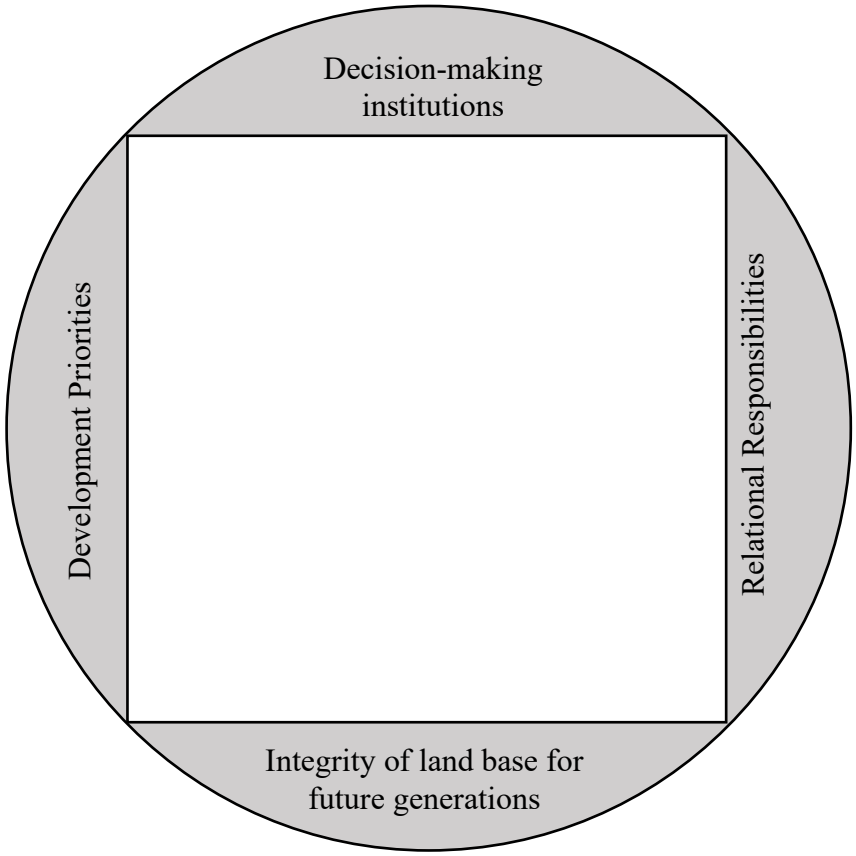
Each of the 32nd article's subpoints affirm and articulate that Indigenous peoples have the right to participate in decision making, *through their own representative institutions*, in relation to development projects that involve their lands and resources, and that this decision making involves their provision of free, prior, and informed consent (FPIC).

When I transitioned from MBA to doctoral studies, my interest in the UNDRIP continued. However, there were no courses on the UNDRIP and Indigenous peoples' rights. I had taken a cognate course on Indigenous legal history and curated my own reading list to become familiar with the subject. An overwhelming majority of academic papers were published in journals outside of the management discipline. Among the few management articles that reference the UNDRIP, I have found problems related to the underlying assumptions associated with their examination and treatment of it. These problems will be addressed in greater detail in the

literature review featured in chapter two. However, an overarching theme that is woven throughout these problematic representations is that they fail to fully apprehend and convey the importance of the UNDRIP as an international human rights legal instrument for Indigenous peoples to exercise their right to self-determination. This oversight is because the literature primarily analyzes UNDRIP from the lens of stakeholder theory. As will also be discussed in the literature review some corporations also apply a stakeholder lens to FPIC implementation, which falls short of the standards laid out by the UNDRIP because stakeholders are not necessarily provided with enhanced participation as will be discussed later in chapter two.

As I consider this co-optation of FPIC standards to secure a social license to operate (SLO) — while failing to uphold the Indigenous peoples' right to self-determination — I am reminded of a visual metaphor I had devised as I considered the literature. Such approaches to FPIC

Figure 1.1: *Fundamental human rights associated with the UNDRIP that are lost by interpreting FPIC implementation through models of stakeholder management.*



implementation effectively attempt to hammer a larger round peg into a smaller square hole – all the while stripping away the human rights affirming elements of UNDRIP and FPIC. This metaphor served as an organizing framework with which I approached my research question. For now, let us label the dominant management paradigm (represented by the square hole) as a **market-oriented approach** to FPIC implementation while an Indigenous-centered paradigm (represented by the round peg) as a **holistic approach** to FPIC implementation. The shaded elements in Figure 1 were drawn from anecdotal observations I had made from the industry project video on negotiations and serve as inspiration for the interview protocol (see Appendix 1).

In summary, it should be noted that human rights affirming practices should reflect the Indigenous peoples' developmental priorities, decision-making institutions, relational responsibilities, and integrity of their land base for future generations. Through the course of my dissertation, I intend to present a decolonized and human rights-affirming approach to how management scholars may explore, interrogate, and theorize about practices that secure the free, prior, and informed consent (FPIC) of Indigenous peoples affected by these projects. In so doing, I will contribute toward a more holistic vision of FPIC implementation that is respectful of inherent and inalienable rights of Indigenous peoples to self-determination while maintaining and strengthening their decision-making institutions.

Recall from Section 1.1, I had shared with you that a central feature of my mission statement is to challenge the assumptions held by people about themselves, other people, and the world around them. Consistent with this, I take inspiration from Alvesson and Sandberg (2011) who observed that many management literature contributions are made through the process of *gap-spotting* whereby the authors "identify or create gaps in existing literature that need to be

filled" (p. 247). They further note that this process usually leaves researcher assumptions unchecked – which "*underproblematizes* existing literatures, and, thus, reinforces rather than challenges already influential theories" (p. 247). Drawing from Davis (1971), they call for more interesting research questions to be generated through problematization of extant theories by challenging the assumptions made by them. Alvesson and Sandberg (2011) offer a six-step framework for researchers to identify interesting research questions through problematization by challenging the assumptions underlying extant research, which will be discussed in greater detail in chapter three.

To fully appreciate my proposed research questions and associated problematization, it is helpful to first describe decolonizing and Indigenous methodologies, as well as the historical and ongoing context of Indigenous-settler relationships, with a particular emphasis on the rights of Indigenous peoples. With a deeper understanding into the struggles faced by Indigenous peoples and to assert their rights to self-determination, it will be readily transparent that extant management literatures on UNDRIP and FPIC play a role to reinscribe colonial legacies that strip Indigenous peoples of their agency thereby denying them their fundamental human rights as peoples. Therefore, the literature review will begin by highlighting problematic areas of dominant and Western approaches to studying Indigenous matters that have been articulated by decolonizing and Indigenous scholars.

This is of particular importance as I intend to draw from the notion of two-eyed seeing to frame the contributions of my research. Bartlett et al., (2012) state that two-eyed seeing "*refers to learning to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of Western knowledges and ways of knowing, and to using both these eyes together, for the benefit of all*" (p.335). They further observe that for

a discipline to meaningfully benefit from two-eyed seeing, it needs be sufficiently decolonized to allow for the strengths of Indigenous knowledges and ways of knowing to be on equal footing with Western knowledges and ways of knowing. The round peg-square hole metaphor used to contrast understandings FPIC implementation (to represent market-oriented and holistic approaches as depicted in Figure 1) may be considered as an instantiation of two-eyed seeing. Western approaches to understand FPIC implementation, represented by the square hole, are focused on the contractual business agreement between the two parties. Indigenous approaches to FPIC implementation, represented by the circle, are focused on the holism with which Indigenous peoples approach economic development. When the two paradigms intersect, with the Western approach taking a dominant role in the exchange between corporate and Indigenous actors, the elements of decision-making institutions, relational responsibilities, integrity of land base for future generations, and [Indigenous] developmental priorities may be compromised in interest of a commercial compact.

Chapter two will identify critiques from decolonizing and Indigenous literatures about inaccurate representation of Indigenous peoples in mainstream research and will be followed by a narrative that provides the socio-political and historical context under which FPIC had emerged as a right asserted by Indigenous peoples to redress historical wrongdoings associated with colonization. The development of Canada's DTCA framework will also be discussed in tandem with the discussion about the emergence of FPIC. Thereafter, both management and non-management literatures will be reviewed and analyzed. The literature review will be followed by articulating the proposed research questions. Chapter three will outline the methodologies that were used to answer the research questions, while chapter four will present the findings. Discussion of findings — including discussion about contributions (to both practice and theory),

limitations, and future research — will be presented in chapter five, while chapter six will offer concluding thoughts about this research study. Having provided a roadmap for the chapters to follow, let us now turn our attention to a review of the literature that informs this study.

Chapter II LITERATURE REVIEW

"Simple! You can tell them to stop treating us like regular stakeholders," quipped one video research participant to another during an off-camera exchange. The two participants shared a knowing laugh. I was recording interviews with Indigenous negotiators for the video series I had referenced in chapter one. The theme of the video was "*Negotiating in a Good Way*" and participants were asked a simple question: what do business school graduates need to know about negotiating *in a good way*? *In a good way* is widely understood within Indigenous circles to convey doing something in a way that honours spirit (Flicker et al., 2015); or in other words, to respect the other party as relatives.

I share this exchange because it highlights the difficulty with which both practitioners and researchers have sought to understand both the UNDRIP and FPIC in a way that aligns with the tenets of self-determination, as will be revealed in the paragraphs and pages that follow. By way of overview, mainstream literature in management will typically examine FPIC within the context of CSR or stakeholder engagement literatures that do not preserve and affirm the human rights of Indigenous peoples as articulated in the UNDRIP. As we begin the literature review, it should be noted that there is scant literature about FPIC and the UNDRIP within management literatures that will be addressed later in section 2.3. As discussed in the closing of chapter one, I will now build upon critiques of Western ways of knowing that examine Indigenous peoples, Indigenous matters, and Indigenous ways of knowing — in addition to how Indigenous peoples are represented in such research. Thereafter, a brief overview on the development of the passage of the UNDRIP by the United Nations General Assembly in 2007 will assist in making clear the problems associated with the assumptions within the management literature.

2.1 Decolonial and Indigenous Scholarly Critique of Western Research Lens Applied to Indigenous Peoples and Matters

> *"Indigenous communities have struggled since colonization to be able to exercise what is viewed as a fundamental right, that is to represent ourselves. The representing project spans both the notion of representation as a political concept and representation as a form of voice and expression. In the political sense colonialism specifically excluded indigenous peoples from any form of decision making."*
>
> *(Smith, 2012, p. 151)*

The above passage from Smith (2012) provides an impactful introduction for the need to adopt a decolonized approach to understand the UNDRIP and FPIC within management literature. As will be explained in the review of management literature below, FPIC conceptualizations do not adequately represent Indigenous peoples and their participation in decision-making. Nor do they accurately represent Indigenous peoples as actors endowed with agency. Instead, Western and corporate perspectives are privileged while the goals, needs, and aspirations of Indigenous people are generally made invisible. It may be argued that such a perspective is appropriate because management researchers are accountable to advance knowledge about the world of business and are therefore focused on the corporation and not its constituent stakeholders. However, as will be discussed in the sections that follow, affected Indigenous peoples possess unique *rights*; as such, they ought not be considered merely as stakeholders to be managed. In fact, emerging best practices equate affected Indigenous peoples as joint venture partners. For example, a recent potash development project in Manitoba recently announced an agreement with the Gambler First Nation where the latter has a 20 percent equity stake in the project (Rosen, 2022).

The absence of discussion on the goals, needs, and aspirations of Indigenous people in the management literatures is a significant oversight because the UNDRIP and FPIC were

rigorously pursued by Indigenous peoples to reclaim and assert their right to meaningful participation as self-determining peoples. This is consistent with Gaudry's (2011, p. 113) observation that Western research about Indigenous peoples is an extractive process that loses the "context, values, and on-the-ground struggles of the people" who are studied. Stripping away these fundamental elements from studies of FPIC renders their analysis incomplete and invalid; to study and theorize about FPIC implementation while excluding its defining characteristics of self-determination and participatory decision-making is tantamount to capturing a unicorn, removing its horn, analyzing it as a horse, and then report results as though the unicorn had been analyzed.

In the introduction to the second edition of her seminal book *Decolonizing Methodologies,* Linda Tuhiwai Smith (2012) stated that, "Decolonizing methodologies is concerned not so much with the actual technique of selecting a method but much more with the context in which research problems are conceptualized and designed, and with the implications of research for its participants and their communities." As noted by Banerjee (2021, p. 1078), management theories developed with a Western perspective exemplify epistemic coloniality that, "*defines the problems of the developing world and articulates possible solutions solely from the perspective of a market economy.*" Both management and non-management scholars have criticized the Western approaches to conceptualize, design, and analyze research as hegemonic and silences Indigenous voices (Smith, 2012; Banerjee, 2021; Kovach, 2009).

Margaret Kovach (2009, p. 81) remarked that "*choices regarding representation and voice reveal to the critical reader the researcher's assumptions about knowledge*." Younging (2018, p. 2) observed that "it is important for *any* national or cultural group to have input into the documentation of its history, philosophies, and reality as a basic matter of cultural integrity."

This is particularly important for Indigenous peoples as a long period of inaccurate portrayals and misrepresentation has "*created a body of literature inconsistent with, and often opposed to, Indigenous cultural understandings.*" Harmful tropes and stereotypes about Indigenous peoples are inextricably and subconsciously bound to the neural network with which people approach their cognitive representation of Indigenous peoples. This is the result of centuries of conditioning. If decolonization is to occur in any meaningful manner, it will "*demand a critical reflexive lens that acknowledges the politics of representation within Indigenous research*" (Kovach, 2009, p. 33).

By reclaiming ownership of how Indigenous peoples are represented within literature, Indigenous scholars will have the opportunity to offer an authentic narrative on matters related to Indigenous peoples (Smith, 2012). A final aspect of decolonization is to amplify these stories where they have hitherto been silenced. For too long, the lived experiences of Indigenous peoples and the current realities have been excluded from literatures. Therefore, if management literature about the UNDRIP and FPIC is to have any validity and meaning, it needs to be examined with a decolonization lens to understand FPIC implementation through a holistic approach. This echoes the Kovach (2009) observation that "*the reproduction of colonial relationships persists inside institutional centres. The result has been, and continues to be, that Indigenous communities are examined by non-Indigenous academics who pursue Western research on Western terms*" (p. 28).

Linda Smith (2012) developed a typology of decolonizing projects pursued by Indigenous researchers. Representation is one such project whereby Indigenous researchers reclaim the representation of Indigenous peoples. For too many centuries, Western researchers, adventurers, and explorers returned from their voyages with "travellers' tales" that inaccurately represented

Indigenous peoples to non-Indigenous audiences. Reclaiming representation is a powerful tool to decolonize the academy. As noted by Smith (2012, p. 37) "… *academic writing is a form of selecting, arranging and presenting knowledge. It privileges a set of texts, views about the history of an idea, what issues count as significant.*" Management literatures that deal with FPIC typically ignore the history behind the development of the UNDRIP and FPIC; this history informs why the issues of participation in decision-making and self-determination are important aspects to be included in the discussion to a greater degree than discussed in extant literatures.

As will be elaborated further in the methodology section, this research will employ qualitative interviews to answer the proposed research questions. Storytelling is yet another decolonizing project listed in Smith's (2012) typology of decolonizing projects undertaken by Indigenous researchers. It is not only a culturally appropriate means to engage with Indigenous peoples and communities on account of our oral traditions, but it also allows the researcher to represent the "diversities of truth" (Smith, 2012, p. 146) about a given phenomenon. From one eye, management literatures have revealed the truth about FPIC from the corporate perspective. However, this focal point of analysis ignores a crucial "other side" of the exchange; I intend to reveal the truth about FPIC from an Indigenous perspective to allow for two-eyed seeing approach to FPIC implementation.

By sharing these stories and offering a counter-narrative, another research project identified by Smith (2012), centred on *celebrating survival–survivance*, may be realized through my proposed research. "Events and accounts which focus on the active resistance are important not just because they speak to our survival, but because they celebrate our being at an ordinary human level and affirm our identities as indigenous women and men" (p. 146). By showcasing these stories of survival and survivance, and manifesting Indigenous peoples on an ordinary

human level, researchers may be less inclined to disregard them as they consider the impact of their research. This crucial element is important to me because, as will be discussed later in this chapter (and throughout the balance of this dissertation) this research will forgo examination of the Duty to Consult and Accommodate (DTCA) framework and will focus on Article 32 of the UNDRIP. On the one hand, the DTCA represents the culmination of a colonial approach to offer redress for historical wrongdoing and injustice, while only offering breadcrumb protections of a narrow set of rights that may be justifiably infringed. On the other hand, the UNDRIP and Article 32 offers a robust recognition of the rights of Indigenous peoples as peoples. It is my hope that this will play a small but important role to decolonize management literatures.

Before embarking on the management literature review, I am reminded of both the origami metaphor (*it all begins with the first fold*) in conjunction with Linda Smith's admonition of "getting the story right and telling it well" (p. 226). In the spirit of centring research about FPIC and Indigenous peoples with an eye toward decolonization — an integral component of which is to provide a diversity of truths, while also exploring colonizing relationships — let us now explore the development of relations between Indigenous and settler societies that gave rise to the need for the United Nations Declaration on the Rights of Indigenous Peoples.

2.2 Indigenous Peoples and Human Rights

> *"Coming to know the past has been a part of the critical pedagogy of decolonization. To hold alternative histories is to hold alternative knowledges."*
>
> *(Smith, 2012, p. 36)*

The rights of Indigenous peoples affirmed by the UNDRIP offer redress to the historical power imbalance between Indigenous peoples and settler societies. The Declaration's

preambular paragraphs reject, “doctrines, policies, and practices based on the superiority of peoples … on the basis of national origin or racial, religious, ethnic or cultural differences” as racist and acknowledges that “Indigenous peoples have suffered from historic injustices as a result of … their colonization and dispossession of their lands, territories and resources” (United Nations, 2007). This dispossession of lands and resources forcibly deprived Indigenous peoples of their right to exercise self-determination in relation to pursuing development according to their aspirations. In the pages to follow, we will explore the relationship between Indigenous peoples and European settler societies. This story is one of struggle. It is a story of the Indigenous peoples’ struggle for their inherent right to land to be recognized by European settlers. This struggle continues to this very day and is important to understand the framing of the research question.

This story is evidenced in the TRCC’s Final Report, wherein the Commissioners laid bare the history of colonialism that deprived Indigenous peoples of their lands, territories, and resources based on racist doctrines, policies, and practices (TRCC, 2015b). The Doctrine of Discovery is an example of one such doctrine that informed policies and practices that was based on the presumed superiority of settler society. A related concept is *terra nullius* — literally empty land — which assumed that the land belonged to no one and was therefore eligible to be claimed. Combined, the Doctrine of Discovery and *terra nullius* maintained that Indigenous peoples, as non-Christians, do not have rights to the lands upon which they exist. Two papal bulls sanctioned Portuguese claims over extraterritorial lands in Africa under the auspices of Pope Eugene’s desire to bring salvation to the world. Four papal bulls subsequently issued by Pope Alexander supported Spanish claims to land in the Americas, so long as they converted Indigenous peoples to Christianity (Courchene, 2018; TRCC, 2015b). The Doctrine of Discovery has continually

been used as jurisprudence for centuries to justify non-recognition of Indigenous title — even as recently as late twentieth and early twenty-first century cases in Canada and the United States (TRCC, 2015b).

While the Doctrine of Discovery and *terra nullius* served as foundational legal principles to justify colonization, it should be noted that critical opponents acknowledged that Indigenous peoples inherently possess title to their land by virtue of occupation prior to European contact. Bartolome de Las Casas and Francisco de Vitoria were outspoken critics of the European assertion of authority over (and colonization of) Indigenous peoples' lands (Anaya, 2000; Thornberry, 2005). Despite their status as preeminent thinkers in the formative years of international law, the efforts of Las Casas and Vitoria to recognize Indigenous peoples' title fell on deaf ears. For the next 250 years the colonization project continued unabated.

In 1763, King George III issued what is known as the Royal Proclamation, which according to Courchene (2018, p.4) "has long been considered the principal source of the territorial rights of Indigenous peoples. Moreover, the Royal Proclamation has never been repealed, so it remains in effect today. Indeed, by reserving lands not already purchased by the Crown for the Indigenous peoples, the Proclamation thus recognizes the pre-existing Indigenous rights to the lands and that this right could only be extinguished by means of a cession to the Crown." While there is little doubt that the issuance of the Royal Proclamation was intended to assert British sovereignty and lay exclusive claim to sign treaties between Indigenous peoples and the British Crown, the Proclamation has been subject to different interpretations as to whether it recognizes Indigenous people's pre-contact title to land (Collie, 2024). This very point has been subject to interrogation through several Supreme Court of Canada cases advanced by Indigenous nations, a sample of which will be highlighted in the pages that follow. As this is a

management study, a full overview of these cases will not be provided as the intention is to highlight the divergent interpretations and the evolution of thought around Indigenous peoples, Indigenous peoples' rights, and their relationship to land.

The Treaty of Niagara was agreed upon in the year following the Royal Proclamation and represents the first major agreement between Indigenous nations and the British Crown. As noted by Coyle and Borrows (2017):

> At the gathering, 2,000 Indigenous people representing twenty-two Indigenous Nations assembled in Niagara to create a relationship with the British Crown. Indigenous leaders entered into an agreement of peace, friendship, and respect in which Indigenous peoples received promises that settler governments would not have authority over them. The Mi'kmaq, Maliseet, and Passamaquoddy of the Maritimes had created a similar process. These arrangements were confirmed by the Royal Proclamation, which pledged the Crown to respect First Nations lands and governance. Though the Royal Proclamation also contained a darker colonial vision, it nevertheless contains solemn promises to ensure that local governments ceased molesting and disturbing Indigenous peoples. Under this vision, Canada was to become a peaceful place for "Indians" and foreign settlers, based on persuasion and the rejection of force. Again, this was largely premised on the view that First Nations leaders accepted a constitutional arrangement which precluded local governments from dealing with them in matters related to their land, governance, or resources. (p. 22)

During the Enlightenment period — roughly contemporaneous with both the Royal Proclamation and the Treaty of Niagara — perceptions of Indigenous peoples as uncivilized were such that political and social philosopher G.W.F. Hegel remarked that the rights of Indigenous peoples were inferior to that of civilized man and their autonomy is recognized merely as a *formality* (Thornberry, 2005). Hegel's remarks provide a salient example of the racist doctrines that have been used to justify the dispossession of Indigenous peoples from their lands, territories, and resources, as noted by the (TRCC, 2015b) earlier in this section. Such doctrines

undergird the rationale behind many Supreme Court of Canada decisions, which will be discussed later in this section.

In the 19th century, colonial powers had begun to confer upon themselves legal obligations under what is described as the trusteeship doctrine (Anaya, 2000) or guardianship doctrine (Thornberry, 2005) whereby Indigenous peoples were regarded as wardens of the state. Quite simply, Indigenous peoples were infantilized and the settler society built upon their lands had imposed profound influence on their daily life and activities. These developments had imposed settler society control over the livelihoods of Indigenous people under the guise of "protection" (Anaya, 2005). In Canada, several major developments occurred within a relatively short timeframe that radically changed the relationship between Indigenous peoples and settler society.

The first such development was the passage of the British North America Act in 1867 (which was later renamed the Constitution Act). In addition to providing a constitutional framework for the establishment of the Dominion of Canada by dividing the powers held by the federal government and the provinces (Macklem & Sanderson, 2018), the British North America Act also assigned to the federal Crown jurisdiction over Indigenous peoples and matters (Courchene, 2018). Further, section 146 had laid out the means through which Rupert's Land may be admitted into the Dominion of Canada (McNeil, 2019). Spurred by John A. MacDonald's nation-building aspirations — coupled with a desire to tamp down American expansionism in the West — the first sitting government of Canada acted quickly to acquire both Rupert's Land and the Northwestern Territory in 1870 (McNeil, 2019).

In the immediate aftermath of these two territorial acquisitions, the federal government set out to negotiate and sign what is known as the Numbered Treaties with Indigenous nations whose territories primarily spanned the Prairie region of Canada (Crown-Indigenous Relations

and Northern Affairs Canada, 2023). The rich history and details of the Numbered Treaties offer a plethora of opportunities for scholarship and analysis. However, that will not be undertaken within these pages. Instead, what I offer are the relevant thematic highlights for this study. First, several scholars noted a disparity between the oral agreements and the written text of the treaties. For example, Slattery (2000) reported that:

> At times, the English parties recorded some of the treaty terms in a concise written document that the Indian parties would be asked to "sign". Such a document has sometimes come to be regarded as the "treaty". However, this conclusion is usually unwarranted. In most cases, the treaty was the oral agreement, and the written document just a memorial of that agreement, similar in status to the belts used by some Indian parties. Many such documents have proven to be unreliable guides to the oral compacts. They often record only matters of particular interest to the English parties and omit certain terms of significance to the Indian parties. Even the recorded terms may not represent an accurate or balanced account of the true oral bargain (page 208).

Relatedly, Craft (2013) and Cardinal and Hildebrandt (2000) reported that the treaty text reflects surrender of land which runs counter to the oral agreement of willingness to share the land with settlers (often reported to be to the depth of a plow blade for agricultural purposes). Much more may be said in respect to divergent accounts and interpretations around the agreed upon terms of each treaty, but they are beyond the scope of the present study. The two most relevant items to consider is that surrender of land was not agreed upon by the Indigenous parties and is best summarized by Calliou (2007):

> The differences behind these two interpretive approaches are illustrated by the surrender clause. A well-known example of conflicting interpretations, the surrender clause stated that the First Nations, "hereby cede, release, surrender, and yield up ... all their rights, titles and privileges whatsoever to the lands." A contemporary First Nation leader has translated this clause as "I quit the land," commenting that "there is no way they would have agreed to this." (p.183)

The second item to consider relates to guarantees from the treaty commissioner that the Crown would not interfere with their traditional livelihood and expression of culture, including maintaining their right to hunt without being subject to the conservation limits placed on settler society. Calliou (2007) describes a rich history that explains the tensions between the provincial and federal governments in relation to jurisdiction over Indigenous peoples and its interaction with conservation and hunting regulations. These tensions would later be resolved through the Natural Resource Transfer Agreement of 1930, which will be discussed later in this section.

At around the time most of the Numbered Treaties were concluded, the Indian Act was passed in 1876, and consolidated elements of policy and prior legislation including the Gradual Civilization Act of 1857 (Canada, 1996). The Indian Act exerted immense control over the political governance structures of Indigenous peoples, land use and tenure (including the establishment of Indian reservation lands), Indigenous law-making institutions, as well as defining the Indigenous nation's membership and citizenry. Successive amendments to the Indian Act imposed further restrictions that attacked cultural, political, and spiritual traditions of Indigenous peoples to advance the government's assimilative agenda (TRCC, 2015b).

In 1888, a ruling related to a dispute between the province of Ontario and the federal government had seismic implications for the issue of Indigenous title to land. At issue was whether Ontario had the authority over a tract of land in Treaty Number Three territory under sections 108, 109, and 119 "which collectively provide that public property, including land, is to be retained by the respective provinces that held it prior to Confederation, unless otherwise disposed of by the [British North America] Act" (McNeil, 2019, p. 37). In rendering its decision, they had imported a US Supreme Court ruling from the 1820's which justified the extinguishment of Indigenous title to land based on the Doctrine of Discovery. The St.

Catherine's Milling case — and its importation of the Doctrine of Discovery — has served as a precedent to justify the continued denial of Indigenous peoples' rights to land as they sought redress for inequities (McIvor, 2021).

In 1924, Chief Deskaheh, a Haudenosaunee speaker for the Iroquois Confederacy had sought admission to the League of Nations to seek redress for treaty violations and encroachment on their territory (Venne, 1998; Corntassell, 2008). The Dutch delegation had been supportive of this petition due to their alliance with the Haudenosaunee during the 1700's. However, the British government had lobbied to bury Chief Deskaheh's petition. Ultimately, the League of Nations determined that the Haudenosaunee campaign was an "internal matter" and the petition unsuccessful (Venne, 1998; Corntassell, 2008). American and Maori Indigenous delegations were similarly rebuffed for seeking redress at the League of Nations in the 1920's (Montes & Cisneros, 2009). These complaints provide evidence that colonial governments, guided by the guardianship doctrine, were oppressive to Indigenous peoples. In his efforts to seek redress for the deplorable conditions to which the Haudenosaunee were subjected, Chief Deskaheh proclaimed, "We are determined to live the free people we are born" (Corntassell, 2008, p. 110).

A few short years after Chief Deskaheh sought redress from the League of Nations for the injustices already discussed, the Canadian government had entered into the Natural Resources Transfer Agreement (NRTA) in 1930. According to Calliou (2007), settler hunters took exception to Indigenous treaty rights to hunt without restriction, culminating in the inclusion of Section 133 to the Indian Act in 1890. The NRTA is particularly problematic because the end result is that the federal government had unilaterally modified the terms of the treaty agreements into which it entered with Indigenous peoples, substantially changing the nature of the treaty relationship without consulting with them (Calliou, 2007).

Although the concerns of Indigenous delegations were summarily dismissed at the League of Nations in 1924, they gained traction with the International Labour Organization (ILO) in 1957, when a study into the abuses of Indigenous labourers culminated in the adoption of ILO Convention 107 (Anaya, 2000). An important aspect of this Convention, as noted by Eide (2009), is that it "recognized, however, that an underlying cause of the vulnerability of these peoples was their widespread deprivation of the land from which they had made their living in the past; the Convention therefore also called for an improvement in the recognition of land rights of the Indigenous" (Eide, 2009, p. 35). Although ILO Convention 107 provided an international legal instrument to protect Indigenous peoples from further exploitation, it was criticized by many Indigenous peoples as problematic and assimilationist (Eide, 2009).

Augusto Willemsen-Diaz, an Indigenous law school graduate from Guatemala, who joined the ranks of the UN's Human Rights Division in the 1950s, observed that goals of "integration" and "protection" articulated in ILO Convention 107 were simply incompatible with the desire of Indigenous peoples that he knew, including his own Indigenous nation. Observing that the United Nations lacked participation of Indigenous peoples, Diaz devised an arrangement whereby Indigenous delegates attended a variety of UN fora under non-governmental organization (NGO) status (Willemsen-Diaz, 2009). Ultimately, this strategy paved the way to establishing the Working Group on Indigenous Peoples (WGIP) in 1982. During its fourth session in 1985, the WGIP determined that a declaration on the rights of Indigenous peoples would enable it to fulfill its mandate to pay "special attention to changes in standards relating to Indigenous rights," (Willemsen-Diaz, 2009, p. 26). Over the next twenty-two years, innumerable Indigenous organizations, state diplomats, and UN officials engaged in protracted negotiation, diplomacy, and dialogue to agree upon the final wording that was accepted by the United

Nations General Assembly on September 13, 2007 (Willemsen-Diaz, 2009; Daes, 2009; Eide, 2009).

While 1982 marked the founding of the WGIP at the United Nations — whose work ultimately led to the passage of the UNDRIP — it also marked the year that Indigenous political mobilization in Canada culminated in recognition in Section 35 of the repatriated Constitution (Collie, 2004). Indigenous mobilization arose in response to then-Prime Minister Pierre Trudeau's efforts to reignite national efforts to repatriate Canada's constitution in 1980 without Indigenous participation or involvement. Dubbed the Constitutional Express, this movement had captured the attention of the nation, and importantly, the opposition parties who refused to support Trudeau's efforts unless Indigenous peoples were involved (Manuel et al., 2015). As a result, Section 35, which recognizes existing Aboriginal and treaty rights, was included in the Constitution Act of 1982 (Manuel et al., 2015; Slattery, 2000). Asch (1987) and Collie (2024) observed that while Section 35 offered constitutional recognition of existing Aboriginal and treaty rights, the initial response from Indigenous leaders feared that a narrow reading may not offer protection of the full set of rights held by Indigenous peoples. This narrow scope is based on the word *existing*, with a tacit understanding that the Crown may argue that certain rights may have been extinguished prior to 1982 (Slattery, 2000).

Over the intervening years since the inclusion of Section 35 in the Constitution Act of 1982, a series of Supreme Court of Canada (SCC) rulings have served to define and outline the current Duty to Consult and Accommodate framework that guides current engagement practices between Indigenous peoples and project proponents (Coates, 2021; Hamilton & Kislowicz, 2021; Mitchell et al., 2019). Coates (2021) clarified that the SCC did not confer upon Indigenous peoples the rights associated with their decisions, but rather that the court had affirmed the

inherent rights asserted by the respective nations who advanced the claims. While there are a series of SCC rulings that may conceivably be related, only a representative handful will be discussed. In the 1990 R vs Sparrow case, the SCC provided what is known as the Sparrow test to allow the Crown to justifiably infringe an existing Aboriginal right (Coyle & Borrows, 2017). This test, as reported by Coyle and Borrows (2017) had been applied to several hundred cases that helped to shape the duty to consult and accommodate framework that we see today.

Two SCC rulings (Delgamuukw in 1997 and Van Der Peet in 1996) helped to define issues related to Aboriginal title to land and land use that has been used to determine the strength of subsequent claims that have been brought forward in the DTCA framework. The Chief Justice in the Delgamuukw case had clarified that Aboriginal title is not held by Aboriginal individuals, but rather it is held collectively by all members of the Indigenous nation. A series of additional SCC rulings helped to clarify concepts related to the Honour of the Crown and the DTCA framework, beginning with the 2004 Haida case, as noted by Coyle and Borrows (2017):

> the 2004 Haida decision establishing an independent Crown duty to consult with and, in some cases, accommodate Aboriginal peoples where there is a credibly asserted Aboriginal right and a Crown decision that has the potential to adversely affect that right; the 2005 decision in Mikisew Cree applying the Crown's duty to consult to situations in which treaty rights might be affected; the 2010 Beckman decision extending the duty to consult to govern modern as well as historic treaties; the 2013 Manitoba Metis decision expanding on what the honour of the Crown requires; and the 2014 Tsilhqot'in Nation decision finding that the Tsilhqot'in Nation had Aboriginal title to areas which it had regularly used for hunting and fishing. These Supreme Court of Canada decisions have changed the law significantly and have provided substantial leverage to First Nations.

While there is little doubt that Indigenous nations affected by resource development projects are afforded opportunities to express their concerns about potential impacts on their rights (at least relative to the experiences of affected Indigenous nations decades in the past), and that as noted by Coyle and Borrows (2017) immediately above, have substantial leverage, the

outcomes are different than if the engagement strategy was formulated around the standards outlined in Article 32 of the UNDRIP. This present study will focus on how current engagement practices may better align with Article 32 of the UNDRIP for reasons that will be discussed later in this chapter under section 2.5 which serves to frame the research question.

The foregoing discussion on Indigenous-settler relations and the struggle for recognition of Indigenous peoples' rights touch upon important points to fully apprehend why extant literatures on FPIC and UNDRIP are problematic. While this discussion could have been presented in subsequent sections, I chose to provide an upfront account to centre the reader on why the passage of UNDRIP is so important to many Indigenous peoples globally: it represents the culmination of centuries of struggle against colonial powers to respect and honour Indigenous peoples as self-determining peoples. Consistent with Kovach (2009), discussion on Indigenous peoples and matters, researchers "must ethically include the influence of the colonial relationships, thereby introducing a decolonizing perspective to a critical paradigm" (p. 30).

It was not sufficient to be recognized as burdensome wardens of the state, or as a vanishing relic of the past, but as vibrant, enduring groups of peoples with distinctive cultural, spiritual, political institutions, and special relationships to the lands on which they are located — notwithstanding colonial efforts to eradicate these peoples and institutions. Since the dawn of the League of Nations, Indigenous actors have sought recognition of their rights through international governance bodies. Despite the fact that the earliest advocates were rebuffed for seeking redress, subsequent generations of Indigenous actors successfully navigated their way through United Nations bodies to become co-authors of the UNDRIP. It is with this understanding of the development of the UNDRIP that we now examine various literatures first

within management, followed by literatures from other disciplines including law, environmental science, and human rights.

2.3 Management Literatures

To conduct my literature review, I shortlisted the Financial Times 50 list of top-tier management journals to select those which present as most inclined to publish articles on FPIC and the UNDRIP. For example, finance and accounting journals do not logically present as journals which would publish FPIC articles. The final list of 12 selected journals include: Academy of Management Journal; Academy of Management Review; Human Relations; Journal of Business Ethics; Journal of International Business Studies; Journal of Management; Journal of Management Studies; Journal of Political Economy; Organization Studies; Organizational Behavior and Human Decision Processes; Research Policy; and Strategic Management Journal. Keywords that were searched included Indigenous; FPIC; Free, Prior, and Informed Consent; UNDRIP; and the United Nations Declaration on the Rights of Indigenous Peoples. The Journal of Business Ethics (JBE) published the majority of FPIC articles, with approximately 15 articles.

Although the Wilburn and Wilburn (2011) article *Achieving Social to Operate Using Stakeholder Theory* was not published in JBE, it was nonetheless one of the earliest management-focused articles that served to set the academic tone of the conversation around how to understand FPIC since the passage of the UNDRIP in 2007. Also, a few of the management scholars discussed later in this section (such as Demuijnck & Fasterling, 2016) build upon the contributions of this seminal article, which frames FPIC implementation within the context of CSR and stakeholder theory. After a discussion on the business case for CSR — particularly as a defensive maneuver to stave off the loss of customers on account of poor CSR

performance — the authors state that social license to operate (SLO) was developed as a direct response to "a United Nations initiative" (citing a 2004 interim report on the UNDRIP from the Working Group on Indigenous Peoples) affirming Indigenous peoples' right to provide or withhold their FPIC in relation to development projects. In defining FPIC, the authors were careful to differentiate it from a SLO, quoting Slack (2008, paragraph 3):

> *The distinction between social license and consent is critical because accepting community consent as a basic operating standard sets a higher bar. If a community's actual consent is required before operations begin, companies must treat the community as more of a partner in project development, rather than as an obstacle to overcome. It also implies that a company must engage more holistically with a community, providing them access to critical information and allowing them adequate time to assess their needs and interests before making a decision about whether to accept a company's presence. The more vaguely defined social license does not necessarily imply these things.*

The above passage correctly identified FPIC as having a higher bar than the granting of a SLO and also acknowledges that affected Indigenous peoples should be considered as a partner in the project (as will be discussed later in the literature review). However, these key components of FPIC were not elaborated upon. Rather, Willburn and Willburn (2011) subsume FPIC implementation under a SLO umbrella – as evidenced by their statement: "*social license to operate is assumed to include free, prior, and informed consent. However, the level of consent has not been clarified, nor is the stakeholders from whom the consent is given*" (Wilburn & Wilburn, 2011, p. 7).

As further evidence of this conflation, the authors remarked, "*unfortunately, a process for achieving FPIC and/or SLO beyond indigenous groups has not been developed*" (Wilburn & Wilburn, 2011, p. 2). Their wording may imply that FPIC and SLO are interchangeable with one another. However, they are not interchangeable, as will be discussed below. The balance of their

article presents a model in which businesses may engage with stakeholders to obtain from them a social license to operate.

The above conflation of FPIC with SLO exemplifies a general problem with management literatures whereby the propensity to seek to understand FPIC within the context of extant literatures tends to strip away the human rights affirming elements of seeking consent. By stating that there are no means to "*achieve FPIC and/or SLO beyond indigenous groups,*" Wilburn and Wilburn (2011) negate the "context, values, and the on-the-ground struggles" (Gaudry, 2011, p. 113) of the affected Indigenous peoples. The UNDRIP and FPIC are means through which Indigenous peoples may re-assert their right to self-determination which had been disregarded for centuries; what is important to understand about the UNDRIP and FPIC is that it represents a *sui generis* (unique) set of rights held by Indigenous peoples to promote the "shedding the legacies of colonization" (Anaya, 2015, p. 138).

It should be noted that the Wilburn and Wilburn article, published in 2011, was likely written in 2010, and the UNDRIP and FPIC were newly affirmed rights, the implications of which were not (and arguably still are not) fully understood. Therefore, it is reasonable for researchers at that time to incorporate extant literature (namely CSR and stakeholder theory) to study the new human rights paradigm. Nevertheless, it is indicative of a pattern of Western research agendas to either misrepresent or invisibilize Indigenous peoples and Indigenous matters as previously discussed in the decolonizing and Indigenous methodologies section. As a relative "first-mover", Wilburn and Wilburn (2011) have garnered over 274 citations listed on Google Scholar and may well have set the tone and grounding for future literature about FPIC implementation. As an interesting side note, at the time I presented my thesis proposal two years ago, I had previously reported that the article was cited approximately 220 times. This suggests

that it still wields influence in framing conversations about Indigenous peoples and project proponents.

Demuijnck and Fasterling (2016) also focused on SLO as their central point of analysis, which also briefly discussed FPIC. Whereas Wilburn and Wilburn (2011) subsumed FPIC under a SLO umbrella, Demuijnck and Fasterling (2016) used FPIC as an example of limitations to the business case for SLO, which implicitly sets it apart from SLO. In their discussion about FPIC as a limitation to the business case for SLO, Demuijnck and Fasterling (2016) observed that business cases typically ignore vulnerable people — particularly where differential power exists between them and the company. They note that "*distributing legal consultation rights or even approval rights to interested parties raises the stakes for the license-seeking or license-holding company of achieving an understanding with them and thus emphasizes the importance of obtaining an SLO next to the legal license*" (p. 681).

The preceding passage from Demuijnck and Fasterling (2016) recognizes that SLO is an outcome of FPIC engagement rather than an umbrella under which FPIC is to be subsumed. Although Demuijnck and Fasterling (2016) do not conflate FPIC with SLO or any other CSR initiative — as did Wilburn and Wilburn (2011) — it is discussed in a fleeting manner that is devoid of "context, values, and on-the-ground struggles" of the Indigenous peoples (Gaudry, 2011, p. 113). However, they did offer discussion about how Sami peoples in Norway have the legislative means to challenge resource development projects for which they were not provided with adequate negotiations and can use these legislative means to effectively suspend the license provided to the resource development proponent.

Erdiaw-Kwasie, Alam, and Shahiduzzaman (2017) examined stakeholder salience in respect to CSR, social license to operate, and the mining industry. They recognized that the focal

point of previous literatures was very firm-centric and emphasized attributes that are important for the firm. Noting the influence of the Mitchell, Agle, and Wood (1997) framework to classify stakeholder salience based on attributes of power, legitimacy, and urgency had on all subsequent research and models for stakeholder engagement, they report that there is little consensus on transition between stakeholder classification — that is to say, how a stakeholder may obtain the missing attributes to get on the firm's radar. In discussing meaningful engagement with affected communities (in general, not Indigenous peoples specifically), they observe that firms must go beyond consultation and seek, instead, to understand the community's aspirations.

The authors noted the distinguishing features of FPIC by defining it as being free from coercion, prior to authorizing development activities, and that affected Indigenous peoples have access to full information about the proposed development project. While an important contribution of their study is the observation that stakeholder theory is too firm-centric, a limitation is that they failed to address *how* corporations go beyond stakeholder consultations toward engaging in a meaningful dialogue with the intent to secure the affected Indigenous peoples' free, prior, and informed consent. A focus on the consent process would necessarily have provided a lens with which affected Indigenous peoples are given due consideration.

A series of articles authored by Matthew Murphy — along with various co-authors — have examined FPIC, social license to operate, and ILO 169. Murphy and Arenas (2010) observed that the primary means through which corporations engaged with Indigenous peoples has been through CSR programs. However, they caution that even the most well-intended engagement initiatives are "*launched from a mind-set that presupposes the superiority of the corporation and the industrialized world over indigenous peoples who are perceived as in need of help and 'development'*" (p. 106) They also noted that while it is reasonable to believe that Indigenous

peoples are “powerful stakeholders” in relation to resource development projects on their territories, this is not always the case. On the contrary, there is a tendency for Indigenous peoples to be perceived as “fringe stakeholders” by the corporations that benefit most from access to their resources. This narrative, however, is beginning to change and civic society organizations (CSOs) have been instrumental in bringing cross-sectoral collaborative partners together to address issues related to environment, poverty, economic development, among others.

Although Murphy and Arenas (2010) do not directly address the UNDRIP or FPIC, they reference the International Labour Organization Convention 169 (mentioned earlier in Section 2.2) — which affirms the right of Indigenous peoples to provide their prior consent — in relation to a case study about the Goldcorp Inc.’s engagement with an Indigenous nation in Guatemala. However, their discussion about ILO 169 was heavily focused on the firm and CSOs in a manner that muted discussion about the development priorities and needs of the affected Indigenous peoples. Nonetheless, three notable contributions about ILO 169 and cross-sectoral collaborations are to be found.

First, they observe that businesses should approach engagement with Indigenous peoples “on … equal footing” (p. 115) while also noting that capacity development is an equally important aspect for successful collaborations to be realized. They further remarked that any capacity building programs cannot be subject to the exclusive influence of the corporation. Second, they caution against the undue influence that corporations may have to influence politicians, national governments, and international finance institutions in relation to their proposed resource development projects. Third, they recognize that mutually beneficial outcomes may be realized through genuine collaborations between corporations and affected Indigenous peoples.

The Marlin Mine case in Guatemala and ILO 169 were also featured by Murphy and Vives (2013) and presented an Organizational Justice–Business and Human Rights (OJBHR) framework. Although the article was written in the post-UNDRIP era, they focus discussion on ILO 169 as the Marlin Mines case pre-dated the UNDRIP passage through the General Assembly in 2007. With this nuanced timeframe of analysis, the authors note that, "while *ILO 169 establishes the right of Indigenous peoples to be consulted regarding development projects, it does not clearly articulate that a community's consent is required unless projects will require the removal of Indigenous communities from their land*" (p. 789). While the primary focus of this article is to demonstrate the efficacy of their OJBHR framework to understand whether Indigenous peoples perceive the consultation processes — particularly whether Goldcorp Inc. had dutifully executed its obligations under ILO 169, of which Guatemala is signatory — and outcome as fair, it offers two important contributions to management literature that support the need for a decolonized approach to understand FPIC on Indigenous peoples' terms.

First, by framing the discussion about ILO 169 within the United Nation's "Protect, Respect, and Remedy Framework", they demonstrate the importance and responsibility of corporate actors to ensure that they are not complicit in human rights abuses. They explicitly highlight from the 2008 UN Framework report that "respect for human rights stands above any other responsibility," and that corporations are "to avoid directly or indirect complicity with human rights abuses" (p. 784). Together, these responsibilities underscore the importance of not dismissing meaningful engagement with Indigenous peoples as a matter of State concern. As noted by Murphy and Vives (2013), the concept that States hold solely responsibility to promote and uphold human rights began to face challenges by the end of the twentieth century —

particularly in relation to the rising power of corporations over governments in our era of globalization.

Second, they observe that States will typically "deputize" or discharge their responsibility to ensure compliance with consultation or consent standards to the corporation. This is typically done through an environmental impact assessment or an environmental and social impact assessment. The granting of a social license to operate is typically demonstrated through the signing of an impact benefit agreement (IBA) between the resource development proponent and the affected Indigenous people. Yaffe (2018) describes an IBA as a private agreement between the resource development corporation and the affected Indigenous people that outlines obligations each party has toward the other and the return of benefits to the affected Indigenous nation. The deputization of the corporation to ensure compliance with consultation or consent standards, therefore, demonstrates the significant role held by businesses to uphold the rights of Indigenous peoples.

ILO Convention 169 is referenced by Arenas, Sanchez, and Murphy (2013), who develop a typology of cross-sectoral collaborations (conflict-resolving, philanthropic, business case, and integrative relationships) using four cases. One of these four cases involved Repsol YPF — an oil and gas company — that was pressured by Intermon Oxfam to present a corporate policy aligned with ILO Convention 169. After significant media coverage, Repsol's CEO followed through on a commitment to create a corporate policy in line with both ILO 169 and the UNDRIP. The focus of this article was on the role played by third parties and CSOs rather than to highlight the uniqueness of corporate engagement with Indigenous peoples. While ILO Convention 169 does not feature prominently in the article, it nevertheless demonstrates the malleability of corporate approaches to engagement with Indigenous peoples.

Two other management articles published by the Journal of Business Ethics worthy of mention in the literature review are Lertzman and Vredenburg (2005) and Byrne (2012). Although the Lertzman and Vredenburg (2005) article - which explicitly examines the relationship between extractive industries and affected Indigenous peoples — does not reference either the UNDRIP or ILO 169, it is noteworthy for three reasons. First, it is cited by many authors who have researched Indigenous peoples and extractive industries. Second, it dedicates an appreciable amount of *journal real estate* to highlight the relationship between Indigenous peoples and settler societies, treaties and land title, assimilation, and present-day disparities between Indigenous and non-Indigenous peoples in Canada. In fact, just shy of two pages of fourteen are dedicated to this discussion — which is significantly more robust than what is the norm in other management journal articles. Third, it features the strengths of Indigenous peoples' traditional knowledge in relation to sustainability issues involved in extractive industry projects. This is crucial as it creates space to discuss the importance of approaching engagement with Indigenous peoples in a manner that allows for their participation in decision-making.

Although the Byrne (2012) article briefly mentions ILO 169 and the UNDRIP without significant discussion about its implications for engagement with Indigenous peoples, it is an important contribution to management literature about Indigenous peoples because it calls into question the legitimacy of colonial claims to land by critically interrogating notions of *terra nullius*, discovery, and other related issues discussed above. Further, he advocates for the rectification of historical wrongdoings committed against Indigenous peoples, citing a hypocritical approach whereby Indigenous peoples are denied redress while other victims of historical injustices are readily offered comfort and redress. Such an understanding needs to be articulated to meaningfully decolonize management literature in a manner that appreciates the

responsibility to engage with Indigenous peoples with an aim to fully upholding and advancing their collective human rights as affirmed by instruments such as ILO 169 and the UNDRIP.

The meaningful participation of Indigenous peoples in relation to mining contexts was examined by Ruwhiu and Carter (2016) who recognized the *sui generis* nature of FPIC and that meaningful participation is one such feature that distinguishes FPIC from stakeholder engagement (rather than subsuming FPIC under the umbrella of stakeholder management or other theories and frameworks). Notably, they acknowledge that:

> *"… any form of agreement and effort towards meaningful participation must:*
> - *be informed by the Indigenous communities' values, knowledge frameworks and aspirations for intergenerational development; and,*
> - *provide for Indigenous peoples to meaningfully participate in development plans from the earliest time possible, which assures informed consent prior to decisions affecting their rights/interests*" (p. 642).

In addition to recognizing that FPIC requires the meaningful participation of Indigenous peoples, Ruwhiu and Carter (2016) are critical about CSR and SLO responses to the need to engage with Indigenous peoples, citing them as "difficult to operationalize in practice" and as "forms of tokenism" (p. 643). Ruwhiu and Carter (2016) add that Indigenous peoples have historically received minimal benefit from resource development projects (even for projects located directly on the affected Indigenous peoples' lands) while the majority of wealth generated benefits the corporation, national government, and non-Indigenous citizens of the region or country.

The authors note, however, that industry standards are beginning to change how extractive industries interact and engage with affected Indigenous peoples. For example, they cite commitments made by the 2013 International Council on Minerals and Mining (ICMM) as an example of shifting norms. The 2013 ICMM guidance document explicitly states that mining company members are to secure the free, prior, and informed consent of Indigenous peoples

affected by their resource development projects. While they note that "CSR provides the business world with a conceptual framework that enables an approach to an SLO with the relevant communities," Ruwhiu and Carter (2016, p. 646) identify two relevant challenges in translating the worldviews held by Indigenous peoples while engaging with the company. First, the information about the project should be framed in a manner that makes sense to the affected Indigenous peoples. Secondly, they observe that, "the relevance and value of Indigenous knowledge that is more experiential and spiritual, as opposed to scientifically rational, is often downplayed in environmental assessment and planning processes" (p. 647).

In their concluding remarks, they note that, "to achieve the aspirations of the industry, the state and Indigenous communities, the notion of meaningful participation must be explored more deeply from the perspectives of all parties to enable a legitimate process of consultation" (p. 651). As is evident from the other management articles, we have seen that the perspectives of the corporation are well-understood — in addition to the tactics with which they strive to engage with Indigenous peoples. The role and involvement of third parties have also been studied (e.g., Arenas, Sanchez & Murphy, 2013). However, a gap in management literature on FPIC and the UNDRIP exists by failing to account for the perspectives of affected Indigenous peoples.

In sum, over the intervening years since the adoption of the UNDRIP by the United Nations General Assembly in 2007, various scholars have sought to bring understanding to the business implications of the relevant UNDRIP Articles — in particular Article 32, which affirms the right of Indigenous peoples to participate in decision-making in relation to resource development projects on their traditional land. On the surface, it may appear that stakeholder management strategies — including strategies and frameworks to obtain a social license to operate — would fulfill the increasingly accepted norm of seeking the consent of affected

Indigenous peoples. However, as discussed in the Indigenous peoples and human rights section above, FPIC and the UNDRIP represent unique, and *collective* human rights that are specific to offer redress for discrimination faced by Indigenous peoples whose human rights — even recognition as human beings — had been suppressed for centuries. Therefore, the firm-centric conceptual and theoretical frameworks of CSR, SLO, and stakeholder theory - based on the assumptions of equality of the person and individualism – are inadequate frameworks to apprehend the UNDRIP and FPIC. Instead, the UNDRIP and FPIC need to be examined on their own merit – outside of extant management literature - with full appreciation for the historical context in which they were developed and affirmed. Let us now turn to literatures outside of the management discipline to fully appreciate how an Indigenous-centred and decolonized approach is critical to meaningfully conceptualize and theorize about FPIC and the UNDRIP.

2.4 Non-management Literatures

In contrast to how FPIC implementation is understood within management literatures, we will now examine how it is understood by scholars outside of management. A comparison between the two literatures will reveal a gulf in understanding and approach. On the one hand, management scholars and practitioners tend to understand FPIC implementation from the market-oriented approach that treats it as another manifestation of stakeholder engagement, while on the other hand scholars from outside of management reveal that it is an entirely different process that cannot be subsumed under a status quo umbrella of stakeholder management. At issue is whether the processes and outcomes associated with proper or improper engagement strategies affirm or deny the affected Indigenous peoples to exercise their right to self-determination by participating in decision-making through their representative institutions.

To gain a deeper understanding about how FPIC implementation approaches may affirm or deny the rights of Indigenous peoples to self-determination, it is important to highlight the constituent components of self-determination.

Former UN Rapporteur on the Rights of Indigenous Peoples, S. James Anaya stated that the expression of self-determination has two integral components: autonomous governance and participatory engagement (Yaffe, 2018; Cambou, 2019). In other words, a process that meaningfully implements FPIC cannot be an externally imposed framework and should allow for the participation of the affected Indigenous people. Market-oriented approaches to FPIC will typically focus on the *outcome* (an agreement to secure the affected Indigenous peoples' consent) whereas a holistic approach to implementation is *processual* in nature (i.e., allows for expression of self-determination through autonomous governance and participatory engagement). With the backdrop of understanding the expression of self-determination as processual, we may examine non-management literatures about FPIC.

While Prno and Slocombe (2012) recognize that similarities exist between SLO and FPIC, they offer valuable differentiating features between the two. First, the primary responsibility that the right to FPIC is upheld remains a duty of the nation State, whereas SLO is a functional process that a corporation may obtain without State involvement. The international legal instruments (ILO Convention 169 and the UNDRIP) that specify Indigenous peoples' right to provide or withhold their FPIC hold that nation States are "duty bearers". As such, States are responsible for ensuring these rights are respected and protected (Haalboom, 2012; Nosek, 2017; Prno & Slocombe, 2012; Rodhouse & Vanclay, 2016). While one may be tempted to dismiss the applicability of FPIC as of no concern to corporate actors since the maintenance of the bundle of rights associated with FPIC and the UNDRIP is the responsibility of the State, it should

nevertheless retain significance for business because in practice the State will often discharge its duty to consult with Indigenous peoples to the interested project proponent.

A second differentiating feature is that FPIC must be secured from the affected Indigenous peoples *prior* to the commencement of the proposed project activities whereas, according to Prno and Slocombe (2012), SLO refers to a dynamic and continual relationship between the corporation and the relevant stakeholders. It should be noted that SLO, in a general sense, may be applicable to both affected Indigenous peoples and non-Indigenous communities — or in other words, both Indigenous peoples and non-Indigenous communities may grant a corporation the social license to operate.

This gives rise to the third differentiating feature between SLO and FPIC, which is that FPIC is only applicable to Indigenous peoples. Again, the international legal instruments which explicitly recognize the rights to FPIC are those that were drafted and adopted to offer redress to the unique social, historical, and political threats faced by Indigenous peoples by virtue of colonization and dispossession of land, culture, and identity. Contrast this understanding with Wilburn and Wilburn's (2011, p. 4) observation that, "a process for achieving FPIC and/or SLO ***beyond*** Indigenous groups has not been developed," (emphasis added); their interpretation of extending FPIC to groups beyond Indigenous peoples has no basis in international law. Having stated that, SLO may be applied to groups beyond Indigenous peoples.

Another important development discussed by Prno and Slocombe (2012) revolves around issues of governance. They note that over the course of the previous few decades, there has been a shift in governance on two dimensions — vertical and horizontal. In respect to the vertical governance shift, "*political power has moved up to transnational levels of government and down to local communities*", while it has also horizontally shifted from "*government actors to non-*

government actors" (p. 349). According to Prno and Slocombe (2012), these shifts have eroded the distinctions between public, private, and voluntary sectors; as a result, they argue that those who are affected by mining projects and operations should have greater influence in terms of political power and decision-making processes. As will be discussed in Nosek (2017) and Yaffe (2018) below, this theoretical argument did not materialize: affected Indigenous peoples continue to wield very little influence over the decision-making processes in relation to resource development projects.

Thereafter, Prno and Slocombe (2012) delve into a discussion within the Canadian context. They observe that Canada's constitution provides an overarching legal framework which defines a division of powers between the federal government and provincial or territorial governments. Of relevance to extractive industries, "the constitution thus enabled the creation of the modern rules that govern ownership and access to mineral resources; prospecting, staking and exploration activities; approval, operating and closure requirements; and public access to information and participation in mineral development activities" (p. 351). They observed that in addition to Canada's signatory support of the UNDRIP, numerous other agreements and institutional forces have influenced, "policy making and decision making in Canada" (p. 352). These trends and institutional forces create the foundation of legitimacy for pursuit of a human rights affirming FPIC implementation.

In the final sections of their paper, Prno and Slocombe (2012) conclude with robust discussions around issues related to market governance, civil governance, and hybrid governance — with many relevant and insightful contributions to note. In respect to market governance, Prno and Slocombe (2012) remarked that self-regulation and CSR initiatives are most relevant to [extractive] industries. Due to a variety of factors that contribute to the profitability matrix —

including the market rate; deposit size; market proximity; and regulatory, environmental, and social constraints — few prospected sites ever materialize into operational sites. Profit motivations feature prominently into whether a prospected site materializes into an operational site. These profit motivations and market-based orientations continue to feature prominently in the corporation's approach to obtaining a social license to operate. As a result of the above, Prno and Slocombe (2012) observe that CSR activities fall within a market-oriented governance, which will rely upon stakeholder management to obtain a social license to operate.

Thereafter, Prno and Slocombe (2012) offer a robust discussion about stakeholder management, including defining a stakeholder as an actor or group of actors who is/are affected by or can affect a business or its activities (from Freeman, 1984), and classifying stakeholders as either primary (market) or secondary stakeholders (non-market) categories (from Freeman et al., 2007). The rationale for engaging with stakeholders may be either instrumental or normative in nature - including ethical or moral reasons (from Donaldson and Preston, 1995); and stakeholder salience based on their power, legitimacy, and urgency (from Mitchell, Agle, and Wood, 1997). According to Mitchell, Agle, and Wood (1997), stakeholders who possess more attributes (power, legitimacy, and urgency) tend to receive greater attention from the relevant corporation. Prno and Slocombe (2012) argue that due to the power, legitimacy, and urgency attributes identified by Mitchell, Agle, and Wood (1997) local communities have become more salient in receiving corporate attention.

On the surface, the theoretical understanding of stakeholders readily lends itself to affected Indigenous peoples, and stakeholder management seems a logical set of processes to apply to FPIC implementation. However, Prno and Slocombe (2012) caution against such application of stakeholders to affected Indigenous peoples, citing civil governance issues. At least within the

Canadian context there is increasing recognition of Indigenous peoples as having, "powers somewhat analogous to those of provinces" on account of Section 35 of the Canadian constitution. Therefore, they assert that Indigenous peoples should only be defined as stakeholders at the basic level of understanding that they can affect and be affected by a business or its activities. In other words, affected Indigenous peoples ought to have more power in relation to decision-making than other "mere" stakeholders (for example, recreational users of a land) to shape the outcomes of the project.

Prno and Slocombe (2012) conclude their discussion by suggesting that the use of IBAs in Canada may be considered a form of governance that constitutes a hybrid between market governance and civil governance. As such, they are agreements between the affected Indigenous peoples and the corporation that address issues identified in the environmental assessment process — which is a required step in the approval process for any project in Canada. They state that IBAs are typically "negotiated directly between mine developers and Aboriginal communities with limited if any state involvement" (p. 354).

Prno and Slocombe (2012) offer three valuable contributions toward the understanding of the complexities associated with FPIC and the UNDRIP — especially in relation to SLO and CSR literatures. First, they recognize that FPIC is a sufficiently differentiated process from SLO and offer a few key distinctions between the two. When one has a sufficient understanding of the differentiating elements, one can resist the temptation to conflate FPIC with SLO or to subsume FPIC under an SLO umbrella. Second, they recognize that although FPIC is generally recognized as a duty of a nation State (versus that of a corporation) their discussion around the horizontal and vertical shifts of political power reveals that corporations take on an increased role in negotiations and consultation with the affected Indigenous peoples respecting the resource

development projects. Third, their discussion around corporate, civil, and hybrid governance models introduces the reader to the Canadian context of engagement with affected Indigenous peoples. This is particularly important because there is no uniformity in engagement processes — nationally or internationally. How States and corporations engage with Indigenous peoples depends upon whether the State is signatory to ILO 169, the strength of domestic Indigenous rights recognition and legislation, and other variables. Haalboom (2012) noted that the lack of uniformity or consensus around FPIC implementation may result in a corporation's reluctance to engage with affected Indigenous peoples to obtain their consent. However, this is a strawman argument as the very nature of FPIC is that no uniformity should exist because a meaningful FPIC implementation should necessarily involve the traditional decision-making institutions of the affected Indigenous people, which varies within and across nation States (Nosek, 2017; Yaffe, 2018).

A limitation of their contributions, however, is centred on the lack of discussion about how IBAs associated with a resource development project could be problematic for Indigenous peoples. This is elaborated upon in the Nosek (2017) and Yaffe (2018) discussions below. Another limitation of their article is that, although Prno and Slocombe (2012) offer a fairly comprehensive discussion about the Canadian context of engagement with Indigenous peoples, they do not touch upon the DTCA framework. This is a significant oversight because, while the framework approaches consent — particularly when contrasted to the history of wholesale dispossession and forced relocations in Canada — it is not an apparatus that allows for full expression of self-determination, nor does it require consent of the affected Indigenous peoples. Given that the DTCA framework allows for a project to proceed without the permission of the affected Indigenous peoples (Nosek, 2017) it cannot be a legitimate proxy for FPIC

implementation as their self-determination is necessarily violated if a project proceeds over their objection. Despite these limitations, Prno and Slocombe (2012) offer a robust, rich, and nuanced discussion about the relationship between FPIC, SLO, and CSR – as well as the interdependent relationships between the affected Indigenous peoples, and corporate and State actors.

Haalboom (2012) noted a negligible amount of literature in respect to the human rights dimension – particularly the human rights held by Indigenous peoples — within CSR frameworks utilized by extractive industries. Like previous authors who discussed FPIC implementation, Haalboom (2012) suggested that CSR governance is a means through which corporations may engage with affected Indigenous peoples about extractive industry projects. Haalboom (2012) remarked how the International Council on Minerals and Mining had become more responsive to engaging with affected Indigenous peoples and cited the inclusion of consent and consultation with various frameworks and standards, including — but not limited to — the World Bank, International Finance Corporation, the UNDRIP, among others. The increased adoption of corporate policies to fall into line with normative expectations associated with FPIC counters any arguments that businesses should not be held responsible for engaging with Indigenous peoples to obtain their consent. If corporate efforts are to be aligned with these emerging norms, they require nuanced understanding of a human rights affirming FPIC implementation if they are to obtain and maintain their social license to operate among affected Indigenous peoples.

Despite the gains in having their rights affirmed by international frameworks, it may prove difficult for Indigenous peoples to fully assert their rights when they reside in nation States that do not recognize their customary rights to land through domestic legislation. This was illustrated in the Suriname mine case highlighted in Haalboom (2012) whereby the affected Indigenous

peoples unsuccessfully sought redress for improper consultation. In the final analysis, Haalboom (2012) observed that corporate actors and affected Indigenous peoples (along with allied non-government organizations) have divergent interpretations on CSR objectives. On the one hand, corporate actors tend to focus on gaining support to realize the project, whereas Indigenous peoples, on the other hand, seek to advance Indigenous human rights vis-à-vis self-determination and its constituent components of autonomous governance and participatory engagement (representative of market versus holistic approaches). This tension between divergent goals of corporate actors and affected Indigenous peoples — a manifestation of the two-eyed seeing framework demonstrated by the square hole–round peg metaphor — is touched upon by Rodhouse and Vanclay (2016), Yaffe (2018), and Nosek (2017), to which we will now turn.

The central theme for both Rodhouse and Vanclay (2016) and Yaffe (2018) is centred around the divergent goals of a corporate-driven FPIC process and the original intent of the UNDRIP and its articulation of FPIC. Rodhouse and Vanclay's (2016) approach is more descriptive and theoretical with an aim to demonstrate that while similarities may exist between CSR and FPIC, they have substantially different normative foundations. They observed that CSR emerged in response to the concerns about the growing powers that corporations held in the wake of neoliberalism whereas FPIC emerged from the decolonizing institutional work undertaken by Indigenous peoples to seek redress for the impacts of colonization.

Extending the observation that FPIC and CSR emerged from divergent normative foundations, Yaffe (2018) cautions that it is not "appropriate to apply principles developed in the context of corporations law or the law of agency, both of which reflect individualistic liberal underpinning" (p. 707). After articulating the theoretical foundations of each, Rodhouse and Vanclay (2016) explored the possibility of FPIC being incorporated within CSR frameworks,

noting that: “Even though FPIC is being increasingly introduced into CSR performance standards and codes of conduct, neither international society nor CSR practitioners know how to effectively combine them” (p. 792). Both Rodhouse and Vanclay (2016) and Yaffe (2018) note increasing acceptance of FPIC among industry and corporate actors and provide examples of the same — including the International Council on Minerals and Mining (ICMM). While Rodhouse and Vanclay (2016) do not offer significant analysis of ICMM’s FPIC guidelines, Yaffe (2018) positions them as a prototypical case that exemplifies how corporate approaches to FPIC implementation undermine the intended goal of FPIC to advance self-determination.

Despite the differences between FPIC and CSR in both foundation and approaches to implementation, Rodhouse and Vanclay (2016) conclude that [genuine] FPIC implementation could be instrumental in improving the project proponent’s transparency and reputation while simultaneously reducing their costs associated with opposition and delays. They also caution that while genuine FPIC implementation may be beneficial to improving corporate social performance it may well be co-opted:

> “Although CSR practices and literature can gain much from the implementation of FPIC, it is the *right to FPIC* that is likely to be infringed. Corporate implementation of FPIC will likely change this human rights-based concept into one that is more compatible with a commercial context” (p. 791).

While they acknowledge that corporate implementation of FPIC may be instrumental in denying Indigenous peoples’ self-determination rights, Rodhouse and Vanclay (2016) do not offer deeper discussion about *how* this right may be infringed upon. We must look toward international human rights legal literature to gain deeper insight into how the rights of affected Indigenous peoples may be undermined through a corporate implementation of FPIC.

Yaffe (2018) and Cambou (2019) draw from Anaya’s (2009) interpretive guidance that self-determination is expressed through both autonomous governance and participatory

engagement to advance a human-rights affirming approach to FPIC implementation. The main idea advanced by Yaffe (2018) is that corporate actors should not be entrusted with the responsibility to design, implement, and evaluate FPIC processes – to do otherwise is to fuel the "normative drift" between the self-determination aspirations of affected Indigenous peoples and the commercial motivations of corporate actors. The emerging pattern for corporate and industry actors to design, implement, and evaluate FPIC processes is particularly problematic for two reasons.

First, Yaffe (2018) observes a strange paradox whereby:

> "the same commercial actors who are now FPIC standard-setters in some cases recently lobbied against Indigenous peoples obtaining the very land on which their bargaining position is based. This corporate opposition is consistent with the view that companies see FPIC practices in a narrow, commercial manner" (p. 709).

Therefore, the diligence of corporate actors to uphold rights which they had initially opposed may reasonably be called into question.

Second, corporate designed FPIC processes externally impose decision-making processes and structures on affected Indigenous peoples. This is inconsistent with the language of Article 32 (ii) of the UNDRIP:

> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned ***through their own representative institutions*** in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (emphasis added)

The UNDRIP not only makes explicit recognition of the need to utilize the affected peoples' representative institutions in the 32nd article but also affirms the right to maintain and strengthen them in articles 5, 27, 34, and 40 (Nosek, 2017). Therefore, if any FPIC engagement process is to maintain legitimacy on the grounds of affirming the self-determination rights of the

affected Indigenous peoples, it must necessarily utilize their decision-making institutions. Yaffe (2018) cautions that industry and corporate designed protocols do not adequately address these elements of self-determination and cited an example of a mining company's 100-page guidance report issued that is nearly devoid of discussion about self-determination, and where FPIC is "relegated to the 'background reader' appended ... to the report" (p. 732). While it may be disheartening to learn about such a lack of focus on FPIC in a guidance document, there are examples of positive corporate practices: Yaffe (2018) later acknowledges that a guide created by Foley Hoag LLP cautions against externally-imposed consent processes as being in direct violation of Indigenous peoples' self-determination aspirations and goals to revitalize their culture.

The utilization of the affected Indigenous peoples' decision-making institutions not only maintains and strengthens them — thereby honouring their right to self-determination – but also has practical implications. Nosek (2017) advises that by centring FPIC design on Indigenous peoples' representative institutions, it provides the affected Indigenous peoples with an opportunity to exercise their agency, express their priorities, and to ensure that their concerns are given adequate weight. Nosek (2017) provides numerous examples of how the concerns of affected Indigenous peoples are deemed as non-significant through a consultation process. For example, a case is cited where an Indigenous nation had been engaged with corporate consultations (as opposed to consent-seeking engagement) for a 50-year resource development project. Through the consultation process, the affected Nation identified food security concerns as their citizens depended on harvesting for anywhere between 70 and 90% of their diet. However, in the company's report, this concern was downplayed, and it committed to provide

compensation and to secure alternative sources for food and water in the event of environmental devastation and degradation.

While most authors of the non-management literature discussed above mention IBAs as being a representation or manifestation of consent from the affected Indigenous peoples, Yaffe (2018) identifies three problematic aspects about them. First, he expresses concern about the breadth of their span, often covering matters related to the Nation's "socio-political, economic and cultural affairs" (p. 710). An example of IBA overreach is illustrated in a case where the project proponent sought to include two provisions that effectively amounted to a "gag order" that obliged community leadership to suppress community dissent about the project (Yaffe, 2018). Second, he reports that FPIC is often approached as a means of engagement through *consultation* whereby the affected Indigenous peoples only express self-determination through voicing concerns. In many cases, these voiced concerns do not result in substantive — if any — changes to the project design. Thus, it does not entirely satisfy the terms of participatory engagement. They do not exercise autonomous governance, nor do they participate in decision-making about the proposed project. Third, IBAs and the negotiations undertaken in advance of their signing are typically held in strict confidence, thereby precluding scrutiny. As an example of the secrecy and confidentiality, members of an affected community were provided limited details about a project with only one month in advance of its signing in a recent case (Yaffe, 2018).

While Nosek (2017) does not explicitly name and analyze IBAs as such, considerable discussion about environmental assessments as a proxy for FPIC or consultation practices is presented. Within the Canadian context, when a proposed resource development project has the potential to impact the "Aboriginal rights" protected by Section 35 of the Constitution, the

Crown has a duty to consult and accommodate and is obligated to do so through corporate controlled environmental assessment processes (Nosek, 2017). As with FPIC, the Crown has the duty to consult and accommodate but will often delegate some of the procedural elements of it to project proponents.

It should be noted that the duty to consult and accommodate framework is *generally* not consent-seeking, as the government is *legally* entitled to proceed with a project in spite of objections by the affected Nation — although the Supreme Court of Canada (SCC) clarified that the consent of the Tsilhqot'in Nation is required for projects that occur within the 1700km^2 tract of land over which the court recognized their title. However, this ruling is very specific to the unique circumstances of treaty signing (or lack thereof) by the Tsilhqot'in peoples and not generalizable to other Indigenous groups across Canada. While there is inconsistency across Canada as to whether landmasses are covered by treaty or not, the standard of the duty to consent and accommodate is consultation and consent is required as the exception rather than the rule (Nosek, 2017).

As discussed above, the current engagement regime in Canada is for the Crown to discharge its duty to consult and accommodate framework, which is typically conducted through an environmental assessment process. According to Nosek (2017, p. 106), "Indigenous peoples have described the assessment process as formal, adversarial, and not conducive to real dialogue," and noted that they are often engaged too late in the approval process to meaningfully participate in project design or to shape the outcomes. Nosek (2017) also reports that a lack of capacity often exists that precludes meaningful participation with the assessment process. Compounding the effects of timing and capacity is the fact that many Nations face concurrent projects they are obliged to consider, leading up to "process fatigue." All too often, affected

Indigenous peoples report that their concerns are not taken seriously, and as noted above, are often summarily dismissed during the assessment process.

To summarize the Canadian context, the standard with which the Crown and corporate actors engage affected Indigenous peoples is to merely *consult* with them; consultation does not imply consent, nor does it allow for decision-making or the ability to shape the project design. The Crown will often delegate its duty to consult and accommodate to the project proponents and this is often done through a corporate-controlled environmental assessment process. Although the duty to consult and accommodate framework represents Canada's closest constitutional obligations that approach FPIC and consent-seeking engagement with Indigenous peoples, it may be considered as incompatible with the intent of FPIC, just as co-opted corporate-led FPIC guidelines fail to live up to the intent of FPIC. Many of the criticisms levelled at corporate-designed FPIC protocols also hold true for the environmental assessment process; in both cases Indigenous peoples must engage with an externally imposed process that does not affirm their right to self-determination expression through autonomous governance and participatory engagement.

Both Yaffe (2018) and Nosek (2017) call for Indigenous peoples' decision-making institutions to be revitalized and respected and to allow the affected Indigenous people to define consent (versus externally mandating a definition of consent) and to design FPIC protocols consistent with their decision-making institutions. Their call to approach FPIC implementation in such a manner is not new. Haalboom (2012) had reported that from a 2005 case in which the affected Indigenous peoples in Suriname had worked together with the North-South Institute, a non-government organization, to provide community-designed FPIC guidelines and protocols to the project proponent. However, the company had decided against using them, stating that "there

is a lack of international consensus on the application of FPIC" (p.976). Their statement of rejection is unfounded. As described above, FPIC that is meaningfully implemented — and consistent with Indigenous conceptualizations of self-determination — will necessarily utilize the affected Indigenous peoples' decision-making institutions. Given the unique histories, cultures, protocols, legal and other traditions of the myriads of Indigenous peoples, globally, there will never be international consensus as it is the right of each Nation to maintain and strengthen their own decision-making institutions. Any manifestation of externally imposed guidelines or protocols undermine the authenticity of FPIC implementation as it will discount the Indigenous nation's autonomous governance mechanisms.

2.5 Framing the Research Question

As is evidenced in the literature review section above, although there has been increased recognition on the part of state and corporate actors to better engage with Indigenous peoples affected by resource development projects, tensions exist between the intended outcomes of FPIC implementation and current practices. On the one hand, state and corporate actors (as well as management theorists) tend to focus on FPIC as a means to achieve legitimacy that ends in an agreement (typically an IBA). On the other hand, affected Indigenous peoples (and allied scholars) tend to focus on FPIC as a process that affirms their right to self-determination through autonomous governance and participatory engagement.

In pursuit of a reconciling framework to resolve the theoretical impasse about FPIC implementation, I would like to draw upon the notion of two-eyed seeing, which is a mode of inquiry that has been advanced by Indigenous and allied researchers in many disciplines including health and medicine (Cyr & Riediger, 2021; McKivett et al., 2020), environmental

management and sciences (Reid et al., 2021; Bartlet et al., 2012), and management (Colbourne et al., 2019). Organizational management scholars are likely familiar with bricolage (Boxenbaum & Rouleau, 2011) and may be tempted to consider two-eyed seeing as a form of it. Therefore, it is important to distinguish between the two modes of inquiry. Bricolage relies on metaphors and epistemic scripts to serve as the building blocks of new theory development, whereas two-eyed seeing "*refers to learning to see from one eye with the strengths of Indigenous knowledges and ways of knowing, and from the other eye with the strengths of Western knowledges and ways of knowing, and to using both these eyes together, for the benefit of all*" (Bartlett et al., 2012, p. 335).

Within management literature, Colbourne et al., (2019) articulate that the inclusion of Indigenous worldviews (including conceptions of relational interdependencies and self-determination) led by Indigenous researchers alongside Western research paradigms will offer a meaningful framework to advance reconciliation within the Canadian context. As previously discussed, Colbourne et al., (2019) and Bartlet et al., (2012) advise that the adoption of two-eyed seeing is not merely a matter of token inclusion of Indigenous worldviews, it requires that the respective discipline affords Indigenous worldviews and research methods with the same respect and legitimacy as the dominant Western paradigms. Management literatures have made clear how market-oriented corporations may engage with Indigenous peoples to obtain their consent. As evidenced through the review of the non-management literature, market-orientations to FPIC implementation deny the expression of autonomous governance and participatory engagement aspects of self-determination.

I would like to illuminate understandings about Indigenous approaches to negotiations to provide an alternative narrative to the corporate-driven approach to negotiations. Recall that "in

a good way" means to conduct oneself in a manner that honours spirit (Flicker et al., 2015). Another distinctive feature of "in a good way", as applied to maintaining relationships, is to be committed to mutual sharing and learning (Stock, Mares, & Robinson, 2019). This interpretation of "in a good way" aligns well with the two-eyed seeing metaphor that recognize the strengths and weaknesses of Western and Indigenous ways of knowing.

The proposed study will seek to answer the following questions (which are predicated on the exchange between affected Indigenous peoples and non-Indigenous owned resource development corporations that are required to engage with Indigenous peoples in Canada):

> **How can engagement practices that have historically been informed by the Duty to Consult and Accommodate framework better align with Article 32 of the UNDRIP? How do tensions, enablers, and barriers interact to produce (mis)alignment between the two frameworks?**

I recognize that one may reasonably question why this study chooses to focus on exploring engagement between Indigenous peoples and project with an eye toward alignment with Article 32 of the UNDRIP, which holds Crown and corporate actors to a higher standard, when the Duty to Consult and Accommodate framework is the current standard for engagement in Canada. There are several reasons for so doing as will now be discussed.

When the UNDRIP had gone to a vote at the United Nation's General Assembly, Canada stood as one of only four nations to oppose its passage. Former Indian Affairs Minister Chuck Strahl had dismissed it as *aspirational* and instead referred to Section 35 of the Constitution to demonstrate Canada's commitment to advance Indigenous rights (Parsons, 2008). In respect to the efficacy of Section 35 to protect and advance Indigenous peoples' rights, Gunn (2021) had noted that whereas Canada's constitutional recognition was groundbreaking for its time, this is simply no longer the case. To drive this point home, Gunn (2021) observed that UN Special Rapporteur on the Rights of Indigenous Peoples had witnessed a significant deterioration of

conditions experienced by Indigenous peoples across two successive tours of Canada (2004 and 2013) which led him to conclude that they had "reached crisis proportions" (p. 1065).

The position held by Chuck Strahl, namely that the UNDRIP is aspirational, was often accompanied with a dismissive statement that it is non-binding and that it does not apply in Canada. However, Gunn (2021, p. 1069-1070) argues that although the UNDRIP is a soft-law instrument, it still applies in Canada for a variety of reasons, the most compelling reason is that of the principle of conformity as discussed below. For context, Gunn (2021) is responding to suggestions that legislation is required for "reception" for international law to have effect within a given nation state.

> There are many technical aspects to the rules of reception, but the Supreme Court of Canada (SCC) jurisprudence is clear that declarations such as the UN *Declaration* can (and should) be used to interpret domestic laws, including the Constitution. However, this is not always broadly understood, even in the legal community. It is a well-established principle under the presumption of conformity that domestic laws, including the Canadian constitution, should be interpreted in accordance with Canada's international human rights obligations. (pp. 1069-1070)

In addition to the UNDRIP having legal effect in Canada, three significant events appear to signal that Canada is trending toward the higher engagement standards as outlined in Article 32 of the UNDRIP. First, Canada had fully endorsed the UNDRIP without qualification at the 2016 meeting of the United Nations Permanent Forum on the Rights of Indigenous Peoples (Gunn, 2021). Second, the federal government passed the United Nations Declaration on the Rights of Indigenous Peoples Act in 2021, which committed Canada to: [i] ensure its laws are in harmony with the UNDRIP; [ii] develop an action plan to implement the UNDRIP; and, [iii] report annual progress to Parliament (Department of Justice, 2023). Third, the federal government committed $11.4 million over a three-year period (beginning in the 2023-2024 fiscal year) to engage with

Indigenous nations to inform the development of new engagement practices that fulfill the Crown's duty to consult in support of implementing the UNDRIPA discussed above (Crown-Indigenous Relations and Northern Affairs, 2025). Taken together, these developments signal that current engagement practices will trend toward alignment with Article 32 of the UNDRIP.

The above story of Indigenous peoples and their struggle to achieve recognition of their inherent rights has been one of resilience and resurgence in their quest to seek redress for historic injustices. Smith (2012) and Gaudry (2011) and other Indigenous researchers have asserted that Indigenous research is necessarily about self-determination. Given the criticisms concerning the efficacy of Section 35 and DTCA to uphold the rights of Indigenous people to exercise their right to self-determination the current framework will not sufficient. This study will, therefore, be forward-looking to what Canada is trending toward and explore Article 32 and FPIC as the standard of choice for meaningful engagement between Indigenous peoples and project proponents. Let us now turn to discussion about the methods and methodology I will employ to answer the research questions discussed above.

Chapter III METHODOLOGY

> *"There has been a history of people being told to amputate a part of themselves to be able fit something that's rigid and not built for them in the first place … amputate your language, your spirituality … Part of what we are going to do now is a healing process in the sense of reclaiming wholeness." (Tafoya, 1995, p. 27)*

I have chosen to include the above passage because of its power to summarize in but only a few words the struggles that I have faced as an Indigenous person enrolled in a doctoral studies program for the past few years. In short, I have experienced competing demands that pull me in two very different directions. In one direction, I feel obligated to fulfill the academic requirements to complete my doctoral studies program. In the other direction, I feel a deep responsibility toward representing (or re-presenting in the words of Smith, 2012) Indigenous peoples in a good way. Therefore, it is important to choose methods that honour the plurality of Indigenous experiences, which will now be discussed.

3.1 – Indigenous Methodological Approach

A researcher's choice of methodology is of the utmost importance as it provides a framework for their research questions, methods, and subsequent analysis (Dunbar, 2008; Kovach, 2009; Smith, 2012). In addition to observing the critiques about Western epistemologies noted by Gaudry (2011), Kovach (2009), and Smith (2012), management scholars have also called into the question the dominance with which Western epistemologies are held within the discipline while silencing voices at the margins (Seremani & Clegg, 2016). In a recent article, Banerjee (2022) cautioned that "attempts to 'integrate Indigenous theories' into the mainstream inevitably depoliticizes and co-opts non-Western knowledge, leading to new forms of cultural

imperialism" (p. 1074). Dominant research paradigms tend to invisibilize the on-the-ground struggles of Indigenous peoples (Gaudry, 2011).

At the outset of this discussion, it is crucial to understand the difference between methodology and methods, as well as to understand how Indigenous methodologies are qualitatively dissimilar from Western methodologies. Wilson (2008) remarked that, "*methodology is a part of the paradigm that guides the research and is based on the assumptions of the ontology and epistemology … methods are the particular tools or techniques that you use to actually gather data*" (p. 39). Therefore, as one contemplates Indigenous methodology, they ought not conflate the methods with the methodology.

Wilson (2008) provides further insight by offering interrelationships between ontology, epistemology, methodology, and axiology and transposing it onto an Indigenous medicine wheel. However, as opposed to dividing the wheel into quadrants, he leaves the circle whole. An ontology may be considered as the nature of reality whereas an epistemology is composed of systems of thinking about that reality. Methodology "refers to the theory of how knowledge is gained", whereas axiology refers to the "ethics or morals that guide the search for knowledge and judge which information is worthy of searching for" (Wilson, 2008, p. 34).

To describe the key differentiating characteristic of Indigenous ontologies and epistemologies, Wilson (2008) observes that Indigenous peoples hold relationships as the defining feature of reality. To illustrate his point, he refers to a chair and demonstrates that the relationship of the chair to other things determines its reality. For some, it may be used for sitting. For others, it may be a doorstop. For himself (and likely other academics), it is a repository for unread journal articles. The chair's relationship to other things determines its uniqueness. He then notes that Indigenous languages describe things by their use and

relationship to other things. Nothing exists on its own and is only defined by its relation to other things. Wilson (2008) suggests that "ontology and epistemology are based upon a process of relationships that form a mutual reality. The axiology and methodology are based upon maintaining accountability to these relationships" (p. 70-71). With this foreground, we can now explore how I intend to employ an Indigenous research methodology for my proposed research and how this research is different from extant management literature about FPIC and the UNDRIP.

Returning to the observations made by Gaudry (2011), Kovach (2009), and Smith (2012), the assumptions held by the researcher determine which questions are pursued, which sets of information is included, and how it is analyzed relates to the researcher's methodology and axiology. As alluded to throughout the literature review section above, research about FPIC within extant management literatures are based on assumptions of transaction and outcome whereas a human-rights affirming approach to FPIC implementation is based on relationality and process. Therefore, an Indigenous-centered approach that employs an Indigenous methodology must be based upon assumptions of relationality and responsibility and accountability to those relationships.

Kovach (2009) observed that Indigenous methodologies and methods are not widely recognized within the academy (Kovach, 2009). Relatedly, while Indigenous scholars increasingly employ Indigenous methodologies, they do not follow a prescribed approach and have often forged a new methodological approach that ensures that chosen methods do not compromise the cultural integrity of their research (Dunbar, 2008; Kovach, 2009). At first blush, it may be tempting to therefore conclude that Indigenous researchers who employ Indigenous methodologies are held to a lower standard of academic rigor. However, this is simply not the

case. As noted by Wilson (2008) and Pewewardy (2019), Indigenous researchers who employ an Indigenous methodology have the added standard of having to justify how an Indigenous methodology is substantially different from more commonly accepted methodologies. In addition to justifying how their methodologies are different from established methodologies, Indigenous scholars - who have no referent established research methodologies - must often devise their own methodologies.

For example, Kovach (2009) crafted a *nehiyaw* (Plains Cree) methodology based on a tipi which includes the following steps: researcher preparation; research preparation; decolonizing and ethics; gathering knowledge; making meaning; and giving back. Consistent with Indigenous worldviews that are circular rather than linear, Kovach (2009) arranged these steps in a circle and they are intended to be iterative – meaning that the research journey may require the researcher to return to a previous step with greater insight gained from subsequent steps. The methodological approach created by Kovach (2009) has been adapted for use by other doctoral students[1] with whom I am familiar.

Through the efforts of previous generations of Indigenous scholars, the academy is increasingly recognizing Indigenous methodologies. Nonetheless, Indigenous methodologies remain decidedly fluid and depend upon the research question and whether the Indigenous researcher draws on their own group's ways of knowing (Drawson et al., 2017, Kovach, 2009). As noted by Wilson (2008), the methods chosen by an Indigenous researcher may be analogously viewed as a means of transportation and that so long as they cohere with Indigenous

[1] While one may argue that I may use this methodology as we are both "Cree", an important distinction is that Kovach is *nehiyaw* (Plains Cree) from the Saskatchewan region whereas I am *ethiniw* (Swampy Cree) from Pukatawagan Manitoba. Therefore, this methodological framework will not be used in my dissertation.

relational paradigms (based on ontology epistemology, and axiology), established Western methods may be imported and used within an Indigenous methodology.

Many Indigenous researchers have found that there is significant overlap between established Western qualitative research and Indigenous peoples' culture of storytelling and oral history (Denzin & Lincoln, 2008; Lavallee, 2009; Kovach, 2009; Smith, 2012; Wilson, 2008). Kovach (2009) aptly described qualitative methods as being naturally allied with Indigenous methodologies as they allow for multiple expressions of truth (or truths) and recognizes the inherent role of the researcher to construct and interpret findings. According to Morse (2018), qualitative research methods were originally utilised within sociological and anthropological inquiry. However, when other disciplines began to use qualitative research methods, they were met with consternation from quantitative research-minded "gatekeepers" within their respective disciplines as qualitative research methods were perceived to fail to demonstrate reliability and validity – a hallmark of scientific inquiry valued and accepted by quantitative researchers. In response to this challenge, numerous qualitative researchers, starting with Guba and Lincoln (1985), had begun to translate qualitative research into quantitative research. Guba and Lincoln (1985) had equated reliability and validity with "trustworthiness", which was defined by dimensions of credibility, transferability, dependability, and confirmability.

In a sense, Indigenous researchers are at a similar point in time where they are defining a place within the academy to gain acceptance for using Indigenous methodologies as were qualitative researchers in the period from the 1980's to 2000's. As will be discussed later in the analysis section to follow, an additional challenge faced by Indigenous researchers is how to respond to critiques about validity and reliability while remaining true to responsibilities associated with relational accountability. For now, it is important to note that while similarities

exist between qualitative research methods and Indigenous methodologies, a key differentiator between them is that the latter tend to incorporate cultural protocols, values, and worldviews as part of the methodology (Kovach, 2009; Lavallee, 2009; Smith, 2012).

Two examples that demonstrate the inclusion of Indigenous cultural protocols into methodologies include self-location and gift-giving. In respect to self-location, Indigenous peoples have traditionally identified themselves, their relations, and community when traversing through the territory held by other Indigenous nations. The inclusion of self-location as part of Indigenous researcher methodologies reflects this tradition and protocol (Absolon & Willett, 2005; Kovach, 2009; Lavallee, 2009). Additionally, it also enables the researcher to critically reflect upon their own biases in relation to the research they undertake (Kovach, 2009; Smith, 2012). Self-location may also be instrumental in establishing trust among prospective research participants (Absolon & Willett, 2005).

In respect to gift-giving protocols, Lavallee (2009) presented prospective research participants with an offering of tobacco. When one seeks knowledge or teachings from another person – typically Elders or knowledge keepers – protocol requires that the seeker provides detailed information about the sought-after knowledge accompanied with an offering of tobacco. If the knowledge keeper accepts the tobacco, they accept the terms upon which the tobacco was passed. In addition to the merits for following each protocol, it is important to note that these protocols allow the Indigenous researcher to uphold their obligations related to relational accountability. Additional means through which my research upholds relational accountability will be discussed in the sections that follow.

Before I describe the methods to collect data — or rather stories — it is important to define what is meant by relational accountability. Wilson (2008) summarizes relational accountability

in respect to Indigenous research methodologies as exhibiting the three R's (respect, reciprocity, and relationality) throughout four stages of research (choice of topic, methods, analysis, and presentation). Relationality is understood by Wilson (2008) to mean that "relationships do not merely shape reality, they are reality" (p. 7). Participants in Wilson's Research is Ceremony helped to further refine understanding of relational accountability as follows:

1. Researchers must form reciprocal and respectful relationships with participants and Indigenous communities.
2. Researchers must be connected to a community or a set of relationships. Additionally, it is important for the researcher to follow the given protocols of the given community to which participants belong. Research participants engaged with his inquiry herald from Indigenous peoples in Canada and Australia. When he engaged with Indigenous participants from Australia, he did not offer tobacco as he would for Indigenous participants from Canada.
3. Researchers must ensure integrity of information (respect). This is manifest through member checking to ensure that participants' voice is not misinterpreted during the writing and analysis process.
4. Researchers must ensure usefulness of information and research findings for the community (reciprocity).
5. Researchers are accountable for including participants in the analysis. An important distinctive feature is that where possible, analysis should be done by consensus such that each participant is provided exposure to not only their contributions but also those of other participants. This allows for them to reflect upon their own viewpoints and experiences and may be instrumental in shaping their learning. This

manifestation of relational accountability means that researchers are responsible to not only each participant *individually* but also the participants *collectively*.

6. Researchers are responsible for maintaining relationships with their family and community.
7. Relational accountability is maintained in how research is presented.

Grounded with an understanding of how relational accountability may be manifest, let us now turn to the methods that were employed in the collection and analysis of data.

3.2 Data Collection Methods

As previously discussed, Indigenous methodologies do not have a prescribed approach to collecting data. Rather, so long as an Indigenous methodological approach to inquiry is centred on relationality and relational accountability, any number of established and mainstream methods may be utilized (Wilson, 2008). Many Indigenous scholars have observed that qualitative research methods are aptly suited to explore research questions with Indigenous peoples due to the importance of storytelling and oral history held by Indigenous peoples (Kovach, 2009; Smith, 2012). Therefore, I engaged research participants with semi-structured interviews throughout the research.

While my thesis proposal included anticipated questions, they were subject to flexibility, depending on the answers provided by the research participants. At times, I asked follow-up questions to clarify their insights and offered my own anecdotes that corroborated their statements. An integral component of relational accountability is to include Indigenous peoples or communities in the process of research design (Wilson, 2008). The organization with whom I partnered for this study was provided with a copy of the interview protocol and they were

offered an opportunity to offer feedback on the research questions. Researchers must approach Indigenous peoples and communities with a goal of reciprocity and to give what the community deems as useful (Kovach, 2009; Wilson, 2008).

The approach of involving Indigenous peoples and communities throughout the research process is buttressed and required by Chapter 9 of the Social Sciences and Humanities Research Council's (SSHRC) Tri-Council Policy Statement (TCPS) about research with Indigenous peoples (TCPS, 2018). The ethics requirement around research that involve Indigenous peoples and matters maintain that the research should involve the partnership of an Indigenous nation or Indigenous organization — to which I adhered in this study — as will now be discussed.

3.2.1 Engaging with Indigenous Communities

To re-present FPIC implementation from Indigenous worldviews as outlined, engagement with Indigenous peoples and communities takes on heightened significance. The Tri-Council Policy Statement (TCPS) Chapter 9, outlines conditions under which a researcher is required to engage with relevant Indigenous communities (see Article 9.1):

a. research conducted on First Nations, Inuit or Métis lands;
b. recruitment criteria that include Indigenous identity as a factor for the entire study or for a subgroup in the study;
c. research that seeks input from participants regarding a community's cultural heritage, artefacts, traditional knowledge or unique characteristics;
d. research in which Indigenous identity or membership in an Indigenous community is used as a variable for the purpose of analysis of the research data; and,
e. interpretation of research results that will refer to Indigenous communities, peoples, language, history or culture.

Although my proposed research did not occur on Indigenous lands, items (b) through (e) were applicable to varying degrees. However, TCPS Chapter 9 acknowledges that, "if … participants are not identified with a community or that the welfare of relevant communities is

not affected, the REB may waive the requirement of a community engagement plan" and that individual consent is acceptable. Despite the fact that individual consent was an option to pursue, I chose to partner with the Indigenous Bar Association in the spirit of "giving back" to Indigenous peoples and nations with an engagement plan as outlined in the research partnership section below.

3.2.2 Research Partnership, Sampling, and Participant Recruitment

As I considered prospective research partnerships, I contemplated two strategic considerations: reciprocity impact, and participant recruitment strategies. With respect to reciprocity impact, I envisioned that my research may be considered useful by a wide set of Indigenous nations – potentially beyond a regional scale. Therefore, my first strategic decision was whether to pursue this research within a single Indigenous nation or a single case study, or multiple nations and multiple case studies. While there are doubtlessly many benefits in terms of data richness associated with a single case study, the insights offered by that single study may be an anomalous experience — good or bad — between the affected Indigenous group and the corporation involved with it. Therefore, this research sought to include the voices and experiences from multiple Indigenous nations.

It is crucial to point out that the proposed research is not intended to generalize the lived experiences of groups of Indigenous peoples under a pan-Indigenous umbrella. Instead, it strives to honour of the diversity of Indigenous peoples while exploring common experiences shared across Indigenous nations related to divergent understandings about FPIC implementation held by corporate and Indigenous actors in Canada. As noted by Smith (2012) and Wilson (2008), Indigenous peoples often share more in common across international borders than they do with

settler peoples within their own borders on account of similar experiences and discrimination related to colonization processes and attempted assimilation.

Drawing from my experience interviewing participants about negotiations between Indigenous peoples and corporate actors for the Overdue Diligence video series, I noted that similarities exist across diverse Indigenous peoples and communities with respect to how their unique interests are not respected by the current regime of corporate engagement with affected Indigenous peoples. I am confident that approaching this research question with participation from multiple Indigenous nations will strengthen its relevance and reciprocity for Indigenous peoples rather that detract from it.

I employed a purposive sampling technique, which is quite often associated with qualitative research as the researcher samples from populations best able to answer the research question (Leavy, 2017). Given that the research intends to explore the economic development priorities and self-determination aspirations of affected Indigenous peoples — as well as relationship building and negotiation strategies — research participants were selected based on their involvement in such negotiations. While the participation of elected leadership may be the *prima facie* obvious participant pool, they may lack historical continuity to formerly negotiated projects and be unable to speak to them from an insider perspective. Further, as noted by Yaffe (2018) and Nosek (2017), their participation in this research (or, more precisely, their ability to speak to any portions of negotiations) may be precluded by confidentiality clauses negotiated in their IBAs. Therefore, a desirable pool of participants is those whose professional experience is centered on negotiating on behalf of affected Indigenous.

In consideration of reciprocity impact and participant recruitment strategies, I partnered with the Indigenous Bar Association (the other IBA), which is a non-profit organization in

Canada. Its membership is comprised of 330 lawyers, judges, legal scholars, and law students who identify as Indigenous peoples in Canada. By virtue of their association mandate and membership constituencies, they may be considered as a "community of interest" under TCPS Article 9.4 and allowable for consideration as effective means of engagement with an Indigenous community. I had first approached them while I worked on my Research Ethics Board (REB) application in January of 2023. As the decision of a potential research partnership was made at the board level (which met monthly), a letter of agreement was finalized on June 02, 2023.

Through the research partnership agreement, the IBA also assisted in the recruitment of participants amongst its membership. Two participants came forward in response to the first communication email that the IBA sent to its membership. An additional member of the IBA was not able to participate in the research directly but made connections with members of their network. This is not dissimilar from a participant recruitment technique employed by Wilson (2008) who started with members of his personal network and subsequently engaged in snowball sampling techniques. This strategy is not only effective in terms of identification of participants who meet the participation criterion but also is a culturally appropriate means through which a researcher may build relationships with prospective participants.

Wilson (2008) observed that the use of intermediaries reinforces relational accountability because of the use of an intermediary to "vouch" for the researcher's credibility and sincerity to approach research in a good way. An additional culturally appropriate dimension is that the use of intermediaries allows a prospective participant to decline offers of participation, as it is considered a *faux pas* to directly do so in many Indigenous cultures (Wilson, 2008). Prospective participants may also rely upon the intermediary to discuss the researcher's motivations for conducting the research.

Throughout the data collection process, a total of ten participants were interviewed by employing purposive, snowball sampling techniques discussed above. While ten participants may *prima facie* present as an insufficient number to conduct qualitative analysis, it is important to consider bear in mind three considerations. First, there are so few Indigenous lawyers whose practice involve negotiations of this calibre in Canada that the *n* of research participants represents approximately 30% of the total available subject pool. This estimated statistic was presented to me during a conversation at the Indigenous Bar Association conference in October of 2023. Second, theoretical and data saturation was produced across the research participants. Third, many Indigenous researchers have explored underexamined topics related to Indigenous matters using a similar – if not smaller pool of research participants. Carrière (2018) reported a series of studies undertaken by Indigenous researchers that utilized a small number of participants ranging from one to fifteen participants. While not common, I am satisfied that the research participant *n* is sufficient to move forward with analysis for the reasons listed above.

3.3 Data Analysis

I had taken an Indigenous methodologies course in the first term of my doctoral studies. An important takeaway from this course was the importance of analyzing data in a way that is consistent with how Indigenous peoples view themselves. Indigenous (Kovach, 2009; Wilson, 2008) and decolonizing (Banerjee, 2021) scholars have argued that Western standards for analyzing data is incompatible with Indigenous methodologies as they may result in inaccurate representations about Indigenous peoples. Therefore, data analysis should be consistent with Indigenous methodologies and be held to a standard of relational accountability. Not to discount the prospect of qualitative researchers to misrepresent Indigenous peoples, as I have learned

more about qualitative research analysis, I realize that goals of academic rigor and maintaining the relational accountability required of Indigenous methodologies are not entirely discordant. So long as the Indigenous researcher employing an Indigenous methodology (epistemology, ontology, axiology, and methods) remains centred in the objective of maintaining relational accountability as part of the data collection and analysis phases of research, they may use methods that allow them to maintain academic rigor.

Meadows and Morse (2001) reported that qualitative research may be descriptive or interpretive in nature and may be accompanied with hard and soft data sets, respectively. To demonstrate rigor, a researcher must apply standards of validation and verification to the hard and soft data sets, respectively. The data collected is arguably highly subjective in nature as it seeks to understand the experiences, goals, and motivations of Indigenous actors within the context of negotiations with resource development proponents. As such, it resulted in the collection of a soft data set. Morse (2018) reports that "subjective phenomena are … partial representations, because they are interpretive … [t]hey are reality from the person's perspective, which is what meaning is all about" (p. 1386). Morse (2018) then offers a number of strategies for verifying soft data, including verifying statements vis-à-vis member checks and saturation.

In respect to verification through member checks, Morse (2018) notes that a researcher may verify information with other participants, including the original participant. This is quite like the approach advocated by Wilson (2008) who associates member checking with relational accountability. After each interview, I immediately set out to transcribe the interview via Adobe Premiere Pro's transcription feature and reviewed the output for accuracy while listening to the recording. Interview transcripts were provided to interview participants for verification and accuracy. All participants agreed with the transcriptions provided to them.

I would like to share a funny anecdote about using Adobe's speech-to-text transcription feature. The accuracy rate was dependent upon two features: first, the clarity of the participant's voice and, second, language used. One participant had identified as a member of the *Haudenosaunee* nation, and in response to one of my questions responded, "I am going to give you a very *Haudenosaunee* answer," which was mis-transcribed to "I am going to give you a very hot-and-shiny answer". I subsequently shared this with the participant when I provided them with the completed transcription. This participant shared this story with the emcee of the opening plenary on the conference's second day who, in turn, included it in her opening remarks. Hot and shiny had later became a running joke at the Indigenous Bar Association's conference.

Beyond the merit of verification from the perspective of Western paradigms, Wilson (2008) offers that an added dimension of Indigenous methodologies is that the researcher is accountable to build relationships between participants and to facilitate the learning process between them; he strongly recommends engaging them early in the data analysis and providing them with an opportunity to learn from one another's contributions and insights. In October of 2023, I had the opportunity to host a workshop session at an Indigenous Bar Association conference and shared with them tentative analysis of findings from my research. I had presented the square hole/round peg metaphor and its associated human rights affirming elements that are stripped off through a corporate implemented process and presented some preliminary findings and insights from the seven interviews I had completed to date. My IBA contact had distributed informed consent forms among the audience while I had announced that to make use of their contributions and insights, I was required to have their consent forms signed. Although there were upwards of 15 workshop attendees to provide reflections, only two consent forms were

signed and returned to me. Therefore, the transcript from this workshop will not be used in chapter four (Findings).

However, I feel that it is appropriate to share the general sentiment of what was shared. Workshop attendees had agreed that the pursuit of knowledge around how to better align current engagement practices with the UNDRIP is worthy of pursuit as the laws and standards are changing. Reflections were shared to not generalize all Indigenous nations under catch-all terms or terminology, and to be able to represent the diversity of experiences, goals, and aspirations held by this diverse set of Indigenous nations within Canda. I have taken this to heart as I have engaged with the data provided by the interviews and subsequent analysis.

In addition to this friendly advice against making sweeping generalizations about distinctive and unique Indigenous nations, workshop participants had provided reflections that served to confirm several findings, including concepts such as fait accompli, land use mapping, engaging with Elders and knowledge keepers, early engagement, as well as some of difficulties encountered when large-scale proponents engage with multiple affected Indigenous nations — each of whom have their own development priorities. These reflections shared by workshop attendees served as verification of the information shared by research participants, which bolsters its credibility. Their insights were also helpful as I moved from first-order coding to second-order codes, and conceptual codes, and confirmed that I was on the right path to understanding and making sense of the data.

Morse (2018) also noted that the production of data saturation is another means through which data may be verified. The production of data saturation occurs when the inclusion of additional participants yields “similar instances of the phenomenon, so that certainty is incrementally built” (Morse, 2018, p. 1392). Data saturation may also be used as a measure for

the researcher to know when they have sampled a sufficient number of participants. When a researcher achieves data saturation, the inclusion of additional participants does not yield any new insights or data (O'Reilly & Parker, 2012). Data saturation was produced after interviewing ten participants. As evidence of this, my informed consent form included an option for participants to engage in an analysis review after completion of the write-up. Four of the ten participants had indicated interest in participating in a group follow-up meeting to whom I had reached out to ascertain interest and availability. Two of these four participants were able to meet with me to review my findings in March 2025. In response to reviewing my findings and analysis, Participant 10 had remarked that they were amazed at how similar the experiences of the other participants were to their own and stated they were glad I gave them their participant number because the words of any one of the other participants could very well have described their experiences in dealing with project proponents.

Gioia, Corley, and Hamilton (2013) recommend that "first-order analysis" should remain as true as possible to the terms used by research participants, and to subsequently cluster first order items into second-order themes, which are more manageable in number; upwards of one hundred first-order categories may be pared down to twenty-five second-order themes. Consistent with the recommendation by Gioia, Corley, and Hamilton (2013), I had coded transcripts in NVivo software using a grounded approach. At the conclusion of first order codes, I was surprised to have identified an initial number of 278 codes. As I considered how to meaningfully answer the research question with an unmanageably large number of codes, it became evident that an analytical framework was necessary.

To develop an analytical framework, I returned to the text of Article 32 in its entirety to develop an analytical framework. At this juncture it is noteworthy to observe that several

scholars have cautioned against interpreting Articles of the Declaration independent of others; in other words, to be meaningfully apprehended, the UNDRIP must be interpreted in its entirety (Warnock, 2021). For example, Nosek (2017) observed that the utilization and strengthening of a nation's decision-making institutions noted in Article 32, is affirmed elsewhere under Articles 5, 27, 34, and 40.

In its entirety, the UNDRIP affirms the right of Indigenous peoples to exercise self-determination, including the right to provide or withhold their free, prior, and informed consent. Therefore, FPIC as affirmed in Article 32 cannot and should not be interpreted without the guidance of relevant articles affirmed in the Declaration. Recognizing that a full analysis of alignment of current engagement practices with the entirety of the UNDRIP would prove both impractical and cumbersome within the confines of a dissertation, analysis of alignment will be limited to Article 32 of the UNDRIP. It is crucial to further recognize that both the current engagement practices and interpretation of Article 32 implementation are not static institutions but rather are subject to continuous evolution as Indigenous peoples, State and corporate actors interact with one another through negotiations, agreements, and litigation processes. Having noted caution over interpreting Article 32 independent of other Articles, let us now turn to the text of Article 32 to develop an analytical framework.

> **Article 32**
>
> **1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.**
>
> **2. States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.**

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

From the text above, Article 32(i) affirms the right of Indigenous peoples to determine and develop priorities, which is the only component for analyzing alignment with Article 32[i]. Article 32(ii) has two discrete components for analysis: first, States are to consult and cooperate with Indigenous peoples through the representative institutions of the affected Indigenous peoples; and second, the right of Indigenous peoples to provide their free, prior, and informed consent before the approval of projects that affect their lands, territories, and other resources. Finally, Article 32(iii) has two discrete components for analysis: first, States are to provide mechanisms for redress for impacts of resource project activities; and second, mitigation efforts should be undertaken to limit environmental, economic, social, cultural, or spiritual impacts. A summary of these analytical components is offered in the table below.

Once I had developed the analytical table 3.1 (see below), it became easier to manage the 278 unique codes, which were then aggregated toward alignment or misalignment with each of the five discrete components of the UNDRIP Article 32. As I considered the data, codes were analyzed to answer whether it described a condition, action, or trait that served as an enabler or barrier toward alignment with Article 32 based on the table 3.1. Some codes described important phenomenon that were significant in nature but were neither an enabler nor a barrier. These were aggregated as tensions. An enabler was operationalized as a variable that does not produce direct alignment but rather creates conditions upon which alignment may be produced. A barrier was operationalized as a variable that does not produce direct misalignment but rather creates conditions upon which misalignment may be produced. Tensions were operationalized as conditions that represent competing or conflicting worldviews, goals, or orientations that served

Table 3.1 – Article 32 Alignment Analysis

	Article 32 Language	Alignment	Misalignment
Article 32(i)	Right to determine and develop priorities for development or use of lands, territories, and other resources	Practices and conditions that foster the ability to develop priorities and determine use of lands, territories, and other resources	Practices and conditions that undermine the ability to develop priorities and determine use of lands, territories, and other resources
Article 32(ii)a	States shall consult and cooperate in good faith with Indigenous peoples through their own representative institutions	Practices of consulting and cooperating with Indigenous peoples through representative institutions	Practices of not consulting and cooperating with Indigenous peoples through representative institutions
Article 32(ii)b	States shall obtain free, prior, and informed consent prior to approval of projects affecting their lands and resources	Practices that seek free, prior, and informed consent	Practices that do not seek free, prior, and informed consent
Article 32(iii)	States shall provide effective mechanisms for just and fair redress for such activities	Practices that provide redress for impacts related to development activities	Practices that do not provide redress for impacts related to development activities
	Appropriate measures to mitigate adverse environmental, economic, social, cultural, or spiritual impact	Practices that promote mitigation efforts around environmental, economic, social, cultural, or spiritual impacts	Practices that do not promote mitigation efforts around environmental, economic, social, cultural, or spiritual impacts

to guide actions and behaviours of each side of the negotiation (i.e., Indigenous peoples versus project proponents). These tensions exist outside of the engagement practices (i.e., are not produced as a result of the engagement processes), many of which can be considered as pre-existent to the engagement processes. This round of analysis yielded seven unique tensions, ten

enablers, and seven barriers. These enablers, barriers, and tensions were then aggregated to a conceptual level to produce a conceptual model, as presented in chapter five.

As noted above, I had included two research participants in the interpretation and analysis phases which serve to bolster the relational accountability with which I have undertaken this study, as discussed by Wilson (2008). By so doing, I believe that the analysis presented in chapter five are consistent with Indigenous peoples' self-representation and with their worldviews. As an urban *ethiniw* person, I do not have the same lived experiences as those communities who are more directly affected by resource development projects nor those who negotiate on their behalf. I carry my own biases and ways of interpreting statements, stories, teachings, and laws.

Therefore, it was important that my analysis was not left alone to my narrow experiences, which is why I chose to involve the research participants to review my findings before final submission of my dissertation. This approach is consistent with the stances of Kovach (2009) and Smith (2012) and other Indigenous scholars who argue that Indigenous peoples have the right to determine how they are represented in research findings. Relational accountability requires involvement of participants in the analysis (Wilson, 2009). Article 9.17 of TCPS also observes that the community should be afforded, "opportunity to participate in the interpretation of the data" prior to completion of the final report.

Additionally, I disseminated my findings to each research participant and through the Indigenous Bar Association as outlined in our research partnership agreement. Such dissemination strategies uphold reciprocity responsibilities required by Indigenous methodologies. Research must never be extractive and should always "give back" to affected communities of Indigenous peoples (Gaudry, 2011; Kovach, 2009; Smith, 2012; Wilson, 2008).

This spirit of reciprocity is also reflected throughout the TCPS Chapter 9 – particularly within Article 9.17:

> Final reports shall be made available to the territorial or organizational community or community of interest participating in the research. Researchers and communities should clarify the extent to which research findings will require translation, plain language summaries or oral presentations to community members, in order to make the research findings accessible to the community.

3.4 Concluding Reflections

The foregoing outlines the context, background, and methods related to my research question, which (as a reminder from chapter two) seeks to answer the following:

> **How can engagement practices that have historically been informed by the Duty to Consult and Accommodate framework better align with Article 32 of the UNDRIP? How do tensions, enablers, and barriers interact to produce (mis)alignment between the two frameworks?**

I am honoured to have been able to partner with the Indigenous Bar Association on this research and to have had as many experts, knowledge keepers, advocates, and (for the lack of a better word) changemakers recognize the importance of answering these questions. Not only did they recognize its importance in answering these questions they also stepped forward and freely gave of their time to help answer them. Given the geographic diversity of their locations, I had to rely on technology to meet with them. Humour is a trait that is shared across many Indigenous nations, and I feel that despite the vast distances that physically separated us, we were nonetheless able to build rapport through our sharing of laughter and stories.

I had offered tobacco to each participant as part of the interviewing process to introduce cultural protocols into this research. All participants accepted the tobacco and in so doing agreed to approach our time together in a good way and to freely give of their knowledge and speak

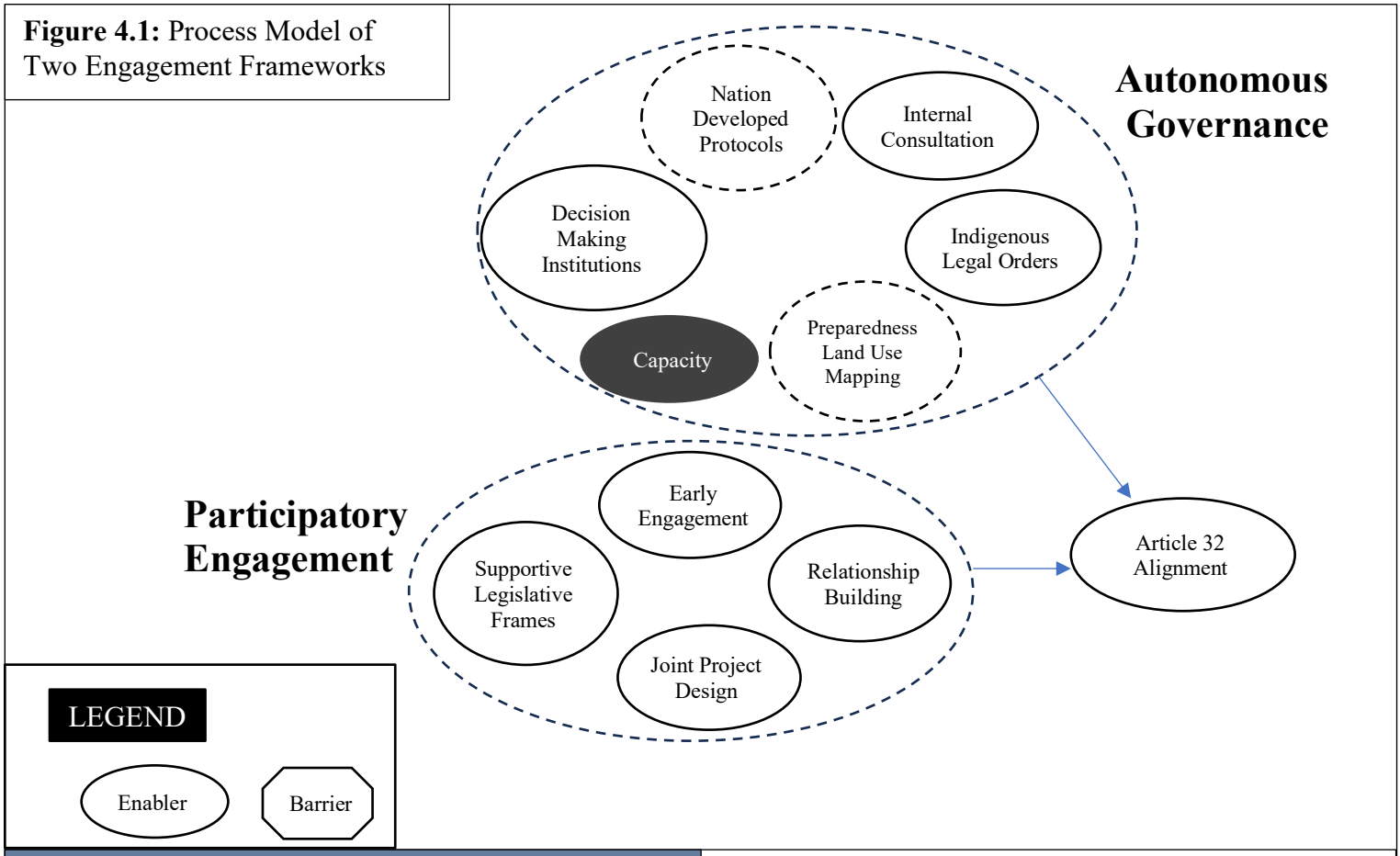
truthfully. I hold their words and truths with humility and am honoured to now share their words and their truths in a good way.

Chapter IV FINDINGS

This research aims to answer *how can engagement practices that have historically been informed by the Duty to Consult and Accommodate framework better align with Article 32 of the UNDRIP? How do tensions, enablers, and barriers interact to produce (mis)alignment between the two frameworks?* as noted in chapter two. As will be demonstrated in the pages to follow, while these two frameworks (current engagement practices and Article 32) are misaligned on a variety of bases, there are positive signals that some alignment exists. Participants have shared vignettes, experiences, and insights that illuminated variables that may be classified as enabling alignment with Article 32 of the UNDRIP or as barriers that produce misalignment with Article 32 of the UNDRIP. Additionally, participants identified tensions and pre-existing conditions or states that represent competing interests, goals, or ontological understandings around engagement strategies between project proponents and the Indigenous peoples affected by those projects.

A visual overview of the findings, based on the data, is provided in Figure 4.1 on the following page, which may be helpful to foreground the discussion of findings to follow. The diagram at the top of the page depicts Article 32 aligned strategy which is comprised of enablers that, bundled together, form two conceptual categories (autonomous governance and participatory engagement). It should be noted that two enablers within the autonomous governance category (nation developed protocols and preparedness and land use mapping) are presented with a dashed ellipse. The dash is representative of the fact that they are not common to all Indigenous nations. Also, capacity is shaded in black to denote that it may serve as a meta-enabler as will be discussed later in this chapter.

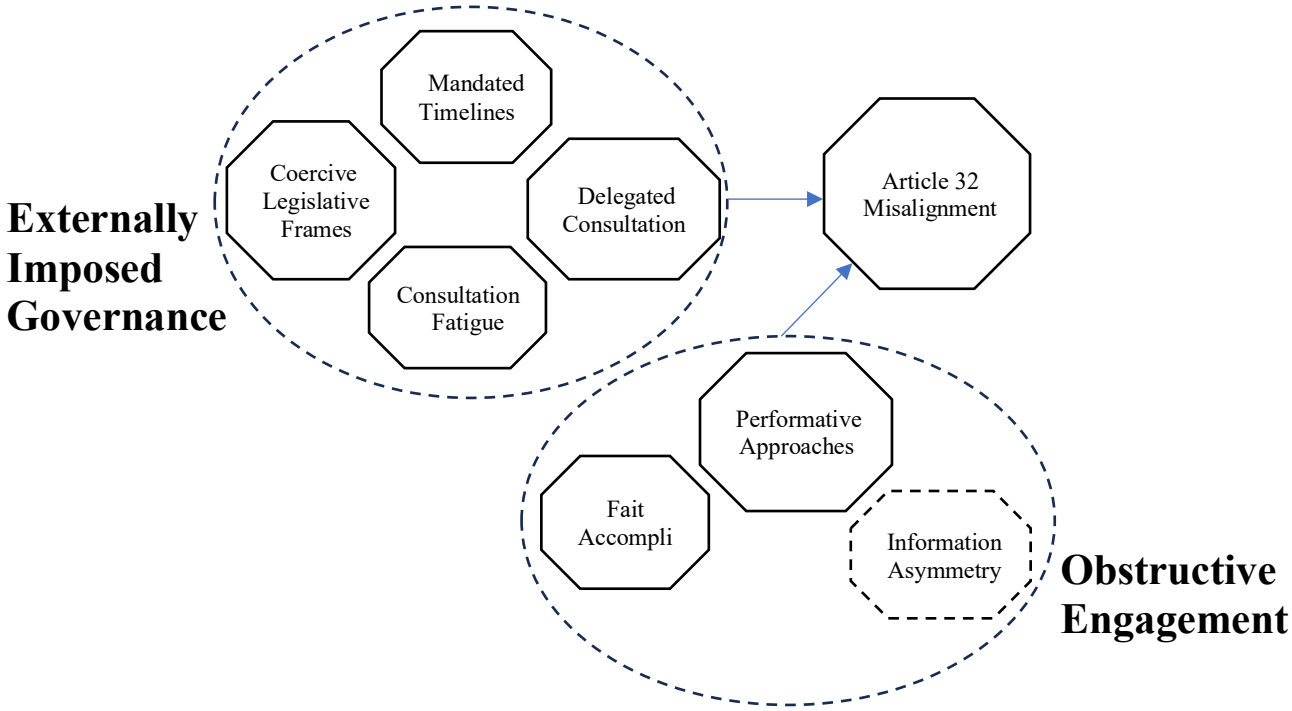
Figure 4.1: Process Model of Two Engagement Frameworks



TENSIONS and PRE-EXISTING CONDITIONS associated with ontological perspectives held by parties to negotiations

- Self-determined projects vs. externally-initiated projects
- State Duty (FPIC) vs Honour of the Crown (DTCA)

- Interpretive Frames
  - Temporal Orientation
  - Impact vs benefit
  - Redress vs mitigation
  - Defining consent (including FPIC)
  - Identification of rightsholders



The diagram at the bottom of the page depicts Article 32 misaligned strategies that are comprised of barriers that, bundled together, form two conceptual categories (externally imposed governance and performative engagement). Tensions are depicted in between the two strategies to signify that they apply to engagement processes regardless of whether alignment is produced or not. Let us now examine the tensions described by participants.

4.1 Identification of General Tensions

As we explore whether current engagement practices align with Article 32 of the UNDRIP — and enablers and barriers toward the same — it is important to note several over-arching tensions identified by participants that exist in relation to the divergent goals, worldviews, and desired outcomes between the affected Indigenous peoples and the project proponents. These tensions are dynamically related to their approach to implementation of engagement practices. Several participants spoke of these tensions and its applicability to whether Indigenous peoples can freely and fully exercise their right to self-determination as affirmed in Article 32 of the UNDRIP, as will be discussed below.

4.1.1 Self-Determined Projects vs. Externally Initiated Projects

Several participants had spoken about the norm for Indigenous peoples to respond to requests from external parties who wish to advance resource development projects on their lands, rather than to determine the development of these resources on their own accord.

Participant 6 spoke to this tension as follows:

> Looking at that Article 32 again, Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their land or territories or other resource and other resources. This is the one I feel, like, that is, we're still far away from that, right?

> Because, yeah, I mean, you may have a community that, like, at the end of the day gets a really good IBA and gets good benefits and they may actually support the project. But can it be said that they really had a role in determining that the priorities and for the development of their territory? Like, no, they've had no – there was no regional planning for the most part going on where communities decided: "yes, we want a mine" or "no, we don't". I think that [alignment under Article 32 subsection] number one is not happening.

Such insights suggest three problematic areas of concern related to when Indigenous peoples respond to externally initiated resource development projects. First, such projects may run counter to what priorities the affected Indigenous peoples may have for the development of resources on their land. Second, the presentation of such projects to the affected Indigenous peoples may precede the regional planning that the Indigenous nation may wish to undertake as part of exercising their right to ***determine and develop priorities and strategies for the development or use of their lands or territories and other resources*** as affirmed in Article 32(i). Third, the participant implicitly suggests that while IBA's reflect a contractual agreement between the affected Indigenous peoples and resource development project proponent, it ought not be conflated as reflecting consent as envisaged by Article 32 of the UNDRIP.

In addition to the tension at a fundamental level, Participant 2 had related this tension to environmental impacts associated with the project:

Participant 2:

> It seems to be at the core of most of the communities who I work with their concerns – particularly if they're working on projects that are not their own, but projects that are being initiated by outside actors and that are highly invasive or highly extractive resources, things that will have a large impact. I think their primary concern is, is not, you know, "how can we economically benefit from this project?" or "how can we get our kind of the deal?", but "how can we actually ensure that if this project goes ahead, it's done in a way that lets future generations of our community still rely on the lands and live off the land and live off their resources and use the waterways and just preserve it for future generations?" Like that is almost kind of the first consideration and that it's only once there is comfortableness that, that a project can

> proceed in a way that actually ensures that the land won't be incredibly devastated – that it can still be used or relied on for future generations.

The insight that the affected Indigenous nation's first priority is to ensure minimal environmental impact (or sufficiently mitigated to reduce impacts) prior to exploring economic or other benefits is corroborated with contributions offered by Participant 7, who had also observed that FPIC engagement will build confidence toward this end.

Participant 7:

> Free, prior, informed consent is the vehicle. It's the hinge. It's the tool through which you achieve that recognition and implementation of that right. And as I mentioned, it varies. In some instances, it has been very effective. And we often see the vehicle of equity or, like, participation in major projects as a means of ensuring that free prior informed consent is achieved through both the dialogues necessary to ensure that First Nations and others have sufficient confidence that the project won't adversely affect their spiritual, cultural or environmental interests or rights and the economic benefits and upside to ensure that any environmental or spiritual or cultural impacts are appropriately mitigated through benefits or compensation or other tools so that you're seeing an upside, you're seeing a value to the First Nations for participating in the project.

Given that Article 32(iii) is centered on mitigating adverse environmental, economic, social, cultural or spiritual impacts associated with resource development projects, this tension is closely related to the intersection of Article 32(i) and Article 32(iii). In other words, environmental stewardship as well as mitigating environmental impacts of resource development projects will often – but not always – feature prominently into the developmental priorities of affected Indigenous peoples.

4.1.2 State Duty (FPIC) vs Honour of the Crown (DTCA)

It is critically important to note that under the Duty to Consult and Accommodate framework, the Crown will normally discharge its Duty to Consult by delegating the procedural

elements of consultation to the project proponent. This norm is associated with a tension — specifically, that although the Crown (state actor) is responsible for upholding the Indigenous nation's right to self-determination, they are reliant upon the corporation to conduct the engagement with the respective nation.

Participant 3:

> The consultation process across Canada is, for the most part, delegated from the government, right? From the provincial and federal crown on to proponents. And that in and of itself is not always the best mechanism to reach free, prior, and informed consent because it's a game of telephone, to a certain extent, between regulators and the crown. On one hand, project proponents who have been delegated to go consult and accommodate with these nations, and then we'll give you your permit and the nations themselves who on the other hand may be seeking accommodation directly from the proponents.

It should be noted that delegated consultation does not necessarily produce misalignment with Article 32 of the UNDRIP. In fact, three participants shared experiences about how the project proponent had been motivated to meaningfully engage with affected Indigenous peoples – more so than the nation's interactions with the Crown.

Participant 2:

> I think corporations are -- well, the ones who I've had most recent engagement with -- seem to be doing a pretty good job. They seem to be engaging early. They seem to be very responsive to information requests to building relationship with community. They seem to be very responsive to meeting with communities in their community to put in the time and effort to build that that space with a couple notable exceptions.

Participant 9:

> I did have a duty to consult case, but that was after everything had gone south and I hadn't been active on the actual file itself for the community. But for that same community I had actually been active on an IBA and yeah, I mean, I think that they're interesting instruments – IBA's - you know, they're sort of propped up as being a model of getting to consent. And, you know, I thought the company that was dealing with my community was pretty good, although the, like, there wasn't … I don't recall the government of the province being all that engaged. It was more the company being engaged. And I think that that's good that they really were, and I

> thought the council that were working for them really were strongly encouraging their community that that was the best approach.

Participant 10:

> I would say often corporations are amoral in the end. I'm not saying that in a way that it's awful. But that's the reality of what you know, that's what they are. They're there to maximize profit. And I think fortunately, the good news is, is that as part of that, that actually effective consultation and accommodation is often consistent with their business goals. So you don't get that kind of resistance where – often, to be honest I can deal with industry better than I can deal with government because they're not bringing … it's nice when they're sincere. It's nice when they actually mean it. But in the end for them, if they can get a deal that that moves their project forward, that delivers value to their shareholders, etc. then they will.

While the representative quotes above observe that some proponents were more attuned to relationship building and demonstrating good faith than Crown actors, there are tensions related to the delegated duty to consult. On the one hand, the state is the duty bearer, and is obligated to consult and cooperate with the affected Indigenous peoples. On the other hand, project proponents (to whom this responsibility had been delegated) may be financially or otherwise motivated to conduct the engagement process in a manner that produces misalignment with Article 32 of the UNDRIP. This tension between the state's duty and the project proponent's desired outcome (and accompanying motivations) may be further analyzed by the diversity of outcomes that exist across provincial jurisdictions. As will be discussed in sections 4.4.1 and 4.5.1 below, the institutional logics across provincial jurisdictions may promote or hinder alignment of current engagement practices with Article 32 of the UNDRIP.

4.1.3 Divergent Interpretive Frames

Another set of tensions reported by several participants revolve around corporate actors and affected Indigenous nations holding divergent interpretive frames. These interpretive frames,

as discussed below, include temporal orientations (with implications for expected timing to begin engagement, time required for the affected nation to deliberate and render a decision, and time horizon to envision and consider impacts of the project), defining outcomes as a benefit or negative impact, and defining consent. Each of these divergent interpretive frames represent tensions between the affected Indigenous nation and the project proponent and will determine whether a project is aligned with Article 32 of the UNDRIP. Let us now discuss temporal orientations.

4.1.3.1 Temporal Orientations

Affected Indigenous nations and project proponents hold divergent interpretive frames related to temporal orientations at every stage of planning a project, including the timing of engagement, time required for deliberative processes to render a decision, and time horizon for envisioning impacts. Each context for divergent temporal orientation interpretive frame will now be discussed, beginning with timing of engagement.

4.1.3.1.1 Timing of Engagement

The first divergent interpretive frame relates to how early project proponents ought to engage with the affected Indigenous nation. Participant 6 spoke at length about regional differences associated with how early proponents engage in the first quote, with advice for earlier engagement in the second quote below.

Participant 6:

> I think that you're going to have regional differences. I think you're going to have some proponents who, at the conception stage of their project, go into community and are like, “You know, we hear that there might be minerals in the area, like we're thinking about investigating whether or not we could have a mine here.” But like,

> "Are you interested in that? Would you want to partner with us?" Where that kind of thing happens then I think we're getting closer on the spectrum to consent to actually giving some teeth to Article 32. Unfortunately, like a lot of my practice is on the East Coast, so in New Brunswick in particular, and we're so far away from any of this.

Participant 6:

> So for corporations [to] 100% come into communities early. Really, as early as possible. Like when you, at the conception stage, when you have an idea, right? You think that there might be minerals in the area you, think you might like to develop a wind farm, you, when you haven't even selected the location, right? Like that I think is key. I think go in not with a fully baked plan but really going to listen.

It should be observed that in the first quote, Participant 6 had noted variability across provincial jurisdictions whereby some jurisdictions are better at nudging project proponents toward earlier engagement than others. This overlaps with other sections of the findings presented in this chapter including: supportive and coercive legislative frames (section 4.5.1) early engagement (4.4.2); and relationship building (4.4.3). In particular, those project proponents who engage at the earliest possible stage (i.e., at the conception stage) position themselves well for a positive engagement experience that allows for the affected Indigenous nation to exercise their right to self-determination while also being compatible with the project proponent's business goals.

4.1.3.1.2 Time Required to Render Decision

A second dimension of temporal orientations involves the time required to render a decision. As will be discussed in the autonomous governance section below, engagement with an affected Indigenous nation will typically trigger an "internal consultation" with a variety of demographics — in particular, land users and Elders/ knowledge keepers — to weigh in on the community's decision on the proposed project. An implication of this internal consultation stage of decision-making is that it will naturally lengthen the amount of time for the affected

Indigenous people to arrive at a decision. For the group of affected Indigenous people, this is simply a part of their decision-making institutions; it is how things are done. However, as noted by Participant 1, this represents a source of tension with Crown or corporate actors, who may exert pressure to move quickly on decisions so they may set into motion the first stages of their planned project.

Participant 1:

> When it comes to this type of work, it's also one of the biggest challenges because of the time that it takes to engage with those folks, right? A lot of proponents don't understand that just because we have an elected government doesn't mean that they can necessarily speak on behalf of the community without additional engagement on specific issues. And so, their timelines really do not allow for that to happen.

Relatedly, these decisional timeline tensions are exacerbated by legislative constraints placed by Crown actors, which will be discussed separately later in this chapter under the Coercive Legislative Frames (4.5.1) and Mandated Timelines (4.5.2) sections. For now, it is important to note that divergent expectations on reasonable timelines to arrive at a meaningful decision has been a prevalent source of tension between affected Indigenous peoples and the Crown and corporation actors engaged in negotiations.

In addition to statutory timelines discussed above, Participant 1 remarked that *Ministerial Zoning Orders* serve as another legislative barrier than undermines the ability of Indigenous people to meaningfully participate in decision-making around a resource development project.

Participant 1:

> In our area, we're having real challenges with the ministerial zoning orders and the ability to ensure that there is some level of meaningful consultation. It doesn't come anywhere near free, prior, and informed consent. Typically, those projects come to us with - if they come in at all - they come to us within the ministerial zoning order in place already, which reduces the burden for them to act, to consult. And the idea of consent is entirely out the window at that point.

The above vignettes demonstrate that while tensions around divergent understandings of reasonable decision-making timelines serve to undermine alignment between the DTCA framework and Article 32 of the UNDRIP, these tensions are exacerbated by externally imposed legislative and administrative constraints laid out by the Crown. This not only contributes to misalignment around consulting and cooperating in good faith but also calls into question whether the affected groups are providing their "free" consent, as will be discussed in Section 4.1.3.3 below.

4.1.3.1.3 Time Horizon to Envision Impacts

Another dimension of the temporal orientations tension relates to envisioning impacts of the project. As demonstrated below, many affected Indigenous nations consider their relationship to the land from time immemorial in the past and indefinitely into the future (although some participants spoke of stewarding the land for seven generations into the future) as they envision impacts of the project. This is at odds to the proponent's understanding of walking into the geographical area and envisioning impacts for project lifespan.

Participant 5:

> In my experience [environmental impact is] the animating concern for a lot of communities. They tend to think longer term about their traditional territories and sustaining their traditional livelihood on those territories. So they tend to take that longer view.

Participant 10:

> You know of course, we're talking about land use, which is multi, multi, multi, multi-generational. So, you're impacting a whole family's traditional lived experience by doing that. But in fairness to industry, I think it's not malicious, but sometimes just not quite appreciating it … you know, again, in eastern Canada, a lot of the resource development is mining. And it depends what kind of mining and what style, but it comes with real environmental impact, which is often - if not permanent, then very, very long term.

Participant 3:

> When we talk about the life of projects, a very important discussion is, and you know, when we think about the future, obviously one of the most important discussions is “how is the land going to be reclaimed at the end of the project?” “Are we going to get the land back at the end of the project?” “And what is it going to look like when we get it back?” And that is sometimes difficult because obviously the nature of a lot of these projects, mining and oil and gas and what have you, we're looking at 50 to 70 years sometimes, but not always. I mean, some projects, you know, talk about pipelines and things like that after, you know, after it's built, you maybe have compressor stations and things like that.
>
> But for the most part there's an ability to reclaim the land and fix the disturbance. And people would argue with me about that; maybe, but there's varying levels of that. Some projects, obviously, you know, we're talking about very long periods of time where the land is not going to be usable. And, you know, those conversations are difficult because obviously they’re so far in the future. So, we don't know. And when accommodation or sort of like negotiating agreements, you know, mostly the parties focus on the most the closest in time effects and accommodations and not so much on the sort of the ones 50 or 70 years from now because a lot can happen in that amount of time. And so, the further in the future the impacts and the accommodation may be, I think the harder it is to negotiate on those things.

Participant 6:

> Once you're in an IBA negotiation [one thing] that often comes up when communities want to try to fight a project, not when they're prepared to sit down with the proponent. And so when communities are like, “We have very little of our land left, we want to make sure that we're, you know, protecting this for seven generations to come,” then that is the motivation to try to participate in an impact assessment or environmental assessment, to try to not let a project go ahead.

Participant 8:

> [Proponents] have to appreciate that the Indigenous party doesn't see their territory within the project timeline. [Indigenous peoples are] going to see that their territory where they're not going anywhere — consistent with their territory from time immemorial and it's their territory into the future. So, I think that is a real necessity to invest in the relationship, which I think a lot of liaisons will say that that's almost become the language of a liaison. But it is that long term longevity and understanding the other party - like where the nation’s coming from - require you to really invest in that relationship. You know, I mean, you're helping them. And in that vein, you understand why their priorities are what they are right now.

In summary, it is vitally important for project proponents to understand that, while they may wish to advance their project as expeditiously as possible, the affected Indigenous nations will approach negotiations with different temporal orientations than those with which they typically operate. As outlined above, it is a best practice to engage affected Indigenous nations significantly earlier, and proponents ought to give time and space for the necessary deliberative processes to render a meaningful decision. Additionally, it is important to understand the temporal scale of impacts: environmental impacts will cascade into other impacts (economic, social, cultural, and spiritual) that are experienced by the affected nation well beyond the project lifecycle.

4.1.3.2 Impact Versus Benefit and Redress Versus Mitigation

Within the DTCA framework, redress may be conceptualized as the provision of an economic benefit or other *accommodation* measure to the affected Indigenous group when their Section 35 rights are impacted by the project. Several participants observed that the affected Indigenous nation and the project proponents are sometimes at odds in interpreting whether a given outcome is impactful or beneficial for the affected Indigenous nation. In answering the question as to whether current practices are aligned with Article 32 of the UNDRIP, Participant 6 suggested that they are misaligned on account of inappropriate or inadequate accommodations for impacts experienced by the affected Indigenous people.

Participant 6:

> [Article 32iii is] absolutely not [aligned]. Like states shall provide effective mechanisms for just and fair redress for any such activities I think that the Crown so often relies on proponents to fulfill accommodation, right? [There are] very few examples of where the Crown has stepped up to provide appropriate accommodation. So I'd say, no, as a country we're not doing well in [Article 32iii].

Participant 6 remarked that monitoring environmental impact is distinct and qualitatively different from redress or accommodation as illustrated by one of their negotiations.

Participant 6:

> It was in a meeting and the Crown said something like, “Oh, no, we understand. And what we are going to insist on is that as an accommodation measure, the proponent is going to have to strike a monitoring committee and we're going to pay for your community members to go and monitor it. You can have community monitors.” And then the chief was like, “Okay, so sorry, our big accommodation is we get to watch the destruction of our land – like that's the prize here? Thank you very much.”

This narrative provided by Participant 6, which includes the perspective-taking quote from the representative chief, illustrates that conflating monitoring with an accommodation is an erroneous application of the DTCA framework, particularly when one considers that monitoring does not guarantee mitigation of impacts — although it is a necessary precondition toward mitigation. To caution against conflating monitoring as an accommodation or redress is not to devalue its importance in an agreement. As noted by Participant 3, monitoring — when properly bundled with appropriate redress — environmental impact monitoring may well be a source of motivation to enter into an IBA with project proponents.

Participant 3:

> And the nations that wanted the economic accommodation and a lot of the agreements, their rationale a lot of the time was, “there's already a pipe in the ground, it's already there. It's old. This is better for us. We get to go back in time. We you know, we get to right this wrong. We get this accommodation, you know, we get a new pipeline — twinned but yeah, we get a say in the development we get a say in the standards.” You get a say in the monitoring plus all the other you know, things that come out of these agreements or the old pipe just stays there too. So, to me, that was a compelling idea about that project.

Participant 6:

> The Crown also needs to recognize the difference between mitigation and accommodation; like I will often in negotiations with the Crown, say, “Okay, we've told you what the Section 35 impacts are and what are you doing to address those?” And they'll say, “Well, we're going to tell the proponent that they need to monitor.”

> They have all these mitigation conditions like, okay, well that's mitigating, that's not accommodating the right. That's trying to have the impact be slightly less severe. But there's still an impact. And so, if your mitigation measure doesn't erase the impact, then you've got to give something on top to make up for the fact that there's an impact and they don't seem to get that.

A tension that may exist related to accommodating and mitigating impacts, as noted by Participant 10, is that the affected Indigenous nation may perceive an activity or outcome of the project as impactful whereas the project proponent may not.

Participant 10:

> Sometimes industry doesn't quite always appreciate is that sometimes they think putting in things like an access road is doing a favor for an Indigenous group. And it may not be a completely negative thing, but it is a very impactful thing. It can change land use radically, right? All of a sudden, some area which you have to hike in for a day and a half or is only accessible by a by river you can drive to get to your cabin or trapline, but guess who else can? Anybody, right? So that's those things which they may not quite get in terms of, in terms of the actual connection to land use especially.

As highlighted above, some activities which are perceived by the proponent as beneficial may, in fact, be perceived as harmful and impactful by the affected Indigenous nation. Where proponents fail to identify an activity as impactful, they are ill-equipped to address the impact. Such tensions arising from ontological differences may be resolved through relationship-building, which is discussed toward the end of this chapter. Through meaningful dialogue proponents may better understand the perspectives of the affected Indigenous nation and to appreciate ontological underpinnings that drive their position on impacts related to the resource development project.

4.1.3.3 Defining Consent

A final divergent interpretation to note is that the different actors involved in negotiations (affected Indigenous peoples, Crown, and corporate actors) may define Article 32

implementation differently — particularly in respect to defining consent. Of particular importance is whether UNDRIP Article 32 confers upon affected Indigenous peoples the right to "veto" a resource development project. This important question has been a point of debate since the UNDRIP's passage at the General Assembly in 2007 and remains an important consideration as parties seek to implement Article 32 (Sadiq, 2017). Several participants spoke to this issue as reflected in the representative quotes below.

Participant 2:

> One of the key things that I think doesn't align - which is a frustration to many Indigenous communities, including like some of my clients who I've worked with in resource development negotiations or discussions - is the idea of consent. You know, most of the process does provide information. It does provide kind of information in advance and discussions in advance.

While lauding current practices of engagement for the proponent providing information to the affected Indigenous nation, and doing so in advance of discussions and negotiations, Participant 2 thereafter suggested that these elements (i.e., provision of information, and earlier engagement) are not sufficient to align with Article 32 because these processes are not oriented around obtaining the affected Indigenous nation's consent. This observation is shared by Participants 4 and 5 immediately below.

Participant 2:

> In my experience it's been … it's more than lip service that is paid to it, but ultimately the developer always says, "in the end we get to make the decision. We'll consult you, we'll try to take what you're saying into account and change designs and that kind of thing. But at the end of the day, we're making a decision because the most important thing is that we get this project up and running, and it's to the benefit of the greater Canadian society."

Participant 4:

> In terms of what's been put on the table we've had the courts and stuff say, "Well, it doesn't give Indigenous people a veto." Oh, no. I mean, there is an argument to be made under UNDRIP that maybe they do have a veto, that, 'No, we don't want that mine built here. That's it. We don't want it. We don't want that forestry plan to cut down certain types of trees – or any of these trees. We don't want that transmission line built. We don't want …" you know, you name it, "… we don't want that road put there." But I have not seen things go to that extent in terms of, if I'm reading that and I'm interpreting UNDRIP and going, well, this is what it seems to say to me. I have not seen that either be respected or fulfilled in resource projects to date.

Participant 5:

> Well, in a single singular word, you know, um, the Indigenous community I think takes the view that sector, that Article 32 gives them an ability to say no, that a project won't go ahead in their traditional territory. And industry doesn't necessarily accept that. I think there's a great deal of concern in the industry what free, prior and informed consent means, and I don't think industry thinks that means what Indigenous people think it means. I think there's a bit of a disconnect there and that is really what drives some of the areas of disagreement between Indigenous peoples and industry.

The frustrations expressed by the participants above touch upon other elements identified as barriers toward alignment under Obstructive Engagement section (later in this chapter), including performative approaches, *fait accompli*. For now, it is sufficient to note that the lack of a consent-seeking framework severely undermines the alignment of current practices with Article 32[ii] of the UNDRIP.

Participant 10:

> And you know, I think what you hear back always is veto, right? You know, there's veto and veto. It's a very bad word. And you know, someone – I can't remember who I wish I could give credit – said no one talks about municipalities having land use bylaws and municipal planning strategies and say like, "Oh, my God! You're supposed to have a veto over everything."
>
> No, they have a right to control. So that way you don't have a nightclub next to your house when a young family neighborhood or some kind of industrial factory. And no one ever says, "Oh, geez! How dare the municipality try to tell people what to do?" And yet when we have this concept from, that which is really not that different [from what] governments are entitled to, you know, that level of consent and approval for

> everything. So, I think practically how we're going to see it manifest itself — it's going to be super, super interesting over the next ten years.

While each of the divergent interpretive frames play an integral role to shape how the two sides approach negotiations and consultation over resource development projects, the latter of these (i.e., defining consent) features prominently in the outcome of the engagement process. Given this gravity, we will now explore a perspective of Indigenous scholars (drawing from the Canadian Indigenous Bar Association) on how FPIC implementation is to be construed.

4.2 Indigenous Perspective on Defining Consent

As discussed in previous chapters, this research seeks to privilege understandings of FPIC and resource development project negotiations from the perspective of affected Indigenous nations. Therefore, to meaningfully apprehend the tensions associated with divergent interpretive frames – in particular defining consent – let us now explore how several Indigenous scholars (Mitchell et al., 2019) have defined characteristics that are demonstrative of FPIC implementation. Several participants discussed issues directly relevant to the defining characteristics advanced by these scholars and will be presented alongside discussion of these perspectives.

Drawing from the Canadian Indigenous Bar Association's position on FPIC implementation, Mitchell et al., (2019, pp 8-9) offer the following as defining characteristics of each FPIC component referenced in Article 32[ii]:

> **Free** necessarily includes the absence of coercion and outside pressure, including monetary inducements (unless they are mutually agreed on as part of a settlement process), and "divide and conquer" tactics. Indigenous peoples must be able to say "no," and not be threatened with or suffer retaliation if they do so.

> **Prior** means that there must be sufficient lead time to allow information-gathering and sharing processes to take place, including translations into traditional languages and verbal dissemination as needed, according to the decision-making processes of the Indigenous peoples in question. This process must take place without time pressure or time constraints. A plan or project must not begin before this process is fully completed and an agreement with the Indigenous peoples concerned is reached.
>
> **Informed** means that all relevant information reflecting all views and positions must be available for consideration by the Indigenous peoples concerned. This includes the input of traditional elders, spiritual leaders, traditional subsistence practitioners, and traditional knowledge holders. The decision-making process must allow adequate time and resources for Indigenous peoples to find and consider impartial, balanced information as to the potential risks and benefits of the proposal under consideration.
>
> **Consent** involves the clear and compelling demonstration by the Indigenous peoples concerned of their agreement to the proposal under consideration. The mechanism used to reach agreement must itself be agreed to by the Indigenous peoples concerned, and must be consistent with their decision-making structures and criteria (for example, traditional consensus procedures). Agreements must be reached with the full and effective participation of the leaders, representatives, or decision-making institutions authorized by the Indigenous peoples themselves.

4.2.1 Defining FREE in FPIC

As we consider whether the affected Indigenous nation is able to freely offer their consent, participants noted that they ought to be able to say "no" to a proposed project (Section 4.1.3.3) and projects should not be presented to the affected Indigenous peoples as *fait accompli* (Section 4.6.1). If the affected Indigenous peoples do not believe that opposing a project is an available option - and it is presented as going ahead despite their objections – then any agreement that emerges from negotiations and consultation with the Crown or project proponent their consent cannot be meaningfully interpreted as having been freely given.

Mitchell et al., (2019) also report that FPIC compliant engagement practices are free of "divide and conquer" tactics. This is often seen in larger scale projects wherein many Indigenous nations are impacted. The inter-nation tensions and conflict associated with larger scale projects

may be exacerbated by the project proponent or Crown recognizing some nations over others as being impacted by the project in question, as noted by Participant 4.

Participant 4:

> I've got one situation right now where they're trying to negotiate an agreement with a couple of Indigenous groups, and they have completely ignored the impact that this settlement agreement will have on a couple of other Indigenous groups. They've given absolute lip service to their interests and their rights and their entitlements and just have gone ahead despite the protests of these two other Indigenous groups.
>
> It's going to end up in court and it's not that these two Indigenous groups want to screw around these other Indigenous groups, but it's just - Canada and Manitoba - I don't know if they don't know what they're doing, or they don't care, or they don't know and don't care. But it's leading to an inevitable conflict between Indigenous groups.
>
> And I understand why they're talking to the other groups, because there's historical wrongs and those groups have rights and entitlements, but it's just they mess things up so much, they mismanage things so much.

Participant 10 had noted that overlapping land claim areas associated with shared usage of waterways for transportation is another complicating factor associated with larger-scale projects.

Participant 10:

> And I'm thinking of Labrador primarily where there's fairly significant overlap between claim areas, where often there's areas that are not - exclusive is not the right word - but largely one group or the other. But then where there [are overlapping areas] that really gets reflected in hydroelectricity because, as you can expect, that river way is which were central to all the Indigenous groups' way of life and way of travel are the very waterways which are attractive for hydroelectric development. So, you know that that has come to play is significantly there and will in the future as well.

As Crown and project proponent actors seek alignment between engagement practices and Article 32 of the UNDRIP, it is incumbent upon them to ensure that they are engaging with as wide of an inclusivity net to ensure they account for all the nations that are impacted by the

proposed resource development project. However, it is also important for Crown and corporate actors to ensure they are, in fact, engaging with the appropriate, rightsholding nations that are impacted by the project.

Participant 2 had cautioned against casting too wide of a net of engagement inclusivity and how it may diminish their engagement processes and its efficacy to meaningfully engage with those nations that are impacted by the proposed project.

Participant 2:

> Sometimes it's an outreach to the PTO [Provincial Territory Organization], which frankly says “We don't know who to talk to, but we know kind of you’re active in this area and we have a project. So please, please basically help us figure out who we talk to, right?” With the crown, it seems to be a little bit more like they just want to simplify things or aggregate or frankly, even, I'm increasingly seeing a concern about not offending anyone.
>
> Like the Crown is increasingly saying, you know, “Well, we will talk to anyone. We don't want to exclude anyone out of this conversation.” I'm like, “No. No, but you should be excluding some people, right?” Like, you know, there's a difference between when you're engaging with somebody who's actually, whose traditional territory it is, who actually has rights over this, versus if you're engaging with somebody who doesn’t, right?
>
> And by saying, “Oh, we just need to treat everyone equally, right?” That sounds well and good, but you're actually missing the point of why you're supposed to be talking to somebody in the first place. And you know, you can spell that out to the Crown and they still just come back with the “Oh, you know, well, we can't be the ones who are drawing any lines here. Like, we can't be, you know, taking sides” is often their line.
>
> “We can't be taking sides on this. Like, we'll just talk to anybody who wants to talk to us.” And it's like, “Great! So, you know, does my dog get an input into this decision then?” Whereas proponents oftentimes, when you kind of spell that out -- particularly proponents who have an experience working in Canada -- and then explain the necessity of working with Indigenous communities is, the requirements around consultation, and even just the public focus on reconciliation.
>
> Like once you explain that to them, and once you actually talk to them about like, “No, no, like this is our territory, this community is the rights holder here,” you know, they get it. They do. They just need somebody to sometimes connect those dots for them.

The above vignette that discusses the propensity of the Crown to engage with Provincial Territorial Organization (PTO) bodies — for example, the Assembly of Manitoba Chiefs or Federation of Sovereign Indigenous Nations — rather than the nations that are directly impacted, could very well be placed in subsequent sections that explores autonomous governance (Section 4.3) and participatory engagement (Section 4.4). However, this vignette provides a sharp contrast to the experiences of some nations being excluded from consultation processes.

These contrasting experiences are narrated by different participants; therefore, a reasonable assumption is that these contrasting experiences occurred under different provincial jurisdictions, highlighting the fact that outcomes are not uniform across provincial jurisdictions. This offers triangulating evidence of supportive legislative frames and coercive legislative frames by demonstrating the power wielded by the Crown to nudge proponents closer to alignment with Article 32 of the UNDRIP or not.

It is also worthy to observe that in Participant 2's experience, Crown actors are more likely to exclude affected Indigenous peoples and that corporate actors are more likely to demonstrate willingness to learn about protocols for engagement. Participant 2's observation is corroborated with statements from Participant 9 and Participant 10 in the discussion of delegated Duty to Consult on (Section 4.5.3), who both noted that corporate actors are more motivated than Crown actors to learn about with whom they need to engage and that they do so from a business risk mitigation standpoint.

4.2.2 Defining PRIOR in FPIC

As reported by Mitchell et al., (2019), "prior" engagement is bundled with a number defining characteristics, most of which revolve around allowing sufficient time for the decision-making institutions and processes to unfold. This reflects a combination of reconciling divergent temporal orientations as previously discussed and decision-making institutions, which will be discussed later in this chapter. Recall from the discussion on tensions associated with decision-making timelines, that many Indigenous nations were presented with statutory decision-making timelines, which often pre-empts the nation's ability to gather sufficient information and utilize its decision-making processes.

Another dimension of "prior" to consider relates to when proponents should engage the potentially impacted Indigenous people, and several participants had spoken to this issue (this is another example of divergent interpretive frames on temporal issues). For example, Participant 6 remarked that proponents engage Indigenous nations too late in the planning process for the nation to meaningfully engage with the process.

Participant 6:

> Right now, communities are only engaged either through Crown impact assessment processes or proponents knocking at their door to negotiate impact benefit agreements. Once a project plan and project description has been filed and submitted, [it's] truly way too late. Like the site has been selected it's and so - communities at most can get involved to maybe tweak some of the details. Maybe your access road could be moved a little bit to the left.

As one considers the importance of engagement with Indigenous peoples prior to the planning the resource development project, it becomes clear that failure to engage with Indigenous peoples at an early stage necessarily precludes the Indigenous peoples from providing meaningful feedback that will help to mitigate environmental impacts. In other words, failure to reach alignment with Article 32(ii) on account of not engaging with Indigenous peoples

prior to extensive planning on the development project will often produce misalignment on Article 32(iii). Again, this is demonstrative of the cascading impacts of misalignment whereby failure to achieve alignment in one dimension of Article 32 will necessarily result in failure to align in other dimensions of Article 32. In this example, failure to engage with the affected Indigenous nation — bundled with divergent temporal orientations related to when to begin engagement — represents a failure to align with Article 32[ii] of the UNDRIP. This, in turn, cascades into misalignment with Article 32[iii], which is related to the provision of redress for and the mitigation of impacts.

4.2.3 Defining INFORMED in FPIC

Reflecting on how informed and consent are defined by Mitchell et al., (2019) above, the utilization of decision-making institutions features prominently in understanding informed. As will be discussed later in this chapter, even though a variety of decision-making institutions exist across Indigenous nations, UNDRIP-compliant engagement processes allow for internal consultation whereby the input from diverse constituents is considered as part of the decision made by the affected Indigenous nation. Engagement practices that allow time and space for the affected Indigenous nation's decision-making institutions and internal consultation processes to flourish tend to be better aligned with Article 32[ii].

In addition to information derived from the internal consultation process, affected Indigenous nations require access to impartial and balanced information about the risks and benefits associated with the project. Participant 6 provided deep insight into the needs of their clients that spans many components of the definition of informed consent.

Participant 6:

> I think communities are often stretched super thin and one thing that I have seen sometimes is communities say while the proponent came and they said that they wanted to meet with us and they said they were trying to do it in a good way, but they had their binder of material and like, "(a.) I don't have time to read and (b) it would be in a different language. I wouldn't even understand it. It's all technical and, and so that engagement was meaningless to me."
>
> And, and then you hear sometimes the proponents and well, "We would happily provide you with funding, you know," which, I mean, they should really be leading with that. But I have some communities, some clients who are great with this. This would be my advice to communities; to the extent they can develop this having kind of like a term sheet for proponents, "Here is how we want to be engaged. Here are our expectations."
>
> And I've worked with some communities that have very specific engagement terms. It's like, "Don't send us a binder of your technical report. We want a summary of your project." First point, give us capacity, etc., etc., right? And that is something that I think of course you need: the capacity to develop that right.
>
> But I think that's a good practice to have. I think for communities to insist on capacity, not just to engage but also, like, to do their own technical review. Like they shouldn't be trusting the proponent that, "Oh yeah, we're going to, we're going to mine the shit out of your territory, but don't worry, there's no environmental effects."

As noted by Participant 6 above, many Indigenous nations are *stretched super thin* (on account of consultation fatigue (discussed later in this chapter) and often do not have the capacity to fully engage with an external party's consultation request. The lack of capacity is indeed a barrier to fully engage with project proponents. Additionally, Participant 6 remarked that proponents should be prepared to address capacity gaps by funding translation of technical reports into the respective language of the Indigenous nation, as well as to use plain language and not be overly technical. Finally, in interest of providing impartial and balanced information, project proponents should expect a request for an impartial technical review and for the affected Indigenous nation to not rely exclusively on the proponent's own information about impacts.

4.2.4 Defining CONSENT in FPIC

An important component of consent-seeking processes that utilize an affected Indigenous nation's decision-making institutions that has not hitherto been discussed relates to the notion of consensus. Participant 1 had spoken about consensus-based decision making, as will be noted below.

Participant 1:

> It's certainly not unanimity there. We've had a number of situations where it's been a very difficult topic and we've had individuals who feel very uncomfortable with the decision that's proceeding. And we actually had an incident where an individual was really pushing back against a particular motion or something that had been made at council. And so, our reaction to that ended up being that an elder on council started coaching council in the language and how the language would have reflected that idea of consensus. And so, they started to implement the idea of speaking in the language to accept a motion. And so, what that means for us is, when we're saying that "We're accepting, we're not saying yay or nay. I agree or disagree. We're saying" - you know, the words that they use and I don't know what they are – "we're saying that's a decision I can live with." So, despite the fact that they may or may not agree, in the end with what is happening specifically, they understand that it's a decision that needs to happen and they can live with it.

Two key considerations should be drawn from the representative quote above. First, the consent of an affected Indigenous nation may not be misconstrued as complete acceptance of a project. Even where "consensus" is achieved through the nation's decision-making institution, opposition may still exist; as noted above, consensus may be conceptualized as a decision with which all parties are willing to live. This places greater emphasis on continuous efforts to build and nurture relationships with the community to ensure that the project continues to deliver on the terms to which the community members had agreed and that no unforeseen events or circumstances undermine or erode the trust placed in the proponent from parties who vocalized opposition to the project.

Second, the pursuit of achieving consensus among members of the nation will necessarily extend the time required to arrive at that decision and is demonstrative of the impact of divergent

temporal orientations as discussed earlier in this chapter. This is particularly true in situations where there is greater uncertainty as to the risks and impacts of a given project and opposition may be greater than a project that has fewer risks and impacts. In order to arrive at a decision with which all members may live, it is therefore reasonable to anticipate a more protracted timeline than an artificially developed and externally imposed timeline. This underscores the significance of engagement at the earliest stage of planning, which is discussed later in this chapter.

In summary, as we explore alignment between current practices and Article 32 of the UNDRIP, it is crucial to understand what tensions exist between the parties involved in the negotiations. As a tri-partite conversation involving Crown (or state) actors, project proponents, and the Indigenous nation(s) affected by the resource development project, each party has their own goals and objectives in addition to divergent interpretive frames. The first, decisive tension is whether an externally initiated project is self-determined by the affected Indigenous nation (reflecting alignment with Article 32[i]. Participant 6 mused that externally-initiated projects cannot be conceived as being truly self-determined by the Indigenous nation — regardless of whether an IBA was negotiated in a good way. However, as will be discussed throughout the balance of the chapter, resource development projects that are externally initiated may still allow for the affected Indigenous nation to exercise their right to self-determination through the engagement and negotiation processes with the project proponent.

The current practice of engagement in Canada is that the Crown (state) — who are the duty bearers (Rodhouse & Vanclay, 2016; Yaffe, 2018) responsible for upholding the rights of affected Indigenous peoples — will typically delegate the duty of consultation to the project proponent. This delegated consultation under the Duty to Consult and Accommodate presents a

tension between two competing goals: affected Indigenous peoples aim to have their right to self-determination honoured and respected while the project proponent may be economically motivated to conclude consultation and negotiations as expeditiously as possible. This economic motivation may be at odds with enablers toward alignment and have implications for how they approach engagement with the affected Indigenous nation.

Additionally, tensions that exist across several interpretive frames held by each party in the engagement process have been discussed. These divergent interpretive frames between the affected Indigenous peoples and project proponents include: 1) temporal orientations that guide the appropriate time to commence engagement, including the appropriate length of time required for the affected Indigenous nation to render a decision about the project, and the temporal horizon adopted when considering impacts of the project; 2) defining whether an outcome is a impact or benefit; 3) defining whether a measure is considered redress or mitigation measures related to impact; 4) whether an Indigenous nation is impacted by a given project; and, 5) defining consent.

At the conclusion of this section, an Indigenous-centered perspective on FPIC implementation was highlighted as several research participants had offered insights and experiences that provide context, breadth, and scope to the list of defining characteristics advanced by Mitchell et al., (2019). In the following section, two key bundles of enablers related to autonomous governance and participatory engagement will be discussed and how they work to produce alignment with Article 32 of the UNDRIP, which are located at the top third of Figure 4.1. Thereafter, barriers related to externally imposed governance and obstructive engagement will be discussed and how they work to produce misalignment with Article 32 of the UNDRIP, which are located at the bottom third of Figure 4.1. Let us now turn to discussion of the enablers

that, bundled together, form autonomous governance.

4.3 Autonomous Governance

Recall from chapter 2 that, as reported by Cambou (2019) and Yaffe (2018), former UN Special Rapporteur on the Rights of Indigenous Peoples, S. James Anaya, stated that *autonomous governance* and *participatory engagement* are two integral components that define self-determination. While analyzing the data, it became apparent that these two categorizations would be helpful to serve as aggregate bundles for the enablers associated with alignment that were identified by research participants. In the section to follow, the enablers that are bundled into autonomous governance are discussed, followed by enablers that are bundled into participatory engagement (located at the top third of Figure 4.1). Enablers discussed under autonomous governance are as follows: decision-making institutions; internal consultation; Indigenous legal orders; preparedness and land use mapping; and capacity. Let us now turn to discussing the insights provided by participants about how the utilization of an affected Indigenous nation's decision-making institution drives the engagement process toward alignment with Article 32 of the UNDRIP.

4.3.1 Decision Making Institutions

As noted in the alignment table in chapter three, Article 32-compliant engagement practices should engage the Indigenous peoples through their own representative institutions. It is vitally important to first note that a variety of representative institutions across Indigenous

Table 4.1. Illustrative data excerpts of *autonomous governance*

Conceptual category	*Description*	*Examples from data*
Decision-making institutions	The deliberative institutions through which an affected Indigenous nation will render decisions.	• There's no pan-Indigenous decision-making institutions, right? I mean every nation is different depending on whether they're treaty, whether they don't have a treaty; First nation, Innu, Metis … you know there's a lot of variability. (#3) • Every community has its own processes, customs, all that kind of thing. Some communities will want to call a community meeting to discuss it … I like to tell resource companies and third parties, you're not dictating to this First nation how they make their decisions. (#4) • In many cases, the decision-making institutions of Indigenous peoples … have been impaired by the history of Canadian colonialism, and that has rendered some of the decision-making institutions less capable of rendering the decisions that they need to render in certain context. (#7)
Nation developed protocols	Standardized procedures for project proponents to engage with affected Indigenous nations that were internally developed by that nation.	• The consultation and accommodation protocol was designed to ensure that proponents are providing all of the information upfront so that we're able to kind of triage the various projects coming forward and determine based on community priorities. (#1) • Having a term sheet for proponents, "Here is how we want to be engaged. Here are our expectations." I've worked with some communities that have very specific engagement terms like, "Don't send us a binder of your technical report. We want a summary of your project." (#6)
Internal Consultation	The processes whereby a given Indigenous nation engages with its constituency as part of its deliberative processes to render a decision to participate in a resource development project	• The one thing I think is ubiquitous is the engagement of citizens or members, whatever you want to call them, of the nation. It seems to be of great importance in any decisions related to consultation, accommodation and resource development and adverse impacts to Aboriginal rights. (#3) • It really doesn't matter to some extent what the decision-making institution is, so long as it's legitimate in the view of the community and it's participatory. In the end it might be hereditary, [or] it could even be Indian Act. Even if it's a good system - if it's one where it's simply just sort of only happening at the council table and there's no transparency and no communication to the rest of the community, then it's a problem. (#9)
Indigenous legal orders (ILOs)	A set of laws (often given to an Indigenous nation by Creator according to oral history) that govern the relationships between people, nations, and the land.	• The best place to source [ILOs] is through Indigenous decision-making institutions. If you're operating outside of Indigenous decision-making institutions or outside of the Indigenous protocols and worldview, you're not effectively incorporating those things into decision-making. (#7)

(Continues)

Table I. Continued

Conceptual category	*Description*	*Examples from data*
Indigenous Legal Orders (ILOs)		• I think that nations' ability to apply their own laws is actually probably going to have a growing emphasis … it's more about getting beneath the data and current use and trying to sort of get a better sense of what's driving that governance on the land, you know. Which at the end of the day probably does also suit proponents better because then they have a better sense of a much wider, holistic reason why that's a sacred site … they know that there's a body of law behind it. At the end of the day, I think proponents all want to know what they have to comply with. (#8)
Preparedness and land use mapping	The process of identifying sites that are sensitive to resource development project impacts (economic, environmental, social, cultural, or spiritual). Preferably in preparation for, and prior to, negotiations with project proponents.	• What I found is communities are rarely ready to have that sort of in-depth conversation. I think in some cases they have. And they've actually been lucky because maybe they've had past projects where they've gotten capacity to start building land use mapping or traditional use mapping or elder interviews or to gather this information so that they have it in a bit of repository. So that when they're going into negotiations, they can draw on all of that. (#2) • So basically, the communities were saying, "Okay, we've got this area that isn't really developed yet." … "Before things go ahead, we want to have a say. We need some land use planning, and we want to have a say in where we think that we can accept development and where we can't. And we don't want it just to be based on, oh, there's wetlands here." (#6)
Capacity	Capacity refers to both human resources (preferably a member of the Indigenous nation with requisite education) and financial resources. Capacity spans several stages of engagement and IBA implementation.	• I think the issue with consulting and cooperating in good faith with Indigenous people through their own representative institutions is those representative institutions often lack capacity, like that's the biggest piece, right? And I've thought a lot in my practice about, like, about free prior informed consent and like what it means when. Like are they even in a position to really be giving their informed consent if they are so stretched thin? (#6) • Certainly, the developmental priorities of Indigenous peoples first and foremost require the capacity to conduct the work necessary to identify those priorities. So a First nation that lacks the internal or financial capacity to do the work of engaging its membership, of assessing and informing its determination of what the priorities are, is at a disadvantage when it comes time to have discussions about their priorities and how to implement them. So capacity is an important part of getting that right and implementing Article 32. (#7)

nations and groups in Canada exists. In other words, there is no standard, uniform model of decision-making institutions; each nation has developed its own institutions based on a diverse set of variables, as observed by several participants.

Participant 3:

> There's no pan-Indigenous decision-making institutions, right? I mean every nation is different depending on whether they're treaty, whether they don't have a treaty; First Nation, Innu, Metis - whether they're a First nation band, whether they operate as a nation or a broader nation made up of several bands with a self-government agreement. You know there's a lot of variability.

Participant 7:

> Indigenous institutions function through the legacy of colonialism and the continuing effects of disadvantage in marginalization. So in many cases, the decision-making institutions of Indigenous peoples - to varying degrees across country - have been impaired by the history of Canadian colonialism, and that has rendered some of the decision-making institutions less capable of rendering the decisions that they need to render in certain context[s].

Participant 4:

> After working in this area for … oh boy, I guess over 25 years working primarily for Indigenous peoples and with that primarily First Nations, I have found every community has its own personality. And if you want to just distill it down to decision-making, every community has its own processes, customs, all that kind of thing. Some communities will want to call a community meeting to discuss it. Other communities may just have a large - you know, there's the chief and the council, but then they may have elders, you know, they may have some other people in the community, a smaller sort of advisory group. Other communities - the chief in council might just say, “We are the elected officials we're making the decision.” But it's always important to be aware of that. And I, as an advisor, [need] to be aware of that. But I also tell I like to tell resource companies and third parties, you're not dictating to this First nation how they make their decisions.

Participant 7:

> And that varies from place to place. Some First Nations will rely entirely on the Indian Act structure. Some First nations have sought, with different levels of success, to integrate traditional or Indigenous legal structures into structures associated with the Indian Act.

Participant 8:

> It varies. Yeah, I mean, I think it varies because so many nations do not have like an organized decision-making framework. Yeah, they have council and then they have somebody who has a department. And then maybe they have a whole bunch of consultants and lawyers that they hire for that process, which is not a decision-making institution. Like, I think that's still the norm, right? I know very few First

> Nations that have like a distinguishable entity that can potentially handle the resource. I mean, I've seen lots of models around the idea of doing that. Like, take for example the Tahltan and they have this thing called HALT - it's a very intentional acronym, right? It is Heritage, Aboriginal rights, Language and Territory or something. I think that's what it stands for.

Several participants reported that each group of Indigenous people have their own representative institutions. An implication of this is if Crown or corporate actors wish to engage with Indigenous peoples in alignment with Article 32(ii), it is incumbent upon the proponent to learn about the decision-making institution and to properly engage with it. Having highlighted the diversity of decision-making institutions across Indigenous nations in Canada, any examination of decision-making institutions would be remiss to exclude the current trend of some Indigenous groups to strengthen and build their decision-making institutions. Several participants provided examples of this current trend.

Participant 1:

> From our perspective, the way that we operate is very much within the Indian Act. We do have a Chief and Council, but the actual function is very unique in that we approach it from a consensus-based decision-making model within the room so we can report on what we need to report on in terms of, you know, the federal government and complying with Indian Act requirements. But even our Chief and Council operates from a more traditional model, right, under the guise of Chief and Council … we've been working on developing a process that engages our elders council and our youth council so that we're able to bring in the perspectives of all of those different subgroups within the community to be able to make an informed decision similar to *dodem* based decision making models, where we try to make sure that the representative bodies from the various families, the various subgroups are considered. And so that's for us a very important in impact. And when it comes to this type of work, it's also one of the biggest challenges because of the time that it takes to engage with those folks, right?

The inclusion of *dodem* (traditional clan-based system) decision-making as an underlying feature of the Indian Act governance model is an example of a hybrid decision making institution to which Participant 7 had alluded.

4.3.2 Nation Developed Protocols

Several participants had revealed that their clients have developed their own engagement protocols for project proponents to engage with them or have suggested it as an emergent best practice. For example, Participant 1 reported that their community had developed their own consent-seeking engagement protocols as a tool to deal with the volume of consultation requests.

Participant 1:

> Quite often it's a series of random emails [from project proponents] asking about, you know, giving us a document for a summary and then saying, "Can you comment on this and give us, let us know, what time you would like to be consulted or what you would like to know about this."
>
> Which typically results in multiple emails back and forth to try and get all of the information to be able to engage. Which would be fine if we're asking for that relationship building, except that, you know, these are coming in multiples by the day. And so, the consultation and accommodation protocol was designed to be able to ensure that proponents are providing all of the information upfront so that we're able to kind of triage the various projects coming forward and determine based on community priorities.

Other participants advocated for Indigenous nations to develop their own engagement protocols as a best practice to be proactively prepared to engage with prospective project proponents in the future as well as a strategy to deal with high volumes of consultation requests.

Participant 3:

> I think that many nations are reactive to industry. And that's a capacity issue, right? And also, volume issues in that nations deal with a lot of incoming consultation and other sort of inquiries. [Some] good advice I would give is to set up your own regulatory processes that can help fund those activities.
>
> So nations enacting their own consultation process as an application process so that they can have conversations early on about capacity funding and to use those resources and push for as much of those resources as possible to engage in strategic thinking about the nation, the projects in their territory, their goals in terms of land, economic development, and to have that vision for the future before engaging in negotiation, because otherwise it's a reactive exercise where the proponents or the government or whomever is leading the charge.

Participant 6:

> This would be my advice to communities; to the extent they can develop this having kind of like a term sheet for proponents, “Here is how we want to be engaged. Here are our expectations.” And I've worked with some communities that have very specific engagement terms. It's like, “Don't send us a binder of your technical report. We want a summary of your project.”

In addition to strengthening an affected Indigenous nation’s decision-making institution, nation-developed protocols may allow for nations to manage the inundation of consultation requests from Crown and corporate actors, which leads to consultation fatigue — identified and discussed as a barrier discussed later in this chapter, as observed by Participant 3 above. Additionally, Participant 1 stated that once project requests are submitted with the requisite information by the project proponent, that nation will prioritize projects that align with their developmental priorities — a practice that is demonstrably aligned Article 32[i] whereby Indigenous nations have the right to determine and develop priorities and strategies for the development or use of the lands or territories and other resources.

4.3.3 Internal Consultation

As outlined in the section above, decision-making institutions are not uniform across Indigenous nations in Canada, and they may be organized quite differently from one nation to another. Despite these differences, several participants observe that a common thread across the variety of decision-making institutions is the fact that they invariably involve an “internal consultation” process whereby its constituent family lines and diverse groups provide feedback and input into the decision rendered by the community.

Participant 3:

> The one thing I think is ubiquitous is the engagement of citizens or members — whatever you want to call them — of the nation. It seems to be of great importance in

> any decisions related to consultation, accommodation, and resource development and adverse impacts to Aboriginal rights. And I think that is not only related to these types of decisions, I think that's really to a lot of decisions, right? Internal decisions of nations.

Participant 5:

> The negotiations I have been involved in are with communities that are represented by chief and council, and they will consult with their elders for guidance in how they approach the decision. Industry hasn't really been interested in negotiating with anyone other than the council … the performance that I've done for Indigenous communities and the proponents of always engaged directly with the Indian Act chief and Council. And then it has been on those elected people to engage whatever traditional consultation protocols they want on their side to ensure that their community's viewpoints are being represented in that they're representing their people.

Participant 7:

> Ultimately, whatever institution may be utilized — provided it has the support of the nation that's utilizing it — it is extremely important that it be the vehicle through which decision-making is conducted. And that is to ensure that the community's views as including their membership or citizens, citizenry and their structures and governance and protocols are incorporated effectively into the decision that's being made. So, I'd say it's a highly important component of successful negotiations and ensuring that the concerns and priorities of the Indigenous nation are addressed effectively through the negotiations.

Participant 9:

> A process that's not going to involve the community later being upset or angry or saying, "Why did we approve this?" So I think that that is really just fundamental and having good representation on that. I mean, you hear that and you see that in the literature too, that, you know, women's voices have to be represented there and various groups have to be represented. So I think that's really fundamental. And, you know, it really doesn't matter to some extent what the decision-making institution is, so long as it's legitimate in the view of the community and it's participatory. In the end it might be hereditary, it could even be Indian Act, even if it's a good system. But if it's one where it's simply just sort of only happening at the council table and there's no transparency and no communication to the rest of the community, then it's a problem. So I think it's I think it's really key.

As noted by the above four participants, decision-making institutions — regardless of form or constitution — will deeply engage with its membership and citizenry. This internal

consultation allows for the decision-making institution to ascertain how the proposed resource development project may affect diverse constituents. This requires wide engagement with land users, those who rely on hunting and fishing activities as their primary source of food, those who harvest for medicine and sustenance, traditional knowledge keepers, elders, women, youth, two-spirited people, and other groups. Additionally, the internal consultation allows for transparency, which ultimately serves to strengthen the legitimacy of any agreement that emerges from the negotiation process. An important outcome of the internal consultation process is that Elders and knowledge keepers may share relevant Indigenous legal orders (ILOs) that may apply to the resource development project. Let us now turn to discussion about Indigenous legal orders.

4.3.4 Indigenous Legal Orders (ILOs)

Several participants had identified Indigenous legal orders (ILOs) as another enabler that may ensure alignment with Article 32 of the UNDRIP. ILOs are a set of laws held by each nation that governs relationships between people, nations, and the land; according to oral history these laws are given to the nation by Creator. Speaking to the general trend of ILOs becoming more important during the negotiation process, Participant 8 observed that ILOs will serve to clarify the importance of various sites and buttress the rationale for the affected Indigenous peoples in selecting sites for preservation or development.

Participant 8:

> I think that nations' ability to apply their own laws is actually probably going to have a growing emphasis. In a way, it's nothing different that doesn't exist in that I think Indigenous knowledge studies, crucial land use studies, of course, are already occurring. But it's more about getting beneath the data and current use and trying to sort of get a better sense of what's driving that governance on the land, you know. Which at the end of the day probably does also suit proponents better because then they have a better sense of a much wider, holistic reason why that's a sacred site … they know that there's a body of law behind it. And at the end of the day, I think

> proponents all want to know what they have to comply with. So as we get that emerging body of Indigenous law and the clarification around what it means, like on the whole it's something I think companies are more open to partially because it's in their best interest. They know what to comply with. So if you have a coherent sense of your own Indigenous legal orders and how they apply to say, a water permit, and you can articulate that and they can understand that that body of law with respect to water rights is consent based, then they can understand that's what consent means in this particular circumstance.

Participant 7:

> [Proper utilization of decision-making institutions requires] cultural and legal context, legal in the sense of Indigenous legal systems. So in order to effectively incorporate and address those worldviews and the associated legal systems, responsibilities, obligations, protocols, you need mechanisms to do it.
>
> And the best place to source those mechanisms is through the Indigenous decision-making institutions themselves. If you're operating outside of Indigenous decision-making institutions or outside of the Indigenous protocols and worldview, you're not effectively incorporating those things into decision-making.

Participant 9:

> I mean it speaks to a broader issue of decision-making within the community, being informed by Indigenous values, principles and essentially Indigenous law, right? And if that's not there, then it … you know, the decision can later be seen as lacking legitimacy or sort of divisions within the community. And that's challenging because it invokes all of the work that needs to happen.

Participant 7 had suggested caution should be exercised in attempts to understand ILOs within the epistemes of Western academic and legal frameworks and advised that ILOs are best introduced into an agreement through the nation's decision-making institutions (which as noted in the preceding section emerges through the internal consultation processes). In respect to academic handling of ILOs, it is important to not attempt to seek generalizability — particularly if it is to be useful for project proponents: each group of Indigenous peoples have their own sets of laws that govern their relations to each other and to land.

Participant 7:

> I think there is value in academic investigations trying to categorize and understand better, provide the theoretical foundation for legal structures or incorporation or alignment of Canadian policies with indigenous worldviews. But ultimately it will vary from, from the Esquimault, to the Haida, to the Cree, to the Miqmaq.
>
> And the specifics of those relationships are going to influence both the process that needs to be utilized to negotiate and what the substantive outcomes should be. And that reflects back on the importance of decision-making institutions in order to adequately incorporate and address those components of Indigenous identity and worldview. You need structures and mechanisms and protocols which are built on Indigenous identity.

As noted above, project proponents ought to avoid seeking shorthand solutions by falsely extrapolating the ILOs from one Indigenous group to another, as they are specific to each nation and the legal orders for one group may not hold true for another group. Therefore, it is incumbent to learn about these, on the terms of the affected Indigenous peoples, as part of the project proponent's overall due diligence.

In respect to the inclusion of ILOs into current practices, Participant 7 observes that it is important to provide space for ILOs to guide the decision-making institutions without being appropriated by an "external" (western) system that is not predicated on the cultural foundations of Indigenous peoples.

Participant 7:

> I would say that there's a careful balance between providing opportunities for Indigenous legal orders to function and trying to integrate them into what I would refer to as external systems. And so, the Canadian system isn't designed with the premises and cultural foundations of Indigenous legal orders. So there's a potential for negative impacts if you try to transplant Indigenous legal orders into Western legal systems … but it does present a process necessity in the form of not doing harm to those Indigenous legal orders or ensuring that there is an informed consent on the part of the Indigenous peoples that they're willing to move their Indigenous legal order into a different space in order to perhaps enhance its implementation or give different effect to its utilization. So I would note that the potential harm of wholesale integration of Indigenous legal systems into Western legal systems is fraught with challenge and potential negative impacts.

A final important consideration as we discuss ILOs is that while they have been passed down through the generations, they are not simply a relic from the past. As Participant 9 reveals, some Indigenous nations are involved in contemporary law-making.

Participant 9:

> One of the biggest things [my friend] did is [to develop] our own Rangers law and Fisheries Law. Also, he was sort of forefront of developing a lobster law because we do have a commercial fishery, but we wanted to take more control over that in terms of, you know, asserting our Miq'Maq perspective on it. And he was fundamental in this and did a ton of decision-making community engagement on this and they created a law. It's not under the Indian Act and not with permission of Department of Indian Affairs, but they accept it and it's published and it's our lobster law. But one of the really great things about it - and I use it as an example of Indigenous law-making - is that, a few things, it sets out sort of four key principles in Miq'Maq concepts.

While ILOs have influenced Indigenous ontologies, they also serve as inspiration for contemporary law-making in response to contemporary issues. Whether ILOs are infused throughout and guide the decisions made through the affected Indigenous peoples' representative institutions or guide contemporary law-making, one participant remarked that it is emergent and expects that its centrality will grow in importance in the immediate future as interpreting UNDRIP implementation takes root.

Participant 10:

> The reality is, and this is going to change really significantly over the next 20 years, the practice of Aboriginal law. You know, I don't practice Indigenous law nor do I have any training in that; I bring nothing to it. And I think that's the gap that is recognized and will be addressed is that everything we're doing, we're doing in our Common Law framework. And there may be examples where they really show that Indigenous law is being infused into these relationships. But it's not there yet. And it's going to be a real challenge because you need to bring expertise that a lot of lawyers certainly don't have at all. And, you know, I think it's growing. And I think there's great work being done. And a lot of the schools on this … I know I've heard a lot about UVic and that, but I don't think they're the only ones. So, yeah, I think there's a lot of work to be done on that part.

4.3.5 Preparedness and Land Use Mapping

Several participants provided insights into Indigenous nations being proactive (versus reactive) by preparing to engage with project proponents even before they are approached with a resource development project consultation request. This includes determining their development priorities and mapping out sensitive sites upon which they cannot accept development projects due to adverse impacts. In respect to the ability of a nation to incorporate environmental stewardship and mitigation into its development priorities, Participant 9 had suggested for nations to be proactive about envisioning the types of projects in which they are willing to participate before they are presented with them by external parties:

Participant 9:

> Again, it aligns with having your own set of values about how you're going to approach things and so that you're not, you're doing them in a principled and reasoned way as opposed to sort of ad hoc reaction. Something that I, the best example I have of this is when I did do work with my own home community, I was impressed that they did have a statement about what type of development work that they were willing to because they wanted to be open for business and they wanted to do economic development. And it has brought in a ton of open-source revenue. But they've very clearly said "we are going to go for natural or renewable resource, like, or clean energy, is essentially and would reject forms of, you know, resource of energy that were, you know, based on fossil fuels primarily or were dangerous." So, you know, we've partnered on a wind farm. We have our own wind farm close to our community.

Several participants had identified land use mapping as a key enabler toward alignment with Article 32[i] and [ii] of the UNDRIP.

Participant 5:

> I think one of the things I think that's really important from an Indigenous community's perspective is to be ready for the bigger economy. Like if you don't have a traditional land use already done, get one done, right? You don't have a traditional land use map done, get one done.

Participant 6:

> One of the things that my law partner has been involved in creating a TRLUMP. So T-R-L-U-M-P … a Treaty Rights and Land Use Management Plan … you could have a regional assessment under the Impact Assessment Act. You know, different provinces have different mechanisms for having land use planning … my understanding of it is that it was First Nations led or Indigenous led. And rather than just focus on, you know -- what you might get out of an Impact Assessment Act or regional assessment, which is, which is more sort of focused on the physical environment -- it was largely about rights. So it was basically the communities were saying, "Okay, we've got this area that isn't really developed yet." … "Before things go ahead, we want to have a say. We need some land use planning and we want to have a say in where we think that we can accept development and where we can't. And we don't want it just to be based on, oh, there's wetlands here." Like, you know, the typical stuff that a Crown government would look at, right? And not that the physical environment features of land use planning aren't important, but they wanted like, "We want our spiritual sites taken into account. We want harvesting sites, etc."

Participant 2:

> What I found is communities are rarely ready to have that sort of in-depth conversation. I think in some cases they have. And they've actually been lucky because maybe they've had past projects where they've gotten capacity to start building land use mapping or traditional use mapping or elder interviews or to gather this information so that they have it in a bit of repository. So that when they're going into negotiations, they can draw on all of that. But that's the rare community. Most of them are actually much more in the "We are building it - we're flying the plane and hoping that we don't run out of runway here."

While Participants 5 and 6 spoke to the usefulness of land use mapping in preparation for negotiations and to identify areas in which development is acceptable, Participant 2 had remarked that many of their clients had not undergone the process of identifying these areas within their territories. Further, Participant 2 had noted that some communities may have had the opportunity to previously work with a proponent whereby capacity was provided to gather this relevant information as part of their impact assessment. By mapping out the sensitive sites, harvesting sites for medicine and food, and sites for hunting and fishing, Indigenous nations are

better positioned to respond to consultation requests in a manner that aligns with their developmental priorities.

A trend observed by Participant 2 is that Indigenous peoples are starting to become their own proponents in support of their development priorities. While these projects may not necessarily be in the resource extraction industry, it demonstrates nonetheless that Indigenous nations are engaging with the economy on their own terms in support of their nation's development priorities.

Participant 2:

> I think Indigenous communities are increasingly looking at different development strategies, including becoming proponents of their own - less in the mineral extraction side of things and more on the side of things about, "Okay, my community is, for example, a remote fly-in-only First nation. Well let's actually look at how we can build a road to give our community access to the provincial road system. Let's actually develop a housing corporation or partner with a housing corporation to develop modular homes in our community for low-income families." So that's where I see some of the positive things are being able to take place is for communities who are more active in sort of development initiatives, not on the mining side of things, but more the industry side of things. Like being able to kind of take control of that piece and say, "No, no, we're in a place where we're sophisticated enough or we can find financing institutions to partner with to actually improve the day to day lives of our community by road access, housing access, developing kind of our own health care strategies."

Participant 5:

> I know there are certain communities that are very, very engaged in the oil and gas sector, their own service businesses and that sort of thing. And then there's other nations that won't touch that sector - and the same is true with other industries. It depends on the nature of their activities and the nature of that community's interests and the proximity and location.

As discussed by Participants 2 and 5 above, Indigenous nations are increasingly initiating the pursuit of resource development project that align with their self-determined developmental priorities. This is demonstrative of alignment with Article 32[i]. Participant 2 below notes that other nations may get involved in resource development projects for different reasons.

Participant 2:

> But then people start to talk about, “okay, and how does our community need to benefit from this then?” So, I think it's almost the main threshold concern that if it's a “Oh, no, this will make the land unusable,” then it's a hard stop. There [are] no further conversations they can be had. If it's a project that can proceed without doing detrimental damage to things, then you know, often there's a consideration of, “Okay, well then what can we do? How can we actually benefit from it? How can it help the community in other ways, or build relationships, or jobs, infrastructure, those sort of things.” But it often takes a lot of conversations to understand something that will damage our lands, our resources in a way that really is impacting future generations? And if so, no.

In the first half of the passage above, Participant 2 speaks to the role that assuaging concerns about environmental and other impacts as motivating the affected Indigenous nation to offer consent for an externally initiated project. When affected Indigenous peoples are satisfied that a project will not severely and adversely impact the integrity of their lands and resources for future generations, they are more likely to consider proceeding with a proposed project. In the latter half of the passage, Participant 2 spoke of “a lot of conversations to understand” the impact of a proposed project. This is consistent with internal consultation, as discussed above. In the following section, capacity as an enabler toward alignment — with implications for several enablers — will be discussed.

4.3.6 Capacity

A final enabler (or barrier at its inverse) toward alignment of engagement practices with Article 32 of the UNDRIP relates to capacity. As reported by several participants, the presence or absence of capacity is pivotal in whether the affected Indigenous nation can fully participate in the engagement process, and it applies to every stage of engagement. Several participants had spoken about capacity in relation to a preparatory stage even before negotiations begin. As noted

earlier in this chapter, several participants had remarked that it is important for Indigenous nations to be proactive by identifying their developmental priorities, mapping the use of their land, and to identify and articulate what impacts they are willing to accept even before they are engaged by proponents with a proposed resource development project.

In order to effectively conduct the preparatory work listed above, Indigenous nations require capacity (financial and human), as discussed by Participants 5 and 7 below.

Participant 5:

> I know lots of communities have capacity issues to get ready [for engagement], so I think that's one place there's probably right now a gap in the system in that if you need resources and capacity in order to get ready. But I think it's very important to be ready and to be able to identify your interests when a project is on the table.

Participant 7:

> Certainly, the developmental priorities of Indigenous peoples first and foremost require the capacity to conduct the work necessary to identify those priorities. So, a First Nation that lacks the internal or financial capacity to do the work of engaging its membership, of assessing and informing its determination of what the priorities are, is at a disadvantage when it comes time to have discussions about their priorities and how to implement them. So capacity is an important part of getting that right and implementing Article 32.

When a nation has sufficient capacity to conduct this preparatory to facilitate engagement with project proponents, we will see better alignment with Articles 32(i) and 32(ii), which affirm the right to [i] determine and develop their priorities for the development of their land, territories, and resources as well as [ii] to consult and cooperate with the project proponent to provide their free, prior, and informed consent. Where a nation does not have sufficient capacity, alignment across these two components will prove more difficult — if not impossible — to achieve.

The availability of sufficient capacity is exceptionally relevant to the negotiation stage of engagement, which corresponds to Article 32(ii) wherein states (or corporations vis-à-vis delegated consultation) are to consult and cooperate with the affected Indigenous nation through

their own representative institutions to obtain their free, prior, and informed consent. As will be discussed later in this section, consultation fatigue exists wherein many Indigenous nations are inundated with consultation requests, which serves as an additional draw on limited capacity resources. Participant 3 observes that by developing their own engagement protocols and practices, an Indigenous nation may be able to manage the volume of consultation requests in a more proactive manner, whereas Participants 6 and 7 discuss the relevance of capacity to the engagement processes, once they have moved beyond the initial screening.

Participant 3:

> I think that many nations are reactive to industry. And that's a capacity issue, right? And also volume issues in that nations deal with a lot of incoming consultation and other inquiries. So, you know good advice I would give is to set up your own regulatory processes that can help fund those activities.
>
> So nations enacting their own consultation process as an application process so that they can have conversations early on about capacity funding and to use those resources and push for as much of those resource as possible to engage in strategic thinking about the nation, the projects in their territory, their goals in terms of land, economic development, and to have that vision for the future before engaging in negotiation. Because otherwise it's a reactive exercise, where the proponents or the government or whomever, is leading the charge. They're proposing X-Y-Z and the nation is always sort of reacting to it without a clear understanding of what their goals should be, what their priorities are, and what they're willing to consider in terms of adverse impacts and trade-offs. Because it's all about trade-offs. So that's the biggest piece of advice, is to engage in that strategic thinking and getting good advice in relation to that.

Participant 6:

> I think the issue with consulting and cooperating in good faith with Indigenous people through their own representative institutions is those representative institutions often lack capacity, like that's the biggest piece, right? And I've thought a lot in my practice about, like, about free prior informed consent and, like, what it means when. Like are they even in a position to really be giving their informed consent if they are so stretched thin? And yeah, and maybe the government is consulting with communities and in the way that communities have said. But, like, when a community or an organization that does consultation on behalf of the community has a million files and like three staff, you're not getting really informed consent, right?

Participant 7:

> So a lot of the work that needs to be done to be successful in external relations begins with internal structure and governance. If a First Nation can get those things right, they're in a much more powerful position than a First Nation that's struggling to determine for themselves what they want or what they want to raise with its partners across the table.
>
> And that also speaks to the importance of capacity, which is advice to Indigenous peoples. So, make sure you secure capacity. Advice to industry is make sure capacity is available. To government, ensure that capacity is an ongoing process, not just in relation to individual projects, but over time strengthening the capacity of Indigenous nations to engage in these types of dialogues. Because the less capacity that's available, the more likely that there will be constraints on that First Nations ability to evaluate a project. And if there's constraint on their ability to evaluate a project, the answer is more likely to be no.

As noted by Participant 7, the significance of capacity cannot be overstated: when an Indigenous nation is simply unable to tend to evaluation of a project, the answer is more likely to be no. This is a similar sentiment to what Participant 2 had expressed in relation to mandated timelines for decision-making (discussed later in this chapter) whereby the best answer an Indigenous nation may be able to provide is a "maybe". Capacity constraints similarly create an unnecessary barrier on an Indigenous nation to meaningfully participate in engagement practices. Coupled with the opacity of information, capacity constraints will produce misalignment and possibly induce the rejection of the proposed resource development project.

Finally, it is important to recognize the applicability of capacity constraints during the implementation phase of an agreement with a project proponent. Conceivably, it is during the implementation phase whereby an affected Indigenous nation receives redress (accommodations and benefits) and mitigation measures for their impacted rights. Several participants had discussed the relevance of capacity during the implementation stage below.

Participant 3:

> Implementation funding to build capacity in the nation and to implement and foster the relationship with the proponent goes a very, very long way. Because if you don't have the money to hire somebody, you know, a lot of these agreements, they aren't implemented properly. And then what happens is the nation blames the proponent for the non-implementation and the proponent blames the nation for not engaging with them to implement it.

Participant 6:

> One thing that hasn't come up as we've talked that I think is a big thing is capacity to negotiate and capacity for implementation. Implementation I think is a real issue and is where most good IBA's go to die, right? So as an example, I have a community who negotiated really great environmental provisions, like they're great. But they require an environment committee, they require community members to be on that committee. They require someone from the First Nation to review — not just review — [they] negotiated that there would be co-development of permit applications ... like that's amazing. But if there's not someone who has the time, training, or capacity to do that, it's like, what was the point? Right? And that that's a real concern.

Participant 9:

> I'm thinking back to the project that we did, is that we did negotiate for the establishment of various bodies that would continue over time. But I think the capacity on that one was a challenge.
>
> So, I don't know if it continued. I mean, we did argue and got the company to agree to a body that would meet annually or biannually and talk about issues and continue to raise. And I just I never knew whether it continued or not, and I'm not sure it did. And I think sometimes that ongoing capacity piece is really important.
>
> So, it's not just in the moment of negotiating but the long term. And so, it's putting in place, I suppose, structures, capacity, education funding to create sort of the positions of the people that can continue to do this, which is which can be a challenge.

Observing the importance of securing implementation funding, Participant 3 notes that a lack of capacity will preclude meaningful implementation of the agreed upon IBA. This observation is shared by Participant 6, who eloquently remarked that implementation is "where good IBA's go to die". Participant 9 remarked that both parties had agreed to meet annually or bi-annually to discuss how the project is proceeding — similar to IBA alternatives discussed

later in this chapter (section 4.4.4) — but was not sure that it had been acted upon due to a lack of capacity.

Participant 3:

> If they only think about the negatives and the potential risks - without thinking about long term benefits and really integrated participation in projects - they may lose out on those benefits. Or they may waste some of the benefits that they've negotiated for like I said in terms of preferential contracting and things of that nature.
>
> Sometimes those benefits are negotiated, but they aren't really capitalized on by nations. And that's a lack of capacity, a lack of strategic thinking, etcetera. On that point, nations should always try to negotiate funding from proponents, but recurring funding for staffing, implementation funding, that's just huge.

Although research participants were not proscriptive about whether capacity building costs should be evenly split by Crown and corporate actors, they were clear in specifying that these costs should not be borne by the affected Indigenous nation and that the failure to ensure the nation has sufficient capacity will undermine the efficacy of the engagement practices.

As evidenced in the preceding pages, capacity will determine whether a nation is able to meaningfully engage with a project proponent at every stage of engagement. Further, the availability of capacity to engage will determine the degree to which the engagement process is aligned with Articles 32(i), 32(ii), and 32(iii) of the UNDRIP. If current practices seek to more closely align with Article 32 of the UNDRIP the removal of capacity restraints is required. Affected Indigenous nations that possess sufficient capacity can more fully exercise its autonomous governance and constituent enablers discussed above, including decision-making institutions, nation developed protocols, internal consultation, Indigenous legal orders, and preparedness and land use mapping. Capacity is a powerful enabler that spans both autonomous governance (as discussed above) and participatory engagement which will now be discussed.

4.4 Participatory Engagement

In contrast to autonomous governance — which is exclusively centered on the affected Indigenous nation having sufficient time and space for its governance mechanisms to deliberate over the costs and benefits of a proposed resource development project and render their decision — participatory engagement is characterized by the interactions between the affected Indigenous nation's and project proponents (both Crown and corporate actors).

Table 4.2. Illustrative data excerpts of *participatory engagement*

Conceptual category	*Description*	*Examples from data*
Supportive legislative frameworks and norms	Provincial jurisdictions that are more attuned toward requiring project proponents to meaningfully engage with affected Indigenous nations – either through legislative frameworks, regulatory requirements, or other norms.	• There's a lot of disparity across Canada in how resource development entities and provincial governments work with Indigenous nations … some of the disparity is due to the different regimes, the legal regimes in different provinces in relation to environmental review of projects. Some of them are, I think, cultural on the non-Indigenous side. If you look at the differences between how projects proceed and the negotiations proceed in Alberta versus British Columbia, I think there are major disparities. (#3) • Some jurisdictions are better at "getting it" any way, and then some are worse. And then in those jurisdictions where some are worse, you see communities just getting into IBAs because they know that they don't have a choice … again, that's very regionally focused. Like in New Brunswick that's not happening yet, I think, because proponents know that … the province is … just going to rubber stamp their projects. (#6)
Early engagement	A best practice whereby project proponents engage with the affected Indigenous nation at the earliest possible stage.	• A project proponent - whether they're expanding a project or they're building a new project - has an understanding that they need to consult on accommodations and for adverse impacts to the project. If they don't do so soon enough when they apply for their permits, the nations will file objections or file. (#3)
Relationship building	The process of building a mutually trusting relationship with the affected Indigenous nation	• You know, they're walking in day one and expecting to be able to just jump off the starting point and get right into the weeds - that's not how we function when we're going to be doing that kind of work. The best practices that we've seen have been really working with staff of corporations that are willing to sit with us and get to know us. We get to know them, we build a rapport, we have a relationship, are more able to move forward from a point of mutual trust and understanding. Those have been the most successful. (#1)

(Continues)

Table II. Continued

Conceptual category	*Description*	*Examples from data*
		• You have to actually come to the community. You have to sit down. We have to have a meal together. We have to learn about who you are and who your family is. And share some stories, share some laughs, build that relationship as part of building any economic or other part of the relationship. And if that relationship focus breaks down, then I think there's very little interest to continuing to move forward on sort of economic or other development priorities. (#2)
		• I think part of that is community engagement. You know, what does the community look like? What are their practices? What are they hoping for as individuals? And then at a governance level, what are the selected goals, aspirations and the vision for the community and how do we get there and how can we use and leverage Aboriginal rights and potential product development in a responsible and sustainable way, given the trade-offs, to get to the place where we want to be for proponents? (#3)
Joint Project Design	Project design that is flexible and responsive to input provided by the affected Indigenous nation to mitigate impacts (economic, environmental, social, cultural, and spiritual).	• One of the concerns with the community that I work with is, you know, they're very big users of the water and very, very deeply ingrained with water stewardship over their territory. And so sometimes when there's been exploration happening and there have been even proposed drill sites to take place on water bodies or near water bodies, I've seen actually a very good understanding of saying, “No. No, we need to shift those. We can't have that happening. We're going to agree with setbacks, so no drilling can happen within a hundred meters of any water body” sort of thing. (#2)
		• Often a lot of items that an Indigenous group will identify in terms of a project are fairly easily dealt with - especially at an early stage like where you're placing things or that kind of thing. So to actually make sure that either you're doing it an early enough stage, which is the perfect way to bring those in and plan around that. But if not, at least to be responsive and flexible enough that if … sometimes there'll be things where they would maybe say, “look, the viability, the project doesn't work. If the road is from this side versus that side” or something like that. (#10)

It is comprised of the following enablers, which will now be discussed: supportive legislative frameworks and norms; early engagement; relationship building; and joint project design.

4.4.1 Supportive Legislative Frameworks and Norms

Many participants explained the differences in IBA outcomes based on the diversity of legislative and normative provincial regimes across Canada. Recall from chapter two, the NRTA

effectively provided the provinces with jurisdiction over the natural resources located within its provincial borders. Participants also spoke to the varying appetites and political will of provincial Crown actors to engage with affected Indigenous peoples in a manner that more closely aligns with Article 32. In some cases, as revealed below, provincial Crown receptiveness to meaningfully engage with affected Indigenous peoples is supported by legislative frameworks that aim to produce alignment with the UNDRIP.

Participant 3:

> I think it really depends on the jurisdiction. There's a lot of disparity across Canada in how development entities, resource development entities, or infrastructure and provincial governments work with Indigenous nations in the federal law. And some of the disparity is due to the different regimes, the legal regimes in different provinces in relation to environmental review of projects. Some of them are, I think, cultural on the non-Indigenous side. If you look at the differences between how projects proceed and the negotiations proceed in Alberta versus British Columbia, I think there are major disparities.
>
> I would say "How are we doing in terms of the adhering to the United Nations Declaration on [the Rights of] Indigenous Peoples Article 32?" I would say it depends. That's your typical lawyer thing, but I don't think that — obviously UNDRIP is not necessarily interpreted everywhere as the law of the land. The mechanism by which UNDRIP becomes the law of the land, or flip it around and where Canadian law becomes consistent with the rights in UNDRIP, is through UNDRIPA (UNDRIP Act) and the action plan. Now it's I think it's interesting that B.C. is ahead of Canada in this regard. So there the provincial legislation is a few years ahead of federal.
>
> Even if, you know, there are courts that have taken into account UNDRIP in relation to the interpretation of law - if you're a nation, you can't necessarily sue under UNDRIP, right? So, there's been a gap there. And we've seen some resource development companies understand the risk of being behind the ball when it comes to that gap in the law like Coastal Gaslink.

While affected Indigenous peoples in British Columbia may benefit from provincial legislation that purports to support the UNDRIP, this does not hold true across other jurisdictions in Canada, as observed by participants 6 and 7.

Participant 6:

> Some jurisdictions are better at "getting it" any way, and then some are worse. And then in those jurisdictions where some are worse, you see communities just getting into IBAs because they know that they don't have a choice … again, that's very regionally focused. Like in New Brunswick that's not happening yet, I think, because proponents know that … the province is very conservative in New Brunswick, very anti-Aboriginal rights. Like they don't recognize section 35 for the most part and are just going to rubber stamp their projects. So, they're like, why would we partner with the First Nation? We don't have to.

Participant 7:

> There is a spectrum of negotiations and processes that take place. The dialogues between government, proponents or industry and Indigenous peoples, and it varies from place to place, from Indigenous group to Indigenous group, from sector to sector to sector, and so on. And I think what we see is instances where you have a higher degree of alignment with Article 32 and instances where you have complete misalignment with Article 32.

As observed by the participants in the representative quotes above, the legislative frameworks and norms held by provincial jurisdictions serve as an enabler toward alignment with Article 32 of the UNDRIP. The power wielded by provincial jurisdictions to set the tone for engagement between project proponents is best demonstrated by Participant 8 who noted that the same project proponent may engage with affected Indigenous nations quite differently, dependent upon how much leverage and weight the Indigenous nation is provided by the provincial Crown.

Participant 8:

> So, I would say that strangely - at least in British Columbia - I actually think proponents are coming much closer to recognizing a degree of jurisdiction - especially the right to free prior informed consent in their negotiations. I think that we are trending towards an acceptance that, that IBA's are going to be FPIC-based and that there's a requirement emerging also implicit that IBA's need to be consistent with UNDRIP. You know that contract law might be captured in the least the spirit of what the trend is in Canada and in British Columbia. I mean, it certainly helped, I think in British Columbia, particularly that the B.C. and federal legislation coexist to create an umbrella of potential UNDRIP compliance.

> You can hear stories often the exact same company [is] actually completely the opposite in another provincial jurisdiction or territorial jurisdiction, because they don't feel like … their assessment is the risk is lower. And then they can be the assholes that they always wanted to be. And they've got the government behind them anyway, they always force their project through and there's no repercussions to it, right?
>
> Yeah, I think if they feel vulnerable and there's no way their project to succeed without the consent of the nations and that their assets are in a way landlocked in that particular way, then they feel vulnerable. They negotiate their way out of it or through it, right?

As observed by the participants above, although the project proponent will often conduct the procedural elements of consultation and engagement with the affected Indigenous nation, the Crown wields tremendous power to set the tone of those engagement processes. For example, Provincial Crowns may enact legislation that affirms the applicability of the UNDRIP to projects within their provincial jurisdiction. Several participants noted that Indigenous nations located within the province of British Columbia have more leverage (compared to Indigenous nations located within other provinces) on account of the provincial Declaration on the Rights of Indigenous Peoples Act. Let us now turn to early engagement as another enabler that contributes to alignment with Article 32 of the UNDRIP

4.4.2 Early Engagement

Throughout this chapter, stories and vignettes from participants highlighted both positive and negative examples of engaging with the affected Indigenous nation. Several participants have observed that a tacit understanding among project proponents is that they must engage with nations in some capacity. A consistent theme across participants who spoke of engagement timing observed that the best relationships are built with the affected Indigenous nation by engaging with them at the earliest possible opportunity. For example, Participant 3 observed that

engaging with the affected Indigenous nation is best done at the earliest possible stage whereas failure to do so introduces an exposure to risk by way of the nation filing objections.

Participant 3:

> Actually, what I see happening is a project proponent - whether they're expanding a project or they're building a new project - has an understanding that they need to consult on accommodations and for adverse impacts to the project. If they don't do so soon enough when they apply for their permits, the nations will file objections. They'll engage the Crown and that sort of gets the project proponents aware or more aware of their need to engage with them directly. And so they'll try to have those table [discussions] and the Crown is a party to that those discussions.

Risk exposure and mitigation was corroborated by Participant 8 who discussed it in greater detail.

Participant 8:

> I mean, I think they're very responsive if they think there's a risk there. Okay. Yeah, I think it's all a matter of … I mean, the proponents aren't altruistic in anywhere for so, you know, but they are looking to their capacity to deliver whatever their project is, is all based on financing and risk assessment. Which is part legal, part financial, you know, socioeconomic. So they, over time, have gotten used to the fact that they need to negotiate IBA's, which are sort of this hybrid of all of this. … I think there's lots of things going on internally in the decision making of proponents. And over time, I think they are starting to at least appreciate they have to apply [engagement] at least superficially.

In the representative quotes above, Participants 3 and 8 had mentioned risk aversion as part of the proponent's decision calculus to engage with the affected Indigenous nation. In addition to mitigating risk, Participant 3 had noted that if proponents do not engage the Indigenous people early or soon enough, the affected Indigenous nation may file an objection which will lead to project delays. At this juncture, it would be imprudent to produce a hierarchical order or prioritization of one enabler over another as it may diminish the significance of those that are not positioned in the top tier. Each enabler serves a vital role to

bring project proponent engagement practices to be more closely aligned with Article 32 of the UNDRIP. Nonetheless, early engagement is a practice that serves as a potent enabler for being able to produce alignment across multiple components of Article 32 of the UNDRIP. Early engagement will not only reduce "risk", it will also allow for the proponent to engage in relationship-building with the affected nation, learn about the impacts of their project on the affected Indigenous nation, and incorporate this information into their project planning and design. It is also conducive toward building positive, respectful relationships with the affected Indigenous nation, which will now be discussed.

4.4.3 Relationship building

Several participants had emphasized the significance of project proponents' relationship-building efforts as enabling alignment with Article 32 of the UNDRIP. Participant 7 had observed that respect serves as a potent starting point for project proponents to approach affected Indigenous nations in building a relationship with them.

Participant 7:

> The uncertainty associated with underdeveloped relationships with Indigenous partners, the conflicts that can arise processes, [and the] regulatory processes or judicial processes or within the court of public opinion are best mitigated through simply beginning with the most respectful positions, which is this project will only go forward with your consent.
>
> And the companies that have been most effective are ones that have found the ability of utilizing consent as a competitive advantage over their competitors. And they're getting projects built on time. They're more cost effective. They are reputationally beneficial to the company because the Indigenous partner has been successful in achieving a positive outcome and they are helping to align Indigenous values -- whether environmental, cultural or rights based -- with the project design and development, ensuring that the project is designed in the best possible way to mitigate its impacts for the best degree. So, my advice to industry is exercise a great degree of humility, work on building relationships and embrace free, prior and informed consent as your strategic plan.

Participant observations offered throughout this chapter reveal that some project proponents may tend to view engagement with the affected Indigenous nation — along with costs associated with the provision of accommodations and mitigation efforts — as a burden that erodes their profitability. However, in the experience of Participant 7, the most profitable companies are those who embrace FPIC (and include the affected nation in the planning and design process as partners). Further, these FPIC-embracing companies also benefit from enhanced reputation, on-time completion of projects, with a competitive advantage over those who do not embrace FPIC.

The following pages offer insights from several participants who reflect on specific behaviours, actions, and attitudes that are conducive to building respectful relationships with the affected Indigenous nation. Participant 1 shared two related insights about project proponents and offered advice in terms of engaging Indigenous peoples in a good way.

Participant 1:

> You know, they're walking in day one and expecting to be able to just jump off the starting point and get right into the weeds - that's not how we function when we're going to be doing that kind of work. The best practices that we've seen have been really working with staff of corporations that are willing to sit with us and get to know us. We get to know them, we build a rapport, we have a relationship, are more able to move forward from a point of mutual trust and understanding. So those have been the most successful ones.
>
> They come in time of need. If you're anticipating a project moving forward in certain area, you know what? Why don't you come and visit a community celebration or something or, you know, engage with members of the community in some other way instead of only coming in to them in a time when you have a need, right? It's building that reciprocal relationship and not just a general relationship, ensuring that you are finding ways that you can not only benefit but also provide benefit.

Building an effective and meaningful relationship with the affected Indigenous nation requires the project proponent to get to know the community before getting “right into the weeds”. Ontologically, many Indigenous nations are relational rather than transactional;

therefore, conducting business as usual is not productive to earning the trust of the respective nation. Participant 1 suggested that rather than coming to Indigenous nations in time of need (i.e., we need to meet with you to satisfy the Crown for approval of our project), proponents who build relationships based on respect and reciprocity may lay a foundation of trust for subsequent discussions about their intended project. Naturally, this will extend the timeline in which proponents will engage with the affected Indigenous nation, for which the proponent should account. Additionally, Participant 1 advised that physical meetings should take place, preferably within the community setting. This best practice was echoed by Participant 2, who also provided advice on best practices in relationship-building.

Participant 2:

> I think one of the key things that, you know, I would be remiss if I didn't touch on is how basically all of the communities [that] I work with are very much focused on building relationships, right? So, it's not just that they are able to negotiate 10% of a deal on a project, but that they actually know who's running the project, that they have that relationship that they have those kind of leadership understandings, that they have a good relationship between them. Invariably, it's really important that we have to have a face-to-face meeting.
>
> You have to actually come to the community. You have to sit down. We have to have a meal together. We have to learn about who you are and who your family is. And share some stories, share some laughs, build that relationship as part of building any economic or other part of the relationship. And if that relationship focus breaks down, then I think there's very little interest to continuing to move forward on sort of economic or other development priorities. So, it's interesting that that is always such a main focus, and that's kind of across the board, be that a very small community up in the north or a very large dispersed, highly urban community in the south, right? They're all very much focused on what are those relationships, how are we building those, and how is that kind of the thread that connects whatever opportunities we may be discussing both now and into the future?

While noting that face-to-face meetings are important, Participant 2 remarked that great value is placed on getting to know the key actors who are engaged with running the project, as well as members of the top management team. According to Participant 2, relationship-building

that transcends a transactional approach involves key corporate actors having a meal with community members and leadership to share stories, and getting to know one another. These experiences will serve to build and strengthen relationships and may well provide an opportunity for proponents to begin to understand the community from their perspective. As noted earlier, project proponents had been criticized for failing to understand how some activities are seen as impactful by the affected Indigenous nation; in the absence of developing a trusting and meaningful relationship with the Indigenous nation, proponents may not be well positioned to fully apprehend information shared with them during the consultation process.

In emphasizing the significance of physical presence in the community, Participant 5 juxtaposes a proponent engaged with the nation within their community with a proponent who engages from a distance.

Participant 5:

> And then from an industry standpoint, I would say, "you know what, you need to be in front of this obligation - the duty to consult. You need to be in front of it. You need to engage local people with local knowledge because they can help steer the conversation in ways that somebody sitting in New York or Australia cannot." And so having people engaging with local people, whether that's through - however you do it - it is incredibly important. And so for industry, I would say that taking it seriously and not ignore local knowledge.

Through physical (rather than remote) engagement with an affected Indigenous nation, Participant 5 observes that the proponent may garner local (and Indigenous) knowledge which, again, may offer significant benefits in terms of project design.

In addition to offering triangulating information about relationship-building best practices, Participant 3 noted that this crucial stage allows for the proponent to engage in their due diligence. In this stage of engagement with the affected Indigenous nation, proponents may learn about the nation's practices, aspirations (at a community and individual levels), and

governance issues related to decision-making protocols. This information will undoubtedly serve both the affected Indigenous nation and the project proponent.

Participant 3:

> I think part of that is community engagement. You know, what does the community look like? What are their practices? What are they hoping for as individuals? And then at a governance level, what are the selected goals, aspirations and the vision for the community and how do we get there and how can we use and leverage Aboriginal rights and potential product development in a responsible and sustainable way, given the trade-offs, to get to the place where we want to be for proponents? You know, I think many, many proponents are getting better advice and then there's more of an understanding of Indigenous rights in Canada and the risks involved with not understanding them in a business context and development context. But also, it goes beyond understanding the legal framework in the cases and all that kind of stuff. [It's] important [to] understand the future and where the law is headed in Canada in relation to Indigenous rights - it's also cultural.
>
> And I think people who are involved on behalf of proponents - whether it's lawyers, advisors, negotiators on the proponents side - they need to understand that they have to first develop a relationship with a community, with leadership, with, other parties involved on the other side to understand their interests, understand their history, and their perspectives because otherwise it's two ships crossing in the night, really. The nation understands the business' priorities; it's to a project and make money for shareholders. That's generally it, right? There's not a lot there. But the proponent can't take the same approach they would take when they're negotiating with another business, because nations aren't businesses, right? So, to be successful, they have to understand the issues which will help them not only understand the very real economic risks that they face in not working with nations and not getting consent, but they have to understand from a perspective as well, how Indigenous peoples and that Indigenous nation itself, operates; who are the decision makers? Maybe it's not the band council, maybe it's the Chiefs.

Two additional participants shared confirmatory insights about the significance of relationship-building as part of the proponent's due diligence.

Participant 1:

> Build relationships. That is the biggest challenge that we have, is a proponent will come in not knowing anything about the community, the treaty territory, the partners that anything and will want to start to discuss this giant hotel and water park they want to build right next to our reserve yet will not know anything about the proper about the governance system, about the impacts, about the relationships.

> So, we've had some really great partners who have done things like, you know, they come to powwow and chat with our organizers. And, you know, bring an information booth to greet [the community] … They perhaps are a donor for that, the next year perhaps they're there.

Participant 4:

> It doesn't matter what you're doing – [whether] you're building hydro dam, you're sinking a shaft in the ground, you're building a, you know, a pipeline -- you know the history of this community and not just, "Oh, Treaty one was signed in 1871 here and they have treaty days every August the third." It's knowing that actual history; here's what happened to this to this group and what was happening to them before they entered into Treaty. What has happened to them since? Understanding the context of how Indigenous people were treated in this country and the cumulative effect of the Indian Act amendments from 1927 to 1951. The pass system that was brought in in 1885. Residential schools, day schools, chronic underfunding, and systemic racism in the justice system - as far as I'm concerned, systemic racism and the entire legal system. The fact that Indigenous people were the last people in this country to get the vote, and all of these things - these cumulative things - and the extent of poverty and unemployment and all these things. All that history feeds into these negotiations.

In addition to understanding a nation's governance structure (as reported by Participants 1 and 3), Participant 4 advises that proponents may build knowledge about the community, including its specific history, its relationship with a Treaty, as well as its history in relation to colonial systems such as residential schools among other systems that will enable them to become better prepared to engage in negotiations with the affected Indigenous nation.

Several participants spoke of dispositions that enable proponents to build meaningful relationships with affected Indigenous nations.

Participant 10:

> I think the biggest tension you find is when the Indigenous group is when they're being treated as a stakeholder and not as a rights-holder. And at least for me and my colleagues, we're like, "That's a really fundamental goal difference." And so I think often the tension is that you can't deal with an Indigenous group like you're dealing with your other stakeholders. It doesn't fit and it's not acknowledging the truth of what it is to be a rights-holder. So, I think that's the biggest tension.

Participant 7:

> Humility is probably the main factor, and willingness to be flexible. Willingness to learn the immense value of bringing Indigenous people from the space within which you are seeking to operate, construct, or advance a project, is a major factor in whether you're successful in working across the table effectively.

Participant 9:

> And for the corporations [my advice is] open-mindedness, willingness, good counsel who is going to recognize and tell you that you've got to be seen as a partner. You got to go to the community. You've got to listen. You've got to not be dismissive. You've got to almost do the things that are going to show that you're actually willing to be a partner and actually put some stake in the game.

Taken together, proponents who approach affected Indigenous nations with recognition of that nation as holding rights (versus a stake or interest) will approach the relationship in a qualitatively different manner. When recognition of the status of the affected Indigenous nation as a rights holding party is coupled with attributes of humility and open-mindedness, the benefits associated with meaningful engagement may be realized, moving the engagement practice toward alignment with Article 32. However, these dispositions and attributes are not sufficient to produce this alignment. Several participants had noted that for full alignment to occur, engagement must begin at the earliest possible stage of planning as discussed earlier in this chapter.

4.4.4 Joint Project Design

As discussed immediately above, early engagement is an enabler that provides its own benefits for the project proponent, such as risk mitigation and reducing the likelihood of project delays. Additionally, early engagement has cascading effects on alignment in other domains of Article 32 of the UNDRIP. Recall the origami metaphor discussed in chapter 1; early engagement may be represented as the first fold that a project proponent will make. If done well,

with thoughtfulness, care, and precision, early engagement may set the foundation for successful engagement processes. However, if it is not done — or done thoughtlessly, carelessly, and coarsely — the end product of engagement may suffer. Representative quotes below demonstrate the effect that early engagement may have to align the engagement process with Article 32 of the UNDRIP. Although the following representative quote from Participant 6 was previously discussed in section 4.2.2, it is worth highlighting again.

Participant 6:

> Once a project plan and project description has been filed and submitted, like we truly way too late. Like the site has been selected, it's and so - communities at most can get involved to maybe tweak some of the details. Maybe your access road could be moved a little bit to the left. But that's not, you know … So that's something that I think would be great if it could be implemented.

As Participant 6 observed, project proponents often approach affected Indigenous peoples too far down the planning process to allow them (the proponent) to incorporate mitigation measures based on concerns that are identified in the consultation process. Participant 6 observed that there may be opportunity to make minor revisions to the plan, but the proponent has built up too much inertia (and likely financial investment) to fully respond to the affected Indigenous nation's concerns.

This observation was echoed by Participant 10, who noted that early engagement may be bolstered by flexibility on the part of the proponent in being responsive to concerns identified by the nation.

Participant 10:

> Often a lot of items that an Indigenous group will identify in terms of a project are fairly easily dealt with - especially at an early stage like where you're placing things or that kind of thing. So, to actually make sure that either you're doing it an early enough stage, which is the perfect way to bring those in and plan around that. But if not, at least to be responsive and flexible enough that if … sometimes there'll be things where they would maybe say, "look, the viability, the project doesn't work if

> the road is from this side versus that side" or something like that. But I think often those things can actually be done and they may not be that major [and] can actually go a long, long, long way - particularly on the relationship.

Early engagement and flexibility around project design provide potent opportunities for more fulsome participation of the Indigenous nation, thereby ensuring alignment with the self-determination principles outlined in Article 32 of the UNDRIP. This holds especially true where development activities may produce impacts related to stewardship priorities held by the Indigenous nation.

Participant 2:

> One of the concerns with the community that I work with is, you know, they're very big users of the water and very, very deeply ingrained with water stewardship over their territory. And so sometimes when there's been exploration happening and there have been even proposed drill sites to take place on water bodies or near water bodies, I've seen actually a very good understanding of saying, "No. No, we need to shift those. We can't have that happening. We're going to agree with setbacks, so no drilling can happen within a hundred meters of any water body" sort of thing. So I've seen some movement there.

When project proponents engage with affected Indigenous nations at an early enough stage, with flexibility toward project design that allows them to incorporate mitigation measures, as well as relying on the Indigenous nation as project design partners, the following outcomes may be realized:

- Indigenous nations may be able to determine and develop their priorities for resource development projects on their lands and territories (reflecting alignment with Article 32[i]);
- Indigenous nations are better able to consent to a project that is designed with their priorities reflected in an agreement (alignment with Article 32[ii]); and
- Project proponents are in a better position to fully apprehend and respond to concerns raised by the affected Indigenous nation by providing the appropriate level of

accommodation/redress and measures to mitigate environmental, economic, social, cultural, and spiritual impacts (reflecting alignment with Article 32[iii]).

Examining the outcomes listed above in relation to the vignette offered by Participant 2, early engagement respects the right of the Indigenous nation to determine priorities related to water. In this case, the nation has determined water stewardship as a priority for them (alignment with Article 32[i]). By respecting the jurisdiction of the Indigenous nation to redirect prospecting sites away from the water, the proponent is likely to secure the free, prior, and informed consent of the affected Indigenous nation (alignment with Article 32[ii]). Finally, through early engagement that allows the participation of the affected Indigenous nation in project design, proponents and the Indigenous nation may work together to mitigate the effects of development activity (alignment with Article 32[iii]).

A review of the enablers and barriers suggest that if proponents are to more closely align with Article 32 of the UNDRIP a change of logics is necessary. Rather than approaching engagement with affected Indigenous nations as a requisite step to obtaining their licenses and permits to conduct operational activities, many project proponents (as reported by three participants) are moving away from IBA's toward alternative arrangements that are more indicative of a partnership rather than another box to check.

Participant 3 shares a set of insights that describe one such trend away from IBA's toward what is called an evergreen agreement in the quote immediately below and describes the rationale for pursuit of evergreen agreements as an alternative to an IBA.

Participant 3:

> I think more and more so in these agreements is where nations provide their consent is - we call them evergreen agreements in terms of having periodic review of the agreement and ability to renegotiate and change the agreement and also more

> integration between the nations and proponents on the environmental monitoring side and on stewardship.
>
> So we're seeking regular approvals for not a new project, but potentially expansion or project trade and having an agreement or a mechanism built in to deal with that sort of diverting those issues into an understanding between the parties is much easier than having that lay outside of an agreement with no ability or for either party necessarily to deal with those new issues that come up. And if you don't sort of build it in, then you start at a place where neither party has an obligation to discuss or to consult other than one that's borne out of the regulatory and legal, which leads to more legal processes, including litigation and things like that. And engaging more with the regulatory framework rather than as partners in an agreement.

As noted above, both project proponents and affected Indigenous nations have observed that there is great difficulty in being able to envision and account for every possible contingency related to the development project. By signing an evergreen agreement, both parties can agree to initial terms while also preserving the ability to deal with emergent issued as they arise, which is beneficial to both parties. When presented with a follow-up question on where the impetus for such an agreement had emerged, Participant 3 advised the following.

Participant 3:

> Definitely the on the nation side. And the reason for that is historical and legal. Obviously, in the last 40 years, the law has changed so much with regard to Indigenous rights that an agreement signed 50 years ago is woefully inadequate in terms of its transactional nature and the accommodation, etcetera, etcetera. Also, I think nations have seen the issues with these sort of one-offs baked in agreements that last for 50 years because their rights have expanded and been recognized. And so, they want to maintain the ability to address changes in the law, changes in the project without being sort of locked into a single, you know, standalone agreement that doesn't have those processes and mechanisms. And we've seen a lot of the historic agreements be renegotiated in in their entirety because they're so out of out of whack with, you know, current market conditions in relation to Indigenous rights. And we've seen that in the mining industry.

A similar alternative to the traditional IBA reported by Participant 8 is to develop sequential agreements that span the milestones of a development project.

Participant 8:

> Well, I think that one of the reasons why IBAs have shifted from being sort of like a project agreement to just sort of building on a number of sequential agreements is them building out a successful story is why that's trended that way. And there's also some other financial reasons for it. And then not many companies can afford a life project agreement at the starting of a project. Many different development agreements are starting to map the milestones - the project development milestones. But I think there is sort of like, you know, that you need a series of agreements to sort of build upon each other and then also build that trust and build that relationship and build that understanding of each other, I think has been an adaptation driven by that. You can't just sit in a negotiation table for like three or four years with like lawyers and leadership and then expect that to be building a relationship, convincing the average person.

As observed by Participant 8, the development of sequential agreements arose in response to the difficulties with negotiators to build a trusting relationship with the affected Indigenous nation at the negotiation table as well as the upfront costs associated with the project's entire lifecycle. A benefit of this type of arrangement is that it will allow both parties to build relationship of trust and understanding through each successive agreement. Both parties can demonstrate their commitment to the other party and build upon successes achieved at each milestone of the project.

A final alternative to a traditional IBA is for the project proponent to approach their engagement with the affected Indigenous nation as a joint venture partner.

Participant 6:

> Well, one thing that I know my firm has been big on trying to push is - well, certain partners anyway - moving away from impact benefit agreements and moving towards like joint ventures and really Indigenous groups truly partnering with proponents. So all over there is one partner that leads up our corporate group at my firm and he knows everything about structuring these kinds of deals. I do not. So, if it's a project that a community actually … like if we're getting closer to that consent end of the spectrum where communities are truly like -- renewable energy projects, there's an example - or like a wind farm. "Yeah, I could support a wind farm in my territory." Do you have communities who are, like, trying to stop that shit? You know? They're like, "Yeah, this is, this is good." Now the partner will get in and say, "No, we don't

> want an IBA with you. We want to we want a 50/50 partnership on this deal." Right? And I think that's kind of where we're headed. And that maybe gets closer to your vision, right? Which is like, "This is our territory. We think we'd like a wind farm. We think we'd like a renewable energy project. Who wants in?" you know. So, I think that's kind of a bit of a trend that I'm seeing in my practice.

The adoption of a joint venture partner engagement strategy may produce outcomes that are aligned with Article 32 of the UNDRIP. First, the project proponent may partner with an Indigenous nation that has identified a priority for development that is consistent with their economic development vision, based on their own values. In the example provided by Participant 6, a nation may decide to enter the sustainable energy industry by allocating land on their territory and secure a partner with whom to co-develop the project. Such an approach would truly represent a self-determined project that is fully aligned with Article 32(i).

Also, where project proponents adopt a joint venture partnership with the affected Indigenous nation, they are substantially subverting the status quo approach that is inherently bundled with power, financial, and informational asymmetry by recognizing and respecting the jurisdiction, contributions, and autonomy of the affected Indigenous nation. The subversion of status quo approaches and truly partnering with affected Indigenous nations may allow for joint-decision-making that validates and acts upon input provided by land users and other affected groups within the nation by appropriately accommodating and mitigating impacts on the nation's environmental, economic, social, cultural, and spiritual spheres of society. A partnership premised on participatory decision-making, project design, and characterized by reduced power asymmetry will most certainly align with Articles 32(ii) and 32(iii).

In summary, the constituent enablers bundled under participatory engagement are supportive legislative frames, early engagement, relationship building, and joint project design. While corporations may arguably utilize engagement practices that align with Article 32 of the

UNDRIP within jurisdictions that do not have supportive legislative frames, they generally do not (as evidenced by the example provided by Participant 8). It is noteworthy that supportive legislative frames serve as an enabler associated with Crown actors while early engagement, relationship-building, and joint project design are enablers associated with corporate actors. It should also be noted that when early engagement is done well, it has a cascading impact of enabling the project proponent to build a meaningful and respectful relationship with the affected Indigenous nation. Relationship-building, in turn, is an enabler that — when coupled with dispositional traits such as flexibility and humility — allows for joint project design.

Thematically, research participants noted that proponents who recognize and respect the Indigenous nation as a rights holder will give time and space for the affected Indigenous nation's autonomous governance processes to render a decision and engage with the nation in a participatory manner. By so doing, these project proponents are likely to secure an agreement with the affected Indigenous nation that meet their financial obligations to shareholders while also assisting the Crown in the state duty to uphold and respect the collective human rights of Indigenous peoples as affirmed in Article 32 of the UNDRIP. Having reflected on the insights from research participants around enablers that produce alignment, let us now turn to exploring barriers that produce misalignment with Article 32 of the UNDRIP.

4.5 Externally-Imposed Governance

The previous section explored insights provided by participants around enablers that produce alignment with Article 32 of the UNDRIP, which are depicted in the top of Figure 4.1. In the pages to follow, those enablers will be juxtaposed with barriers that are conducive to misaligning engagement practices with Article 32 of the UNDRIP. First, barriers that bundle

Table 4.3. Illustrative data excerpts of *externally imposed governance*

Conceptual category	*Description*	*Examples from data*
Coercive legislative frames and norms	Provincial jurisdictions that are less attuned toward requiring project proponents to meaningfully engage with affected Indigenous nations – either through legislative frameworks, regulatory requirements, or other norms.	• The entire mining act regime is very broken because you have a free entry permit process to begin with. So, anybody can sort of stake mining claims [on Indigenous land] without even having to engage [with the Indigenous community] at all. It's only when they want to go and actually start doing actions that the engagement piece clicks in, but that's one of my annoyances with the mining Act. (#2) • You can hear stories often the exact same company actually completely the opposite in another provincial jurisdiction or territorial jurisdiction, because they don't feel like they, that their assessment is the risk is lower. Right? And then they can be the assholes that they always wanted to be. And they've got the government behind them anyway; they always force their project through and there's no repercussions to it, right? (#8)
Mandated timelines	Timelines imposed by provincial jurisdictions for the affected Indigenous nation to render a decision about a proposed resource development project.	• One of the biggest challenges that I've seen … are various statutory timelines under the Mining Act that says, "We need to hear back from you within 30 days or 60 days." And that doesn't always align with how the community operates in order to form consent or, in some cases, consensus ... So, it's kind of like, a, the best that they can say is, "Well, well, maybe," and the mining act and doesn't give you an opportunity for "maybe." It just doesn't. (#2)
Delegated consultation	Engagement strategy whereby the Crown discharges its duty to consult by delegating procedural elements of consultation to the project proponent.	• The consultation process across Canada, is for the most part, delegated from the government on to proponents. And that in and of itself is not always the best mechanism to reach free, prior, and informed consent because it's a game of telephone, to a certain extent, between regulators and the crown. On one hand, project proponents who have been delegated to go consult and accommodate with these nations, and then we'll give you your permit. And the nations themselves who on the other hand may be seeking accommodation directly from the proponents. (#3)
Consultation Fatigue	Condition whereby Indigenous nations are often inundated with consultation requests and are unable to effectively and meaningfully engage with the volume of requests, which draws on limited capacity held by the nation.	• One of the community members said once in a meeting there was a proponent who had said something like, "You know, it's frustrating for us. We come in here, we try to meet with you and, like, no one shows up, or whatever." And she's really outspoken and she was like, "This is your project, you know. You were asking me, as a mother of small kids who works full time, at the end of my long day to take time out of my time with my children, to come to my community center so that I can listen to some proponent talk about a project. It's the fifth consultation session we've had this month." Like, you know, like it's asking a lot of people, right? (#2) • The Indigenous groups I work with that are knee deep in [consultation] issues - particularly on resource development all the time … the work I do in the province is so mineral rich and untapped that that's almost a constant reality for them. (#10)

under the category of externally imposed governance will be explored, followed by barriers that bundle under the category of obstructive engagement. The barriers associated with externally imposed governance and obstructive engagement are presented at the bottom of Figure 4.1. We will now turn our attention to the following barriers: coercive legislative frameworks and norms; mandated timelines; delegated consultation; and consultation fatigue.

4.5.1 Coercive Legislative Frameworks and Norms

Several participants discussed how some legislative frameworks and norms are coercive and do not allow for the decision-making institutions of affected Indigenous nations to appropriately function. Examples include legislated mandatory timelines (discussed separately below), legislative acts that do not trigger the duty to consult or engagement with Indigenous peoples, tax regimes, or simply by normalizing advancing resource development projects as expeditiously as possible without meaningful engagement of Indigenous peoples in the approval process. Participant 2 highlighted problematic implications of the Mining Act in Ontario.

Participant 2:

> The entire Mining Act regime is very broken because you have a free entry permit process to begin with. So, anybody can sort of stake mining claims [on Indigenous land] without even having to engage [with the Indigenous community] at all. It's only when they want to go and actually start doing actions that the engagement piece clicks in, but that's one of my annoyances with the Mining Act.

While project proponents are the actors who directly engage with the affected Indigenous peoples, it is important to note that provincial Crown regimes (and their accompanying regulatory and legislative frameworks) may expand or contract the degrees of freedom within which corporate actors may meaningfully engage with affected Indigenous peoples. For

example, Participant 3 had also noted that the carbon tax has an impact on the degree to which affected Indigenous nations are appropriately accommodated (or impacts are mitigated).

Participant 3:

> The carbon tax has not had a great impact on cooperation between resource development and nations because, obviously when things cost more, there are less margins. The accommodations … there's a bit of a crunch on everything, right? So, you know, increased regulation, increased taxation. You would think [the carbon tax] on the one hand would have positive benefits for all of Canada, but potentially lower margins for resource development companies, and in turn, more friction between them and nations in terms of that consultation and accommodation.

It should be noted that the carbon tax is a national tax regime that, in theory, would apply across provincial jurisdictions. Nonetheless, there exists a diversity of outcomes from affected Indigenous nations across provincial jurisdictions. Recall the observation from Participant 8 within the discussion of delegated consultation (Section 4.5.3) earlier in this chapter.

Participant 8:

> You can hear stories often the exact same company actually completely the opposite in another provincial jurisdiction or territorial jurisdiction, because they don't feel like they, that their assessment is the risk is lower. Right? And then they can be the assholes that they always wanted to be. And they've got the government behind them anyway; they always force their project through and there's no repercussions to it, right?

As one considers the degree to which current practices in Canada are aligned with Article 32 of the UNDRIP, it is difficult to ignore the power wielded by the Crown — particularly provincial Crown actors and legislative frameworks — to set terms that serve as either an enabler or barrier toward alignment with Article 32 of the UNDRIP.

4.5.2 Mandated Timelines

Mandated timelines have a chilling effect on an Indigenous nation's ability to consider the impacts of a proposed resource development project and render a decision through its autonomous governance mechanisms. Participant 2 shared two vignettes about how a mandated timeline undermined the ability of decision-making institutions to properly function.

Participant 2:

> I think it is one of the biggest challenges that I've seen for sure, because sometimes you'll have processes where you know, you receive notice, but then there are various statutory timelines under the Mining Act that says, "Oh well, we need to hear back from you within 30 days or 60 days." And that doesn't always align with how the community operates in order to form consent or, in some cases, consensus. You know sometimes - particularly over the last number of years where communities are still struggling with COVID or outbreaks, infrastructure, other challenges going on in their communities - expecting a consent decision, even if it's a yes or no, is just impossible within statutory timelines.
>
> For example, I'm working with my community in northern Ontario. Their traditional territory is subject to a lot of mining development, a lot of different mining applications and permits. So, we have about a half dozen different permits kind of ongoing at any particular point in time. And for them, they've had, is, like six different people in their community passed away since January.
>
> So, even as they're dealing with the tail effects of COVID just those progressive deaths in their community have meant that they have not been able to gather, they have not been able to turn their minds to these earlier exploration permits. And I've been really pushing back on the Crown and the provincial government in this case to say, "Look, you can't expect decisions in these contexts."
>
> And it's not just about being able to provide consent or being able to say like yes or no; they literally cannot even come to a yes or no decision because they just haven't had the opportunity to come together to bring their community together and actually talk about the permits and come to any form of view on them. So, it's kind of like, a, the best that they can say is, "Well, well, maybe," And the Mining Act and doesn't give you an opportunity for "maybe." It just doesn't.

It should be noted that mandated timelines to render a decision directly impacts several enablers of the affected Indigenous nations autonomous governance including decision-making institutions and internal consultation and exacerbates problems associated with externally

imposed governance and obstructive engagement including consultation fatigue, information asymmetry, and *fait accompli*. Next, we will explore challenges associated with the norm of the Crown delegating consultation duties to the project proponent.

4.5.3 Delegated Consultation

Several participants had observed problems associated with delegated consultation. This is related to the tension discussed at the start of this chapter (Section 4.1.2). One problem associated with this was noted by Participant 5, who explained that when the project proponent is primarily responsible for the procedural elements of consultation, the proponent tends to be the repository of all information shared by the affected Indigenous nation.

Participant 5:

> Well, I mean, obviously from a legal perspective, the duty to consult always rests with the Crown. In [my] experience the Crown almost always delegated the procedural aspects to the proponent. And when they say procedural aspects, they mean like all the information collecting about the project itself. All of the information that it collects about the Indigenous concerns are usually collected by the proponent and not the Crown. And so, I think the Crown has a role to play, but in practice I don't think they are necessarily always facilitating that conversation. I think sometimes it gets lost in that procedural delegation. But at the end of the day, whether or not the duty to consult has been discharged, is a legal obligation that [is] always on the crown. So, it's on them to design, ensure that the process meets that obligation.

Participant 3 suggested that once the Crown delegates the duty to consult to the project proponent, they are often hands-off throughout the engagement process and relies on the proponent to provide information back to them to assure that the state duty had been properly carried out. This is confirmed by insights offered by Participant 3 and 4 below.

Participant 3:

> The consultation process across Canada, is for the most part, delegated from the government, right? From the provincial and federal Crown on to proponents. And that in and of itself is not always the best mechanism to reach free, prior, and informed consent because it's a game of telephone, to a certain extent, between regulators and the Crown. On one hand, project proponents who have been delegated to go consult and accommodate with these nations, and then we'll give you your permit. And the nations themselves who on the other hand may be seeking accommodation directly from the proponents.

Participant 4:

> For government, [my advice] would be do the right thing, you, rather than sort of running around going, "Oh, well, you know, we're just … we're the fiduciary and we've got to second guess what Indigenous groups do." It's more like you need to put your thumb on these resource companies and say, "If you're going to do this project and impact these people, this needs to be a good deal for that Indigenous group." And I would say for the governments would be like "… and we will listen to the Indigenous group on whether they're satisfied with this deal or not."

While delegated consultation does not necessarily produce misalignment with Article 32 of the UNDRIP — recall that project proponents who provide time and space for autonomous governance procedures and engaging Indigenous peoples in a participatory manner and who are more likely to conclude negotiations with an UNDRIP compliant agreement, are acting under terms of delegated consultation — it is problematic when it is bundled with other barriers. Examples of such barriers include mandated timelines, coercive legislative frames and norms, consultation fatigue as well as barriers bundled under the obstructive engagement category including performative approaches and fait accompli. When project proponents are motivated to conclude negotiations expediently, they may produce information asymmetry by withholding information from the Crown that reveals the full scope of impact articulated by the affected Indigenous nation. Let us now discuss consultation fatigue and its effect on producing misalignment with Article 32.

4.5.4 Consultation Fatigue

As reported by several participants, many Indigenous nations are faced with consultation fatigue whereby they are inundated with requests for projects to the extent that they are simply unable to meaningfully engage with any of them.

Participant 1:

> Yeah, it was … it was a lot. And the thing is that that's not a unique situation in many communities, right? Like consultation is just a part of their job, not their entire job. And it's exhausting. It's really difficult to engage meaningful ways with the important projects when they're just another on a list.

Participant 10:

> The Indigenous groups I work with that are knee deep in [consultation] issues — particularly on resource development — all the time. And so, for example, the work I do in the province is so mineral rich and largely untapped that that's almost a constant reality for them.

Consultation fatigue affects not only the decision-making institutions of a given Indigenous people, but as observed by Participant 6, the citizens of that nation also experience fatigue due to the participatory and democratic nature of their representative institutions.

Participant 6:

> One of the community members said once in a meeting there was a proponent who had said something like, “You know, it's frustrating for us. We come in here, we try to meet with you and, like, no one shows up, or whatever.” And she's really outspoken and she was like, “This is your project, you know. Like this is, you were asking me, as a mother of small kids who works full time, at the end of my long day to take time out of my time with my children, to come to my community center so that I can listen to some proponent talk about a project. It's the fifth consultation session we've had this month. Like, you know, like it's asking a lot of people, right?”

A story shared by Participant 2 relates to not only consultation fatigue, demonstrating misalignment with Article 32(ii), but also misalignment with Articles 32(i) and 32(iii). They reported that they had worked with a proponent and the Crown around an early exploration

permit for a sensitive site held sacred to the client and how, through over 18 months of negotiation, they had acquiesced — quite reluctantly — to allow drilling for core samples under two conditions. The first condition was to narrow down their sites to avoid the most sensitive areas. And the second condition was to allow a community monitor to participate in the process. At the same time, the participant had communicated to the Crown that the site is sensitive, and that the community is not interested in further development in the area. Nevertheless, shortly after the round of negotiations had concluded, the Crown emerged to present yet another proposed project for the community to consider at the same site. Participant 2 continues:

Participant 2:

> So we just [completed] one round of negotiations with one proponent about this very sensitive area and just earlier this year, the Crown comes to us and says, “Oh, we've got another proponent who's looking to drill in that area.” Instead of telling them, “No, this is such a sensitive area for this community. And, you know they don't accept mining applications there” the Crown instead said, “Oh? We wanted to be sure to tell you early because we know it's such a sensitive area so that you can start working with them early on in the process.”
>
> It's like, “thank you”? “You know, this is going to be contentious? You know this is not a space that this community wants any exploration or any resource development to be happening? And yet because we were able to kind of find a way forward with one mining company after like 18 months of meetings and discussions and constantly saying, “no, no, no, no, no” you just hired on another mining company and say basically the solution is not to not drill there? The solution is just to work with the community early to come to a solution that nobody's really happy with, so that more development can take place on this really sensitive area?” And it's not like we're talking like, you know, like Ring of Fire or like tar sands or like giant development.
>
> It's like a junior mining company or early exploration. “We want to drill like ten sites around the lake” right? It's like “pick a fucking different lake; it's not hard or it shouldn't be.” I think that that's where I also see a real challenge in Indigenous peoples being able to determine their priorities for development of their lands, because sometimes when we say we don't want development here and that's not always - well, it's rarely, rarely respected - unless it's their own kind of title lands or reserved lands, right?

In the vignette above, Participant 2 revealed how the Crown did not demonstrate willingness to respect the nation's right to determine their priorities for use of their land, territories or other resources (Article 32[i]) while possibly undermining alignment with Article 32[iii]. Instead of respecting their decision to avoid a sensitive site, the Crown prompted the nation to consider intensifying development around that site by bringing another developer to their attention – despite knowing the opposition originally voiced by that nation. Such actions are misaligned with mitigation measures against spiritual and cultural impacts by increasing development activities near a site they wanted to avoid.

Finally, consultation fatigue exists when an affected Indigenous nation is inundated with consultation requests. Several participants converged in agreement that it is a common phenomenon experienced by many of their Indigenous nation clients. Participant 1 had disclosed that their community faces upwards of 10 to 20 requests per day. This consultation fatigue often renders the decision-making institutions — as well as the members of the affected Indigenous nation — unable to fully engage with every file.

It should be noted here that each of the barriers bundled in both externally imposed governance and obstructive engagement are not always present in every case. Additionally, they have interactions with each other — even across the two categories. For example, as we shall see in the data below, coercive legislative frameworks and norms and delegated consultation may interact together to produce the presentation of a project as *fait accompli*, resulting in the project proponent engaging in a performative engagement procedure to demonstrate that the engagement and consultation was followed. The barriers of *fait accompli*, performative approaches, and information asymmetry are bundled into the category of obstructive engagement, which will now be discussed.

4.6 Obstructive Engagement

Obstructive engagement is a category in which bundled barriers reflect conditions that constrain the ability for affected Indigenous nations to render a decision. These barriers are labelled as *fait accompli*, performative approaches, and information asymmetry, which will now be discussed, beginning with *fait accompli*.

4.6.1 Fait Accompli

Recall from the tensions section introduced at the start of this chapter that one of the divergent interpretive frames revolved around defining "consent". As has been evidenced from discussion in earlier sections of this chapter, on the one hand affected Indigenous nations reserve the right to withhold their consent for proposed resource development projects that are accompanied with unacceptable impacts. On the other hand, Crown and project proponents do not necessarily interpret the engagement process as consent-seeking, and that resource development projects may proceed despite the objection of the affected Indigenous nation. As will be demonstrated in the representative quotes below, the legal framework under Canada's DTCA process is not consent-seeking.

The provincial Crown will typically set the tone for engagement between project proponents and the affected Indigenous nation located within its province. Several participants spoke to the phenomenon of *fait accompli* whereby Crown and corporate actors, operating within a provincial jurisdiction that operates under coercive legislative framework and norms will present projects as *fait accompli* which is a practice that undermines the autonomy of Indigenous peoples to express their priorities at the negotiation table, by making them feel compelled to enter into an IBA — whether or not they agree with a given project.

Participant 6:

> The reality is that consent isn't needed in currently in Canadian law. Some jurisdictions are better at getting it anyway, and then some are worse. And then in those jurisdictions where some are worse, you see communities just getting into IBAs because they know that they don't have a choice.

Table 4.4. Illustrative data excerpts of *obstructive engagement*

Conceptual category	*Description*	*Examples from data*
Fait accompli	Describes a propensity for Crown or corporate actors to present a project to an affected Indigenous nation as proceeding regardless of whether the nation agrees with the project.	• [The company] says, "Oh, well, we're going to be up in your area because we're talking to one of your neighboring communities, so why can't we just meet with you anyways? Because we've been told by the Crown that we have to meet with you." And you realize you'd be having a meeting just for the sake of *checking a box* and being able to tell the government that you'd met with this community. (#2) • The reality is that consent isn't needed in currently in Canadian law. Some jurisdictions are better at getting it anyway, and then some are worse. And then in those jurisdictions where some are worse, you see communities just getting into IBAs because they know that they don't have a choice. (#7)
Performative approaches	Describes the tendency of some project proponents to superficially engage with the affected Indigenous nation so as to demonstrate to the Crown that interactions had occurred. Proponents are observed to be focused on procedural elements rather than substantive outcomes.	• And that [relationship-building] is the key piece that I think a lot of corporations try to jump over. They just, they're looking to *check the box* and they're not really engaging on a real person-to-person level (emphasis added). (#1) • The Crown often comes in with at least more of that initial knowledge [of the community]. "Oh, yes, we know your community. We know your interests. We know your territory. We know the duty to consult. But, you know, we're going to treat this as just sort of a procedural thing. And we know at the end of the day, if we never address your concerns, we can still go ahead anyways." (#2)
Information asymmetry	Describes a state whereby the project proponent collects, holds, and controls all the information seen by the Crown that was shared by the affected Indigenous nation through the consultation phase of engagement.	• In my experience the Crown almost always delegated the procedural aspects to the proponent. And when they say procedural aspects, they mean all of the information collecting about the project itself, all of the information that it collects about the Indigenous concerns, are usually collected by the proponent and not the Crown … where the proponent is responsible for every conversation with the Indigenous community, gathering the information from the indigenous community about their rights interests that could be impacted by the project. And then they present all this information to the Crown without the Crown having talked to the Indigenous community. (#5)

Participant 7:

> To breathe life into the right of Indigenous peoples to determine and develop priorities and strategies for their lands and territories, we need to look at the distribution of power in the legal and institutional structures within Canadian society. At present most decision-making power will reside with a minister or statutory decision maker can authorize or not authorize particular development in a First Nation territory, subject to consultation and accommodation based on the hydro framework, and that provides opportunities for First Nations to offer their views and input on what their priorities and strategies are and how they might be addressed, accommodated or otherwise respected. But the ultimate decision-making power tends to reside outside of First Nations communities, which is not consistent with the declaration free, prior, and informed consent or Article 32. So, we have a structural change that needs to take place to effectively implement our right.

Participant 6:

> And I think if IBA's are ever going to be a stand-in for consent, if they're ever going to be truly a reflection of a community saying, "No, I support this project" then communities need to know that they don't have to enter into it. It has to really be a choice, right? And right now, for the most part, like as I've said a number of times, communities are often like, "Well, the thing is going ahead anyway, so I might as well get some jobs. I might as well get some benefits." So I think that it's incumbent on the government to start really and then that's implementing UNDRIP - giving some meaning to that so that proponents don't think that it's a *fait accompli* that their project is going to go ahead and that First Nations actually have some leverage. So that's incumbent upon governments.

The presentation of proposed projects to affected Indigenous peoples as *fait accompli* is not only problematic for undermining the authenticity of consent associated with any resultant agreement, but also for its effect on project proponent conduct in relation to the engagement process. At its worst, it may engender a sentiment that is entirely dismissive of any obligation to engage with the affected Indigenous nation, as illustrated by Participant 2 below.

Participant 2:

> I'm working with one company right now that's kind of based out of, or has recently taken over by, an Australian company, right? They had a meeting with my clients a few weeks ago where they basically said, "We don't have to deal with you." Like

> giant developments potentially going to completely affect their traditional territory, their way of life forever. And this company is like, "If you want to talk about that stuff, go talk to Ontario, go talk to Canada, but we don't have to deal with you like that." That was the message we're going to have "We're building this project. If you want to talk about anything else, go talk to go talk to the Crown, because bulldozers are coming," basically. And I was like, "Well - you've got some learning to do." But nonetheless, my clients are continuing to meet with them and are having another meeting with them because they know that this is a development that is very, not a big priority for them, but is a big priority for other people. Which means that it's likely going to happen in some way or another, and they need to build that relationship as part of being able to shape it. So even though, frankly, this company totally insulted them and basically slammed the door in their face, they're continuing to try and have those discussions.

While the outright refusal of this Australian-owned company to engage with the affected Indigenous nation may not be the norm (and perhaps at the extreme end of possible scenarios), it nevertheless demonstrates the impact of setting a tone whereby the project will proceed — even over the objections of the affected Indigenous nation. More common, however, is that the *fait accompli* will engender performative engagement approaches, which will now be discussed.

4.6.2 Performative Approaches

Several participants observed that proponents may utilize a performative approach to engagement and that their activities are reduced to checking off boxes to secure the requisite permit from the Crown. In these scenarios, the project proponents attitudinally appear to engage with the affected Indigenous nation in a superficial manner to demonstrate that they had engaged and consulted with the community. However, input provided by the affected Indigenous nation does not change or otherwise impact the outcome or affect the planning and design of the project. The following vignettes from Participants 1 and 2 provide examples about proponents engaging affected Indigenous nations with a performative box-checking exercise rather than a

meaningful and concerted effort to earn the consent of the group of affected Indigenous people discussed in chapter two above (Rodhouse & Vanclay, 2016; Yaffe, 2018).

Participant 1:

> And that [relationship-building] is the key piece that I think a lot a lot of corporations try to jump over. They just, they're looking to *check the box* and they're not really engaging on a real person-to-person level (emphasis added).

Reflecting on an IBA they had worked on, Participant 2 shared how a project proponent was insistent on visiting a community because they were near another Indigenous community — despite an imminent chief and council election the following week, and the recent funeral that impacted the community two days prior to their proposed consultation meeting.

Participant 2:

> And [the company] says, "Oh, well, we're going to be up we're going to be up in your area because we're talking to one of your neighboring communities, so why can't we just meet with you anyways? Because we've been told by the Crown that we have to meet with you."
>
> And you realize you'd be having a meeting just for the sake of *checking a box* and being able to tell the government that you'd met with this community, even knowing that there might be an election like literally the very next week where chief and council could entirely change. Or where, you know, the community had a funeral two days before and you know, they're not going to be in a place where you can actually have a discussion about what project is going on in that case (emphasis added).

Raising the spectre of projects being presented as *fait accompli*, Participant 2 suggested that the current practices naturally lend itself to a performative approach.

Participant 2:

> The Crown, who often, you know, comes in with at least more of that initial knowledge [of the community]. "Oh, yes, we know your community. We know your interests. We know your territory. We know the duty to consult. But, you know, we're going to treat this as just sort of a procedural thing. And we know at the end of the day, if we never address your concerns, we can still go ahead anyways."

In the quote above, it is clear that the Crown wields power to direct the intensity of the project proponent's engagement with the affected Indigenous nation: it appears that where a project is set to proceed — with or without the approval of the affected Indigenous people — proponents and the Crown engage in the consultation processes in a performative manner and are not motivated to engage in the process in good faith. It is clear that a relationship exists between a *fait accompli* tacit understanding (of assured project approval) and performative approaches that cannot be discounted.

A trend that exists within the delegated consultation that further demonstrates disengagement with the process on behalf of the project proponent is provided by Participant 9, who shared a vignette where the consultation process had been challenged in court for ineffective consultation that did not meaningfully engage the affected Indigenous people.

Participant 9:

> I remember one that I ended up going to court [where] this company hired another … there's like all these companies for hire that essentially do your consultation for you with the Indigenous group. And a lot of it tends to be - I mean, there may be people with expertise who can be helpful, but you got to think that like, you know, the higher ups need to be seen. They have to build a relationship like it's all about good relationship building and like, sort of farm that out to somebody else to do that for you is really performative and fake and not very effective. But also what gobsmacked me was in court, essentially what this organization did was just to document every single interaction to the most innocuous or … and then this got used by lawyers in the case to try to argue that there was somehow effective consultation.
>
> So, I remember saying, the lawyer being, like "there was 77 interactions with the Indigenous party". I mean, some of those were just emails [to] set up meetings. And what was a meeting? Where somebody from this farmed-out consultation company saw the chief at an airport, like, that should not be counted. It's ridiculous. And to think that, you know, I'm sure there's a huge industry that makes money off this, but … it doesn't work, obviously. And what happened in that case is that, although we didn't win the consultation case, like the whole process of going to litigation just slowed the process down to the point where it died, which often does happen even if consultation or even if litigation doesn't work.

As noted in the above passage, this scenario of delegated consultation being outsourced to a company that specializes in consultation had undermined the degree to which the consultation process aligns with Article 32(ii). The actions of this consultation firm suggest that they (or the contracting project proponent) were not interested in genuinely engaging with the affected Indigenous people, but rather to pad a file for anticipated litigation. Such an approach is consistent with the notion that the resource development project is certain to proceed (*fait accompli*) and that the firm is not interested in engaging with the affected Indigenous nation in a manner that considers the full scope of impacts in terms of planning, mitigation, and redress. Instead, the project proponent will engage in performative, box-checking actions to provide the optics of engagement to earn the requisite permit. Let us know turn our attention toward the next barrier identified by participants, that of project proponent information asymmetry.

4.6.3 Information Asymmetry

In the following vignette offered by Participant 4, economic considerations around cost savings appear to intersect with a shortcoming of delegated consultation procedures – namely that information held by the proponent may be selectively offered to regulators and Crown actors to approve a project by diminishing the extent of impacts to the affected Indigenous nation. Participant 5 had noted a drawback of delegated consultation is that the project proponent controls the information that is presented to the Crown (from the discussion on delegated consultation earlier in this chapter). When Crown actors discharge their Duty to Consult through delegated consultation — accompanied with a hands-off approach that fails to monitor the engagement process — the potential exists for accommodations and mitigation efforts to not be provided to the affected Indigenous nation.

Participant 5:

> In my experience the Crown almost always delegated the procedural aspects to the proponent. And when they say procedural aspects, they mean, like, all of the information collecting. All the information collecting about the project itself, all of the information that it collects about the Indigenous concerns, are usually collected by the proponent and not the Crown … where the proponent is responsible for every conversation with the Indigenous community, gathering the information from the indigenous community about their rights interests that could be impacted by the project. And then they present all this information to the Crown without the Crown having talked to the Indigenous community. That's essentially substantive delegation because basically the proponent controls what information the Crown sees.

As noted by Participant 5 above, project proponents collect, and control the information provided by the affected Indigenous nation and then present that information to the Crown at the end of the engagement process — often without the Crown verifying the information or otherwise ensuring that it is adequately accepted by the affected Indigenous nation as an accurate representation of their interests and concerns.

Participant 4:

> So I've seen some stuff where certainly, there has been concerns and Indigenous groups have said "We should really do it this way" and industry has listened. But usually those are things where they're quite happy to do it because it doesn't have that big an impact on either their bottom line or if they don't do it, they know our regulator is going to come in and slap them for not doing it.
>
> Once they don't have to worry about the regulator, or it looks like it's going to cost too much, then they're like, "We're just not doing that." You know, I can remember in one project there was some discussion about a fish ladder, and they just said, "We're not doing that because it'll just add too much to the cost base of the project." And then they were able to convince the regulator that they didn't need to put a fish ladder in.

As noted by Participant 4, the project proponent was not interested in providing the accommodation of a fish ladder simply from a cost management standpoint. Although Participant 4 was not clear on details regarding the regulator's decision to side with the project

proponent, the above insight by Participant 5 lends credibility to the assumption that information asymmetry may have been instrumental in the decision to not put the fish ladder into place.

It is also important to note that if consulting and cooperation with Indigenous peoples is done improperly, it may impact the alignment of Article 32(iii); it is through meaningful consulting that a proponent may learn about the impact of resource development projects on the Indigenous peoples. Participant 5 speaks to the role that improperly conducted delegated consultation may play in decreased accommodations vis-à-vis information asymmetry. Recall from Chapter 3, that Nosek (2017) reported of a case where the proponent had heard of concerns from a community about a resource development project's impact on food security (due to the community being reliant on the land for 70 – 90% of their sustenance needs). However, the proponent had downplayed this concern and offered an inadequate accommodation (or in the words of Article 32iii, redress for impact). Conceivably, a project proponent in possession of all the information revealed during the consultation process may withhold or downplay impacts, rendering the state (and proponent) unable to offer fair and just redress for impacts associated with the development project.

4.7 Concluding Thoughts

Throughout the course of this chapter, participants provided insights, reflections, experiences, and vignettes that identified several common tensions, enablers, and barriers that affect the alignment between current practices and Article 32 of the UNDRIP. Tensions are comprised of competing and divergent goals, conditions, or interpretive frames between affected Indigenous nations on the one side and Crown and corporate actors on the other side. Enablers that move engagement toward alignment with Article 32 are bundled into the categories of

autonomous governance and *participatory engagement*. Barriers toward misalignment with Article 32 are bundled into the categories of externally *imposed governance* and *obstructive engagement*. In the chapter that follows, these enablers and barriers will be analyzed, and a model will be presented to demonstrate how they interact to produce alignment or misalignment with Article 32 of the UNDRIP.

Chapter V DISCUSSION

This study sought to answer how current (Canadian) practices of engagement between resource development project proponents and the Indigenous nations affected by those projects may better align with Article 32 of the UNDRIP. The data revealed several tensions relevant to alignment or misalignment across each of the three components across Article 32. Additionally, data revealed several enablers and barriers that support and hinder alignment, respectively.

As I embark on this discussion, I once more feel tensions related to my two sets of responsibilities. First and foremost, as an Indigenous researcher I feel most responsible to present the findings in the spirit of reciprocity toward the Indigenous Bar Association, with whom I partnered for this study. This is consistent with notions around reciprocity, as discussed in chapter three, wherein Wilson (2008) noted that results of the research ought to be useful for Indigenous participants, nations, and peoples. Second, I must also fulfill my academic responsibilities by demonstrating academic rigor and contribute to extant literature. While these responsibilities need not be mutually exclusive, the outputs are vastly different. On the one hand, a pervasive critique about Western research that focuses on Indigenous peoples and Indigenous matters is that they are reductionistic and seek parsimony. In the pursuit of such academic and theoretical parsimony, the rich and nuanced details of the lived experiences of Indigenous peoples are lost.

While I recognize my statement "lived experiences of Indigenous peoples are lost" (ironically) aggregates and generalizes individual nations under a supra-identity (Indigenous), the presentation of the conceptual framework presented in section 5.2.1 below (as depicted in Figure 5.1) to the IBA would lose the richness of the data for it to be useful. Therefore, in the

pages that follow below, I will provide discussion based on the process model (Figure 4.1) with the hope that it will be a useful foundation for IBA members to help co-create a framework with their respective clients in order to engage project proponents *in a good way* that aligns with Article 32 of the UNDRIP. This "reciprocity in research" section may be conceived as equivalent to "implications for practice", which will be followed by implications for theory.

5.1 Reciprocity in Research

The present research has implications for the practice of engaging with Indigenous peoples affected by resource development projects and may be of benefit and interest to Indigenous, corporate, and Crown actors. I am particularly motivated to give back to the Indigenous Bar Association in a manner that is meaningful and useful to its constituent membership to honour the contributions of research participants from the IBA whose collective experience helped to reveal the tensions, enablers, and barriers associated with whether current engagement practices align with Article 32 of the UNDRIP. While theoretical contributions may be useful for academia, they may not be particularly useful for Indigenous community members who are directly impacted by these projects, or who serve as counsel for impacted nations.

Although research participants discussed some promising features of current practices that have been more favorable toward the affected Indigenous peoples in recent years compared to historical practices, there was general convergence that the majority of current practices are misaligned with Article 32 of the UNDRIP. The interactions between tensions, enablers, and barriers toward alignment are quite complex as is illustrated in Figure 4.1 in the previous chapter. Adding to this complexity is the variety of political wills across provincial jurisdictions to engage with Indigenous peoples in a good way; this complexity is compounded when pitted

against the variety of nations – each with their own unique histories, legal orders, protocols for engagement, and developmental priorities.

Of the many possible takeaways to highlight, three feature more prominently than others and are influential in producing alignment with more than one component of Article 32. However, before discussing these takeaways, it is important to recall that from chapter 3, we recognized that this research does not intend to reveal a pan-Indigenous model with which proponents may engage Indigenous nations; instead, this research aims to balance highlighting the rich diversity of Indigenous nations, while also identifying some common experiences across this backdrop of diversity. Let us now discuss the key takeaways from this research that I offer as my reciprocal appreciation for the knowledge shared with me from members of the IBA.

5.1.1 Centrality of Capacity to Produce Alignment

First, capacity is unquestionably central to producing alignment with Article 32 of the UNDRIP; Klein et al., (2023) had observed that capacity is requisite condition for Indigenous nations and communities to engage in these processes. Therefore, capacity may be conceived of as reference to both human resources and financial resources, and it spans several stages of engagement and IBA implementation. This observation had similarly been noted by other scholars (Nosek; 2017; Warnock, 2021; Yaffe, 2018). While previous insights have identified the need for capacity to engage in these processes, this is the first study to connect capacity at pre-engagement, engagement, and implementation stages of resource development projects to the best of my knowledge. The availability of capacity at the pre-engagement stage is required for effective internal consultation (which involves the inclusion of Indigenous legal orders) for land-

use mapping — both of which will strengthen the nation's decision-making institutions in rendering a decision about the proposed resource development project.

The proper functioning of Indigenous nations' decision-making institutions requires capacity, which will increase the likelihood of it being able to develop and determine its developmental priorities (thereby aligning well with Article 32[i]). When a nation has undergone this preparedness for resource development project negotiation based on their self-determined priorities, they are well-positioned to meaningfully engage with project proponents who may be interested in advancing projects on their territories, which increases the likelihood of alignment with Article 32(ii). Finally, capacity is required after negotiations and the project lifecycle begins (presumably with a construction phase) to ensure that the benefits flow from the agreement, as well as the monitoring for adverse impacts.

On account of capacity's central importance to the full functioning of other enablers (namely, preparedness and land use mapping; internal consultation; and decision-making institutions) capacity may be conceptualized as a meta-enabler that is pertinent to both autonomous governance and the participatory engagement of the affected Indigenous nation with. The utility of capacity, as a meta-enabler, to produce alignment prompted several participants to speak to the need for Indigenous nations (and the counsel that represents them) to secure funding for capacity from both corporate and Crown actors to ensure that they can meaningfully participate in the projects in which they have expressed interest.

Consultation fatigue serves as a critical draw on the resources of affected Indigenous nations by placing additional strains on their capacity; however, participants noted that nations may strategize to limit this strain on their capacity. Recall from Chapter 2 that Haalboom (2012) noted from a 2005 case study wherein the affected Indigenous nation had developed their own

protocols for project proponents to engage with them. While the project proponents were not interested in doing so because no international consensus existed on how to implement FPIC, both Nosek (2017) and Yaffe (2018) confirm that Indigenous peoples have the right to build new decision-making institutions as part of exercising self-determination articulated in the UNDRIP.

Relatedly, several participants shared that land-use mapping and the creation of nation developed protocols (NDPs) have emerged as best practices to assist the affected Indigenous nation to ameliorate the effects of consultation fatigue, which was identified as a barrier toward alignment that also draws resources away from the affected Indigenous nation. Together, land-use mapping and NDPs may allow the nation to better streamline decision-making processes and prioritize projects that least impact their sensitive sites. These two enablers will help a nation pre-empt unnecessary draws on their capacity, allowing them to preserve such capacity for projects that align well with their developmental priorities while providing opportunities for economic development. As Canada strives to revise its DTCA framework to better align with the UNDRIP Act of 2021, the Crown needs to be cognizant of the overarching importance of capacity to enable the functioning of the affected Indigenous nations' decision-making institutions.

5.1.2 Relationship Building Toward Alignment

The second takeaway relates to the overarching significance of the project proponent's ability and willingness to develop relationships (and its accompanying actions and practices) to take initial steps toward aligning their engagement practices with Article 32 of the UNDRIP. While it may appear as a simple and obvious concept, several participants discussed relationship building as intimately connected with other enablers such as early engagement and joint project

design (including pursuit of IBA alternatives to build trust). Participants highlighted several concrete actions that assist in building positive relations with the affected Indigenous nation, including a commitment to due diligence to learn about the affected Indigenous nation including its history, decision-making institutions, and priorities (among other points of knowledge about the nation), and shifting from transactional approaches toward relational approaches — which includes physical presence in the community and building individual and community relationships — among many other actions and dispositions. Consensus had emerged among participants that it is never too early to engage with a potentially affected Indigenous nation; proponents who engage at the earliest opportunity signal that they respect the jurisdiction of the Indigenous nation and are interested in developing a mutually beneficial relationship with that nation. An additional benefit is that the proponent may well discover that their project aims may align with an affected Indigenous nation's developmental priorities.

It should be noted that relationship building is a necessary but not a sufficient precursor to produce alignment with Articles 32.ii and 32.iii. To be clear, a project proponent may engage an affected Indigenous nation with an aim to build a trusting, respectful relationship with that nation for utilitarian purposes (i.e., secure their agreement with the project) but fail to address any of the nation's concerns or provide sufficient redress and mitigation measures of impacts to the nation. To produce alignment with Article 32.iii, it is incumbent on the proponent to act on the information provided by the nation and provide redress and sufficient mitigation measures to minimize the project's impact.

5.1.3 Cascading Effects of (Mis)Alignment

The third takeaway from this research is the interconnectedness of (mis)alignment between Article 32.ii and Article 32.iii. This is particularly important because it demonstrates that proponents who fail to engage the affected Indigenous nation – including to allow sufficient time for decision-making institutions to render a decision with due consideration of the full scope of the project's impacts — will be ill-equipped to provide redress and mitigation measures for impacts associated with the project. Relatedly, project proponents who fail to engage at an early enough stage, as discussed immediately above, may also be ill-equipped to provide redress and mitigation efforts for project-related impacts — particularly if they are inflexible around issues like joint project design. It is only through meaningful engagement with the affected nation (alignment with Article 32.ii) that the myriads of impacts may be identified by the nation, which, in turn, may be appropriately redressed through the provision of accommodations and mitigation measures to minimize the impacts.

Recall that several participants reported that many proponents tend to engage in performative (process-driven) approaches to engagement versus meaningful engagement that is outcome-focused. While performative engagement practices may have the optics of aligning well with Article 32.ii of the UNDRIP, the failure to act upon the information revealed through engaging with the affected Indigenous nation to provide redress and mitigation will preclude alignment with Article 32.iii. This underscores that both the process and the outcome are equally important to produce alignment across Articles 32.ii and 32.iii, which is consistent with interpretive advice provided by former UN Special Rapporteur on the Rights of Indigenous Peoples S. James Anaya (2009). Therefore, it is incumbent upon Crown and corporate actors to re-envision the process not as an end in and of itself, but rather as a means toward an end whereby any impacts experienced by an affected Indigenous nation are appropriately provided

redress and that those impacts are sufficiently mitigated. In short, engagement processes that align with Article 32 of the UNDRIP differ from current processes in that the former are utilized as a means toward an end (i.e., allow the Indigenous nation to exercise their rights to self-determination), whereas the latter are engaged as a means unto itself (i.e., to performatively pre-empt criticism that the Indigenous nation was excluded from consultation processes, which do not uphold their right to self-determination).

5.1.4 Pathways for Research Reciprocity to Benefit

The above takeaways may be of benefit to affected Indigenous nations through three distinct pathways. First, the identification of the key tensions, enablers, and barriers toward alignment may be directly beneficial to affected Indigenous nations by helping them understand the competing goals and aspirations associated with the tensions as well as the enablers and barriers associated with (mis)alignment between current practices and Article 32 of the UNDRIP. Through greater understanding of the same, Indigenous nations may be able to better prepare — through internal consultation and other processes — for engagement with resource development project proponents in a proactive manner rather than reactive, consistent with the advice provided by research participants.

Second, the present study assembles the collective experiences of the research participants who have practised representing affected Indigenous nations and may assist legal practitioners in representing the needs and interests of their clients (i.e., affected Indigenous nations) and to more clearly articulate to both project proponents and Crown actors how their engagement strategies may better align with Article 32 of the UNDRIP. The more clearly the nation's counsel understands these processes and the interconnections between (mis)alignment

across components of Article 32, the better they can advocate for the needs and interests of those nations.

Third, the present study may assist corporate and Crown actors to better understand the joint role they play to ensure that engagement practices affirm and enable Indigenous peoples to exercise their right to self-determination by demonstrating sources of tension between their objectives and the aspirations of the affected Indigenous peoples. Through critical self-reflection, and a deeper understanding of how their goals and aspirations (associated with resource development negotiations) differ from that of the affected Indigenous nation, project proponents may better appreciate the impacts articulated by the affected nation. Through a deeper understanding and appreciation of the scope of impacts articulated by the affected Indigenous nation, project proponents may be more inclined to offer sufficient redress for and mitigation measures of those impacts.

An essential finding of this study is the power wielded by the Crown to set the tone for negotiations. Research participants noted that Crown actors may introduce unnecessary risk through the presentation of coercive legislative frames (e.g., mandated or legislated timelines), or adopting a *fait accompli* approach to engagement between the project proponent and affected Indigenous nation. While the Crown may intend for legislative timelines to expedite the decision rendered by the affected Indigenous nation, it may lengthen the timeline by creating the conditions and grounds for the nation to mount opposition or litigation to the project on account of being inappropriately consulted. Similarly, a tacit *fait accompli* understanding between the Crown and project proponent toward engagement engenders the adoption of a set of performative actions that undermines and negates any participation from the affected Indigenous nation.

Through a deeper understanding of the effects related to their strategies to produce opposition to their proposed project, Crown and corporate actors may be more inclined to approach Indigenous nations *in a good way* rather than in a coercive way. As noted in chapter three, the federal government is currently consulting with Indigenous nations on the development of an engagement framework to better align with the UNDRIP Act, which will presumably move it toward alignment with Article 32 of the UNDRIP. Several participants had shared reflections that while the norm of delegated consultation (whereby procedural elements of consultation is conducted by the project proponent) is how the Crown discharges its duty to consult; it is important for the Crown to nevertheless remain present and to ensure that the outcome satisfactorily addresses the concerns of the affected Indigenous nation. Again, we see the nuanced difference between engagement as an end, or as a means toward an end. If engagement occurs without consideration as to why and to what end, then we necessarily invite the process to be performative and not substantive.

I am hopeful that the above provides an accurate representation of findings that may be useful to affected Indigenous peoples, legal counsel that represents those nations, and project proponents (both Crown and corporate actors) to better understand how they may engage one another in a manner that promotes alignment with Article 32 of the UNDRIP and affirm the rights to self-determination contained therein. Perhaps there are more useful findings to be found in the minutiae; however, I sought to offer aggregate and broad takeaways for a high-level summary. Several of these high-level takeaways are not that dissimilar from the theoretical contributions, which will now be discussed.

5.2 Theoretical Implications

The present study offers several contributions to management literature and is consistent with recent calls for decolonial perspectives that offer "epistemic diversity that will allow us to investigate how different populations conceptualize and experience democracy, freedom, rights, development, prosperity and ecology by listening to the demands of voices 'from below'" (Banerjee, 2021, pp. 293-294). An overarching theme of my theoretical contribution is the distinction between a rightsholder versus stakeholder orientation toward engagement practices with affected Indigenous nations, as depicted in Figure 5.1. Tensions are listed at the bottom of the diagram as they represent ontological differences (and environmental conditions) common to each approach. The left side depicts the interaction between autonomous governance and participatory engagement (associated with a rightsholder orientation) as the engagement strategy moves toward alignment with Article 32 of the UNDRIP. The right side depicts the interaction between externally imposed governance and obstructive engagement (associated with a stakeholder orientation) as the engagement strategy moves toward misalignment with Article 32 of the UNDRIP. Let us now examine the theoretical contributions, beginning with rightsholder status as an underlying assumption.

5.2.1 Problematization through Challenging Assumptions Reveal Rightsholding Approach

The first contribution of this study is that is among the first known empirical management studies to explore engagement practices from the perspective of the affected Indigenous peoples whose aim is to secure the recognition and honouring of their status as rightsholders (rather than stakeholders who have a vested interest in the resource development projects). However, it should be noted that the rightsholding status of affected Indigenous peoples has recently begun to

enter the conversations of management-focused journals (Arjaliès & Banerjee, 2024; McPhail, 2022). As noted in chapter two, extant literature has largely ignored FPIC (and Article 32 of the UNDRIP) as a primary focal point of study — much less to undertake a human rights affirming approach to understand FPIC implementation. Adopting an approach similar to Graebner & Eisenhardt (2004) — who studied mergers and acquisitions from the "seller's side of the story" - the present study explores the perspective of Indigenous nations affected by resource development projects in relation to FPIC implementation. Rather than apply extant stakeholder management theories (and their underlying assumptions) to develop an engagement model to secure the consent (or acquiescence) of affected Indigenous peoples, this study begins with the assumption that such processes should seek to affirm the collective human rights outlined in Article 32 of the UNDRIP.

Recall from chapter one Alvesson and Sandberg's (2011) observation that many contributions to management literature typically rely upon the gap spotting method, which results in incremental changes to extant theory. This method usually does not interrogate the underlying assumptions of the literature involved and results in reproduction of similar knowledges that tend varies slightly across time. Alvesson and Sandberg (2011) thereafter argue that researchers may generate interesting contributions through problematization by challenging the underlying assumptions of extant theorizing and presenting and evaluating an alternative set of assumptions. Bridging Alvesson and Sandberg's (2011) problematization method with calls from decolonial and Indigenous to reclaim representations of Indigenous peoples (Banerjee, 2021; Kovach, 2009; Smith, 2012) in a manner that doesn't "reproduce colonial relationships" (Kovach, 2009, p. 28) this study sought to explore FPIC implementation through problematization. It is with a set of new assumptions that the question of FPIC implementation

that this study was undertaken, and this led to a set of new contributions that will now be discussed.

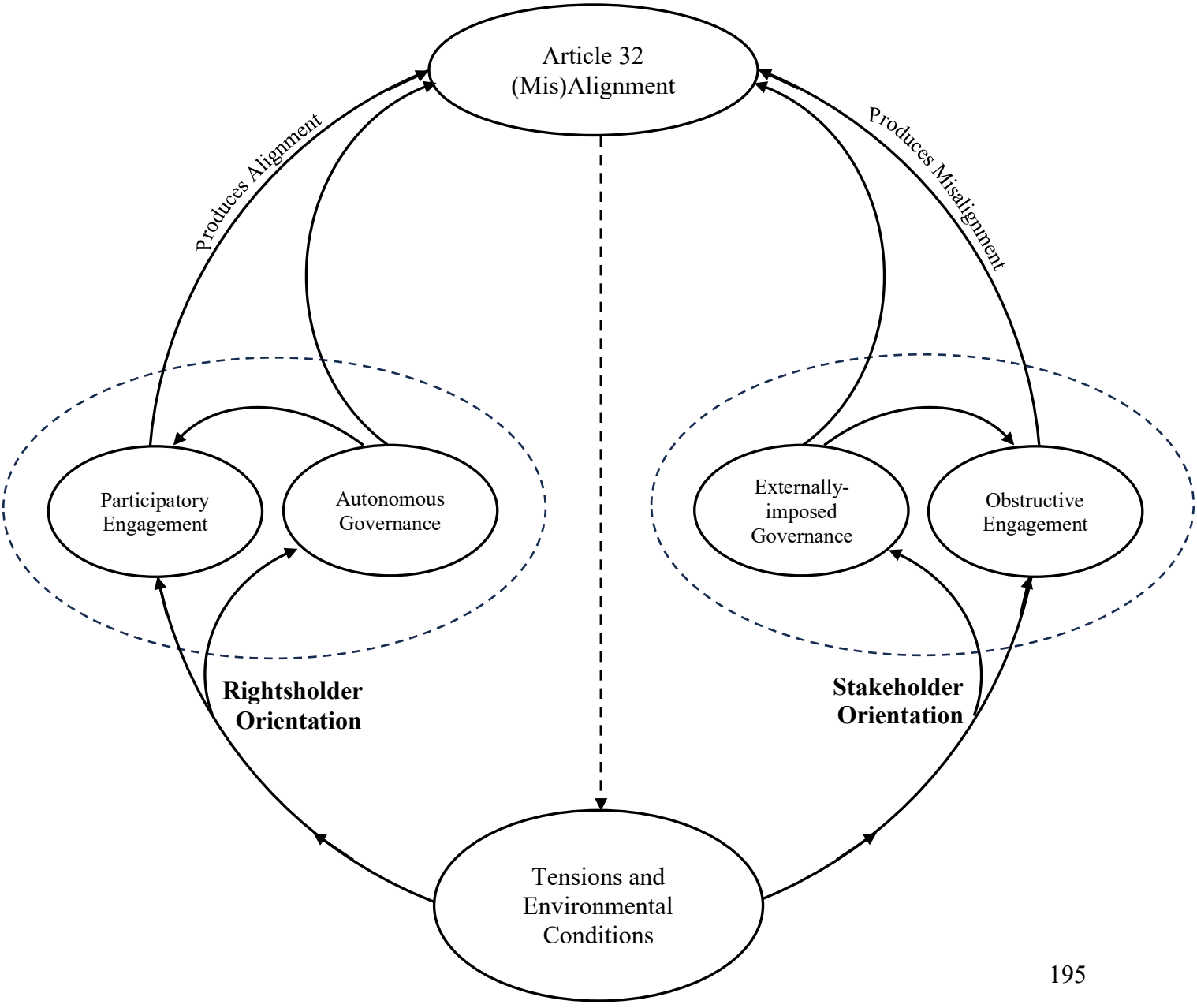
The first contribution of this approach is that it offers an alternative lens with which FPIC may be studied (rightsholder versus stakeholder engagement). Stakeholder theorists invariably revert to Mitchell, Agle, and Wood's (1997) stakeholder salience to determine whether any given stakeholder warrants the attention of a corporation using dimensions of *legitimacy*, *urgency*, and *power*. Breaking away from the underlying assumption that affected Indigenous peoples are a stakeholder to a project proponent's resource development project, and recognizing that they are rightsholders, the dynamics change such that stakeholder theory is rendered inadequate.

A human rights affirming orientation to this study necessarily invites state actors (or the Crown in Canada) into the equation on account of the state being recognized as the duty bearers within the context of human rights and international human rights law (Klein et al., 2023; Rodhouse & Vanclay, 2016). McPhail (2023, p. 119) observed that a human rights perspective "potentially changes the power relationships between rightsholders and corresponding duty bearers." As noted in the reciprocity in research section above, the Crown wields tremendous power in setting the tone for engagement between the project proponent and affected Indigenous nations. Given that the federal government had signalled its intention to revise the DTCA framework to be compliant with the UNDRIP Act of 2021, it is important to understand and address the legacies associated with the NRTA (namely, the transfer of jurisdiction over natural resources to provincial crowns) to provide leverage to affected Indigenous nations within the confines of a new engagement framework regime. I do not offer any solutions in this regard, but rather note its importance to understand the variability that we observed in terms of the political

will of provincial Crowns to negotiate in a good way that honours and upholds the rights of Indigenous nations to exercise self-determination.

Returning to Mitchell, Agle, and Wood (1997), while there may be merit to retain *legitimacy*, *urgency*, and *power* as pertinent dimensions and building blocks for theory development, representative quotes from participants in chapter four demonstrate stakeholder

Figure 5.1 Rightsholder Versus Stakeholder Orientations Toward FPIC Implementation



theory's inadequacy to fully apprehend FPIC implementation — particularly if it is understood that it is a tool to affirm the human rights of Indigenous peoples. Several participants had noted that the Crown may play a pivotal role to promote the (mis)alignment of current engagement processes with Article 32 of the UNDRIP. On the one hand, some provincial jurisdictions are governed by provincially elected officials who are "friendly" to the rights of Indigenous peoples and actively promote and facilitate meaningful engagement between resource development corporations and the affected Indigenous nations. On the other hand, some provincial jurisdictions are less friendly and have even enacted coercive legislative frames that place time limits for deliberative processes to render an informed decision around acceptance of a project. These jurisdictions may often exhibit a tacit *fait accompli* that engenders performative approaches to engagement. In these scenarios, affected Indigenous nations only enter into an agreement so as to receive some benefit (versus no benefit) because the project's approval is determined as inevitable.

Participants remarked that it is incumbent upon governments to respect the right of Indigenous peoples to FPIC — which necessarily includes the right to say no to a project on the terms presented to them during the negotiation process. Several participants identified sources of *leverage* as a potent enabler toward producing alignment with Article 32 of the UNDRIP. Relatedly, participants had offered advice for Crown actors to become more involved in tripartite conversations to ensure that Indigenous peoples are satisfied that the process is meaningfully engaging them and offering sufficient redress and mitigation measures in response to the impact areas of concern articulated by the affected Indigenous nation. Leverage will be discussed in more detail in the future research section later in this chapter.

5.2.2 Cascading Effects Become Transparently Observable

A second contribution of this study is that it demonstrates the cascading nature of each component of Article 32 of the UNDRIP. While the cascading nature of Article 32's subcomponents (in addition to the enablers and barriers) had been discussed under the *reciprocity in research* section above, it also has theoretical implications as well. Given that Western modes of inquiry tend to dissect complex phenomena into discrete units of analysis, it is possible that this inter-connectedness may have been lost — particularly when previous studies that examine FPIC and Indigenous peoples have primarily focused on consent as an outcome. With a deeper appreciation of this interconnectedness, it is transparently observable that when seeking to understand the alignment of current practices with Article 32, one must consider the holistic relationship between the components rather than as distinct units of analysis. The holistic manner in which these tensions, enablers, and barriers interact with one another serves to explain the cascading effects observed from this study.

In chapter four, participants spoke of barriers that hinder the ability of an affected Indigenous nation's decision-making institutions to fully render a decision. These barriers are likely, then, to produce misalignment with Article 32(ii), which would logically cascade into producing misalignment with Article 32(iii). As noted above, provincial jurisdictions vary in terms of amenability to engage with Indigenous peoples in a good way. For example, some jurisdictions may impose mandated timelines (which may well be considered a subset of coercive legislative frames) while presenting the project to the Indigenous nation as *fait accompli*. If the proponent perceives approval of the project as inevitable, they may then be motivated to performatively engage with the nation in a manner that the Indigenous nation would perceive as meaningful and cooperative.

This type of engagement would directly produce misalignment with Article 32[ii]. When one considers that the purpose of the negotiation process is to provide the opportunity for the affected Indigenous nation to bring forth their concerns that involve economic, environmental, social, cultural, and spiritual impacts, it stands to reason that project proponents who performatively engage with that nation would not be motivated to offer redress and mitigation measures in response to those impacts. Thus, we see how misalignment in one component (Artice 32[ii]) is likely to produce misalignment in another component (Article 32[iii]). Mandated timelines may produce the same cascading effects of misalignment. When a nation is placed under a strict timeline, they may not be afforded sufficient time to deliberate and render a decision, which may increase the likelihood that an impact may not be properly identified. Impacts that are not properly identified are not likely to be mitigated or redressed.

Another dimension of the cascading nature of Article 32 items relates to the impacts articulated within Article 32[iii]. Specifically, Article 32[iii] identifies environmental, economic, social, cultural, and spiritual impacts as areas in which Indigenous peoples should be offered redress or mitigation measures. As evidenced throughout chapter four, the landbase of many Indigenous nations serves as a foundational element from which other spheres of culture and society are manifest. Participants had spoken about sensitive sites that hold spiritual, cultural, and social significance to the affected Indigenous nation; environmental impacts, therefore, naturally cascade into spiritual, cultural, and social impacts.

Additionally, throughout the territories of many Indigenous peoples, sensitive sites relate to their cultural and spiritual gatherings and ceremonies; as such, land impacts are intimately connected to producing impacts on cultural, social, and spiritual spheres of that Indigenous nation. As project proponents seek to advance a project on the territories of Indigenous peoples,

it is vitally important to recognize that impacts are interconnected such that an impact in one domain may well cascade into impacts on other domains of the Indigenous nation's society. Inversely related is the fact that it may prove difficult to parse out and compartmentalize impacts for redress or mitigation without recognizing that the impact may be plural in nature (i.e., environmental impacts will also produce economic, social, cultural, and spiritual impacts).

On the positive side, participants noted areas in which enablers may have cascading effects to produce alignment across Articles 32[ii] and 32[iii]. Early engagement had been identified by several participants as an enabler that helps build and engender trust between the project proponent and the affected Indigenous nation which assists relationship building (yet another enabler toward producing alignment). It is assumed that project proponents who are invested in building a trusting and respectful relationship are more likely to be attuned to the impacts as articulated by the affected Indigenous nation. Therefore, early engagement is likely to produce alignment with Article 32[ii], which in turn will increase the likelihood that project proponents will offer sufficient redress and mitigation measures in response to the impacts identified by the affected Indigenous nation through the engagement process.

5.2.3 Imported Concepts from Literature in Law

A third contribution is that this study imports concepts from literature in law that may be of use to refine models of engagement related to business and human rights. Again, this reflects a rightsholder approach for engaging with the relevant constituents (versus a stakeholder approach). Recall from the literature review that Yaffe (2018) and Cambou (2019) both referenced S. James Anaya who defined autonomous governance and participatory engagement as key determinants of self-determination. This study identified key actions and processes (i.e.,

enablers) associated with autonomous governance and participatory engagement, as depicted in Figure 4.1 in the previous chapter. Participants also helped to reveal a set of barriers that, together, act to reinscribe the status quo approach to engagement that does not align with Article 32 of the UNDRIP.

Throughout the analysis process, I had struggled with how to make sense of the data, and it only made sense to return to autonomous governance and participatory engagement as conceptual categories to properly tell the story that my participants had shared with me. Through this study, autonomous governance and participatory engagement was operationalized by identifying the subset of associated enablers, while also providing inspiration to identify a contrasting framework to explain the status quo (i.e., DTCA) framework that produces misalignment by using the conceptual categories of externally-imposed governance and obstructive engagement. Again, these conceptual categories were operationalized by identifying the subset of associated barriers toward alignment with Article 32 of the UNDRIP.

While one may argue that importing concepts from literature in law may be unimportant or uninteresting, its significance is noteworthy as these concepts are necessarily bundled with the assumption of self-determination. Recall from chapter two that the stated intention of this study is to interrogate the underlying assumptions of extant management literature about FPIC through problematization as advanced by Alvesson and Sandberg (2011). Whereas extant literature had previously asked how to utilize stakeholder theory to implement a quasi-FPIC strategy to acquire the "consent" of the affected Indigenous nation, this study is centered on the self-determination as an outcome of a meaningful FPIC implementation. Extant literature had been problematized for its implicit assumption that Indigenous peoples are stakeholders and that project proponents may focus on the process to obtain their consent (or at least acquiescence) to the proposed

resource development project. The imported concepts of autonomous governance and participatory served as potent concepts to assist in the analysis of the data with which to organize concepts into frameworks that describe UNDRIP-compliant engagement strategies, as well as engagement strategies that are misaligned with Article 32.

5.3 Limitations and Future Research

This study was motivated to "tell the other side of the story" in relation to FPIC, as inspired by Graebner and Eisenhardt (2004), who sought to explore mergers and acquisitions from the seller's perspective, and decolonial scholars (Gaudry, 2011; Kovach, 2009; Smith, 2012) whose research is focused on reclamation of representing Indigenous peoples from an Indigenous perspective. Naturally, a set of limitations are associated with this study, and are necessary to meaningfully apprehend the contributions outlined earlier in this chapter. The themes associated with these limitations are as follows: Duty to Consult and Accommodate framework; narrowing the scope on Article 32 of the UNDRIP; rightsholder meaning; FPIC meaning; and research participant pool.

As discussed throughout this thesis, I deliberately elected to not focus on the DTCA framework and chose, instead, to explore FPIC and Article 32 of the UNDRIP. However, I recognize that the DTCA is the current framework for engagement practices between resource development project proponents and Indigenous peoples affected by those projects in Canada. Additional context for why the DTCA does not prominently feature in this dissertation — over and above the previously stated rationale in chapter two — is that it is the DTCA framework lacks uniformity across Canada. As noted in chapter two, several SCC rulings have shaped the

DTCA framework and whether or not the DTCA is triggered depends upon tests articulated by these rulings (Coyle & Borrows, 2017).

To effectively tell the story of my research participants, I chose to focus on Article 32 because it offered an opportunity for elegant analysis for two reasons. First, research participants would have to provide details about their respective clients, which may have compromised client anonymity — potentially exposing the participants to unnecessary professional ethics risk. Second, the complexity of the DTCA framework may prove too difficult to meaningfully analyze. During a conversation with my thesis committee, one committee member had remarked that entire research careers have been forged from the study of Canada's DTCA framework. An additional reason for studying Article 32 and FPIC instead of the DTCA framework is because, to the best of my knowledge, the DTCA framework had not been studied within the management literature. Although there had been scant mention of Article 32 and FPIC in the management literature, it has at least been examined by management scholars. For the above reasons, I had elected to only provide the DTCA historical background in chapter two; it is important to know the history of the DTCA framework as Canada looks to move its DTCA practices to be consistent with the obligations under the UN Declaration Act of 2021.

In respect to the narrow scope of this study (i.e., to focus on Article 32 of the UNDRIP rather than UNDRIP as a whole), recall from chapter three that I had noted several scholars advise against interpreting any one article independent of others — an example of which I provided was Nosek (2017) who observed that the utilization and strengthening of an Indigenous nation's decision-making institutions is affirmed in Articles 5, 27, 34, and 40. Additionally, FPIC is affirmed across Articles 10, 11, 19, 28, 29 as well as in Article 32. It should be noted that the context of FPIC in the other articles does not apply to resource development activities and

therefore does not apply to the present study. While the articles of the UNDRIP generally cohere with one another, the 46th Article stands out as peculiar and out of sync with the other 45 articles. It reads as follows:

> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
> 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

While the 46th Article may be interpreted as negating or otherwise limiting the scope of rights held by Indigenous peoples, as affirmed in the UNDRIP, historical context on the UNDRIP's drafting, negotiation, and passage is helpful. As noted by Barume (2009), several states — including a bloc of African nations —expressed eleventh hour concerns about the passage of the UNDRIP and its potential to be used as justification for secession by Indigenous peoples within their national borders. With the spectre of the draft failing to pass at the General Assembly, last minute negotiations had occurred to address this issue (along with several other suggested revisions to the draft declaration, which were addressed or withdrawn by the African block) and the 46th Article is an outcome of those negotiations. Notwithstanding the territorial integrity clause of the UNDRIP, the 26th Article recognises "Indigenous territoritory" (Montes & Cisneros, 2009).

As mentioned above, the UNDRIP should be interpreted in its entirety, and the question may be asked why I chose to study Article 32 and FPIC. There are several reasons for so doing, chief among them is the fact that the management literature had already explored FPIC, which is reasonable and expected on account of its intersectionality with business. As was evidenced throughout this dissertation, the norm in Canada is for project proponents to engage with Indigenous peoples on behalf of the state. Therefore, one may understand why the management literature has examined FPIC. Nevertheless, most of the literature published in management journals fell short for reasons outlined in chapter two. Alternatively, a set of articles (Arenas, Sanchez, & Murphy,2013; Murphy & Arenas, 2010; and Murphy & Vives, 2013) were ahead of their time and the conversation they attempted to start was, unfortunately, not kindled. However, shifts in terms of corporate norms and expectations, political shifts, and general understanding over the applicability of UNDRIP to Canadian law has changed over the intervening years. Therefore, it makes sense to pick up the FPIC conversation that was started in the early 2010's, and to present it through Indigenous lenses.

A third limitation revolves around understanding what is meant by "rights" and "rightsholder". As shown throughout chapter four, divergent interpretive frames held by state, corporate, and Indigenous actors has been a source of tension when it comes to engagement practices between project proponents and Indigenous peoples. At issue are interpretive frames about temporal orientations, impacts versus benefits, redress versus mitigation, and defining consent. As discussed in chapter two, the Section 35 rights protected by the DTCA framework (and the accompanying SCC decisions that helped to define the framework) are limited in scope, and because this study focused on Article 32 and FPIC, it takes a more expansive approach to understand the rights of Indigenous peoples. This approach is consistent with decolonial scholars

such as Gaudry (2011) and Smith (2012) who assert that Indigenous research is focused on self-determination. In addition to divergent interpretive frames around "rights", the understanding of "rightsholders" has also been the subject of scrutiny by the Crown and the courts. Due to Canada's colonial history, Metis, and Inuit groups are often not afforded the same recognition as are First Nations. In fact, during the interview process, several participants excused themselves for continually referring to Indigenous peoples as First Nations — simply because an overwhelming majority of their clients are First Nations whose rights are more readily recognized over other Indigenous peoples. Readers are well-advised to note that state and corporate actors may not necessarily recognize expansive rights of affected Indigenous nations.

The fourth limitation of this research is also associated with interpretive frames — namely interpretations of how to define FPIC and whether power or economic disparities undermine consent that is "freely" given. While *fait accompli* and performative approaches were discussed at length, and its association with power asymmetry between the project proponent and affected Indigenous nation, the fact is that some nations are in desperate need for opportunities to provide jobs for community members and revenue to spur economic development. Where such economic disparities exist, one may reasonably question the authenticity of their consent to the project. While higher levels of economic need may not fit the definition of coercion, there exists some doubt whether a nation would have acquiesced to a project if the nation was in a better financial position.

A final limitation of this study is that the participant pool only included Indigenous lawyers who have represented Indigenous nations affected by resource development projects. It is possible that the experiences recounted by them may not be fully representative of the nations they had represented, or that they do not fully reflect the diversity of values, aspirations, and

developmental goals that exist within those nations. However, it should be noted that research participants were careful to observe that internal consultation will tend to smooth out these differences by arriving at a consensual decision, which was often described as a decision with which everyone may live. Nevertheless, it should be observed that if this study included the perspectives of corporate or Crown actors, drastically different stories would likely have been told. However, the purpose of this study was not to compare or contrast these different studies. Instead, I sought to privilege the perspectives of the Indigenous nations whose livelihoods and ways of life are disproportionately affected, relative to the benefits they receive in exchange.

Relatedly, one may suggest that the present study only represents one side of the equation by focusing on the affected Indigenous nations. As noted earlier in chapter 3, this is a deliberate choice and is intended to provide an alternative narrative to supplement extant literature. Management literatures have examined Indigenous peoples as stakeholders and have focused on businesses using stakeholder engagement strategies to secure a social license to operate and conduct business as usual. However, the times, they are a-changing. Slowly. But they are changing. Several research participants had remarked that since the passage of the UNDRIP, project proponents have come to realize that they must engage with Indigenous peoples in some capacity. This observation offers an entry point into discussion around future research.

Future research may draw from social movement and institutional logics literatures to outline how Indigenous peoples — through advocacy, litigation, and direct resistance — have helped to redefine their role and membership status within institutional fields to shift the institutional logics of state and corporate actors. Such a study would contrast with the work done by Olabisi et al. (2019), who presented findings about how affected Indigenous peoples transformed their stakeholder status categorization by the multinational corporation from a non-

stakeholder (Phillips et al., 2003) to a primary stakeholder. The proposed research would build upon their contribution by adding in a rightsholder dimension to the standard understanding of stakeholders thereby offering an entry point to examine hitherto unexplored dimensions of power from the Mitchell, Agle, and Wood (1997) framework (which seeks to categorize stakeholder salience according to power, legitimacy, and urgency). Recall from the theoretical contributions section above that several participants had noted leverage as a potent variable that could produce alignment with Article 32 vis-à-vis increased state involvement in the negotiations. Wanvik and Caine (2017) had explored the role of leverage among Metis communities who are engaged with extractive industries within the scope of Mitchell, Agle, and Wood's (1997) stakeholder salience model. This proposed research would build on this study as well, with the specific inclusion of state (Crown) actors.

Another domain of future research relates to the emerging and UNDRIP-compliant best practices for engagement (and accompanying outcomes) that are shifting away from the traditional IBA and toward alternative arrangements such as evergreen agreements (Participant 3), joint venture agreements (Participant 6), or sequential agreements (Participant 8). Given this dynamic, continued theorizing about engagement practices that end with an IBA agreement are not forward-looking and not consistent with the trending practices. Therefore, forward-looking research on engagement practices between Indigenous peoples and project proponents may produce more relevant results by examining IBA alternatives.

Several decolonial and Indigenous scholars (Kovach, 2009; Younging, 2018; Smith, 2012) have called for research that honours the agency of and contributions of Indigenous peoples on society. The increasing adoption of IBA alternatives may provide an avenue to do so. Recall that Participant 3 observed that the impetus for these alternative IBA arrangements had

originated from the Indigenous nations who were cognisant of the shortcomings of a single, standalone agreement; these shortcomings are particularly pronounced in longer-term, decades-spanning projects where legal recognition of Indigenous rights and title had been expanded in the intervening years since the original agreement. While this may appear to be to the benefit of Indigenous nations, this type of arrangement has proven beneficial for both parties. It is interesting to note that this alternative type of agreement is parallel to how Indigenous nations entered into treaty and alliance relationships with other Indigenous nations prior to contact with European settlers, the protocols of which were also followed during the signing of the numbered treaties.

For example, Craft (2013, p.113), observed that Anishinabe nations entered into treaty relationships in the spirit that those relationships were to be "constantly fostered, re-defined, re-examined, and renegotiated." Relatedly, Borrows (1992, pp. 191-192) remarked that, "[treaty] relationships were continually renewed and reaffirmed through ceremonial customs. Renewal and re-interpretation were practiced to bring past agreements into harmony with changing circumstances … the idea of the principles of treaty being 'frozen' through terms written on paper was an alien concept to the Odawa." In speaking to these alternate arrangements to replace the traditional IBAs, participants related how they may enable both parties to develop a trusting, and mutually beneficial relationship. As we live in an era of reconciliation, such Indigenous-inspired frameworks may prove indispensable in redefining how Indigenous peoples liaise and interface with corporate and Crown actors.

As discussed in chapter two, several disciplines – including management – have welcomed the metaphor of "two-eyed seeing" as a research methodology to provide new perspectives on extant literatures. Recently, Arjaliès and Banerjee (2024) engaged in a

community-based participatory research project with a two-eyed seeing approach to understand regenerative capital to address biodiversity loss among Indigenous territories in Canada. While this study offers a complementary view to the traditional stakeholder theorizing about FPIC implementation, it does not critically examine how the two views (Indigenous and non-Indigenous) may complement one another to provide a two-eyed seeing approach to FPIC implementation. Future participatory research may further develop the ideas advanced by this study with a two-eyed seeing approach to identify mechanisms with which Indigenous nations, Crown, and corporate actors engage with one another to affirm the exercising of the Indigenous nation's rights that also sustainably advance resource development projects.

I am cognisant of the fact that Bartlett et al. (2012), who first proposed the metaphor of two-eyed seeing, remarked that in order for two-eyed seeing to be implemented Indigenous knowledges should be on equal footing with Western ways of knowing — or in other words, disciplines should be necessarily decolonized. While the present study examines DTCA and FPIC with a decolonial lens, it is still exploring the realities faced by Indigenous peoples within a colonial system. Future research may examine Indigenous legal orders on their own accord, without regard to colonial constructs to confine analysis, and possibly yield rich frameworks to understand relationality that encompasses relationships between peoples (i.e., Indigenous and non-Indigenous peoples), as well as relationships between peoples and the land.

In closing, this study offers several practical and theoretical contributions toward understanding FPIC implementation in Canada. Implications for practice (reciprocity in research) had identified the centrality of capacity to produce alignment; the overarching significance of relationship building to produce alignment; and the interconnectedness of tensions, enablers, and barriers which results in cascading impacts of (mis)alignment across

components of Article 32 of the UNDRIP. It is my hope that these contributions will prove useful in providing affected Indigenous peoples (and the counsel that represents their interests at the negotiation table), Crown, and corporate actors with a better understanding of the variables that factor into alignment with Article 32 of the UNDRIP.

In respect to theoretical contributions, the present study offered an alternate set of assumptions using the problematization framework advanced by Alvesson and Sandberg (2011). By adopting a human-rights framework to understand FPIC implementation, a set of tensions, enablers, and barriers were revealed that resulted in a conceptual model that serves to differentiate a rightsholder orientation versus a stakeholder orientation to FPIC implementation (Figure 5.1). Analysis of the data demonstrated cascading impacts that I had never fully appreciated prior to commencement of this study. Finally, this study imported the concepts of autonomous governance and participatory engagement from literature in law. These two concepts were particularly useful as an organizing conceptual framework with which to bundle the enablers and barriers. Finally, limitations to this study as well as future research directions were discussed, including a variety of research avenues with which Indigenous agency may be honoured and highlighted. Let us now turn to a few concluding thoughts as I prepare to close this present study and reflect upon the journey that has brought me to this point.

Chapter VI CONCLUSION

Storytelling is central to the identity of Indigenous peoples (Kovach, 2018; Smith, 2009) and it has been a central part of my identity throughout my life. While I may not have been able to fully deploy Indigenous methodologies throughout this dissertation for a variety of reasons which I will not discuss here, I have sought to bring in rich metaphors, storytelling, and perspective-taking into my writing. These stories connect us to our past to understand our present while envisioning the future. Past. Present. Future. A holistic understanding of time and recognition that time is not linear, but rather circular is also central to Indigenous worldviews. Thus, as I conclude, let us return to the beginning.

As I offer my concluding thoughts on this dissertation, it is impossible for me to not reflect upon my overall journey throughout my doctoral studies, beginning with a meeting with my former Dean in late winter of 2018 in which he had tapped me on the shoulder with an invitation to consider transitioning to a career in the academy. At that time, my spouse and I had learned that we were expecting to become parents later that year, with a due date at the end of my first semester, should I choose to begin the program. Several months later, I submitted my final fall term paper while in the hospital in the final hours before delivery.

Over the ensuing years, I have striven to raise a daughter and work part-time, while in pursuit my doctoral studies. Among these roles, fatherhood has been of central importance to me as my daughter represents a future that takes a radical departure from the historical, intergenerational colonial trauma that has afflicted my family for generations – one of countless Indigenous families in Canada, and across the world. My role as a father, with an aim to improving upon the legacy I have inherited, serves as a perfect metaphorical grounding for the

academic research I undertake. While trauma and dysfunction has been a part of our shared history that defined relations between Indigenous and non-Indigenous peoples, that history does not dictate how we can relate to one another in the future. We can do better.

My research drew from the collective wisdom held by Indigenous peoples – including knowledge keepers, advocates, and community leadership – to highlight best practices and ways of relating that reduce power asymmetry, address inequities, and promote solutions to social and environmental problems faced by humanity. I have chosen to study these matters as a result of the silencing of Indigenous peoples' experiences throughout my MBA and doctoral studies. I have long argued that the state of Indigenous peoples and the state of ecosystems on their traditional territories are allegorically akin to canaries in the mineshaft of climate change and environmental degradation. Further degradation of unexploited/underexploited lands will necessarily have wider impacts than on Indigenous peoples.

This is especially true, given how much of the Earth's remaining landmass and biodiversity reserves - and other important indicators for the vitality and viability of our species - are located on the territories of Indigenous peoples. Consider that Garnet et al., (2018) reported that lands considered under the jurisdiction and use of Indigenous peoples span approximately 25% of global land surface, or that Fa et. al. (2020) found at least 36% of global intact forest landscapes remain on Indigenous lands. If humanity is to actionably pursue a truly sustainable future, we cannot do so without recognizing and respecting the jurisdiction of Indigenous peoples over these crucial tracts of land. Our ability to *get it right* (i.e., prevent or mitigate the worst impacts of climate change, resource depletion, and environmental degradation) depends on the ability of state and corporate actors to maintain good relations with Indigenous peoples and to respect the relations Indigenous peoples maintain to their lands and ecosystems.

I am grateful to have had the opportunity to engage in this research throughout my dissertation and the many people who have helped me along the way – the most important of whom are the research participants, and key board members of the Indigenous Bar Association. Without their support, my research would neither have taken root nor blossomed. They have appreciated the value of the work reflected in this dissertation and were eager to share their insights and experiences to add to this conversation. Thank you for giving so freely.

I am also grateful for the support of my advisors who have helped me navigate my way through the unfamiliar scripts of the academy and for helping me refine my skills as a researcher to allow the story to emerge from the data. As I continue to grow and develop these skills, I am certain I will look back on this and see vast room for improvement, but at this stage in my research career, I am satisfied that I have allowed their voices to speak to the best of my ability.

Most importantly, I am honoured to have the encouragement and support of my spouse who has kept me grounded as the inevitable thoughts of dropping out of the program surfaced on occasion – perhaps more occasionally than I would like to admit. Your support has allowed me to continue this difficult journey, and I am proud of the daughter we have been able to raise together.

I am who I am because of the resilience of my mother and generations that preceded her. who survived - across many generations - the onslaught of colonial efforts, policies, and actions to eradicate their languages, customs, identities, worldviews, and their very essence as Indigenous peoples. That is part of my past, which informs who I am today. When I envision a future, I cannot help but close with a story from a recent playdate my daughter had with a school friend. She decided that she wanted to share part of her culture and asked for my spouse to play a pow wow song from her phone. As the drum beat emanated from the speaker, I stood in awe

over how the two girls — Indigenous and non-Indigenous — stepped in synch with the beating drum. They danced as one without regard to the false constructs that adults use to divide us from one another. It was beautiful. It gave me hope that our children may always dance together, today, tomorrow, and generations to come.

APPENDIX 1: Research Ethics Board Proposal

PROTOCOL TITLE: Relational Accountability and Negotiating in a Good Way

SUMMARY

Select the appropriate REB for review:
REB1

Is this a study that has already been approved by another Canadian institution?
NO

Does this study only involve the use of secondary data?
NO

Provide a brief statement about the project written in lay language. Do not cut and paste directly from the study proposal.
This study seeks to explore perspectives, motivations, and responsibilities held by affected Indigenous peoples as they negotiate with resource development project proponents. Management literatures typically focus on the priorities of the corporation while ignoring those of the affected group of Indigenous peoples. A greater understanding of Indigenous peoples' perspectives, motivations, and responsibilities is expected to contribute to improve relations between affected Indigenous peoples and corporate actors so that they are conducted in a good way.

Describe the research question(s) and objectives for this research study.
The proposed study will seek to answer the following questions (Research Question Protocol):

Preamble:

Thank you for participating in this research, which is called "Negotiating in a Good Way." We appreciate your willingness to share from your experience and observations on negotiations and/or project design.

I will now ask you a series of four questions regarding resource development projects that take place on Indigenous lands. In particular, the questions will ask you about the negotiation that takes place between resource development corporations and the affected Indigenous peoples on whose (or adjacent to) land the projects will take place.

Each question will have a series of sub-questions, to ensure we get your full thoughts on a topic. We are looking for your thoughts on current practices, but also on best practices and practices that may be improved upon. Please feel free to take the conversation in different directions if you think they are important.

1. How well do current practices in negotiations (and/or project design) between development corporations and Indigenous peoples] in Canada align with Article 32 of the United Nations

Declaration on the Rights of Indigenous Peoples? Please explain.

2. What are the most important concerns or priorities identified by the affected Indigenous people during negotiations?

[Note: as participants provide answers to this question, sub-prompting questions are likely to be pursued, "Tell me more about _____", "Please elaborate on _____"]. The following sub-questions may be asked if participants did not identify any of the following:

a. How important is the utilization of decision-making institutions? [e.g., self-determination]
b. How important are relational responsibilities? [to whom are Indigenous peoples accountable? Two-legged and four-legged relations]
c. How important is the integrity of landbase for future generations? [e.g., relationship between affected Indigenous peoples and land, importance of landbase to exercise of culture, etc.]
d. How important are Indigenous developmental priorities? [e.g., economic factors, Nation priorities for development, etc.]
e. Now that we've gone through the list of concerns, are there any other priorities or concerns you would like to mention.

   Follow-up for each of "a" through "d": If you can think of one, please provide an example or two describing when "a" through "d" were incorporated or ignored during negotiations and/or project design.

3. The final question asks for any advice you might have for each of the three key groups involved in negotiations between resource development corporations and Indigenous peoples: the corporation, the government, and the Indigenous people's. What can each do to promote/ensure negotiations are done *in a good way*?

a. What advice would you provide to corporations engaged with affected Indigenous peoples?
b. What advice would you provide to governments engaged with affected Indigenous peoples?
c. What advice would you provide to affected Indigenous peoples engaged with project proponents?
d. Feel free to identify other stakeholders if you wish [e.g., general public, media, other relations]

4. Finally, are there any other things you can think of that are important to consider in this study of negotiating in a good way between resource development corporations and affected Indigenous people?

Describe the research methods.
The proposed research will utilize a qualitative research approach using semi-structured interviews, to be conducted in-person or through online video conferencing platforms such as Zoom or Skype.

Describe briefly in a step-by-step manner what the research team will be doing with participants, after they have been recruited and consented.

Upon successful recruitment of a research participant, the step-by-step manner in which research participants will be engaged is as follows:

1. Consistent with traditional Indigenous protocols, the PI will offer a bundle of tobacco or other medicine at the time of securing their participation.
2. The PI will reach out to them via email to thank them for generously giving of their time to participate in the study. The email will include an orientation letter and information about the study as outlined in Appendix 1. The welcome package will also include the informed consent form for their signature.
3. The PI will schedule an interview time with the participant. The informed consent will be received prior to commencing the interview. The PI will review the informed consent form with the participant and will answer any questions they may have about the interview process and will remind them that they are free to voluntarily withdraw from the research at any point.
4. Research participants will be asked the questions identified in the interview protocol (Appendix 2). As this will be a semi-structured interview, related follow-up questions not identified in the protocol will be asked of the research participants to elaborate on their responses.
5. At the conclusion of the interview, the PI will inquire if they can identify members within their network who meet the criteria for participation and whom they would be willing to nominate/recommend. Provided that they can identify potential additional research participants, the PI will provide a copy of the orientation letter with instructions for the research participant to contact their network member with an invitation for them to email the PI if they are interested in participating [see appendix XXX].
6. In the event that information from the interviews is unclear, or if additional information is required as part of the PI's analysis, a follow-up interview or telephone call may be required [if participants give permission to do so in the consent form].
7. Upon conclusion of the PI's preliminary analysis, research participants will be invited to participate in one or more focus group sessions to review the findings and to offer their own insights into the analysis presented to them, as explained in the consent form. Participants will receive a draft exposure of the findings one week or more prior to the scheduled focus group meeting.
8. Those participants who are unable to join focus group(s) will be offered an anonymized draft exposure that was presented to focus group participants and an opportunity to contribute to the overall analysis. This approach is consistent with Wilson (2008), who advocates for the inclusion of research participants as a means to ensure relational accountability, which is a hallmark of Indigenous methodologies. Further, this approach is consistent with TCPS Article 9.17, which holds researchers responsible for affording, "community representatives … an opportunity to participate in the interpretation of the data."
9. The above engagement and participation in interpreting data may be an iterative process. Depending on the agreed upon terms with the proposed organization, they may wish to engage in more than one session, which will require an additional focus group discussion.

10. The final engagement with research participants will be the provision of my final dissertation draft and I will make myself available to answer any follow-up questions upon dissemination and presentation of the research findings.

Where will the study take place?
Due to the highly specialized nature of professional experience required by purposeful sampling, research interviews are likely to be conducted via telephone or online video. This study aims to provide a Canadian context of FPIC implementation; therefore, participants will only be recruited within Canada.

Approximately how long will this study take for participants?
The time commitment to participate in the one-on-one qualitative interview is expected to be between 45 and 90 minutes. Follow-up interviews, if required, are expected to be approximately one-half hour in length. Optional focus group participation is expected to be between one to two hours.

Type of Research (select all that apply):

- [ ] Faculty Research
- [x] PhD Thesis
- [ ] Post-doctoral Research
- [ ] Master's Thesis
- [ ] Honour's Thesis
- [ ] Course Assignment
- [ ] Other

Type of Study (select all that apply):

- [ ] Randomized Control Trial
- [ ] Case-Control
- [ ] Cohort
- [ ] Cross-sectional
- [ ] Survey
- [ ] Pilot Study
- [x] Focus Group/Interview
- [ ] Experimental
- [ ] Observational
- [ ] Ethnography
- [ ] Secondary Use of Data
- [ ] Other

General Questions

Does the study involve participants who are not legally or practically able to give their valid consent to participate?	○ Yes	◉ No
Does the study involve participants who are under the age of 18?	○ Yes	◉ No
Are participants from a population that may be marginalized or vulnerable in the context of research?	○ Yes	◉ No
Does this research include the use of personal health information?	○ Yes	◉ No
Does this study use deception (i.e., will participants be intentionally misled about the purpose of the study, their own performance, or other features of the study)?	○ Yes	◉ No
Will the majority of participants identify as First Nations, Inuit, and/or Metis?	◉ Yes	○ No
Will the analysis of the research results use First Nations, Inuit, and/or Metis identity as a variable?	◉ Yes	○ No
Will the interpretation of research results refer to First Nations, Inuit, and/or Metis people, language, history or culture?	◉ Yes	○ No
Will participants be given the choice to waive their anonymity?	◉ Yes	○ No
Does this study require approval from another organization?	◉ Yes	○ No
Will this study include involvement or recruitment from a specific organization?	◉ Yes	○ No
Will this study occur in locations outside of the University of Manitoba?	◉ Yes	○ No

PARTICIPANTS

How many participants do you expect to recruit?
A total of twenty to thirty participants are expected for this study.

What is the inclusion criteria to participate in the study?
Participants will be recruited on the basis of having represented the needs and interests of one or more affected Indigenous peoples during a negotiation between the respective First Nation or Indigenous community and a resource development corporation.

What criteria would someone become ineligible to participate?
The only criteria for which someone would become ineligible to participate is that they have not represented the needs and interests of an affected Indigenous people within the context of a negotiation between the relevant First Nation or community and a resource development corporation. While an implicit preference is to recruit Indigenous participants in this study, if a participant is non-Indigenous, they will not be excluded from consideration.

Given that first round participants will be recruited from among the IBA membership list, and that IBA members are of Indigenous ancestry, the inclusion of non-Indigenous participants will likely occur through the recommendation of Indigenous participants. An underlying assumption is that the recommendation for participation will be made under the merit of the non-Indigenous participant having demonstrated sensitivity and commitment to advancing the needs and interests of Indigenous peoples.

Will the participants in your study be UNAWARE that they are participants?
No

Will information about the participants be obtained from sources other than the participants?
No

Will participants receive any compensation for participating (e.g. honorarium, course credit, food, parking)?
Participants will not receive compensation in a remunerative understanding. However, consistent with traditional Indigenous protocols, participants will be gifted with tobacco as part of the consent-seeking process (Lavallee, 2009). Research participants will be afforded the same level of respect as a knowledge keeper and tobacco will be passed to them as part of the knowledge seeking process.

Provide a step-by-step description of how you will identify and recruit participants. Describe how prospective participants will be identified, who will contact prospective participants and by what means this will be done.
The first step will be to secure the support of the IBA, who will help to design this study. The PI will work with the IBA and together craft an invitation letter to be disseminated by the IBA to its membership list [see appendix xxx]. The letter will identify the participant selection criteria, as well as to provide prospective participants with the PI's contact information. It is anticipated that

this will yield approximately ten first-round research participants. At the conclusion of each interview, the PI will discuss whether each participant is able to identify members of their network who are appropriate potential research participants. The PI will forward the invitation package to the first-round participants who confirm willingness to participate in snowball sampling, who will then forward the invitation package to prospective second-round research participants. It is anticipated that a third-round of participants should yield the expected number of participants who will contribute toward data saturation, as outlined in the thesis proposal.

Attach copies of all material that will be given/read to participants and/or third parties:
WILL WORK ON THIS OVER THE WEEKEND

CONSENT PROCESS

Describe the consent process. Where and how will consent be obtained?
Consent will be sought among prospective research through email correspondence. As part of the confirmation of participation, prospective research participants will be provided with an offering ceremonial tobacco and will be provided with the informed consent form for their signature. It is anticipated that approximately three or four emails will be required from first contact to final scheduling of an interview time. During this process, the PI will ensure that research participants return a signed informed consent form.

DATA

Are there conditions in which privacy or confidentiality cannot be guaranteed (e.g., focus groups)?
Research participants are provided an opportunity to participate in a focus group during the interpretation/analysis phase of study. This is consistent with Indigenous methodologies and requirements of TCPS Chapter 9 (Article 9.17). This focus group will incorporate a ceremonial element common to sharing circles and will begin with an opening prayer from an Elder (mutually agreed upon with the research partnership organization). An important element of sharing circles is that participants are not allowed to discuss what was shared in the sharing circle.

While the feedback provided during the sharing circle will be incorporated into the research findings, the PI will endeavor to adhere to privacy and confidentiality responsibilities by not associating named participants with experiences shared by them. It is with this understanding that sharing circle members will be instructed to not disclose identifying information that will ultimately be published.

Please describe how participants will be given the choice to waive their anonymity.
According to Wilson (2008), Indigenous methodologies recognizes the importance of identifying teachings, knowledges, and insights with research participants. It is anticipated that some research participants may choose to waive their anonymity. This option will be presented as part of the informed consent form, which will be signed by all participants.

RISKS/BENEFITS

What are the expected benefits of the research?
There are a small number of potential benefits of this research. The first benefit is that it will be instrumental in creating deeper understanding of and appreciation for the motivations, aspirations, and economic development priorities held by affected Indigenous peoples in relation to resource development projects. This enhanced understanding and appreciation may, in turn, be instrumental to create improved negotiation conditions for future groups of affected Indigenous peoples. Another potential benefit (by extension of the above) is that it may be used as source material to lobby for implementing policy changes at regulatory or corporate levels of governance.

What are the indirect benefits for participants participating in the research?
Research participants may indirectly benefit through recognition within the publication findings. This may be useful for their professional accomplishments and their recognized community service.

What are the direct benefits for participants participating in the research?
Through participation in optional focus group analysis, research participants may be exposed to best practices that they may not have been previously aware. Additionally, they may have the opportunity to further expand their professional network with other research participants.

What are the risks (psychological, physical, emotional, social, legal, economic, or political) to participants, or to a third party?
There are no known risks for participation with this study.

Provide a description of the risks, the steps that will be taken to reduce or eliminate them, and the steps that will be taken to improve any actual harm to participants, including (if appropriate) providing a list of helpful resources.
Not applicable.

DISSEMINATION/WITHDRAWING

Will you be providing participants with the opportunity to review their data?
Yes

Please describe
Indigenous methodologies hold researchers to a standard of relational accountability, a part of which is to include participants (this has been described above under …)

How will information from or about your participants be presented (e.g., summary statistics for the whole group, direct quotations from their interviews)?
Research participants will be provided with a thematic summary analysis, which will include direct (but non-attributed) quotes from other research participants. However, each quote will reference a numbered participant (for example: “Participant 1 reported XYZ”) and each

participant will only be provided with their own number so as to allow them to verify their quotes and to be provided with an opportunity to clarify their contributions. This exposure to other participants will also allow them to learn from the insights and contributions offered by other research participants without compromising the overall privacy and confidentiality of research participants.

Will your publications refer to individual participants?
Yes. Research participants – as well as the research partnership organization – will be provided with copies of the dissertation.

How will the research results be disseminated, to whom, and for what intended purpose?
Research participants and the research partnership organization will be provided with an electronic PDF copy of the dissertation. If requested by the research partnership organization, the PI will remain available to offer a condensed presentation of major findings within six months of the final approval of the dissertation committee. Results of this study will be included in submissions to management journals for publication consideration, classroom curriculum, and through reports provided to the IBA.

Steps should be taken to provide participants with a brief, non-technical summary of research results as soon as possible after the data collection phase of the study is completed should they want it. Provide your plans for providing project results to participants. Participants should be given a choice of how they wish to receive a summary and should be told approximately when (MMYY) to expect it.
Research participants and the research partnership organization will be provided with a condensed research summary within three months of the final approval of the dissertation committee [see consent form]. In interest of environmental considerations, this summary will be offered via electronic copy (PDF).

INDIGENOUS PEOPLES

As per Article 9.1 of the TCPS 2, please provide a plan on how you have and will engage the relevant community in your research plans (e.g.. chief and council, band councils, tribe elders, local Metis associations, committees and organizations representing urban Indigenous people).
Several members of my personal network belong to the Indigenous Bar Association (IBA), and I intend to pursue a research partnership agreement with this organization for reasons outlined in pages 63 to 66 of the attached thesis proposal, inclusive. As a community of interest, defined under TCPS Chapter 9 (Article 9.4) the IBA is a logical choice within the context of the proposed research.

Are you conducting research on lands under the jurisdiction of First Nations, Inuit or Metis authority? No

Is there a research agreement in place? No.

Please provide rationale for why you do not have an agreement in place.
The PI would like to ensure that the University of Manitoba REB1 is satisfied with the proposed organization's eligibility to fulfill obligations under Chapter 9 prior to securing an agreement.

Will the participants' personal information be disclosed to community members without their consent?
Participants' personal information will NOT be disclosed to community members without their consent.

Please explain why information will not be disclosed.
It is not appropriate to disclose research participant information to anybody without their explicit consent. As a researcher the PI takes this responsibility seriously.

As per Article 9.13 of the TCPS 2, please provide information on how the nature of the research is relevant to the community needs and practices, and how it might benefit the participating community.
The PI is confident in the relevance to community needs and practices for the proposed research and will ensure that an agreement with the proposed research partnership organization unequivocally expresses support to this end. The anticipated benefits previously outlined in this REB proposal are expected to be an integral component of the support offered by the research partnership organization.

Please describe how the community representatives will be engaged in the interpretation of data and review of research findings, before finalization of any relevant publications or reports resulting from the data.
As discussed above, as well as on pages 66 to 70 of the attached thesis proposal, individual member checks will be presented to each research participant to ensure accuracy of representation and interpretation. Further engagement will include one or more focus groups of research participants to participate in the analysis and interpretation of research data. During these phases, research participants will have the opportunity to shape the research findings to ensure that the findings are meaningful and accurately reflect Indigenous worldviews.

APPENDIX 2: Research Partnership Agreement

INDIGENOUS BAR ASSOCIATION
ASSOCIATION DU BARREAU AUTOCHTONE

June 2, 2023

Mr. Peter Pomart
371E 181 Freedman Crescent
Winnipeg MB R3T 5V4
Email: pomart@myumanitoba.ca

Dear Mr. Pomart,

Re: Letter of Support for Research Partnership on Indigenous Perspectives on FPIC

As President of the Indigenous Bar Association in Canada (the "IBA"), it is my great pleasure to write this letter of support for your proposal to enter into a research partnership with the IBA as part of your dissertation. I understand that your research is focused on the engagement between resource development corporations and Indigenous Peoples affected by resource development projects, and specifically on exploring the perspectives, priorities, and aspirations of Indigenous Peoples in order to gain insights into what this means for obtaining their free, prior, and informed consent ("FPIC").

The IBA is a national non-profit association comprised of Indigenous lawyers (practicing and non-practicing), judges, paralegals, legal academics and scholars, articling clerks, and law students, including graduate and post-graduate law students within Canada. Our mandate includes, among other things, to promote the advancement of legal and social justice for Indigenous Peoples in Canada and the reform of laws and policies affecting Indigenous Peoples. While the IBA does not represent rights-holding Indigenous communities or nations, our over 330+ members are each from different Indigenous communities and nations located across Canada. Many of our members represent Indigenous Peoples as part of resource development matters, including in consultation and engagement with the Crown and proponents. As such, the IBA welcomes the opportunity to enter into a research partnership that further explores these areas and topics including how the IBA members can uniquely contribute to this research.

At the IBA's March 14, 2023, Board of Directors meeting, the Board approved your proposal to enter into a research partnership with the IBA. We understand this partnership to involve engaging with you during the research process, including assisting you in the recruitment process to identify individuals (including IBA members) who may be willing to engage in interviews with you on this subject. In addition, we may explore opportunities for joint presentations on your research, including at the annual IBA Conference or other venues (to be determined).

The IBA Board has identified IBA Secretary, Samantha Craig-Curnow and IBA Vice President, Alexandria (Ajay) Winterburn, to be your points of contact with the IBA for the purposes of this research partnership.

Should you have any questions, please feel free to contact them directly at samanthac@ramafirstnation.ca or awinterburn@pstlaw.ca.

We look forward to working with you on this research partnership and receiving an electronic copy of your dissertation upon its successful defense.

Sincerely,



Drew Lafond
President, Indigenous Bar Association in Canada

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