Implementing the UNDRIP into the Province of British Columbia: The Impact of BC's *Declaration Act* on Buck-Passing and Injustices of Misframing

by

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We acknowledge and respect the Lək^{w}əŋən (Songhees and Esquimalt) Peoples on whose territory the university stands, and the Lək^{w}əŋən and W̱SÁNEĆ Peoples whose historical relationships with the land continue to this day.

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Abstract

This thesis will examine the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) within British Columbia. I argue that BC's *Declaration on the Rights of Indigenous Peoples Act* has the potential to shift the opportunity structures that the division of powers and section 35 of the Constitution have created, allowing settler governments to pass the buck and misframe injustices. Institutional practices of buck-passing and misframing have historically led to the province completely ignoring or imposing settler colonial frames of justice as means of addressing injustices of Indigenous sovereignty and land dispossession. Buck-passing is a government tactic that leverages the ambiguities within the division of powers between federal and provincial governments so as to blame some other level of government in attempt to escape moral blameworthiness as well as the responsibility for rectifying an injustice. For its part, misframing is a problem that involves misconstruing the nature of an injustice so as to block or obscure possible political actors, arenas, or processes that could play important roles in remedying it. Misframing can be both strategic or systemic. Strategic misframing occurs when an injustice is intentionally misconstrued in order to somehow weaken perceptions of its extent or severity or generally to somehow remove from public consideration or view other actors, institutions, venues, or processes that should in fact be considered as possible political places or spaces in which to resolve the injustice. In contrast, systemic misframing is a result of the normal working of existing social or political structures, so that actors, institutions, venues, or processes that should in fact be considered as possible political places or spaces in which to resolve the injustice are somehow invisibilized or kept from view. The UNDRIP provides Indigenous peoples with a potential tool to challenge institutional norms and policies that have historically undermined Indigenous rights to sovereignty and self-determination, and in turn to tackle the problems of passing the buck and misframing injustices within the province of BC. However, this potential will only be actualized if the FPIC principles are utilized to develop consultation mechanisms created by Indigenous peoples. Further, it is imperative that the government of British Columbia actually works with Indigenous peoples to ensure that Indigenous peoples and their legal orders and perspectives are incorporated into all aspects of the policy development of BC's *Declaration Act*.

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Chapter One
Introduction

This thesis will examine the transformative and decolonizing potential of British Columbia's *Declaration on the Rights of Indigenous Peoples Act* (*Declaration Act*). Following Canada's official endorsement of the *United Nations Declaration on the Right of Indigenous Peoples* (UNDRIP) in 2016, British Columbia was the first province to introduce the UNDRIP into provincial legislation in 2019 (Hamilton, 2021). Within this thesis I will specifically examine the challenges that the structures of federalism and jurisdictional ambiguities between federal and provincial governments pose in successfully implementing the Declaration within provincial legislation. Throughout this thesis, I argue that BC's *Declaration Act* has potential to change the way that the province has historically viewed and practiced Aboriginal law. However, this potential will only be actualized if the government of British Columbia actually works with Indigenous peoples, to ensure that Indigenous peoples and their legal orders and perspectives are incorporated into all aspects of the policy development of BC's *Declaration Act*. Specifically, I argue that it is imperative that Indigenous peoples are able to develop their own mechanisms of consultation utilizing the Free, Prior and Informed Consent (FPIC) principles outlined in the UNDRIP, instead of being forced to comply with settler legal frameworks and settler mechanisms of consultation.

Within recent years there has been an increase of pressure on settler-governments to recognize Indigenous peoples right to self-government (Coulthard, 2014). However, settler government efforts of recognition are often critiqued for further perpetuating colonialism rather than decolonizing policies and laws (2014). Decolonization is not as simple as superficially "recognizing" Indigenous rights, but rather occurs when making constitutional changes, specifically involving repatriation of Indigenous land and life (Tuck & Yang, 2012). As such,

Canada's reconciliation efforts have often angered many Indigenous peoples because they do not effectively address or change structures that enable settler governments to oppress and marginalize Indigenous peoples (Coulthard, 2014). However, the UNDRIP, specifically the FPIC principles provide hope that the implementation of the Declaration will be able to provide an avenue for incorporating Indigenous legal orders in defining and interpretating Indigenous rights in accordance to Indigenous peoples, and in turn move away from applying and interpretating Indigenous rights through a colonial lens (Allard & Curran, 2021; Curran, 2019; Morales, 2019; Papillon & Rodon, 2020).

Despite the decolonizing potential of the UNDRIP, the division of powers between federal and provincial governments poses a significant challenge in successfully redressing historical wrongs and protecting Indigenous peoples' rights. Jurisdictional distributions played a significant role in Canadian governments dispossessing Indigenous peoples of their lands and cultures (Pasternak, 2014). The organizational structure of federal and provincial jurisdictions has enabled Canada to have governing power over all lands and resources despite pre-existing Indigenous governance within given areas (2014). Additionally, not only does Canada's jurisdictional make-up allow for settler regimes to control Indigenous lands, but the ambiguities that exist between federal and provincial jurisdictions allow governments to ignore Indigenous concerns by blaming certain issues on the other level of government (James, 2009).

The division of powers is rather ambiguous and it is not always clear which level of government is entitled to handle certain issues and/or policies (Harrison, 1996). Historically, this ambiguity has been used as an excuse by governments (both federal and provincial) to ignore Indigenous demands and to blame the other level of government for failures when it comes to recognizing Indigenous sovereignty and rights (James, 2009), just as Harrison shows

governments have done in “passing the buck” on matters of environmental policy and governance (Harrison, 1996). For example, Harrison explains that when we view jurisdictional ambiguities from a cost and benefits analysis, we can understand how overlapping jurisdictions can be leveraged to avoid responsibility for a lack of environmental protection, by passing the buck to the other level of government. However, in other circumstances overlapping jurisdiction can create competitive credit claiming between governments, as some fields of jurisdiction would be more politically advantageous than others (Harrison, 1996).

Using jurisdictional ambiguities to pass blame as well as compete for specific areas of jurisdiction is not a unique issue to environmental politics, but is also very prominent in dealing with Indigenous relations and concerns (James, 2009). Passing the buck is a political tactic used by governments, and I argue it is a form of injustice. When confronted with a given injustice, settler governments can pass the buck by insisting that a given policy area falls under the jurisdiction of its provincial or federal counterpart (Harrison, 1996). For example, there is a continuous debate between provincial and federal governments pertaining to which government is responsible for providing health services on reserves (Ladner, 2010). This in turn often results in Indigenous demands being left unaddressed.

Passing the buck also leads to injustices of misframing. It is important to distinguish that passing the buck and misframing are two separate concepts and two different types of injustices. Though buck-passing and misframing can often work together and governments could strategically use buck-passing as a tactic to misframe an injustice, they are separate concepts in that misframing is often employed when buck-passing fails. Buck-passing is a political tactic that is used to avoid responsibility entirely for a given injustice by claiming that the issue/injustice falls under the jurisdictional responsibility of the other level of government (Harrison, 1996).

However, when governments are no longer able to pass the buck to another order of government, and are held accountable for a given issue, governments can strategically misframe injustices by blocking certain actors, avenues, or processes that could significantly contribute in remedying the injustice (Fraser, 2008).

Nancy Fraser, a philosophy and politics scholar, explains that injustices of misframing often arise from the power of states to in effect dictate how, where, and what constitutes an injustice (Fraser, 2008). When discussing injustices of misframing, there is a specific focus on "who" is redressing a given injustice. Injustices of misframing often occur when Westphalian states apply a "one-size" fits all approach to name and address an injustice, neglecting to incorporate the views and perspectives from those directly impacted by the injustice (2008); and obscure the right actors or avenues from playing a role in addressing the injustice. For example, and as discussed later within this thesis, within cases pertaining to self-government and land-claims issues, injustices will often be misframed; as the injustices will be linked to a lack of legal acknowledgement of Aboriginal title, rather than addressing the government of British Columbia's failure to uphold and acknowledge pre-existing Indigenous legal orders (McCrossan & Ladner, 2016). This in turn results in a redress mechanism (e.g., duty to consult), that still enables settler governments to disregard Indigenous legal orders and/or decision-making processes (Morales, 2019). Thus, when an injustice is misframed, it often leads to the root of the injustice (e.g., colonial dominance) being ignored and in turn the injustice is not adequately addressed (Fraser, 2008).

Canada's history of misframing injustices and failing to redress historical wrongs is further complicated by the structures of federalism that enable governments to pass the buck and neglect responsibility for certain issues. This creates concern as to whether the UNDRIP and the

FPIC principles contained within the UNDRIP will be successfully implemented and fully enforced. The BC *Declaration Act* showcases the potential to address issues of passing the buck, especially in relation to land claims and the duty to consult. However, the jurisdictional ambiguities that exist between federal and provincial governments could impede the implementation of the Declaration and in turn further exacerbate issues of buck-passing and misframing. The specific complexities, challenges, and concerns that the division of powers pose in the implementation of decolonization policies, like the Declaration, has inspired my research question which is: will the FPIC principles within the UNDRIP help to successfully address problems of misframing injustices and passing the buck, and in turn redress historical wrongs and decolonize policies that limit Indigenous peoples' rights to self-determination? I will answer this question throughout my thesis by analyzing how BC's *Declaration Act* could exemplify government accountability and redress for historical injustices suffered by Indigenous peoples. I will do this by conducting a case study of the *Haida Nation v. British Columbia* [2004] and the *Taku River Tlingit First Nation v. British Columbia* [2004] case, as well as reviewing legal experts and Indigenous perspectives on the *Declaration Act*. By analyzing these cases and reviewing legal and Indigenous perspectives, I will be able to examine specific challenges that the division of powers pose, and specifically how the Declaration, if successfully implemented, could address issues relating to settler governments disregarding Indigenous legal orders through tactics of passing the buck, as well as misframing injustice.

In this introductory chapter, I will first provide a literature review, highlighting scholars' perspectives and research on Indigenous politics, the decolonizing and transformative potential of the UNDRIP, as well as other's concerns/doubts about the legitimacy of the Declaration. The literature review will also cover debates and themes relevant to the relationship between

Canadian federalism, multi-level governance, and Indigenous relations. The research that has been conducted on the relationship between Canadian federalism/multi-level governance and Indigenous relations, is important to review as this relationship is relevant and directly impacts the implementation of the Declaration. I will then provide a brief overview of how my thesis would add to the existing literature. Additionally, I will outline the theoretical framework which will guide my research. Further, I will then provide an outline of the methods I intend to use within my research, as well as a chapter outline/breakdown.

Literature Review

To be able to assess the challenges as well as the importance of implementing the UNDRIP within British Columbia, it is imperative to review three areas of scholarly research: Indigenous politics, perspectives relating to the decolonizing potential of the UNDRIP, as well as the debates and theorizations relating to the relationship between federalism, multi-level governance, and Indigenous relations. This scholarly work has shaped my own research and informed the issues and debates that my thesis will further develop. Specifically, this literature provides essential knowledge on how the Canadian state has organized itself in order to establish and continue to exercise power and dominance over Indigenous peoples. As such, this knowledge aids in understanding the complexities and challenges in decolonizing laws and policies that limit Indigenous peoples' rights to self-determination. Further, this knowledge will be imperative in order to further address and assess the obstacles that the structures of federalism pose in decolonization efforts within a sub-unit of a national state. It will also help us to understand the significance and importance of implementing policy that aims to address colonial laws and policies not only at the federal level but also within provincial jurisdiction.

Indigenous Politics

In Canada the history of colonialism has created a legal and political system that continues to oppress and marginalize Indigenous peoples, as evidenced through dispossession and assimilation policies (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019). There is a variety of scholarly work and literature critiquing, examining, and analyzing how Western-centric laws, policies, and norms have and continue to marginalize and oppress Indigenous peoples. Within this section of the literature review I will specifically discuss the work of Indigenous scholars, mainly in social sciences and/or law, and their work and analysis in two areas. The first area is the legal implications of laws and policies that directly impact Indigenous communities, including topics on treaties, section 35 of the Constitution, Aboriginal title, and self-governing issues. The second area is critiques of Canadian assimilation policies and reconciliation efforts. These literatures will provide the foundational knowledge required to develop my thesis and further assess the challenges of implementing decolonizing laws and policies.

Despite Canada's history of failing to acknowledge Indigenous legal orders, those orders have influenced and shaped Canadian Constitutional law (Borrows, 2017). When European settlers first arrived, within certain regions, settlers considered and implemented various Indigenous legal orders into Canada's constitution (e.g., Métis rules and regulations around buffalo hunting in Red River) (2017). As settlers began to further oppress and dispossess Indigenous peoples of their lands and cultures, they began ignoring existing Indigenous legal and political orders (Borrows 2017; Woolford, 2005). Anishinaabe legal scholar John Borrows further argues that even Canada's failure to recognize Indigenous legal orders has shaped and

influenced Canada's constitutional laws (Borrows, 2017). For example, due to Canada's lack of acknowledgement of Indigenous legal orders, constitutional laws such as section 35, which stipulates the existing Aboriginal and treaty rights of Aboriginal peoples in Canada, have been introduced to address Indigenous rights being ignored (Borrows, 2016). However, section 35 is open to interpretation and is often not interpreted strongly by courts, ignoring Indigenous legal orders (McCrossan & Ladner, 2016). The impacts of successive colonial and Canadian government officials neglecting to acknowledge and honour Indigenous legal and political orders has reinforced the dominant belief that Western-centric laws and norms are the superior form of law (Napoleon, 2013). This problem, in turn, results in the advancement of settler territorial sovereignty over Indigenous rights to self-government (2013).

Canada's history and failure to acknowledge Indigenous governance has led to multiple court cases and issues pertaining to Aboriginal title including cases such as *Delgamuukw v. British Columbia* [1997] and *Tsilhqot'in Nation v. British Columbia* [2014] (McCrossan & Ladner, 2016). The *Tsilhqot'in Nation* case has been deemed as ground breaking, as a specific title claim was acknowledged and set a precedent for future cases pertaining to title and land claims (2016). However, Indigenous politic scholars Kiera Ladner and Michael McCrossan note that when examining the *Tsilhqot'in Nation v. British Columbia* case from a settler-colonial lens, it is apparent that settler governments have ignored Indigenous legal orders in order to maintain colonial structures and power over Indigenous peoples (2016). Ladner and McCrossan argue that the legal acknowledgement of Aboriginal title does not address the issues of settler governments disregarding Indigenous legal orders. The allocation of sovereignty between federal and provincial governments enables settler governments to have governing powers over all areas of jurisdiction. For example, this problem, in turn, creates a legal reality that elevates BC

sovereignty in forest law over Indigenous law. As such, the Supreme Court of Canada (SCC) maintains a settler colonial conception of federalism that further oppresses Indigenous peoples (2016). Thus, Canadian legal structures and dominant Western discourse have created a legal and political system that undermines and overrules Indigenous peoples' rights to self-government.

In addition to ignoring Indigenous land claims, treaties, and governance, settler governments implemented genocidal policies as they are defined in accordance to international law, as these law and policies aimed to eliminate Indigenous peoples and cultures as distinct peoples and cultures (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019). These assimilation laws and policies reinforced settler colonial power and sovereignty (Simpson, 2016), and in turn resulted in Indigenous peoples being treated as objects of jurisdiction rather than subjects in a nation-to-nation relationship (Pasternak, 2014). The violence Indigenous peoples have faced in Canada is a result of policies that aimed to marginalize Indigenous communities in order to protect the interests of settler governments (Simpson, 2016). In attempts to minimize the population and power of Indigenous communities, Canada passed gendered policies that specifically targeted Indigenous women (2016). Mohawk Anthropologist Audra Simpson argues that Indigenous women and girls are targeted by settler regimes and governments, because a women's body signifies, "political orders, land itself, of the dangerous possibility of reproducing Indian life and most dangerously, other political orders" (Simpson, 2016, p. 7). When recognizing the symbolic and material significance and threat that an Indigenous woman poses to the Canadian state, one can understand that the phenomenon of "missing and murdered Indigenous women" can be linked to Canada's colonial genocidal policies. For example, the *Indian Act* and the status loss/marrying out laws contained in the Act, the Sixties Scoop, residential schools, and breaches of human and Indigenous rights have all

targeted Indigenous reproductive capacities (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019). Further, the above policies have led to women and children being separated from their communities, which has placed them in vulnerable positions and increased risk for violence. As such, the violence Indigenous women have experienced at the hands of settler regimes constitutes a genocide (2019).

Within recent years the Canadian government has started issuing apology statements as part of reconciliation efforts for the colonial violence that has been inflicted on Indigenous communities (Coulthard, 2014). However, many scholars criticize Canada's reconciliation efforts for lacking material restitution (Blackstock, 2008; Coulthard, 2014). For example, the Canadian government has publicly acknowledged that Indigenous children are over-represented within the child welfare system, but has failed to redress the inequalities present within the child welfare system (Blackstock, 2008). Yellowknives Dene First Nations political scientist Glen Coulthard explains that the practice of Canada trying to promote a discourse of reconciliation and healing, but failing to address the colonial systems that support assimilation policies, does not redress wrongs but instead perpetuates a system that oppresses Indigenous peoples and demobilizes them politically (Coulthard, 2014). As such, Canada's "reconciliation" efforts fail in decolonizing oppressive regimes and structures and in turn further perpetuate colonial ideals.

The literature on Indigenous politics provides an in-depth understanding of the violence and oppression that Indigenous communities have experienced as a result of colonial regimes. It is imperative to recognize the work produced by Indigenous scholars that critically analyze the actions of the Canadian state to better depict the functions and impacts of settler colonialism. As a white settler working and researching within the broader field of decolonization and reconciliation politics, the literature and work Indigenous scholars have produced on the

implications of laws, assimilation policies, and critiques on the politics of reconciliation inspires my own research to further examine the government structures that pose challenges in reconciliation and decolonization efforts. I specifically intend to add to this literature by exploring and examining the challenges that multi-level governance and federalism pose in implementing decolonizing policies; and how jurisdictional ambiguities can be leveraged to misframe injustices and pass the buck.

The Transformative Potential of UNDRIP

Many scholars agree on the transformative and decolonizing potential of the UNDRIP. Scholars such as Anishinaabe political scientist Sheryl Lightfoot argue that the Declaration has reframed discourse on global Indigenous rights. The Declaration challenges the Westphalian system of sovereign states, and in turn acts as a framework for decolonizing laws and policies that have limited Indigenous peoples' right to self-determination (Lightfoot, 2016). The Declaration calls on states to decolonize the notion of self-determination, by recognizing the various modes of plural sovereignty and power sharing (2016). Lightfoot argues that, over time, international law has coupled the notion of self-determination to Westphalian notions of sovereignty and territoriality, which then leads to the perpetuation of colonialism (Lightfoot, 2021). Scholars such as Watson and Venne (2012) and White Face/Wobaga (2013) criticize the Declaration for protecting state sovereignty (Article 46), stating that the inclusion of Article 46 undermines the original intent of the Declaration and Indigenous peoples' rights to self-determination. However, Lightfoot argues that the inclusion of both Article 3, which protects Indigenous peoples' rights to self-determination and Article 46 actually decolonizes the notion of self-determination, as it re-affirms that Indigenous peoples' rights to self-determination should

operate outside of the traditional notions of state sovereignty (Lightfoot, 2021). Lightfoot argues that self-determination is an individual human right whether or not people(s) are self-governing as independent nation states (2021). Therefore, the inclusion of both Article 3 and Article 46 challenges the state-centric notion that self-determination is achieved through independent, sovereign, and territorial statehood (2021).

By de-colonizing the notion of sovereignty and recognizing Indigenous knowledge systems and legal orders, the UNDRIP creates a shift in thinking about human rights (Youngblood Henderson, 2019). Chickasaw international human rights lawyer and scholar James (Sa'ke'j) Youngblood Henderson explains that Eurocentric notions of law have shaped human rights discourse to reflect Western notions of sovereignty and theories of humanity and society (2019). As such, Indigenous peoples' human rights have been neglected and over-ruled by Western-centric legal orders that are governed by a "sovereign" power. Youngblood Henderson affirms that the UNDRIP not only re-enforces existing treaties but also shifts Western-centric notions of human rights to recognize the fundamental rights of Indigenous peoples, in accordance to their own knowledge and legal and political systems (2019).

Many scholars have specifically emphasized the importance of the Free Prior and Informed Consent (FPIC) principles contained within the UNDRIP as a means to redress historical wrongs, specifically in relation to economic development and settlement of Indigenous territories. Scholars argue that the FPIC principles have the potential to significantly advance Indigenous rights (Morales, 2019). In the Canadian context it is argued that the FPIC principles provide a more robust framework in protecting Indigenous sovereignty and rights to participate in decisions that directly affect them, compared to the duty to consult (2019). The current duty to consult is ambiguous and does not provide a full box of rights and protections for Indigenous

peoples (Nagy, 2022; Nichols, 2019). The duty to consult still assumes state sovereignty whilst aiming to reconcile Indigenous interest (Morales, 2019). By contrast, the FPIC principles recognize Indigenous self-determination, specifically by emphasizing a requirement to elicit consent and making room for Indigenous legal orders in determining the consultation framework, which is not established within the duty to consult as outlined within section 35 of the Constitution (2019). There are many limitations to the duty to consult, as the duty implies a 'spectrum of obligations' and varies according to the severity of the affected Indigenous interest (Boutilier, 2017; Nagy, 2022), while the FPIC principles affirm that consent must be obtained from Indigenous governments without any form of coercion. Further, the Declaration itself, and the FPIC principles outlined within the Declaration, are international legal tools that were created by Indigenous peoples and can be leveraged to dismantle colonial laws and policies that impede their right to self-determination (Doyle, 2015). Thus, the FPIC principles can potentially be leveraged to decolonize laws and policies because they provide Indigenous peoples with a tool to protect their rights to self-determination and minimize colonial power over Indigenous lands (2015; Morales, 2019).

In recognizing the decolonial potential of the Declaration, scholars argue that if Canada can successfully implement the Declaration, this will transform Indigenous and settler relations in Canada. Currently section 35 of the Constitution lacks clarity and does not fully protect Indigenous rights (Nichols, 2019). Indigenous governing bodies are not recognized as equal, and as such negotiations between Crown and Indigenous governments operate through a sovereign-to-subject model while settler governments exploit the vagueness of the section 35 principle of the duty to consult, and courts continue to conceptualize federalism in terms of the exclusive and exhaustive jurisdiction of settler governments (Chartrand, 2019; McCrossan and Ladner, 2016;

Morales, 2019; Nichols, 2019). The rights contained and outlined within section 35 of the Constitution are not clearly identified and can be interpreted in varying ways. By contrast, the UNDRIP and the articles contained within the Declaration clearly outline Indigenous peoples' rights. Additionally, the UNDRIP was created by Indigenous peoples and provides an international standard for Indigenous peoples' rights to self-determination (Knockwood, 2019). Thus, if the UNDRIP is successfully implemented, it provides a promising path to reconciliation and, in turn, has the potential to decolonize colonial jurisdictions (Chartrand, 2019; Nichols, 2019).

Doubts, Concerns & Questions

Despite many scholars highlighting the decolonizing, reconciliatory, and transformative potential of the UNDRIP, others express doubt and concern, questioning whether the Declaration will be able to reconcile relations between the Crown and Indigenous peoples. There are two main differing perspectives/critiques on the decolonizing potential of the UNDRIP. Some scholars recognize the decolonizing potential of the Declaration but are skeptical that settler governments will fully and successfully enforce the Declaration. Political scientist Rosemary Nagy is doubtful that the UNDRIP and the FPIC principles contained within the Declaration will be fully enforced in domestic legislation, as it will likely be politically costly to adhere fully to the FPIC principles (Nagy, 2022). By contrast, other scholars critique the legitimacy of the Declaration itself. Shawnee-Lenape legal scholar Steven Newcomb affirms that colonial and state domination is the root cause of Indigenous human right violations, and the Declaration does not sufficiently address the domination embedded within international and domestic societies and politics (Newcomb, 2011).

In critiquing the legitimacy of the Declaration, many scholars argue the inclusion of Article 46 (which protects state sovereignty) undermines the legitimacy of the Declaration. Critics argue that the Declaration fails to address colonial barriers and in turn does not successfully decolonize notions and laws that limit Indigenous sovereignty and rights. In contrast to Lightfoot's stance that the inclusion of Article 3 and Article 46 redefines the notion of self-determination to place it outside the bounds of the traditional concept of territorial state sovereignty, others argue that Article 46 limits the Declaration's potential to decolonize laws and policies. Oglala Tetuwan environmental scientist and human rights activist, Charmain White Face, Zumila Wobaga, argues that Article 46 undermines the initial intent of the Declaration. Further, Tanganekald, Meintangk Boandik First Nations legal scholar Irene Watson & Cree legal scholar Sharon Venne argue that Article 46 will most likely perpetuate power disparities that lead to the minority status of Indigenous peoples (Watson & Venne, 2012). Watson & Venne (2012) and White Face/Wobaga (2013) affirm that the inclusion of Article 46 protects the territorial integrity of the states over those who have been colonized, which results in limited opportunities for the development of Indigenous self-determination.

My thesis will aim to further explore and add to these debates. In particular, by examining the implementation of the UNDRIP within British Columbia, I will be able to add to the literature on the barriers and constraints, specifically the challenges of federalism, that would impact the likelihood of settler governments successfully implementing the Declaration. Looking at the implementation of the UNDRIP within British Columbia allows for structural components, such as provincial exploitation of the ambiguities of federalism and the division of powers, to be addressed and examined. This analysis will shed a different light and perspective on the challenges in implementing the Declaration, one that focuses specifically on questions of

multilevel governance and the role of subunit governments in a federation. Additionally, throughout my thesis I will also simultaneously be addressing and contributing to the debate around whether de-linking self-determination from statehood is or isn't a good way forward. Examining, how structures of federalism, specifically, the division of powers would impede and interact with delinking self-determination from statehood. Throughout the case study on the *Haida Nation v. British Columbia* [2004] and *Taku River Tlingit First Nation v. British Columbia* cases [2004], I will examine the decolonizing potential of de-coupling self-determination from statehood, as these cases highlight Indigenous concerns and challenges of defining self-determination within the constraints of state institutions and legal frameworks. Throughout the analysis of these cases, it is apparent that "self-determination" is applied through a state-centric lens. Thus, by analyzing these cases and identifying the role that the duty to consult played within these cases compared to the rights outlined within the FPIC principles, we will be able to closely examine the challenges and benefits of de-linking self-determination from statehood.

Canadian Federalism, Multi-Level Governance & Indigenous Relations

To pursue the focus noted above on the specific challenges to the UNDRIP implementation at the BC provincial level and on possible negative effects arising from the province's unprecedented legislative move into an area historically understood as a federal government, nation-to-nation responsibility, it is necessary to draw on the literature addressing the relationship between Canadian federalism, division of powers, multi-level governance, and Indigenous relations. The division of powers directly impacts the implementation of the Declaration. Multi-level governance and the division of powers between federal and provincial

governments introduce a variety of challenges and obstacles in decolonizing law and policies. Additionally, the ambiguity between federal and provincial jurisdictions creates opportunities for governments to misframe injustices by passing the buck, and blaming another level of government for a given wrong-doing. Thus, it is important to be versed in what research has been produced on federalism, multi-level governance and Indigenous relations, in order to better understand how multi-level governance and the division of powers pose complexities in decolonizing laws and policies. In the following section I will address key debates pertaining to the division of powers and systems of multi-level governance, and whether they act as obstacles or opportunities in pursuing Indigenous rights to self-determination.

The ambiguity embedded within the division of powers presents an extreme obstacle in advancing and protecting Indigenous rights. The division of powers is rather ambiguous and it is not always clear as to which level of government is responsible for a given issue (Harrison, 1996; James, 2009). For example, section 91 of the *Constitution Act* stipulates that the federal government has authority over Indigenous and Northern Affairs (*Constitution Acts,*1867-1982), and the province has authority over healthcare and child welfare[1]. This creates a lack of clarity as to whether the provincial or federal government is responsible for Indigenous child welfare and health (Blackstock, 2008). The jurisdictional ambiguity outlined above then creates an opportunity for federal and provincial governments to neglect to address concerns related to Indigenous child welfare and health, by claiming the other level of government is responsible for a given issue (2008). This leads to what political scientist Matt James refers to as "reparation

[1] Despite, the *Constitution Act, 1867,* not explicitly including "health" under provincial jurisdiction, the Constitution outlines provincial jurisdiction over hospitals, and the responsibility for the delivery of most medical services and related functions is derived from section 92(13), which includes provincial authority over property and civil rights, as well as section 92(16), which outlines provincial authority over local or private matters (Butler & Tiedemann, 2011).

displacement", which occurs when governments redirect blame for historical injustices and responsibility for addressing those injustices to the other level of government (2009).

Indigenous political scientist Kiera Ladner also acknowledges the challenges that Canadian federalism and the division of powers pose in advancing and realizing Indigenous rights. Ladner explains that the standard treatment of Canadian federalism fails to account for the ongoing effects of colonialism and in turn perpetuates oppressive policies that marginalize Indigenous communities (Ladner, 2016). She further discusses the role multi-level governance plays within Crown and Indigenous relations. Multi-level governance provides an avenue for Indigenous governments to engage in decolonization efforts against state governments (both the federal and provincial level). However, Canadian federalism also poses multiple threats in advancing Indigenous rights, as different levels of state governments (provincial and federal), still maintain colonial relationships and power over Indigenous governments (2016). Additionally, the ambiguity surrounding jurisdictional powers leads to many Indigenous demands being neglected. Nevertheless, these challenges of the division of powers can also aid in protecting and progressing Indigenous rights. For instance, federal legislation can be used to delegate given responsibilities to ensure Indigenous needs are met and addressed (2016). Thus, multi-level governance does pose challenges in safeguarding Indigenous rights, but in certain circumstance can aid in advancing and protecting Indigenous rights.

In the book *Federalism and the French Canadians*, Pierre Trudeau argues that multi-level governance and Canadian Federalism act as tools to enable differing perspectives, views, and concerns, to be acknowledged and implemented not only at the federal level but also the provincial level (1968). Additionally given that different regions across the country face different economic and social situations multi-level governance aids in addressing those specific concerns

within that province/region (1968). Thus, when looking at the implementation of the Declaration from this lens, it can be recognized that multi-level governance could aid in implementing the Declaration within British Columbia. Multi-level governance enables Indigenous governments to be recognized as governing partners within the federation, as they are increasingly being engaged in matters that affect them resulting in trilateral and bilateral agreements (Papillon, 2015). However, as political scientist Martin Papillon recognizes, there is an un-even power distribution between federal and Indigenous governments which can lead to federal governments dictating and dominating negotiations (2015). The power disparities that are embedded within Crown governments enable settler governments to disregard Indigenous concerns expressed within the negotiation process (Ladner, 2016). As such, Canadian federalism and multi-level governance are complex systems that can significantly threaten as well as aid in progressing Indigenous rights and self-determination.

My thesis will further add to the literature on multi-level governance, federalism and Indigenous relations. By looking at the implementation of an international law within provincial legislation, the challenges as well as the opportunities of multi-level governance will be able to be closely examined and addressed. Given that the implementation of the Declaration in provincial legislation will require co-operation between, federal, provincial, and Indigenous governments (Declaration on the Rights of Indigenous Peoples Act, 2019), assessing the implementation of the UNDRIP within BC, will highlight both the opportunities and pitfalls that multi-level governance poses in advancing and addressing Indigenous rights and concerns. Additionally, looking at the implementation of the UNDRIP within BC provides an opportunity to assess how the structures of colonialism create power disparities that are further complicated by the jurisdictional ambiguities and roles and responsibilities of governing bodies. Thus, the

analysis of the UNDRIP, provides a tangible case study to better understand how the Canadian government structures could work with and/or against Indigenous legal and political orders.

Filling in the Gaps

The literature, themes and debates discussed above provide an in-depth overview of various implications as well as transformative and decolonizing aspects of the Declaration. As previously noted, the Declaration has been praised for challenging the Westphalian system of sovereign states (Lightfoot, 2016) and providing Indigenous peoples with an international legal framework to protect Indigenous rights in accordance to Indigenous legal orders (Youngblood Henderson, 2019). Much of the literature has focussed on the FPIC principles contained within the Declaration and how those principles could provide more robust protections for Indigenous peoples in relation to resource extraction projects on their lands (Morales, 2019). In the Canadian context the FPIC principles have garnered a lot of attention in relation to the current duty to consult, specifically emphasizing how the FPIC principles provide more robust protection for Indigenous peoples than the duty to consult (Morales, 2019; Nagy, 2022). However, there is skepticism that settler governments will seriously implement and enforce the FPIC principles contained within the UNRIP (Nagy, 2022). This literature has led and inspired me to further explore how the FPIC principles would operate within provincial jurisdiction. Throughout my analysis of the BC *Declaration Act*, I will be able to gain a better understanding on how the province is planning to implement and enforce the FPIC principles. Further, I will be able to apply my findings from the case study on *Haida Nation v. British Columbia* and *Taku River Tlingit v. British Columbia* to contextualize how the province has historically utilized the duty to

consult, and then compare the functions and applicability of the duty to consult to the FPIC principles.

The literature on multilevel governance pertaining to Indigenous relations provides essential information to better assess and add to the debates on whether governments will seriously implement and enforce the FPIC principles. The literature critiquing the settler-colonial conceptions of federalism and how that prevents Indigenous peoples from being equal governing parties within a multilevel governance system will prove to be essential to understand how the FPIC principles could be leveraged to aid in addressing structural impediments and provide a more robust protection to Indigenous rights and self-determination, than the current duty to consult. Additionally, this literature highlights both benefits and barriers that multi-level governance pose in protecting and mobilizing Indigenous rights. As previously explained, multi-level governance provides an avenue for Indigenous peoples to partake in agreements and conversations affecting them (Ladner, 2010; Papillon, 2015). However, federalism is viewed from a settler-colonial lens that shifts governing power to Crown governments, dispersed between federal and provincial jurisdictions (Pasternak, 2014). As such, this literature will provide the necessary information to assess the current context of multi-level governing systems in Canada and how that would impact the implementation of the UNDRIP within British Columbia.

Both the research/knowledge on the transformative potential of the UNDRIP and multilevel governance in relation to Indigenous rights will help guide my own research, in addressing the ways in which the division of powers and multi-level governance could potentially affect the implementation of the UNDRIP within BC. The literature on federalism and multi-level governance has inspired me to further assess how colonial structures of

federalism have enabled and perpetuated injustices of misframing and passing the buck. Further, the literature on the transformative potential of the Declaration has led me to specifically look into and examine the FPIC principles, and how the successful implementation of the Declaration has the potential to address buck-passing as well as misframing injustices. Additionally, the literature on multi-level governance has enabled me to understand how governments have utilized jurisdictional ambiguities to pass the buck and neglect to address Indigenous issues. This knowledge combined with the knowledge presented in the literature on the transformative potential of the UNDRIP, will enable me to conduct my analysis and research through a critical lens, understanding both the UNDRIP's potential to address injustices of misframing and passing the buck, as well as the challenges of federalism that could potentially impede the successful implementation of the Declaration.

As outlined above there is a significant amount of literature on the various implications, challenges, and benefits of implementing the Declaration at a national level. However, little research has been done on the implementation of the Declaration at a provincial level. Thus, my research will be able to add to the existing literature by discovering the specific challenges and potential of implementing the Declaration at the provincial level, which would be unique from the challenges and impacts of implementing the UNDRIP at a national level. Further, my research will add to existing knowledge on the relationship between federalism, multi-level governance and Indigenous relations, by analyzing the role that jurisdictional ambiguities play in misfraiming and buck-passing, and how implementing the UNDRIP into provincial legislation has the potential to address or exacerbate issues of misframing and passing the buck.

Methods

Throughout this thesis I will analyze how the province's UNDRIP legislation could affect the province's history of buck-passing and misframing injustices. Specifically, I will examine the following question: will BC's move to adopt the Free Prior and Informed Consent (FPIC) principles within its provincial UNDRIP legislation surmount or rather exacerbate the problem of buck-passing and the injustice of misframing? In order to answer this question my methodological approach will incorporate institutional theory and analysis. As I am directly analyzing the opportunities and challenges that the structures of federalism, pose in implementing the Declaration, an institutional analysis will aid in identifying the specific ways in which government structures further complicate and enable passing the buck and misframing of injustices. Further, given that Canada's colonial history has directly influenced Canada's constitutional genealogy and in turn political behaviour (Borrows, 2017), an institutional analysis will allow for the specific impacts and effects that political norms and culture have on implementing decolonizing policy.

The five main approaches within the institutionalist paradigm are a normative, rational choice, historical, empirical and discursive approach (Peterson & Peters, 2020). For the purpose of this thesis, I will apply both a normative and historical lens to my research. Normative institutional theory assumes an ontological underpinning that affirms the norms and values established within institutions greatly influences political behaviour and beliefs (2020). On the other hand, a historical institutional analysis follows a structuralist approach. Historical institutional analysis focusses on the actors operating within structural constraints that have been influenced by historical factors, and in turn political outcomes and changes are greatly influenced by the way in which these factors contribute to the creation of political thought and behaviour

(2020). Applying historical institutional theory to my analysis will aid in identifying how elements of history have shaped institutional structures, and how those historical factors will play a role and impact the implementation of the UNDRIP within British Columbia. Further, a historical lens will provide clarity and understanding on how current political norms and thoughts could influence not only how the government implements the Declaration, but also public reactions and perceptions to the Declaration.

Within my thesis I will apply both theories of historical and normative institutionalism to a case study method. I will conduct a case study on the *Haida Nation v. British Columbia* [2004] and the *Taku River Tlingit First Nation v. British Columbia* [2004] case. I have chosen these cases as they both showcase examples of how BC attempted to misframe injustices as well as pass the buck, in order to avoid responsibility and blame. As such, these cases will enable me to investigate injustices of misframing and passing the buck in BC, which will then allow me to analyze how the Declaration could redress these injustices. Within the case study I will specifically assess the ways in which the FPIC principles outlined within the Declaration could aid in transforming the current duty to consult to fully recognize and protect Indigenous peoples' rights to self-determination. By utilizing historical institutional theory within these case studies, I will be able to examine how the constraints of colonial structures have not only led to both the Haida Nation and the Taku River Tlingit First Nation court cases, but also how redress mechanisms, specifically the duty to consult fails to successfully protect Indigenous peoples right to self-determination.

Throughout the case studies I will answer and assess the following question: how did the provincial government misframe the injustices prevalent within the Haida Nation and Taku River Tlingit Firs Nation court case? What were the implications and consequences of the government

misframing the injustices within these cases? And how could the successful implementation of the Declaration redress and prevent the government from misframing redress mechanisms, as well as buck-passing and neglecting to address Indigenous demands/concerns? As such, the case study's units of analysis will be the government's legal arguments in both of the cases. To analyze this data, I will rely on journals for commentaries and reactions to these cases, as well as various briefs submitted by the federal and provincial Crowns. Additionally, I will utilize relevant literature and scholarly articles that describe injustices of misframing and passing the buck, in order to assess how the government attempted to misframe injustice and avoid responsibility within the cases. After I have analyzed the ways in which and how the government misframed injustice and passed the buck, I will examine how the FPIC principles could be utilized to redress the government's actions of negating responsibility by misframing injustice and passing the buck. In order to do so, I will analyze the Supreme Court of Canada's decisions and the differing dimensions of the duty to consult. I will then compare the duty to consult with the FPIC principles and assess whether the FPIC principles would provide a more robust framework in dismantling colonial powers and laws that enable governments to misframe redress mechanisms and injustices inflicted on Indigenous communities.

In addition to a case study, I will apply a normative institutional theoretical lens to the analysis of legal experts' perspectives on relevant courts cases and legislation in relation to BC's *Declaration Act*. Throughout this analysis I will be able to better understand how the province's *Declaration Act* is or is not shifting institutional legal norms, such as the duty to consult and overriding settler sovereignty, that have historically undermined Indigenous rights to self-determination and fostered practices of buck-passing and misframing. Additionally, I will review Indigenous reactions to the *Declaration Act*, as well as relevant legislation and cases. The three

main resources I will use in order to compile Indigenous reactions to the Act will be the Yellowhead Institute, an Indigenous led think tank, The Union of BC Indian Chiefs website, as well as the BC Assembly of First Nations website. I have chosen to use these organizations in order to compile a variety of different Indigenous perspectives, because all of these organizations highlight and address differing First Nations' concerns pertaining to Crown government policies and actions in British Columbia. Thus, these resources will provide a variety of different perspectives and views on differing aspects of the *Declaration Act*.

Chapter Outline

Within this next section I will outline and provide a chapter breakdown. In the following chapter, I will first provide the reader with an overview of key themes that will be prevalent throughout my thesis. Given that my thesis aims to examine the ways in which the Declaration could redress government efforts of misframing injustices and passing the buck in order to negate blame and responsibility for issues confronting Indigenous peoples, I will briefly explain both of these concepts within the following chapter. I will then move into the case study of the *Haida Nation v. British Columbia* case and the *Taku River Tlingit First Nation v. British Columbia* case. The case studies will provide the reader with an understanding of how jurisdictional structures have not only enabled intentional misframing of injustices through blaming other levels of governments for wrong-doings, but as well as unintentional misframing of injustices. This chapter will showcase that intentional and unintentional misframing of injustice is harmful to Indigenous peoples; as well the potential (if successfully implemented) that the UNDRIP, specifically the FPIC principles hold in addressing issues of misframing injustices (both intentional and unintentional) and passing the buck.

Within chapter three I will conduct an institutional analysis and examine legal experts'

perspectives on various cases and policies in relation to BC's *Declaration Act*, in order to examine the ways in which the division of powers and the colonial structures embedded within Canadian federalism could impede the implementation of the Declaration within BC. This chapter will add to the analysis that was developed within the case study, by examining cases and legislation that both indicate promise as well as skepticism that the *Declaration Act* will end the era of passing the buck and misframing injustices. It is important to proactively identify and examine ways in which the *Declaration Act* is both changing as well as perpetuating institutional norms that have dictated how the province handles Indigenous relations. If the *Declaration Act* can successfully address institutional norms such as the duty to consult and overriding settler sovereignty, this will aid in redressing injustices of passing the buck and misframing.

My last substantive chapter will address Indigenous reactions to the Act, and compare those reactions to the conclusions and findings made in the previous chapters. Within my analysis I will identify and isolate relevant themes and perspectives that emerge within various media outlets. I will mainly be collecting perspectives from the Union of BC Indian Chiefs (UBCIC), British Columbia Assembly of First Nations, and an Indigenous led thinktank, the Yellowhead Institute, on the BC *Declaration Act* as well as relevant policies and court cases. These perspectives will provide valuable insight in order to add to my own analysis to further understand how and if BC's *Declaration* Act is either mitigating or exacerbating practices of buck-passing and injustices of misframing. Additionally, these perspectives will aid in determining what imperative and crucial perspectives and views I may have overlooked within my own analysis. Further, this chapter will provide Indigenous insight into whether the way the government is implementing the Declaration is aligning with how Indigenous governments and peoples envisioned the implementation of the Declaration.

Conclusion

Within the following chapters I will further assess and examine the challenges that the division of powers pose in successfully implementing the Declaration. Specifically, the intention of this thesis is to identify the structures of federalism that enable passing the buck and injustices of misframing, and subsequently how the implementation of the Declaration within provincial legislation could address or rather exacerbate injustices of misframing and passing the buck. Through the analysis of the Haida Nation and Taku River Tlingit First Nation cases, the negative impacts of passing the buck and misframing injustice will be examined. This will highlight the importance of addressing these injustices. Additionally, throughout the case study, structural and institutional obstacles to transformative change will be examined, as well as how the FPIC principles could play a role in deconstructing the structures that enable governments to disregard Indigenous peoples' rights to self-determination. Further, reviewing legal experts and Indigenous perspectives on the BC's *Declaration Act* and relevant legislation will play an imperative role in determining how and if the *Declaration Act* is addressing or further perpetuating practices of buck-passing and injustices of misframing. If British Columbia can successfully implement the Declaration and deconstruct the structures that enable governments to avoid blame and responsibility for wrong-doings, this would significantly aid in decolonizing structures and policies that directly aim to diminish Indigenous peoples' rights to self-determination.

Looking at the implementation of the UNDRIP within British Columbia, offers an understudied opportunity to explore specific challenges in decolonizing laws and policies within provincial legislation. As described within the literature review on Indigenous politics, Canada has recently started issuing apology statements for the colonial violence that has and continues to be inflicted on Indigenous communities. However, these efforts have been criticized for failing

to actually change or dismantle oppressive policies and regimes that limit Indigenous peoples' rights to self-determination. In addition to Canada's failed reconciliation efforts, the ambiguities that exist between federal and provincial jurisdiction create significant obstacles to decolonization. As previously explained, settler governments have leveraged and taken advantage of jurisdictional ambiguities in order to avoid responsibility for given wrong-doings. Within my thesis I am aiming to specifically examine this problem and assess the ways in which the UNDRIP could shift the structures that enable governments to take advantage of jurisdictional ambiguities at the expense of Indigenous communities.

Thus, looking at the implementation of UNDRIP within a sub-unit rather than a national state allows specific barriers to decolonizing laws and policies to be addressed and examined. It is important to proactively identify and confront these barriers. If BC can successfully and seriously implement the UNDRIP, this could aid in facilitating a bottom-up approach to addressing structures of colonialism that aim to limit Indigenous sovereignty. As such, I believe that my research will produce important knowledge that would then be able to be used in a subsequent study that could provide recommendations on how provincial governments could successfully implement the Declaration. Additionally, I believe that this work will add to the literature by showcasing specific challenges and merits of implementing the Declaration at a provincial level, that are different from those challenges and merits of implementing the Declaration at a federal level.

Chapter Two
A Case Study on the Haida Nation v. British Columbia & TRTFN v. British Columbia

Within this chapter I will examine how British Columbia's implementation of the UNDRIP, through BC's *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act), could address historical injustices, such as denying Indigenous peoples their rights to self-determination. As discussed within the previous chapter misframing and buck-passing have a history of impeding the rectification of historical wrongs. However, misframing and buck-passing are also historical injustices in their own right. Misframing denies Indigenous self-determination and prevents Indigenous perspectives, voices, and legal traditions from being incorporated to redress mechanisms. On the other hand, passing the buck is a continuous deflection for addressing Indigenous concerns, and ultimately is a tactic used to disregard Indigenous rights and concerns (James, 2009). Throughout this chapter, I will specifically examine how the FPIC principles contained within the UNDRIP could redress injustices of misframing and passing the buck.

Misframing is a problem that involves misconstruing the nature of an injustice so as to block or obscure possible political actors, arenas, or processes that could play important roles in remedying it (Fraser, 2008). As mentioned within the previous chapter, misframing can be both systemic and strategic. However, both intentional and systemic misframing pose extreme barriers in protecting Indigenous rights and redressing historical injustices. In addition to misframing, which poses significant barriers in realizing and recognizing Indigenous rights, the government tactic of buck-passing also prevents effective redress and enables governments to redirect blame and responsibility for given injustices (James, 2009). The government of British Columbia has a history of both buck-passing as well as misframing injustices, which results in redress measures that fail to accurately address the injustice (2009). Misframing leads to the denial of Indigenous

sovereignty, and buck-passing creates another layer of complexity to this problem, as this then creates public confusion about the proper organization of responsibilities in multilevel governance contexts (James, 2009). When buck-passing fails, and a specific level of government is held responsible for an injustice, injustices of misframing will often occur as an attempt to deny Indigenous sovereignty and still prioritize settler interest over Indigenous (*Haida Nation v. British Columbia,* 2004; *Taku River Tlingit First Nation v. British Columbia,* 2004). As such, it is imperative that misframing and buck-passing are redressed in order to be able to effectively address other colonial injustices.

The UNDRIP provides a framework for decolonizing laws and policies that have historically marginalized and oppressed Indigenous peoples. Specifically, the FPIC principles outlined within the Declaration directly address the structures of colonialism and the power disparities that enable governments to disregard Indigenous demands and concerns (Doyle, 2015; Morales 2019). Further, the UNDRIP addresses structures of colonialism and power that enable governments to strategically misframe the injustices that have been inflicted on Indigenous communities. Given the potential that the UNDRIP holds, it is important to examine and question how the successful implementation of the UNDRIP within BC could effectively address injustices of misframing and passing the buck. Further, we can ask whether the implementation of the UNDRIP would have the potential to end the era of passing the buck. And if the Declaration were successfully implemented and in turn ended the era of passing the buck, how would this affect Indigenous-settler relations? These questions have shaped and formed my arguments that will be presented within this chapter.

Throughout this chapter, I argue that the successful implementation of the UNDRIP within BC could effectively redress injustices of misframing. Specifically, the FPIC principles

outlined within the Declaration could be used to challenge institutional norms and practices that have shaped injustices of misframing. Further, I argue that the successful implementation of the UNDRIP could also end the era of passing the buck. If injustices of misframing as well as buck-passing are successfully redressed, this would then allow for other historical injustices that Indigenous peoples have endured to be effectively redressed. It is important to note that there are many factors, such as the division of powers between the federal and provincial government that could impede the successful implementation of the Declaration; these challenges will be explored further in chapter three. The purpose of this chapter is to: 1) examine how injustices of buck-passing and misframing impede effective redress, and in turn pose barriers in advancing Indigenous rights; and 2) how the implementation of the Declaration within BC has the potential to redress buck-passing and injustices of misframing.

The following sections will examine how the successful implementation of the UNDRIP in provincial legislation could redress injustices of misframing and diminish the government's ability to pass the buck. I will do this by conducting a case study of the *Haida Nation v. British Columbia* [2004] and the *Taku River Tlingit First Nation (TRTFN) v. British Columbia* [2004] cases. I will first provide an overview of the two cases. I will then examine how the government strategically misframed the injustices and issues present within the cases, in order to avoid blame and responsibility for resolving the injustices present within the cases. Further, I will analyze how the social realities and power disparities between settler and Indigenous governments and communities have shaped systemic misframing present within the cases. I will also examine and compare the duty to consult with the FPIC principles. Specifically, I will analyze how the FPIC principles could provide a more robust framework for redressing the injustices that were

presented throughout the *Haida Nation v. British Colombia* and *TRTFN v. British Columbia* court cases.

Naming the Injustice: Misframing & Passing the Buck

Throughout the case study and the analysis of the injustices of land and sovereignty dispossession, it becomes apparent that injustices of misframing and buck-passing exacerbate settler practices of land and sovereignty dispossession and prevent and/or provide barriers in redressing these injustices. As such, buck-passing and misframing are injustices that directly undermine self-determination and obstruct political responsibility (Fraser 2008; James 2009). Thus, it is important to have a thorough understanding of buck-passing and misframing, in order to follow the analysis and arguments present within this chapter. Additionally, it is imperative to understand that despite that these injustices often overlap, they are separate concepts, injustices, and problems. I will first explain the government tactic of buck-passing, and then the concept of misframing. I will then explain the potential that the UNDRIP, specifically the FPIC principles, hold in addressing issues of buck-passing and misframing.

Injustices of Misframing

Misframing is a complex concept that is used to explain instances where injustices and/or solutions to a given injustice are wrongly depicted/framed which result in redress mechanisms that fail to successfully address the given injustice (Fraser, 2008). Misframing can be both strategic or systemic. Strategic misframing occurs when an injustice is intentionally misconstrued in order to somehow weaken perceptions of the extent or severity of the injustice or generally to somehow remove from public consideration or view other actors, institutions,

venues, or processes that should in fact be considered as possible political places or spaces in which to resolve the injustice. An example of strategic misframing occurs in land claim cases, where the Crown justifies unjust resource development on Indigenous lands by denying any wrong doing under the claim that Indigenous title had not been proven. In contrast, systemic misframing is a result of the normal working of existing social or political structures, so that actors, institutions, venues, or processes that should in fact be considered as possible political places or spaces in which to resolve the injustice are somehow kept from view (2008). An example of systemic misframing is the belief that section 35 provides Indigenous peoples with a full box or rights.

I argue that the province's history of misframing (both intentional and systemic) is a specific injustice that not only prevents injustices from being addressed but is an injustice within itself that undermines Indigenous rights to self-determination. Misframing injustices prevents effective redress measures from being implemented, and in turn poses barriers in advancing Indigenous rights. The province has historically imposed Western-centric "justice" frames on Indigenous communities that have dictated how and if an injustice is redressed, and often favour the interest of the province over Indigenous rights (Woolford, 2005). Due to the extent to which colonialism is entrenched in Canadian settler society, the way that governments and institutions address or discuss given injustices/issues allows them to avoid acknowledging the specific colonial nature of the issue, which in turn creates discourse and debates that perpetuate colonial ways of thinking and acting (Ladner, 2010).

Misframing injustice prevents other injustices from being realized and addressed. I argue that the successful implementation of the UNDRIP within British Columbia would aid in diminishing the injustice of misframing. Should this be sufficiently addressed, other injustices

such as land dispossession, sovereignty dispossession, and policy discrimination could potentially be redressed. The Declaration provides a framework for redressing historical injustices and decolonizing oppressive laws and policies (Gómez Isa, 2019). Specifically, the FPIC principles contained within the Declaration have the potential to decolonize laws and policies that are aimed at diminishing Indigenous sovereignty (Morales, 2019; Nagy, 2022). If the government could successfully implement the Declaration and adhere to the FPIC principles, this would protect Indigenous rights to self-determination as well as rights to governing their lands, cultures, and peoples (Morales, 2019), which would aid in preventing the government from disregarding Indigenous sovereignty. In addition to the UNDRIP potentially addressing injustices of misframing, the Declaration also has the potential to mitigate practices of passing the buck in BC.

Buck-Passing

As mentioned within the previous chapter, buck-passing is a government tactic that leverages the ambiguities within the division of powers between federal and provincial governments so as to blame some other level of government in attempt to escape both moral blameworthiness for an injustice as well as responsibility for rectifying it (Harrison, 1996). The division of powers within Canadian federalism is rather ambiguous, and it is not always clear as to which level of government is responsible for dealing with a given policy issue (Harrison, 1996). As such, provincial and federal governments are then able to deny responsibility for a specific issue by passing the buck and affirming that the given issue is the other level of government's responsibility. This results in no effort at redress and a total lack of accountability specific to the given issues, as well as confusion for citizens as to who to hold responsible for

rectifying a given injustice and a complete disregard and respect for Indigenous peoples (James, 2009).

Passing the buck is an intentional tactic used by governments and the Crown to re-direct responsibility for a given issue. The case of Jordan River Anderson, a First Nations toddler from Norway House Cree Nation (Indigenous Services Canada, 2024), who was born with a serious medical disorder (Blackstock, 2008), exemplifies how settler governments have manipulated jurisdictional ambiguities to avoid responsibility for addressing Indigenous issues and concerns. Due to the jurisdictional ambiguities and overlap pertaining to government responsibility over healthcare in cases involving status First Nation patients, the government of Manitoba and the federal government of Canada could not agree on which level of government was responsible for covering Jordan's medical costs. As the government officials argued over who was financially responsible for Jordan's medical bills, he spent an additional unnecessary two years in the hospital, and unfortunately passed away in the hospital before the federal and provincial government ever resolved the dispute (2008). The case of Jordan Anderson exemplifies how governments pass the buck, by asserting that a given issue falls outside of their jurisdictional responsibilities.

Reparation displacement is another form of buck-passing that is discussed and present within the case studies that will be analyzed below. Political scientist Matt James, explains that reparation displacement is not only negating responsibility for an injustice—it also involves placing blame on the other level of government for it and implying or stating directly that fixing the problem is the other level of government's problem (James, 2009). The province of British Columbia has a history of shifting blame and responsibility to Ottawa for injustices experienced by Indigenous communities. When the province shifts blame and responsibility to Ottawa, this

leads to a mis-representation of who is responsible for the injustice and in turn who should address it (2009). This has resulted in widespread frustration directed at the Canadian state for policies that the government of British Columbia has convened and enforced, rendering the province well positioned to avoid blame whilst neglecting to address/amend their problematic policies (2009). As such, BC's *Declaration Act* provides a promising opportunity to challenge BC's traditional approach to Indigenous relations within the province.

It is important to note that constitutional jurisdiction enacts power to a certain level of government, but that does not guarantee that a given level of government will take political action to address an issue that falls within given jurisdiction (Harrison, 1996). Not only does the distribution of powers enable settler governments to control all areas of jurisdiction dispersed between federal and provincial governments (Pasternak, 2014), but the ambiguities between the jurisdictional powers also enable settler governments to dictate who and/or if anyone is responsible for addressing jurisdictional issues and concerns faced by Indigenous communities. For example, the province has a history of disregarding issues concerning Indigenous land claims by affirming that, "there is no problem and if there is a problem it is a federal responsibility" (Tennant, 1996, p. 45), which is a strategic tactic used to not only avoid moral blameworthiness, but also enables the continuation of injustices of Indigenous land and sovereignty dispossession.

Passing the buck undermines Indigenous rights and in turn results in failed redress mechanisms for given injustices. When provincial and federal governments avoid responsibility as to who is responsible for a given injustice, it prevents prompt solutions and redress mechanisms, as seen within the case of Jordan Anderson. Further, reparation displacement creates public confusion as to who is responsible for a particular injustice and in turn which level of government should be held accountable for the given injustice (James, 2009). Thus, the

jurisdictional ambiguities and settler colonial perspectives of federalism, that treat Indigenous governing bodies as objects of jurisdictions, maintain structures of colonial dominance and push forward an agenda that ignore Indigenous demands and concerns (Pasternak, 2014), all while avoiding blame and failing to take accountability for oppressive and marginalizing policies and actions (James, 2009).

If the UNDRIP and the FPIC principles were implemented and enforced in provincial legislation, the provincial government would be more likely to be held accountable for respecting Indigenous rights to self-determination. Accordingly, this would aid in preventing the government from disregarding Indigenous sovereignty by affirming that a given issue was beyond its jurisdictional powers. In particular, the FPIC principles could be leveraged to protect Indigenous communities from government resource extraction projects on their lands without their consent (Morales, 2019). Further, the provincial government would encounter difficulties if it tried to pass the buck and assert that an issue pertaining to resource extraction on Indigenous lands and territories was outside of its jurisdiction, because the provincial legislation would affirm that the government must enforce and adhere to the FPIC principles. However, it is worth noting that there would be loopholes that could still enable buck-passing to occur, as ultimately the courts interpret the rights contained in UNDRIP and are operating from a settler colonial institution.

Additionally, the Declaration provides a legal tool that can be used to introduce a more effective redress/solution in cases pertaining to unjust resources and extraction on Indigenous territories, a legal tool of potentially much greater effect than Canada's current duty to consult. In contrast to the duty to consult and accommodate, which is protected under section 35 of the *Constitution Act* and guides disputes pertaining to development and extraction projects on

unceded territory (Do, 2020b; Do, 2022), the FPIC principles provide a more robust framework for protecting Indigenous self-determination (Boutilier, 2017; Nagy, 2022). The duty to consult does not address the power imbalance between settler and Indigenous governing bodies. For example, the duty to consult does not enable Indigenous peoples to say "no" to a Crown resource development project, but on the contrary the Crown has the power to reject Indigenous initiatives (Morales, 2019). Whereas, the FPIC principles safeguard Indigenous peoples' rights to self-determination, and if interpreted in accordance to the intent of the principles, the application of the FPIC principles would make space for Indigenous legal orders and ensure Indigenous authority throughout the entire consultation process (2019). Thus, the successful implementation of the Declaration and the FPIC principles could provide an effective solution to injustices of misframing, as the FPIC principles would enable Indigenous peoples the power to dictate how, who, and what constitutes the injustices before them.

Context & Overview: *Haida Nation v. British Columbia* & *Taku River Tlingit First Nation v. British Columbia*

The *Haida Nation v. British Columbia* [2004] and the companion case of *Taku River Tlingit First Nation (TRTFN) v. British Columbia* [2004], were decided by the Supreme Court on November 18th, 2004. Both cases involved issues pertaining to resource extraction and development projects on Indigenous lands. In both cases the Court ruled that the province of British Columbia must consult and accommodate before conducting development projects that would impede or impact First Nations (*Haida Nation v. British Columbia*, 2004; *Taku River Tlingit First Nation v. British Columbia,* 2004). The duty to consult had been recognized in previous court cases; however, before the SCC decision within the Haida case, the duty's

foundational principles and the framework for consultation had not been established (Morales, 2019). It is the SCC decision that paved the way to establishing the principles and framework.

The *Haida Nation v. British Columbia* case was the result of a conflict between Haida Nation and British Columbia's Ministry of Forests (*Haida Nation v. British Columbia*, 2004). Despite Haida claiming title to Haida Gwaii and the surrounding waters, their Aboriginal title was not recognized by the government of British Columbia. The province of British Columbia had issued a tree farm license to a forestry firm in 1961 that permitted the firm to harvest trees on Haida Gwaii. In 1999, the Ministry of Forests had transferred the tree farm licence to Weyerhaeuser Company without Haida's consent (*Haida Nation v. British Columbia*, 2004). A similar issue was at stake in the *TRTFN v. British Columbia* case. The TRTFN case was a result of a mining company (Redfern) intending to reopen a mine and build a 160 km road to access the mine from the town of Altin. This caused particular contention as the road would be built through a portion of the traditional territory of TRTFN. Despite the TRTFN expressing concern over the environmental impacts of the proposed road, the project was approved by the Minister of Environment, Lands and Parks and the Minister of Energy and Mines on March 19, 1998. In February 1999 the TRTFN brought a petition under the *Judicial Review Procedure Act* (*Taku River Tlingit First Nation v. British Columbia*, 2004).

In both of the Haida and TRTFN cases, the province denied any wrong-doing. During the arbitration for the *Haida Nation v. British Columbia* [2004] case, the province of British Columbia argued that because Aboriginal title was not legally established, the province did not do anything wrong (Factum of the Appellants, 2003). Additionally, the province made the case that, if the court were to determine that the province had a duty to consult with Haida, it would be the responsibility of the federal government to do so, rendering the matter beyond provincial

jurisdiction. Further, the BC government argued that the federal government is responsible for Indigenous Affairs and that the province has authority over natural resources, contending that if the federal government overruled the province's decision pertaining to natural resources, they would be undermining the legitimacy of Canadian federalism (James, 2009). Similarly, in the TRFTN case the province argued that without Aboriginal rights proven through litigation or within a treaty, the province is only required to provide a common law "duty of fair dealing" (*Taku River Tlingit First Nation v. British Columbia* 2004). Further, the province argued that if Aboriginal rights were determined, the province would have a "justificatory fiduciary duty", but otherwise the province is not obliged to provide a duty to consult (*Taku River Tlingit First Nation v. British Columbia* 2004). A justificatory fiduciary duty is the Crowns obligation to act in good faith when conducting negotiations with Aboriginal peoples (Hurley, 2002). On the other hand, the duty to consult provides more specific rights, as it requires the Crown to consult with First Nations on any action that may adversely affect Aboriginal rights (Do, 2020b).

The SCC decision in *Haida Nation v. British Columbia* case affirmed that the province had a duty to consult with the Haida Nation regarding the transfer of the tree farm licence to Weyerhaeuser Company. However, this duty to consult did not extend to Weyerhaeuser (*Haida Nation v. British Columbia*, 2004). Similarly, in the TRTFN case, the SCC affirmed that the province did have a duty to consult; however, the Court also determined that the province's consultation and accommodation efforts with the TRTFN prior to approving the project were adequate. The court affirmed that the Crown fulfilled its duty to consult, as the TRTFN participated in a three and a half year environmental assessment process and the province accommodated TRTFN's concerns by adapting the environmental process and implementing

specific requirements in order to grant Redfern the project approval (*Taku River Tlingit First Nation v. British Columbia* v. British Columbia, 2004).

The injustices that led to both of these cases exemplify injustices of land and sovereignty dispossession. The province completely disregarded Haida sovereignty and extracted resources on Haida territory without Haida's consent (James, 2009). Similarly, within the TRTFN case, the BC government still granted approval for the project, despite TRTFN's disapproval of the proposed road (*Taku River Tlingit First Nation v. British Columbia,* 2004). Unfortunately, these cases are not the only examples of federal and provincial governments approving resource development and extraction projects on Indigenous territory without consulting or receiving consent from the relevant Indigenous community (Morales, 2019). Unjust resource extraction and development on Indigenous lands significantly compromises the Indigenous communities, in that Indigenous land and the resources on that land are foundational to their lives and cultures. For example, the cedar on Hadia Gwaii plays a vital role in the economy and culture of the Haida people (*Haida Nation v. British Columbia*, 2004). The wildlife area that the proposed highway would run through within the TRTFN case is also essential to TRTFN's culture and economy (*Taku River Tlingit First Nation v. British Columbia*, 2004). The extraction of resources on Indigenous lands directly threatens Indigenous livelihoods and diminishes Indigenous rights to self-determination. Indigenous peoples' right to land governance and self-determination is a human right (Lightfoot, 2016). As such, injustices of land and sovereignty dispossession are dire issues that require settler government accountability and redress.

The Haida and TRTFN cases not only highlight the impacts and negative consequences of extracting resources from Indigenous territories. They also illustrate how the province has historically misframed injustices and redress mechanisms, as well as passed the buck to avoid

blame and accountability for injustices inflicted upon Indigenous communities. Within the following section of the case study, I will analyze how the injustices within these two companion cases were misframed, as well as the role in which the media played in misframing the injustices and how this has impacted redress and accountability. I will then highlight and explain various elements of buck-passing within the cases and the detrimental consequences that buck-passing poses in advancing and recognizing Indigenous rights.

Misframing: *Haida v. British Columbia* & *TRTFN v. British Columbia*

Misframing injustices pertaining to Indigenous sovereignty and land dispossession pre-dates the establishment of British Columbia as a colony. As sociologist Andrew Woolford explained, visions of "white benevolence" have greatly influenced Indigenous relations within the province of British Columbia, that have led to Western-centric frames of "justice" (Woolford, 2005). These justice frames have been utilized to defend disputes over title claims prior to the establishment of British Columbia as a colony, by relying on doctrines of "discovery" and "conquest" (2005). The province of British Columbia continued to rely on these doctrines to defend its actions and arguments against Aboriginal land claims through a colonial frame of "justice" (2005). This sort of misframing is a strategic tactic used to justify settler-colonialism and settler-colonial violence, by denying wrong-doing and instead affirming that the province's actions are "just" (2005), and further inferring that settler institutions are the "right" political institution to decide what frames of justice will be applied in relation to Indigenous concerns and demands. This sort of misframing has shaped Indigenous relations within the province, which in turn leads to injustices being ignored or redress mechanisms that do not incorporate Indigenous perspectives and voices, which further perpetuates the imposition of

colonial frames of justice on Indigenous communities. Throughout the analysis of the Haida and TFTRN cases we see a continuation of the sort of misframing described above, that shape and define the way in which the province of British Columbia has historically handled injustices of land and sovereignty dispossession.

Within the Haida and TRTFN cases we see examples of how the provincial Crown has intentionally tried to misconstrue what contributed to the injustice as a means of continuing colonial practices that undermine and diminish Indigenous self-determination. Within these cases the provincial Crown argued that it did not do anything wrong because Aboriginal title was not legally recognized (*Haida Nation v. British Columbia*, 2004; *Taku River Tlingit First Nation v. British Columbia*, 2004). If we analyze this argument keeping in mind the concept of misframing, we can really begin to understand the complexities and challenges that misframing presents in redressing injustices of sovereignty and land dispossession. The argument that the government did not do anything wrong because Aboriginal title was not legally recognized, is a glaring example of how the provincial government and provincial Crown strategically misframed an injustice in order to avoid accountability and pursue its own colonial agendas. The government of British Columbia entirely neglected to acknowledge that the provincial Crown's assumption of sovereignty over Indigenous lands, regardless if Aboriginal title is established, is a significant injustice within itself, one that then enables the government to enact a vast multitude of other injustices that perpetuate colonial agendas (Knafla, 2011). Not only did the government misframe the injustice by misconstruing the nature of the injustice, but also by failing to acknowledge the injustices further prevents Indigenous peoples and governments from redressing the injustice in accordance to their own legal orders.

The provincial Crown has framed injustices of sovereignty and land dispossession as merely issues regarding the recognition of Aboriginal title, but the application of Aboriginal title has been limited to a form of common law that fails to encompass and affirm rights of self-determination and governance (McCrossan & Ladner, 2016). Aboriginal title has always been a contentious topic as settler governments dictated how Aboriginal title was expropriated and extinguished (Knafla, 2011). Aboriginal title still presents challenges today, as First Nations struggle to not only prove the existence of Aboriginal title, but even when Aboriginal title is acknowledged, Indigenous peoples rarely benefit from the rights that Aboriginal title is supposed to protect (2011). Thus, the injustices present within these cases root back to settlers' disposition of Indigenous lands and rights to self-determination, and are not merely just an issue of title recognition. As such, this form of strategic misframing allows the government to continue to marginalize and oppress Indigenous communities and peoples.

Similarly, the government of British Columbia argued that it only owed TRTFN a duty of fair dealing until Aboriginal title was proven (*Taku River Tlingit First Nation v. British Columbia,* 2004). Again, the provincial Crown misframed the solutions the same way the provincial Crown misframed the solutions in the Haida case. And as the TRTFN stated within their factum, "if the Crown has no fiduciary obligations until specific rights are adjudicated, Aboriginal peoples will have no constitutional protection unless they flood the courts with applications for declarations of all their Aboriginal rights and corresponding interlocutory relief" (Factum of the Respondents, 2003, para. 44). This argument presented by the TFTRN clearly and accurately depicts the impacts of strategic misframing. Strategic misframing not only undermines the nature of an injustice, but in doing so it prevents particular people, venues, and institutions from redressing the injustices, enabling the injustice to reoccur (Fraser, 2008). Within the Haida

and TRTFN cases, the wrong institution (SCC) and lens (settler conceptions of Aboriginal rights and title) was applied to redress injustices of land and sovereignty dispossession. Thus, it is evident that the issues present within these two cases are more than just an issue of legal recognition of Aboriginal title, but the provincial Crown's approach of strategically misconstruing the nature of the injustice as an attempt to continue to dispossess Indigenous peoples of their land and sovereignty.

Additionally, within the Haida case, the province made the argument that the majority of British Columbia's economy is reliant on resource development, thus decision makers, in this case the Ministry of Forestry, must maintain the ability to make, "timely resource allocation decisions pending the resolution of disputed claims of aboriginal rights and title" (Factum of the Appellants, 2003, para. 48). This is another example of how the provincial Crown strategically misframed the injustice by framing the provincial Crowns actions as "just" because it benefited British Columbia's economy. The issue, as framed by province, pertains to economic activity rather than acknowledging that this "economic activity" is detrimental to Haida's decision making authority and directly impacts Haida culture (*Haida v. British Columbia*, 2004). Again, this argument exemplifies settler colonial visions of justice. The provincial Crown was making the claim that its actions were necessary for the greater good of the province, while simultaneously undermining Indigenous peoples' rights to self-determination and governance on their territories.

The province also argued that in accordance to section 35, "reconciliation must address and balance both the constitutional rights, powers and responsibilities of Province under ss. 92 and 92A" (Factum of the Appellants, 2003, para. 97). Further, the province argued that British Columbia has sovereign power over lands and resources, and even though title is an interest of

Aboriginal peoples this interest is only exercised once Aboriginal sovereignty/title is recognized (2003). The provincial Crown has yet again strategically shaped the injustice as a matter of whether Aboriginal title is legally recognized or not as a means of justifying not addressing Indigenous interests and concerns. Within the provincial Crown's arguments, it becomes apparent that misframing re-enforces subsequent misframing. In turn, this reinforcement creates a perpetual cycle that works to limit the possibility of resolving the given injustice, which then enables the provincial Crown to continue to ignore and undermine Indigenous peoples' rights to self-determination.

In addition to the government strategically misframing the injustices presented in the cases by attempting to misconstrue who is responsible for responding and protecting Indigenous rights, as well as trying to undermine the nature and scope of the injustice, both of these cases also exemplify issues of systemic misframing. While strategic misframing occurs when injustices are intentionally misconstrued to obscure what constitutes an injustice and who should remedy a given injustice (Fraser, 2008), systemic misframing is not intentional and is a result of the dynamics of existing social or political structures. Systemic misframing often occurs and stems from the colonial dominance, embedded within society, and leads to the social construction of ignorance. Steve Rayner, a climate governance scholar, explains that denial, dismissal, diversion and displacement of uncomfortable knowledge amount to the social construction of particular kinds of ignorance (Rayner, 2012). Uncomfortable knowledge, then, is information that societies and institutions choose not to acknowledge because doing so could undermine or challenge institutional goals and organizational structures (2012). When considering the concept of misframing through the lens of the epistemology of ignorance, it can be understood how injustices are systemically misframed. The colonial dominance that is deeply embedded within

society and institutions leads to injustices being misframed. Western-centric views that minimize self-determination and sovereignty to merely Aboriginal title and ownership (McCrossan & Ladner, 2016), exemplifies how the social construction of ignorance leads to misframing. The way section 35 has historically been applied to land claim cases re-affirms that these issues are merely about title rights and ownership and fail to address issues pertaining to self-determination and governance (2016). This then leads to the injustices being framed in a way that neglects to acknowledge the uncomfortable truths and issues of self-determination, sovereignty, and jurisdiction.

The duty to consult is an example of systemic misframing as it fails to successfully deconstruct the power dynamics that enable Crown governments to exploit resources on Indigenous lands without their consent (Morales, 2019); in turn this legal tool fails to address the injustices that are prevalent in cases of Crown resource exploitation. The duty to consult could be seen as a redress measure leveraged in an attempt to protect Indigenous communities from Crown exploitation; however, there are many limitations to the duty to consult. The duty to consult does not actually provide Indigenous peoples with the opportunity to say no to Crown decisions. In practice, the duty to consult assumes Crown sovereignty, and in doing so attempts to tend to Indigenous interests while still pursuing interests of the state (Morales, 2019). As such, the duty to consult does not protect Indigenous sovereignty, and in-turn fails to effectively redress injustices of land and sovereignty dispossession. Additionally, the duty to consult re-enforces settler-colonialism, because it casts First Nations as just another demographic group that should be ‘consulted’ as part of ‘best practice’, and acts more as an administrative check-box, rather than a consultation mechanism that actually incorporates Indigenous legal orders and governance into decision making processes (Curran, 2019; Papillon & Rodon, 2020). Thus, the

duty to consult does not effectively prevent the federal or provincial Crown from conducting resource extraction without Indigenous consent nor does it prevent the federal or provincial Crown from disregarding Indigenous sovereignty. Accordingly, many Indigenous communities and governments have expressed discontent with the duty to consult as it fails to fully protect Indigenous rights to self-determination (Morales, 2019).

The duty to consult is a form of systemic misframing that is a result of settler colonial governance dealing with Indigenous rights through section 35, which provides little room for Indigenous legal orders to operate within this framework (McCrossen & Ladner, 2016). The duty to consult was not necessarily created with the intent to misframe injustices or perpetuate colonialism; however, given that it was established through a colonial institution (Supreme Court of Canada) and fails to address the power imbalance between settler and Indigenous governments (Morales, 2019), it is inevitable that the duty to consult will misframe injustices and neglect to adequately address structures of power and colonialism that allow settler governments to assert dominance and control over Indigenous communities. Thus, the Haida Nation and TRTFN cases demonstrate both strategic and systemic misframing of injustices. A comprehensive analysis of these cases substantiates that both forms of misframing prevent longstanding historical injustices from being effectively acknowledged and addressed.

Further, when comparing the advice that the Haida president had for the government of British Columbia and what is covered and protected under the duty to consult, it is evident that the duty to consult does not effectively redress the injustices present within these cases. Within the early stages of the court proceedings, the Haida president had the following advice for the government of British Columbia:

1. “Recognize the legal reality that Aboriginal rights and title, including the inherent right to self-government, continue to exist.”

2. Recognize "that First Nations need to be fully involved in and benefit from all resource development in their respective territories, as has been shown in Quebec with the recent agreement with the Cree."
3. "Provide government negotiations with string mandates, sufficient to reach viable, workable and fair agreements with First Nations …"
4. Acknowledge that "it is time for all of us to strive to achieve certainty through agreements negotiated in good faith" (John & Pierre, 2002, para.13)

However, the duty to consult does not align with the Haida president's advice. The duty to consult does not necessarily safeguard Indigenous peoples' right to self-government or ensure that they are adequately consulted and accommodated. Additionally, there is a lack of clarity regarding accommodation, as it varies from case to case (Charowsky, 2011). As such, the duty to consult misframes the solution of the injustice as the redress mechanism put in place does not successfully address all the problems and issues brought forward from Indigenous groups and communities affected by injustices of land and sovereignty dispossession.

In addition to systemic misframing shaping the redress mechanism and in turn failing to adequately address the injustices in question, we also see examples of misframing within both public and government discourse. These cases received media attention and were covered within various news articles and interviews. When reviewing the news articles on these cases we can see examples of how the injustices prevalent within these cases were misframed. In 2004, November 17th the Vancouver Sun published an article titled, "Haida, Tlingit challenges at root of pending ruling". The article included snippets of quotes from various actors within the court proceedings. The article included a quote from Percy Crosby who was a Haida liaison officer working for the government of British Columbia, who stated: "There are lots of challenges – getting industry to understand Haida values, and getting Haida to understand the logging industry, which can be even worse" ("Haida, Tlingit," 2004, para. 24). This statement exemplifies how social constructions of ignorance can misconstrue conceptions of injustice.

Instead of recognizing that this injustice stems from the harms of settler colonialism, specifically the dispossession of Indigenous sovereignty and land, the liaison officer framed the injustice in a way that appeared as if this is just an issue of getting along and co-operating with one another, rather than acknowledging the extent and severity that the injustice inflicts on the Haida.

Government officials, government news announcements, as well as the SCC judge also participated in discourse that misframed the injustices present within the cases. Within the same Vancouver Sun article that quoted Percy Crosby, the article also included a quote from John Winter, the B.C. Chamber of Commerce president: "You can't realistically say we [B.C.] are open for business as long as this hangs over our heads … Hopefully, we'll have some resolution. Whether it's good or bad, depending on your perspective, doesn't matter. At least it's a resolution and we understand the rules of the game" ("Haida, Tlingit," 2004, 5). This statement wrongly frames the injustice by inferring that this issue stems from a lack of legal clarity, and the injustice will be resolved once clarification is provided. And in fact, the lack of legal clarity does contribute to the injustice, however, it is the government that manipulates the ambiguity set out in section 35, to treat title claim issues as a limited form of common law ownership rights, and undermines Indigenous self-determination (McCrossan & Ladner, 2016). Further, by referring to the consultation process with Indigenous communities as the "rules of the game", it completely misframes the injustice by affirming conventional conceptualizations that settler and Indigenous peoples have an equal say in resource development and extraction on Indigenous lands, when in reality there is a power disparity that has led to the unjust resource extraction and developments on the Haida and TRTFN territories ,which have severe consequences on the culture and economy for both Haida and TRTFN (*Haida Nation v. British Columbia*, 2004; *Taku River Tlingit First Nation v. British Columbia,* 2004).

The Vancouver Sun also released an article after the SCC decision and quoted Chief Justice McLachlin: “As for the Aboriginal claimants, they must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation agreement is not reached” (“Crown cannot delegate,” 2004, 5). This statement is essentially asserting that First Nations must be “reasonable” whilst consulting with Crown governments on resource development and extraction projects. But it fails to address the problem that colonial settler perspectives on what “consent” is and what it entails does not guarantee the protection of Indigenous people’s rights to self-determination (Doyle, 2015). Thus, Chief Justice McLachlin’s comments misframe the injustices present within the cases by failing to acknowledge that in order to successfully redress unjust resource extraction on Indigenous lands, it is imperative that Indigenous perspectives are given at least equal weight in determining what an adequate consultation process looks like (2015).

The government of British Columbia also released a press release pertaining to the SCC decisions in both of the Haida and TRTFN cases. However, nowhere within the news release did it mention the province’s duty to accommodate if deemed necessary. The news article only stated that the SCC decisions “reaffirmed that governments do have a duty to consult with First Nations over land and resource use” (British Columbia Ministry of Attorney General, 2004, para. 1). By failing to include that the SCC decision also affirmed that Crown governments have a duty to accommodate in certain situations, the statement is misleading and fails to acknowledge the full scope of the SCC decision. Further, the news release affirms that it is a positive outcome for all parties involved (2004). However, within the Vancouver Sun article entitled, “Crown cannot delegate consultations to third party”, Ed John who was speaking on behalf of the B.C. First

Nations summit, was quoted saying, “It’s a bit of a mixed bag because no one can say it’s a clear victory or clear defeat” (2004, 5). Further, within the same news article, the Haida president was quoted saying, “this ruling is very much about honour …. Aboriginal people must be vigilant to ensure the province meets its obligations” (“Crown cannot delegate”, 2004, 5). There is a discrepancy in how the province was framing the SCC decisions versus how the First Nations were responding to the decisions. There was more skepticism present within the First Nations reaction to the decision than the governments’ reaction. These contradicting perceptions/reactions also contribute to the misframing of injustice, as the government reaction creates an assumption that the duty to consult is a one size fits all approach that addresses the injustices present within the cases. However, as previously explained the duty to consult does not adequately address injustices of sovereignty dispossession.

Through the analysis of these cases, it is apparent that misframing, of both the systemic and strategic varieties, is a complex phenomenon that involves many different factors that all contribute to and lead to an inadequate redress mechanism and a lack of accountability. Additionally, misframing and buck-passing directly impedes discursive accountability. Political scientist Michelle Bonner explains that discursive accountability is a combination of horizontal accountability (state actors and institutions), and social accountability enforcing and shaping one another to frame a wrong-doing determining who is responsible, who should address the wrong doing and what are the appropriate reparations for the wrong-doing (Bonner, 2013). For example, if the actors of the state make a statement pertaining to a given issue, the media plays a role in supporting or challenging the frames presented by the state, this then shapes perceptions of the wrong-doing (2013). Thus, if government actors are negating to take accountability for

their actions, this would impede the frames of justice in which are being applied to the case, and can lead to a dominant discursive frame that implies that no injustice has occurred.

As seen within the Haida and TRTFN cases the provincial Crown attempted to create a discursive frame that denied any wrong-doing (*Haida Nation v. British Columbia*, 2004; *Taku River Tlingit First Nation v. British Columbia*, 2004). Through the analysis of the Haida and TRTFN cases it is evident that the misframing present within the cases, not only create extreme barriers in redressing the injustices of land and sovereignty dispossession, but perpetuate the systemic framing that imposes colonial frames of justice on Indigenous communities, providing little room for Indigenous legal orders to operate within this framework. Misframing not only exacerbates injustices of land and sovereignty dispossession, but help maintain colonial sanctions, power and dominance all while creating a false narrative that the province is working towards reconciling relations with Indigenous peoples.

Buck-passing: *Haida v. British Columbia* & *TRTFN v. British Columbia*

Misframing injustices is further complicated by settler government tactics of buck-passing. As indicated previously, a major issue that faces Indigenous peoples in developing their relationship with federal and provincial governments and protecting their rights is the ambiguities that exist within Canadian federalism (Papillon, 2015). In turn this creates unclear accountability structures and multiple opportunities for blame avoidance (2015). Within the *Haida Nation v. British Columbia* and the *TRTFN v. British Columbia* cases, it is evident that misframing and buck-passing played a central role in perpetuating injustices of land and sovereignty dispossession. More specifically, and as will be explained in further depth below, buck-passing played a central role in perpetuating issues of misframing. Throughout the analysis

of these cases, it becomes apparent that the provincial Crown not only passes blame for the injustice to the federal government, but also utilizes buck-passing as a strategic means to enable the government to continue to unjustly extract resources on Indigenous lands without consent.

In the Haida case, British Columbia argued that if there was a duty to consult with Haida, it was the federal government's responsibility as per jurisdiction and their oversight of Indigenous Affairs (Factum of the Appellants, 2003). As indicated previously the government has strategically attempted to place the blame of their actions on the federal government as an attempt to misconstrue who was responsible for addressing the issue. Further, the province argued that because British Columbia has jurisdictional governing authority over provincial lands and natural resources, if the federal government were to overrule the provincial resource decision in the interest of First Nations, it would undermine the legitimacy of federalism (James, 2009). The second part of this argument isn't necessarily "buck-passing" per se; however, what is significant to note is that both of these arguments take advantage of jurisdictional ambiguities, which then contribute to the injustice of land dispossession in order to maintain colonial dominance.

The provincial Crown's chain of arguments specifically showcases how buck-passing and misframing can work together to create this reproducing cycle that continues to undermine and misframe injustices of land and sovereignty dispossession. Essentially, the government argued, first, that if there was an issue it was not its responsibility to address it, and, second, that, if there were any adverse consequences for the province in how the other level of government addressed the issue, then federalism would have been violated. The arguments put forward by the province exemplify the extent that the province has gone to create insurmountable obstacles for advancing and protecting Indigenous rights within the province. If we break down the government's

arguments into specific sections we can see how misframing and buck-passing operate together: 1) the government first misframed the injustice to deny that it acted wrongly, 2) then made the argument that if its previous arguments fail in convincing the SCC that it did not act wrongly, then this is not its issue but rather the federal government; and then 3) asserts that if the federal government redresses this issue in a way that undermines provincial decision making then the federal government is not respecting provincial authority and jurisdiction. As such, buck-passing is woven into the government's tactic of strategically misframing the injustice, not to just merely pass blame to the federal government for the wrong-doing, but more specifically to manipulate ambiguities of jurisdictional powers to continue to conduct unjust resource extraction on Indigenous lands without any repercussions.

In the TRTFN case the government also attempted to pass the buck. Within the provincial government's factum, it stated that, "the provincial Crown, unlike the Federal Crown, has no constitutional duty to protect Indian interests by interposing itself between First Nations and third parties" (Factum of the Appellants, 2003, para. 33). As such, the Haida and TRTFN cases exemplify buck-passing in order to negate responsibility and blame for extracting resources on Indigenous lands without adequate consultation or accommodation. But what is specifically unique about the strategic tactic of buck-passing within these cases, is the government was not just passing a jurisdictional responsibility to Ottawa because Indigenous affairs falls under federal jurisdiction. Rather, the provincial Crown was actively committing sovereignty and land dispossession, and as a means to continue to do so, they were inferring that this was not its issue and further the federal government cannot address Indigenous concerns, if in doing so it impinged on provincial jurisdiction of forestry (*Haida Nation v. British Columbia*, 2004).

In this scenario buck-passing was being leveraged to contribute to the strategic misframing of the injustice, by mis-construing who was responsible for the injustice. The government was falling back on British Columbia's historical stance in regards to Indigenous concerns: that if there is a problem it is the Federal governments problem (Tennant, 1996). Further, Kathryn Harrison explains, jurisdictional ambiguities can be leveraged and manipulated for different objectives: 1) federal and provincial governments will cultivate certain areas of jurisdiction in order to protect and promote their own interests; and 2) will avoid jurisdictional responsibility by passing the buck to the other level of government (Harrison, 1996). Within the arguments advanced by the province in the Haida and TFTRN cases, the provincial Crown attempted to pass the buck in order to avoid responsibility and blame, as well as assert its jurisdiction of provincial land and resources challenging the federal governments jurisdictional powers over Indigenous relations, as a means of protecting the provinces own interest. As such, jurisdictional ambiguities are being used to buck-pass in order to avoid blame and responsibility, but also prevent redress, in attempts to further pursue provincial interest at the expense of Indigenous peoples and undermining Indigenous sovereignty and self-determination. It is important to note that what is significant about the role that jurisdictional ambiguity plays in buck-passing, is not only that these ambiguities exist, but that government fails to address these ambiguities as a means to ignore/neglect given issues/concerns.

In addition to the provincial government attempting to pass blame and accountability for the injustices to the federal government, within these cases there were also examples of federal buck-passing. Following the SCC decision, the Vancouver Sun published an article on November 19th, 2004, quoting Andy Scott, the Federal Indian Affairs Minister at the time saying, "the Supreme Courts judgement won't result in a 'big change' in the way Ottawa approaches

negotiations with First Nations" ("Crown cannot delegate," 2004, 5). The federal government was asserting that the Supreme Court decision did not affect them because the development project in question falls under provincial jurisdiction, and thus this does not impact the federal government. Despite the federal government not having jurisdictional authority over provincial forestry decisions, they do have direct stake in interprovincial development projects such as natural gas pipelines. And the federal government also has a history of overlooking and undermining Indigenous sovereignty. For example, the Federal government had approved resource development projects, such as the Trans Mountain Expansion Project and the Northern Gateway pipeline. Many Indigenous peoples have contested the approval of these projects as they feel their rights promised under section 35 are being overlooked (Morales, 2019). Thus, the federal government affirming that the SCC ruling would not affect them, is another example of buck-passing.

Indigenous leaders demanded to hear the Federal government's reaction to the decision. Phil Fontaine, grand chief of the Assembly of First Nations, was seeking a meeting with the Prime Minister at the time, Paul Martin, to assess the Federal reaction of the SCC decision ("Crown cannot delegate," 2004). While it was not reported if Paul Martin met with Phil Fontaine, the federal government did fail to acknowledge that this decision should also impact the federal government as well. As previously mentioned, Martin stated the judgement would not result in a 'big change' in Federal negations with First Nations (2004). It is evident that the federal government had deliberately ignored the injustices present within the Haida and TFTRN, by not only failing to comment on the injustices, but also failing to state how this decision would affect not just the province but also should affect the federal government as well. It follows that the federal and provincial government both partake in actions that re-affirm norms that

perpetuate Western-centric frames of justice, and pass the buck as a tactic used to prevent accountability, and to continue this perpetual cycle that misframes injustices facing Indigenous peoples.

When analyzing these cases through a settler colonial lens, it becomes apparent that the province had used the ambiguity within the structures of federalism to unjustly exploit Indigenous territories. More specifically, what these cases exemplify are institutional norms and practices that have historically led to and shaped the provincial Crown's actions specific to land claims and resource extraction. And as exemplified throughout these cases the province attempted to pass the buck in order to maintain norms that support colonial frames of justice that lead to misframing in order to further perpetuate the dispossession of Indigenous lands and sovereignty. Within both of these cases it was deemed that the province does have a responsibility to consult and accommodate (*Haida Nation v. British Columbia*, 2004; *Taku River Tlingit First Nation v. British Columbia*, 2004). However, the governments arguments exemplify the strategic use of buck-passing as a means to not only avoid responsibility for the wrong-doings, but also re-affirm historical norms and practices that shape colonial perspectives of justice in a way that block Indigenous perspectives from being included in determining how, who and what constitutes an injustice.

The Duty to Consult vs. the FPIC Principles

In order to successfully redress misframing solutions and injustices of sovereignty and land dispossession, the uncomfortable knowledge that the application of section 35 and the rights pertaining to Aboriginal title does not address or protect issues of self-determination and sovereignty needs to be acknowledged. However, settler colonial constructions of ignorance

have created the false perception that section 35 provides a full box of rights (Nagy 2022; Nichols, 2019). This is where the successful implementation of the UNDRIP along with the FPIC principles demonstrates potential to confront uncomfortable knowledge that leads to colonial frames of justice that fail to fully address Indigenous concerns and issues (Morales, 2029; Nagy 2022; Lightfoot 2021). Specifically, it provides a legal tool that can be utilized to challenge institutional norms that imposes Western-centric frames of justice, such as the title rights outlined in section 35. The UNDRIP is particularly significant in that the voices and perspectives of Indigenous peoples were included in the creation of the Declaration, and Indigenous peoples can use the FPIC principles to articulate and create their own consultation processes that challenge the colonial versions and perceptions of consultation that fail to incorporate Indigenous legal orders (Doyle, 2015; Papillon & Rodon, 2020). We can reanalyze the Haida and TRTFN cases to examine the ways in which the FPIC principles outlined within the Declaration would provide a more robust framework for protecting Indigenous self-determination than the duty to consult, and in turn prevent misframing. However, before examining the ways in which the FPIC principles could be leveraged to effectively redress injustices similar to the issues/injustices presented throughout the Haida and TRTFN cases, it is necessary to briefly review and explain what the FPIC principles entail.

The FPIC principles affirm that Crown governments must consult with Indigenous governments when conducting business/extraction projects on their lands. The FPIC principles assert that Indigenous governments have the right to engage in negotiations with Crown governments without coercion, bribery, rewards, intimidation, or manipulation (Boutilier, 2017; Mitchell et al., 2019). Further consent must be granted before governments issue permits for projects on Indigenous lands, and consent must be obtained prior to every stage of the resource

extraction process (Boutilier 2017; Mitchell et al. 2019). Additionally, Crown governments must provide Indigenous governments with the specific nature of the project including size, space, reversibility, scope, purpose, duration, and locality of a potential project. Crown governments must also disclose potential economic, social, cultural, and environmental implications of the proposed project(s) (Boutilier, 2017; Mitchell et al., 2019). As such, the FPIC principles include and safeguard measures integral to protecting Indigenous sovereignty, more than the duty to consult does.

The Declaration holds the potential to redress injustices of buck-passing. As previously mentioned, the Declaration is a legal tool created by Indigenous peoples which can significantly aid in advocating and protecting Indigenous rights. There has been significant contention and uncertainty pertaining to the FPIC principles, specifically from settler institutions. This, in turn, has opened spaces for Indigenous groups to take advantage of the legal uncertainty of various Indigenous rights to operationalize the FPIC principles using their own decision-making mechanisms (Papillon & Rodon, 2020). For example, the Squamish Nation has leveraged the legal uncertainty relating to their unsettled title claim as a way to create and establish their own FPIC mechanisms (2019), demonstrated through the case of natural gas processing and transportation. Woodfibre Natural Gas proposed to build a natural gas processing and export facility on the traditional territory of Squamish Nation. In response to the proposed project, the Squamish Nation created a community driven impact assessment (IA) process as a means of making their own decisions pertaining to the proposed project and exercising their governance. To ensure their IA was not just symbolic but also binding, they convinced the project proponent to collaborate and fund the process (2019). Thus, the successful implementation of the FPIC principles in BC would aid in shifting the power dynamics that have historically enabled Crown

governments (both federal and provincial) to control all areas of jurisdiction and pass the buck whenever there is an Indigenous issue or injustice.

Further, if the FPIC principles are upheld and enforced, this would provide Indigenous peoples with rights and protections in provincial legislation, which in turn would effectively mitigate the era of passing the buck in British Columbia, simply because the provincial government would have a more difficult time claiming that a given issue was outside of its jurisdictional powers. However, the federal government could still leverage jurisdictional ambiguities to claim that the FPIC principles are enforced in provincial legislation but not federal, so the federal government could approve cross border projects that adversely affect Indigenous peoples' rights to self-determination and contradict the FPIC principles. Thus, even though the successful implementation of the FPIC principles in the province could aid in mitigating practices of buck-passing, there are still loop holes, such as the federal government exploiting jurisdictional ambiguities, that the successful implementation of the UNDRIP in province of BC would not entirely address.

The FPIC principles also have the potential to redress injustices of misframing, specifically by providing a more robust redress mechanism for the injustice of land and sovereignty dispossession. The FPIC principles outlined within the Declaration further advance the Crown's current duty to consult with Indigenous governments (Morales, 2019). Specifically, the principles provide more of a concrete framework for protecting Indigenous sovereignty than the duty to consult. As mentioned previously, the duty to consult is rather ambiguous, as Crown governments can exercise discretion as to the extent of consultation that a given project requires (Boutilier, 2017; Nagy, 2022). This leads to many court cases, as Indigenous governments and communities do not feel as though they have been adequately consulted with on given projects,

and as such their sovereignty and authority to make decisions on their lands has been overlooked and disregarded (Morales, 2019). However, the FPIC principles affirm that Crown governments must adequately consult Indigenous governments on projects that impact Indigenous lands and peoples, regardless of the perceived threats/damages of the proposed project or if Aboriginal title is established (Morales, 2019). As such, if settler governments seriously and successfully implement the Declaration into legislation, the FPIC principles could potentially address the pre-existing structures that enable governments to exploit resources on Indigenous land. In turn, the FPIC principles could provide a robust framework for dismantling colonial structures, whereas the duty to consult often perpetuates colonialism.

The successful implementation of the FPIC principles would not only prevent unjust resource extraction practices from occurring, but would also address injustices of misframing. As previously referenced, the BC government attempted to misframe its wrongdoings within the Haida and TRTFN cases by claiming that the lack of Aboriginal title rendered the government of BC to be not at fault (James, 2009). However, if the government diligently implemented the Declaration and a similar case occurred, Indigenous governments and peoples could use the FPIC principles as a legal tool to defend and protect their rights in a fashion that the duty to consult does not. The FPIC principles compel Crown governments to consult with Indigenous communities regardless of the perceived consequences of the proposed project or whether Aboriginal title is established, whereas the duty to consult leaves room for the Crown to determine the extent to which they are required to consult with Indigenous governments, which enables them to overlook Indigenous sovereignty (Morales, 2019).

The FPIC principles promise to ensure a tight framework that protects Indigenous rights to sovereignty (Morales, 2019). Further, the principles imply that the need to affirm Aboriginal

title on land that has been occupied by Indigenous peoples prior to European arrival is a colonial sanction. By eliminating the need to prove Aboriginal title from the equation, Indigenous peoples have the right to FPIC regardless of established title (Morales, 2019) and ultimately systemic structures of colonialism that enable governments to strategically misframe injustices in order to pursue their own interests would be properly addressed. As such, this would aid in preventing the government from strategically misframing injustices, as it did in the Haida and TRTFN cases. However, that is not to say that the provincial government could not find other avenues/ways to misframe injustices, but the successful implementation the FPIC principles into provincial legislation would make it more challenging to misframe injustices pertaining to Aboriginal title and title claims. Should the Declaration be successfully implemented the province would be responsible for ensuring that all its decisions and actions align with the FPIC principles.

As previously mentioned, the concept of misframing injustices is complex and involves multiple different factors. However, what I argue is one of the most significant aspects about the FPIC principles is that the principles have the potential to unveil uncomfortable knowledge, which would in turn aid in redressing unintentional misframing. The FPIC principles could be leveraged by Indigenous peoples to address and acknowledge the uncomfortable knowledge and impacts of settler colonialism, specifically sovereignty dispossession. Canadian law currently enforces a “Crown-centric” focus that enables settler governments to undermine Indigenous rights to self-determination (Nagy, 2022). In contrast, the FPIC principles provide an international standard of consultation (2022). Further, the FPIC principles aid in diminishing the social construction of ignorance in reference to issues of land and sovereignty dispossession, because the implementation of the principles would provide a legal framework for engagement between Indigenous peoples and settler governments and would address the power imbalances

that historically led to unjust resource extraction (Morales, 2019). In turn this would aid in addressing the deep-seated colonial structures that continue to operate and undermine Indigenous sovereignty in order to protect and promote the interest of the state.

The FPIC principles can be leveraged to decolonize structures, laws, and policies in a way that the duty to consult does not. The FPIC principles address structures of colonialism, power disparities, and dominance that are embedded within settler states (Nagy, 2022; Morales, 2019). Because these structures are acknowledged as core issues that then empower oppressive and racist policies that target Indigenous communities, the Declaration is integral to the provision of an effective framework for redressing human right violations. To the contrary, the duty to consult does not address the core issue and in turn does not protect Indigenous self-determination. As well, it is important to consider that since these structures are not effectively addressed, Crown governments remain able to partake in misframing of injustices. And as indicated throughout this chapter, the misframing of injustice significantly hinders government accountability and corresponding redress. It follows that the successful implementation of the Declaration within BC could significantly modify settler and Indigenous relations within the province and would safeguard the rights of Indigenous peoples by decolonizing structures and policies that impede their human rights (Knockwood, 2019; Lightfoot, 2021). Given BC's history of passing the buck and failing to adequately address Indigenous issues, the successful implementation of the Declaration would also exemplify government accountability and redress.

It is important to recognize the transformative potential of the Declaration, specifically how it would address injustices of misframing and end British Columbia's longstanding practice of passing the buck. The successful implementation of the UNDRIP within BC would significantly aid in diminishing institutional norms that have historically led to the application of

colonial frames of justices that overlook Indigenous rights to self-determination. However, it is also crucial to acknowledge that despite the transformative potential of the Declaration, it is not guaranteed that the province will successfully implement the Declaration and adhere to the FPIC principles. The province's history of colonial violence combined with the ambiguity within the division of powers creates significant doubt as to whether the implementation of the UNDRIP will actually improve Indigenous rights. These challenges and doubts were not efficiently discussed in the analysis of the Haida Nation and TRTFN cases. The analysis provided an examination of how the Declaration and the FPIC principles could effectively challenge and dismantle structures that enable governments to avoid accountability for injustices that Indigenous communities contend with; however, the realization that the Declaration and the FPIC principles have the potential to significantly redress injustices of misframing and passing the buck needs to be accompanied by an acknowledgement that there are many implications and challenges that might impede the successful implementation of the Declaration. Within chapter three I will provide an in-depth analysis of the various challenges and institutional norms that would impede the successful implementation of the Declaration. However, the purpose of this chapter is not to engage in an all-encompassing analysis that explains all of the challenges posed in implementing the Declaration, but rather to generate awareness of the transformative potential of the Declaration.

Conclusion

Throughout analyzing the *Haida Nation v. British Columbia* case and *TRTFN v. British Columbia* case it is apparent that the injustices presented within the cases have been misframed. Further, the above analysis shows how strategic tactics of misframing and buck-passing as well

as systemic misframing create a reproducing cycle -- misframing leads to more misframing. Further, the provincial tactics of buck-passing as seen in the case of Haida and TFTRN, not only acted as a means of negating blame and responsibility for the injustice present within the case; the province also leveraged jurisdictional ambiguities in an attempt to continue development projects on Indigenous territory without consent and without having to face any consequences for doing so. Misframing (both systemic and strategic) as well as the buck-passing that shaped and contributed to the injustices presented within the cases, were not unique to these specific cases, but rather act as deep-seated institutional norms that shape colonial frames of justice that have historically denied the existence of Indigenous rights to self-determination and governance.

If the government of British Columbia seriously implements the Declaration, the FPIC principles could be used to redress injustices of both strategic and systemic misframing, and in turn this would end the era of passing the buck. The FPIC principles contained within the Declaration provide a framework for addressing colonial and oppressive laws and policies (Morales, 2019; Nagy, 2022). Further, if the government successfully implemented the FPIC principles into legislation, it would showcase government accountability and prevent BC from passing the buck. If the FPIC principles were enforced, Indigenous peoples right to self-determination would be protected within provincial legislation, as such this would limit BC's ability to blame given issues/injustices on the federal government. In addition to redressing issues of strategic misframing, the FPIC principles could also address systemic injustices of misframing, as the FPIC principles could be leveraged to address and challenge the colonial structures and uncomfortable knowledge that perpetuate the social construction of ignorance, that lead to injustices of misframing.

Despite the UNDRIP's potential in addressing injustices of misframing and passing the buck, it is not guaranteed that the province will seriously implement the Declaration. As discussed throughout this chapter the FPIC principles provide a transformative framework to address oppressive laws and policies; however, the ambiguity within the division of powers could significantly impede the successful implementation of the Declaration. Even though the successful implementation of the UNDRIP could end the era of passing the buck, the ambiguity within the division of powers could be used to pass the buck while implementing the Declaration and, in turn, this would prevent the successful implementation of the UNDRIP, and the *Declaration Act* would not reach its transformative/redress potential. This chapter did not provide an in-depth examination of all of the challenges and complexities involved in implementing the UNDRIP into provincial legislation, as they will be addressed in the following chapter. However, if these challenges are addressed and the UNDRIP is successfully implemented, the Declaration will significantly aid in settler and Indigenous reconciliation.

Chapter Three
BC's Declaration Act: Shifting Institutional Norms & Practices

Within this chapter I will analyze BC's *Declaration on the Rights of Indigenous Peoples Act* (*Declaration Act*), and its potential to weaken institutional norms that have historically shaped how the province handles Indigenous relations and concerns. The two institutional norms that will be discussed and analyzed in relation to the BC *Declaration Act* are the legal norm, the duty to consult, and the overarching norm of overriding settler sovereignty. As discussed in the previous chapter, the duty to consult enforces a mechanism of consultation that does not incorporate Indigenous legal orders or challenge state sovereignty, is not applied consistently, and does not necessarily require Indigenous peoples consent in order to approve a given project (Do, 2020b; Morales, 2019; Papillon & Rodon, 2020). The overarching norm of overriding settler sovereignty is derived from Canada's assumption of sovereignty over all Indigenous lands, and was informed by legal processes like the Doctrine of Discovery and *terra nullius* that justified European sovereignty over Indigenous lands and peoples (Truth and Reconciliation Commission of Canada, 2015).

Throughout this chapter I will specifically be focussing on how norms of overriding settler sovereignty are informed by section 35, specifically rights pertaining to Aboriginal title. As previously discussed, Aboriginal title rights are treated as a form of common law that overlook Indigenous peoples' inherent right to self-determination (McCrossan & Ladner, 2016). The duty to consult and overriding settler sovereignty, as they are currently applied in relation to Aboriginal law in Canada, lead to practices of buck-passing and injustices of misframing (both strategic and systemic). At the same time, buck-passing and injustices of misframing reinforce institutional norms like the duty to consult and overriding settler sovereignty. Thus, if BC's *Declaration Act* can challenge institutional norms that (e.g., the duty to consult and overriding

settler sovereignty) have historically shaped how the provinces views and applies Aboriginal law, practices of misframing and buck-passing are likely to be mitigated.

As previously discussed, the UNDRIP does have the potential to create transformative change in the way Indigenous rights are viewed and practiced. Specifically, the FPIC principles hold the potential in providing more robust protections than the duty to consult, and hold the potential to counter norms of overriding settler sovereignty that currently apply state-centric versions of self-determination. However, institutional practices such as misframing and buck-passing have historically played a prominent role in the way the province of British Columbia has handled Indigenous concerns and relations, creating doubt as to whether the province will seriously implement the Declaration, and create substantive change in the way Aboriginal law is viewed and practiced. The multilevel governance landscape between settler and Indigenous governments in Canadian federalism has created an opportunity structure for settler governments to leverage jurisdictional ambiguities as a means to not only negate moral blameworthiness for an issue but as well as responsibility for addressing the given issue (Harrison, 1996; James, 2009). The province of British Columbia has specifically taken advantage of this opportunity structure that the ambiguities of jurisdictional powers afford, as seen within the Haida and TRTFN cases. Further, section 35 provides little room for legal orders to operate within this rights framework (McCrossan & Ladner, 2016), and in turn perpetuates issues of misframing which undermines Indigenous peoples' rights to self-determination. Throughout this chapter I will conduct an institutional analysis to further examine how institutional practices (buck-passing and misframing) and institutional norms (the duty to consult and overriding settler sovereignty) operate together. Further, I will review cases and legislation pertaining to BC's *Declaration Act* to examine if and how the Act is impacting and shifting institutional norms that dictate and

inform how Indigenous rights and concerns are handled, and what impact this all has on institutional practices of buck-passing and misframing.

Throughout this chapter I argue that in certain scenarios the *Declaration Act* is creating a normative change in the way that Aboriginal rights are viewed and applied; however, other recent government actions and court decisions do not align with the rights outlined in the Declaration. In order for the Declaration to mitigate practices of misframing and buck-passing, the implementation and interpretation of the Declaration needs to be applied consistently. This chapter outlines the different scenarios and cases where the province's actions and recent court rulings indicate promise, as well as doubt that BC's *Declaration Act* will shift norms such as the duty to consult and overriding settler sovereignty. The purpose of this chapter is to investigate recent government actions and court decisions to determine if and how BC's *Declaration Act* is shifting the opportunity structures that have historically allowed for settler governments to take advantage of the ambiguities between the division of powers to completely undermine Indigenous rights' to self-determination with little to no consequences, and, in turn, examine the potential the Act has in mitigating institutional practices of buck-passing and misframing.

Within the following sections I will conduct an institutional analysis, focusing on the views and perspectives of legal experts in relation to recent government actions and court decisions and what these actions and rulings mean for the province and the implementation of the UNDRIP within provincial legislation. I will first provide a brief literature review of the research that has been conducted on the implementation of the Declaration within BC. While there is very little research on the implementation of the UNDRIP within provincial legislation, the research that has been conducted provides an overview of current issues and realities that the province is facing in implementing the UNDRIP. This information will provide useful insight in

order to better analyze the impacts of BC's *Declaration Act*. I will then briefly provide an overview of the institutional norms such as the duty to consult and overriding settler sovereignty. It is important to have an understanding of these norms, as this chapter is specifically looking at how BC's *Declaration Act* could challenge these norms and what impact a shift in institutional norms would have on practices of buck-passing and misframing. Finally, I will analyze recent government actions and court rulings, including the BC's Declarations Act's Action Plan, the provinces 10 Draft Principles that govern Indigenous relations, the *Gitxaala v. British Columbia* [2023] case, the *R v. White and Montour* [2023] case, the provinces proposed amendments to the BC's *Land Act*, which have now been put on hold, and the SCC decision on Quebec's appeal to strike down the federal legislation on an *Act respecting First Nations, Inuit and Metis Children Youth and families*. The analysis of the above cases will provide a picture of the current legal and political environment in relation to the implementation of the UNDRIP within British Columbia.

Literature Review

As previously mentioned, minimal research has been conducted on the implementation of the Declaration in British Columbia. However, the little research that has been conducted on implementation of the Declaration into provincial legislation, mainly focuses on the Free, Prior and Informed Consent (FPIC) principles and the role that they will or will not play in challenging the colonial practices and perceptions of consultation processes with Indigenous governments and communities. Scholars agree that the FPIC principles provide an avenue for Indigenous peoples to incorporate their legal orders into consultation processes. However, settler governments are viewing the FPIC principles as merely "aspirational" rather than having serious potential in addressing colonial consultation processes, which could impact the transformative

potential of the Declaration (Papillon & Rodon, 2020). Despite the scholars all taking similar stances on the implementation of the FPIC principles into provincial legislation, they all take a different approach to their analysis and research, which will prove to aid in providing essential knowledge to better understand not only how the FPIC principles could reframe and reshape norms in British Columbia but also how institutional norms and practices could prevent the FPIC principles from decolonizing consultation processes.

Prior to BC's *Declaration Act* being passed, environmental legal scholar Deborah Curran recognized that the FPIC principles could be leveraged by Indigenous peoples to incorporate their own governance practices into consultation processes. Specifically, Curran argues that in relation to water laws and regulations in BC, the FPIC principles could be used to repoliticize Indigenous water governance. The term 'repoliticizing' in this context is used to describe the process of incorporating Indigenous legal orders and methodologies within consultation processes, and in turn, employing a consultation process that operates outside of colonial state-controlled consultation processes (Curran, 2019). Curran argues that Indigenous peoples are utilizing the FPIC principles as an international standard in which they can hold settler-governments accountable and move beyond the narrow scope of colonial consultation processes (2019). For example, the Okanagan Nation Alliance adopted the Syilx Nation Siwlkw (water) Declaration in 2014, in which the nation worked with the Okanagan Basin water Board and provincial government to define environmental flow needs in the Okanagan watershed (2019).

However, Curran also asserts that if the FPIC principles were applied similarly to administrative processes like the environmental assessment, this could depoliticize water governance, as the FPIC principles would not actually enable Indigenous communities to address methods of governance, or incorporate their own legal orders and tradition into water governance

(2019). Despite Crown governments adopting the language of the FPIC principles, the Crown does not adhere or uphold these principles, as the Crown still continues to rely on administrative processes of consultation, such as British Columbia's *Environmental Assessment Act* (2019). In order to diminish the likelihood of the FPIC principles being leveraged as a depoliticizing force, it is imperative that Indigenous laws are incorporated into both substantive and procedural standards for consultation (2019).

British Columbia was the first province that implemented the Declaration into provincial legislation through the 2019 *Declaration on the Rights of Indigenous Peoples Act* (*Declaration Act*), followed by the federal governments 2021 *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA). The federal and provincial implementation of the Declaration does not guarantee the instant transformation of Indigenous rights within Canada (Amatulli, 2023). However, the federal and provincial UNDRIP legislations do provide an avenue to use the UNDRIP as an interpretive aid to define Indigenous rights in Canada (2023). Further, the implementation of BC's *Declaration Act* and the federal UNDRIP legislation provides hope that courts will apply the principles of the UNDRIP to uphold and recognize Indigenous rights to self-determination (2023). Within recent court cases between First Nations and the government of British Columbia, the Declaration, including the FPIC principles, have played a central role within the court proceedings. Through the analysis of the *Yahey v. British Columbia* [2021], Socio-legal scholar Giuseppe Amutalli argues that even though Justice Burke did not refer to the UNDRIP within the decision, the ruling could potentially act as a framework/reference for implementing and enforcing the FPIC principles (Amatulli, 2023). Within the case of *Yahey v. British Columbia*, the decision affirmed that the province of BC could no longer approve projects that breached Treaty 8 rights. Further, the province and Blueberry River First Nations (BRFN)

were ordered to establish a consultation process together to assess the impacts of development projects on BRFN's traditional territory (2023). Following the decision, the BC government agreed to allocate $65 million to the BRFN as a means of monetary compensation for land restoration and cultural practice revitalization (2023). The final agreement between the province of British Columbia and BRFN was signed January 18, 2023 (2023). Amatalli affirms that by not appealing Justice Burke's decision, the province showed its commitment to adhering to the principles contained within the UNDRP (2023).

Despite settler governments viewing the FPIC principles through a state-centric lens, BC's *Declaration Act* does offer a promising pathway for agreements between the provincial Crown and Indigenous governments (Allard & Curran, 2021). Within BC's *Declaration Act*, section 3 of the Act states that, "[i]n consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration" (Declaration on the Rights of Indigenous Peoples Act, 2019). Legal scholars Deborah Curran and Christina Allard argue that section 3 of the Act is significant because if fully implemented and enforced this affirms that the government of BC will have to amend laws and policies to ensure they align with the UNDRIP. Further, the *Declaration Act* provides a more robust framework for consultation, than administrative processes such as the provinces *Environmental Assessment Act*, because the *Declaration Act* stipulates consultation and cooperation, and creates new avenues through the environmental assessment for Indigenous peoples to participate and voice their opinions in regards to development projects that would affect them (2021). As such, if the *Declaration Act* is successfully implemented, then the Environmental Assessment process will have to be amended

in accordance to the principles outlined within the UNDRIP, which will then provide an avenue which facilitates direction and participation between Indigenous and Crown governments (2021).

In addition to recognizing the transformative potential of the FPIC principles, political scientists Martin Papillon and Thierry Rodon also affirm that the FPIC principles are highly contested and the state interpretation of these principles differ from Indigenous perceptions and use of the principles (Papillon & Rodon, 2020). States (including Canada) often view the FPIC principles as a procedural obligation, failing to acknowledge the underlying intent of the FPIC principles. On the other hand, Indigenous governments have been utilizing the FPIC principles to determine their own consultation mechanisms. There is a lack of legal and political clarity around resource extraction projects on Indigenous territories. Aboriginal and treaty rights are affirmed in Section 35. However, this section does not directly outline or define the specific rights. As such, courts have played a significant role in defining these rights (2020). The FPIC principles enable Indigenous peoples to contribute to defining their own rights in relation to consultation processes, as well as countering state-centric definitions of the FPIC principles. For example, the Cree have used their institutional capacity through the James Bay and Northern Quebec Agreement to develop their own consent and decision-making processes in relation to mining policies (2020). They were able to establish a consultation process that included criteria for their consent on a given project (2020). As such, Indigenous peoples are rejecting state definitions of the FPIC principles and instead are defining their own perceptions of the FPIC principles (2020).

As described above, the little research that has been conducted on the implementation of the Declaration in provincial legislation mostly focuses on the role the FPIC principles play in consultation processes between First Nations and provincial Crowns. Scholars agree the FPIC

principles provide an avenue for Indigenous nations to determine their own consultation processes. However, they also recognize that Crown governments view the FPIC principles as an administrative consultation process, which in turn leads to a consultation process that does not fully adhere to the FPIC principles outlined within the Declaration. Within this chapter I plan to build on this research by not only analyzing the ways that Indigenous groups can use the FPIC principles to define their own consultation processes, but examine what and if any legal and political changes are occurring due to BC's *Declaration Act*. Specifically analyzing how legal and political changes stemming from BC's *Declaration Act* would impact institutional norms of overriding settler sovereignty and the duty to consult and, ultimately, how a shift in institutional norms that directly relate to the way the province deals with Indigenous concerns and injustice would either mitigate or exacerbate institutional practices of buck-passing and misframing.

Overview of Institutional Norms

In this section, I will discuss two legal norms, the duty to consult and the overarching norm overriding settler sovereignty, and the role that these norms play in influencing interactions between federal, provincial, and Indigenous governments. Specifically, I will focus on how the duty to consult and overriding settler sovereignty as currently applied in Canada lead to practices of buck-passing and misframing injustice (both strategic and systemic) as well as misframing solutions to a given injustice. As concluded within the previous chapter buck-passing and injustices of misframing undermine Indigenous peoples' right to self-determination. Jurisdictional ambiguities create opportunity structures for settler governments to undermine Indigenous self-determination by placing blame and responsibility for given injustices to the other level of government (Harrison, 1996; James, 2009). Further, when buck-passing fails and a

given settler government is held responsible for an injustice, historically misframing will occur, as the wrong political actor, space, arena, or process is assigned to address the injustice. Thus, both buck-passing and misframing prevent Indigenous peoples from exercising their rights to self-determination.

The ways in which the duty to consult and overriding settler sovereignty are currently applied in the Canadian context also undermine Indigenous rights to self-determination, as state-centric versions of self-determination are incorporated into the legal tool of the duty to consult and legal processes and practices informed by the overarching norm of overriding settler sovereignty. Before discussing in more depth, the interconnected relationship between institutional norms (duty to consult and overriding settler sovereignty) and institutional practices (buck-passing and misframing) and how they reinforce one another, it is worthwhile briefly reviewing international norms such as the saltwater thesis, that have led to state-centric notions of self-determination. Understanding state-centric notions of self-determination can aid in explaining why these norms fail to actually protect Indigenous peoples' rights to decision-making and governing authority, and, further, understand why these norms then lead to practices of buck-passing and injustices of misframing. Thus, it is important to have a base knowledge and understanding of what norms and practices have influenced state-centric perceptions of self-determination.

State-centric perceptions of self-determination extend beyond the Canadian state and have been affirmed through international norms (e.g., the saltwater thesis) of Global Indigenous Politics (Lightfoot & Macdonald, 2020). Historically, within the UN Indigenous peoples were not deemed as "peoples" and, as such, the exercise of "self-determination" operated within the sovereign power of the imperial state (2020). Further, the 1960s' saltwater thesis, as part of the

UN's decolonisation project asserted that, "that only overseas territories, non-contiguous to the colonial power, were eligible for decolonisation and independent, sovereign statehood" (Lightfoot & Macdonald, 2020, p. 34). As such, the international norm, the saltwater thesis, led to state-centric notions of self-determination that failed to recognize Indigenous peoples right to self-determination (2020). However, within recent years there has been a shift in perceptions of self-determination to reflect non-state-centric versions of self-determination (2020). As mentioned within the introductory chapter the Declaration plays a key role in decolonizing notions and conceptions of self-determination (Lightfoot, 2021).

The adoption of the UNDRIP by the UN General Assembly has played a significant role in transforming Global Indigenous Politics (Lightfoot, 2016). Specifically, the UNDRIP provides Indigenous peoples with a legal tool to counter state-centric perceptions of self-determination, and define and determine their own rights (Curran, 2019: Doyle, 2015). As more states support the Declaration and Indigenous rights regimes, it is more likely this will create an international pressure for other states to do the same. The growing support of the Declaration is creating international pressure, demonstrated by the four reluctant states who ended up endorsing the Declaration by the end of 2010 (Lightfoot & Macdonald, 2020). Further, the implementation of the Declaration within BC shows promise that the UNDRIP could act as a legal mechanism to assert and define Indigenous rights in accordance to Indigenous peoples within provincial legislation (Amatulli, 2023; Curran 2019). That said, there remain many practices and policies put in place to uphold and re-enforce norms such as the duty to consult and overriding settler sovereignty that undermine and diminish Indigenous peoples' rights to self-determination.

As analyzed and discussed within the previous chapter, the court's interpretation of section 35 and the duty to consult allows the Crown to determine the procedural and substantive

phases of the duty to consult, resulting in a legislative agenda that fails to fully and adequately consider Aboriginal interests (Do, 2020b). Thus, the legal norm the duty to consult is problematic in advancing Indigenous peoples rights to self-determination, as it is embedded in a larger colonial legal framework that prioritizes settler sovereignty over Indigenous (Morales, 2019; Papillon & Rodon, 2020). Not only does section 35, play an imperative role in shaping the legal norm the duty to consult, but as well as the overarching norm of overriding settler sovereignty (Nichols, 2019). The legal practices, such as the duty to consult, that the norm overriding settler sovereignty informs, reflects Glen Coulthard's critiques of the politics of recognition. Norms of overriding settler sovereignty historically shaped "institutional practices that emphasize [Indigenous] recognition and accommodation" (Coulthard 2014, p. 6), while attempting to reconcile Indigenous claims of Nationhood within the constraints of settler-state institutions (2014). Thus, the legal norm the duty to consult and the overarching norm of overriding settler sovereignty lead to practices that completely undermine Indigenous rights to self-determination and protect the interest and sovereignty of the state. The norms the duty to consult and overriding settler sovereignty are directly related and connected to practices of buck-passing and misframing. Settler governments have a history of attempting to avoid to consult and override settler sovereignty by leveraging the opportunity structures that the division of powers provide to completely neglect to address given issues; and if they are held accountable, then the way the duty to consult is currently applied misframes the injustice and solutions to the given injustice.

Within the following section I will view and analyze perspectives from legal experts to gain a better understanding if the BC Declaration Act will challenge norms, such as the duty to consult and overriding settler sovereignty, that undermine Indigenous peoples' rights to self-

determination; or if the Act will exacerbate these issues and further re-affirm institutional norms that disregard Indigenous rights to self-determination and governance. Specifically, by looking at recent cases and legislation in relation to BC's *Declaration Act*, it will provide a better understanding on how a shift in the institutional norms described above will also impact practices of buck-passing and misframing. The analysis below will explain that in order to mitigate practices of misframing and buck-passing institutional norms that limit Indigenous self-determination also need to be challenged and addressed.

Analysis of Legal Experts Perspectives on Relevant Cases

To support the implementation of the *Declaration Act*, the province has introduced a Declaration Act Action Plan as well as drafted 10 principles that inform and guide Indigenous relations within the province. Both the principles and Action Plan outline promising plans and actions that indicate that the province is going to seriously implement the Declaration. Following the 2019 *Declaration Act*, the province introduced a five-year Action Plan to implement the *Declaration Act* (British Columbia Ministry of Indigenous Relations and Reconciliation, 2022). The plan included 89 actions that are sorted into four themes: 1) self-determination and inherent right of self-government; 2) title and rights of Indigenous peoples; 3) ending Indigenous specific racism and discrimination; and, 4) social, cultural and economic well-being (2022). The Action Plan creates the perception that the province is going to take an appropriate course of action to ensure that the Declaration is successfully implemented into provincial legislation. However, the province's history of promoting reconciliation but failing to adequately address disparities in power that lead to Indigenous rights being undermined and overlooked (Ladner, 2016) casts doubt as to whether the province will seriously implement these 89 actions, or continue to

proclaim they are working towards reconciliation while remaining committed to colonial ideals by failing to fully implement the Declaration.

The Draft 10 Principles also indicate that the province is incorporating the rights outlined within the Declaration to guide relations with Indigenous communities. For example, principle 6 states, "the province of British Columbia recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when B.C. proposes to take actions which impact them and their rights, including their lands territories and resources" (Government of British Columbia, n.d, p. 5). The FPIC principles could be viewed as an emergent potential norm that could mitigate practices of buck-passing and injustices of misframing that flourish in an intergovernmental context shaped by the colonial norms of the duty to consult and overriding settler sovereignty. The FPIC principles aid in determining consultation processes in accordance to Indigenous legal orders (Curran, 2019; Doyle, 2015). However, similarly to the Action Plan, the Draft Principles show a convincing plan on paper, but don't actually ensure the province will adhere to the actions/principles outlined within the Action Plan and Draft Principles. Looking at recent agreements and court cases that test BC's *Declaration Act* will provide a better avenue for examining if the province is adhering to the Declaration than government produced action plans and principles; as agreements and court decisions show concrete examples of the role the *Declaration Act* is playing in shaping policies and laws.

Within this following section I will analyze recent court cases that test the BC *Declaration Act* and the implementation of the Declaration into provincial legislation. Specifically, I will examine the recent the *Gitxaala v. British Columbia* [2023] case, the *R v. White and* Montour [2023] case, the provinces amendments to the *BC Land Act*, and the SCC

decision on Quebec's appeal to strike down the federal legislation on an *Act respecting First Nations, Inuit and Metis Children Youth and families*, and what these cases mean for BC and the implementation of the UNDRIP. The role that the UNDRIP played in these cases is a significant indicator as to how the Declaration will be implemented and upheld in provincial legislation. Further, these cases provide insight necessary to assess whether the implementation of the *Declaration Act* is likely to challenge or exacerbate practices of misframing and buck-passing and in turn shift norms like the duty to consult and overriding settler sovereignty that negate Indigenous concerns and/or impose colonial frames of justice on Indigenous communities.

The *Gitxaala v. British Columbia* was the first case that tested the application of BC's *Declaration Act* (Amatulli, 2023). As such, this case has gained a lot of attention from legal experts commenting on what this decision means for the province and the *Declaration Act* going forward. Gitxaala & Ehattesaht Nation filed a petition, arguing that the current *Mineral Tenure Act* (MTA) in BC fails to comply with the duty to consult (*Gitxaala v. British Columbia*, 2023). Further, Gitxaala argued that the current MTA does not align with rights recognized in the *Declaration Act* and the UNDRIP (2023). On the other hand, the province argued that "*DRIPA* does not create any justiciable rights, nor does it implement UNDRIP into domestic law" (*Gitxaala v. British Columbia*, 2023, para. 12). However, the British Columbia Supreme Court (BCSC) found that the duty to consult is triggered as the MTA impinges on Aboriginal rights and title. The BCSC also found that the *Declaration Act* does not implement UNDRIP into domestic law or create justiciable rights but, rather, that the *Declaration Act* is an interpretive aid (*Gitxaala v. British Columbia*, 2023).

Lisa C. Fong was the Lawyer for Gitxaala in the case and has published a blog highlighting both positive impacts as well as concerning outcomes of this case. She stressed that

it is significant that Ross J, the BCSC judge, affirmed that due to the cultural and spiritual impacts to First Nations the Crown owed a duty to consult (Fong, 2023a). As such, this aspect of the ruling is consistent with Article 25 of the Declaration which states that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard" (United Nations Declaration on the Rights of Indigenous Peoples, 2007). Further, this ruling aids in minimizing injustices from being misframed, as it recognizes that approval of unjust resource development/extractions project on Indigenous territories that create spiritual and cultural impacts is an injustice. Further, this ruling signifies that spiritual, cultural and sacred locations of First Nations are equally as important as Western religions and beliefs (Fong, 2023a).

Further, Ross J. applied section 8.1 (2) of the *BC Interpretation Act* to his analysis of the MTA, which states that: "[e]very Act and regulation must be construed as being consistent with the Declaration [i.e. UNDRIP]" (Interpretation Act, 1996). By relying on section 8.1 (2) of the *BC Interpretation Act* to interpret the argument put forward, the court rejected the Crown's argument that the UNDRIP should only be used at the end of a decision as a means of either supporting or confirming a given outcome. The BCSC affirmed that if there was a possibility of multiple interpretations of the MTA, then the Act should be interpreted through a lens that is consistent with the rights outlined within the Declaration (Fong, 2023a). The court ruling showed that the Declaration played a role in determining the decision of the case. In accordance to the Gitxaala ruling if every Act is to align with section 8.1 (2) of the *BC Interpretation Act,* it can be speculated that this ruling will aid in shifting the overarching norm of overriding settler sovereignty. Ross J.'s assertion that the UNDRIP must be applied to the interpretation of the

MTA provides hope that the norm of overriding settler sovereignty will be challenged, as an Indigenous created international legal tool (Lightfoot, 2016) was used to analyze a Crown statue to interpret if the statue breached the rights outlined and contained within the Declaration.

The BCSC decision affirmed that the province has a duty to consult, but did not affirm Indigenous peoples have a right to the FPIC principles. Even though the ruling did indicate some promise that the UNDRIP is starting to shift the way Aboriginal law is practiced, there is still doubt that there has been enough of a shift that the practices of misframing and buck-passing will be mitigated, as the legal norm the duty to consult was not challenged in a way that would shift this norm to incorporate, what I refer to as a potential emergent norm, the FPIC principles. As discussed in the previous chapter, the FPIC principles hold the potential to mitigate misframing injustice (systemic and strategic) and solutions, as well as practices of buck-passing. Further, BCSC provided the province 18-months to amend the MTA in a manner that is consistent with the Duty to Consult (*Gitxaala v. British Columbia,* 2023). The 18-month grace period is reason for concern, as this allows for mining explorations to continue without adequately consulting First Nations. Further, mineral claims that are made within that 18-month period will continue to exist after the 18-month period (Fong, 2023a). Despite the *Gitxaala v. British Columbia* case exemplifying ways in which the UNDRIP is influencing court rulings to include and adhere to Indigenous rights, certain aspects of the BCSC decision also provide reason to doubt that the province will seriously implement the Declaration.

Fong (2023) also commented on the many concerning components of the BCSC ruling. For one, Ross J rejected the argument that the negative impacts on Gitxaala's legal orders and governance would trigger the duty to consult (Fong, 2023a). Ross J stated that, "[t]he role of the province is to preserve the territories such that each First Nation can exercise its Aboriginal title

rights after Aboriginal title is settled" (*Gitxaala v. British Columbia*, 2023, para. 305). This statement further perpetuates the idea that Aboriginal title rights falls into a form of common law, rather than acknowledging and upholding Indigenous governance and legal orders (Ladner & McCrossan, 2016). And as discussed in the previous chapter, treating issues of land dispossession as sole issues of title misframes the injustice. If the Declaration is interpreted in this way, instead of providing a more robust protection of Indigenous rights than the duty to consult, the interpretation and application of the Declaration and FPIC principles will also act merely as an administrative check-box, rather than fully upholding and respecting Indigenous legal orders and governance (Curran, 2019).

The court also rejected the argument presented by the intervenors (BC Human Rights Commissioner) that the *Declaration Act* implements the UNDRIP into domestic law. The intervenors argued that in accordance to section 2(a) of the Act, the Declaration is to be implemented into provincial legislation (Fong, 2023a). Section 2(a) states that the purpose of the *Declaration Act* is to "affirm the application of the Declaration [UNDRIP] to the laws of British Columbia" (Declaration on the Rights of Indigenous Peoples Act, 2019). However, the court affirmed that section 2 of the *Declaration Act* does not create any obligation to implement the Declaration, as it is merely just a "purpose statement", but does not create substantive provisions (Fong, 2023a). Further, the court also rejected the argument put forward by Gitxaala that in accordance to section 3 of the Act, the government must work with Indigenous peoples to address laws that are inconsistent with the UNDRIP. The court stated, "s. 3 was not intended to invoke the courts to adjudicate every instance where the laws of BC may be inconsistent with UNDRIP" (*Gitxaala v. British Columbia*, 2023, para 488). Instead, the province is

obligated to consult and work with Indigenous communities when laws are not consistent with the UNDRIP, but that does not obligate the court to adjudicate (Fong, 2023a).

The court's statements pertaining to BC's *Declaration Act* is concerning; if no sections of the Act create justiciable rights, it is hard to believe that the *Declaration Act* will create substantive change (Fong, 2023a). It is important to note that if the *Declaration Act* provides interpretive guidance in similar cases to the Gitxaala case, this could potentially aid in mitigating injustices of misframing. However, if the *Declaration Act* does create justiciable rights, this will create more challenges and difficulties in misframing injustices. In order for an international legal standard (like the UNDRIP) to become implemented in domestic legislation in a federation like Canada, the law also has to be implemented in the provinces if the law touches on or implicates provincial jurisdiction (Janes, 2023). As such, if BC seriously implements the Declaration this could potentially redress issues of buck-passing as this would prevent the province from blaming Indigenous concerns/issues on the federal government, as they would have to align provincial laws with the UNDRIP. However, as seen within the court's interpretation of the *Declaration Act* in the *Gitxaala v. British Columbia* case, the *Declaration Act* does not mandate the province to implement the Declaration. If subsequent interpretations of the Act are consistent with Ross J's interpretation, the *Declaration Act* and interpretation of the Act will run the risk of potentially following the pattern of promoting "reconciliation", but only seeking to reconcile Indigenous concerns within the constraints of settler state sovereignty (Coulthard, 2014; Do, 2020; Morales, 2019).

Prior to the Act being passed, business law firm, McCarthys, also raised concerns over the vague language used within the *Act.* Specifically, the firm highlighted that the language used within section 3 is rather ambiguous. For example, while the act states that "[i]n consultation and

cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration" (Declaration on the Rights of Indigenous Peoples Act, 2019), the firm pointed out that the Act does not clarify what is considered a sufficient "necessary measure" (Axmann, 2019). Additionally, it does not describe what is the requirement for laws to be consisted with the UNDRIP. The law firm stated that the ambiguous language within the *Declaration Act* could lead to failure and legal challenges in adequately implementing the Declaration. And as seen within the Gitxaala case, the ambiguity within the *Declaration Act*, despite creating some mitigating affects, has also in certain scenarios created a loophole that enables the province to avoid accountability for not fully implementing the UNDRIP into provincial legislation (*Gitxaala v. British Columbia*, 2023). This is problematic because if the province does not successfully implement the Declaration, instead of challenging institutional norms, such as the duty to consult and overriding settler sovereignty, that often undermine and overlook Indigenous self-determination, it could re-affirm these norms, and in turn exacerbate practices of buck-passing and misframing.

Despite the confusing interpretation of the *Declaration Act* within the *Gitxaala v. British Columbia* [2023] case, the *R. v. Montour and White* [2023] case in Quebec could have a positive impact on the implementation of the Declaration in British Columbia (Fong, 2023b). According to Fong, the Montour case provides a ground breaking decision on how the UNDRIP should be applied and upheld by courts (2023b). The Montour case involved two Indigenous individuals who were convicted for not paying taxes on tobacco that they were planning to bring from the States to Canada (2023b). The two individuals argued that the tax law breached the Covenant Chain and treaties made between 1665 and 1830s (2023b). The court agreed that the Covenant

Chain was a binding treaty, and thus, the tax laws did breach their Aboriginal and treaty laws (2023b). Additionally, the court found that the test established within the Van der Peet case is no longer applicable due to the changing legal and societal conditions and, as such, the court affirmed that trading tobacco is an Aboriginal right (2023b).

The Van der Peet test has received a lot of criticism, as the test determines whether a given activity has been an integral part of the societies/cultures of Indigenous peoples prior to European arrival (Fong, 2023b), with a non-Indigenous judge typically determining if these practices are integral to Indigenous cultures and societies (2023b). In deciding whether the court should apply the Van der Peet test, the court in the Montour case determined that the "entire societal landscape surrounding the decision in Van der Peet has changed" (Fong, 2023b, para. 6). The court further found the UNDRIP played a key factor in influencing these societal changes and recognizing that the Van der Peet test does not actually act as a consistent and reliable tool to determine Indigenous rights (2023b). The court used the UNDRIP as an interpretive aid to determine that the Van der Peet ruling is no longer applicable and that laws need to be consistent with the UNDRIP.

Importantly, the court in *Montour* noted that the UNDRIP "should be given the same weight as a binding international instrument in the constitutional interpretation of s. 35(1)" (*R. c. Montour*, 2023, para. 1201). The court also affirmed that rights contained within the Charter should at least equate to the rights contained in international human rights documents that have been ratified by Canada (Fong, 2023b), and that the UNDRIP should be treated as a binding international instrument. Thus, section 35 rights must be consistent with the UNDRIP. As such, the UNDRIP was used as in interpretive aid in this case to determine that the Van deer Peet test is an inaccurate tool to determine Indigenous rights, and in accordance to UNDRIP Indigenous

peoples have a right "to freely pursue economic development by their own chosen means" (*R. c. Montour*, 2023, para. 1370). This ruling can significantly impact the way in which BC interprets the implementation of the Declaration. The Montour case involved the federal UNDRIP legislation, however, there is very similar language used in BC's *Declaration Act* and the federal legislation (Fong, 2023b). Further, the interpretation and application of the UNDRIP in the Montour case could create a national standard for how the courts perceive both federal and provincial UNDRIP legislations (2023b).

If the Montour case does influence BC to interpret section 35 in accordance with the UNDRIP, this would significantly aid in decolonizing institutional norms that apply colonial frames of justice to injustices of land and sovereignty dispossession. Specifically, if the FPIC principles and the Declaration were applied to the interpretation of Aboriginal title rights, this would challenge norms that treat Aboriginal title rights as a form of common law that fail to acknowledge inherent Indigenous legal orders (Ladner & McCrossan, 2016). Further, if the province interprets the Declaration and the *Declaration Act* in a way that is consistent with the way the UNDRIP was interpreted in the Montour case, this would also aid in diminishing injustices of misframing and buck-passing. If the interpretation of section 35 is consistent with the UNDRIP, this could potentially lead to the legal norm, the duty to consult shifting to reflect the FPIC principles, which would aid in mitigating practices of buck-passing and misframing. If the FPIC principles are seriously implemented into provincial legislation this would most likely shift the opportunity structures that the division of powers currently creates, as settler governments would have a more difficult time passing the buck, as Indigenous peoples rights to the FPIC principles would be protected in provincial legislation. Further, if the FPIC principles are enforced in provincial legislation and the interpretation of section 35 is consistent with the

UNDRIP, this would mitigate practices of misframing (both strategic and systemic) as it would enable room for Indigenous legal orders to operate within the interpretation of section 35.

In addition to the Montour decision exemplifying the possibility of influencing the way the Declaration is implemented into provincial legislation, there has also been recent government actions that indicate that the province is considering and aligning its actions with the rights outlined in the UNDRIP. For example, the province was preparing to amend the *Land Act* to ensure shared authority between the Crown and Indigenous governments regarding development projects on Crown land (Hunter, 2024). However, on February 21, 2024, the provincial government announced that the amendments to the BC *Land Act* will be placed on hold due to non-Indigenous concerns expressed regarding the amendments (McKay, 2024). The *Land Act* currently governs 94% of the provinces public land access (Hunter, 2024). Thus, amending the Act to ensure there is shared authority over decisions pertaining to public land with Indigenous partners aligns with actions and rights contained within the UNDRIP. This, in turn, would significantly aid in diminishing institutional norms, such as the duty to consult and overriding settler sovereignty, that have historically resulted in Indigenous peoples being treated as objects of jurisdiction rather than equal governing partners (Pasternak, 2014).

The pause to the *Land Act* amendments exemplify how misframing can directly impede the successful implementation of the Declaration. The original intent to amend the *Land Act* was a strong indicator that the *Declaration Act* is starting to change colonial policies and legislations that have historically promoted settler sovereignty over Indigenous peoples' rights to self-determination. However, given that the amendments are paused, this has created great frustration among Indigenous groups, especially given the original praise for the amendments (The Union of B.C. Indian Chiefs, 2024b). Further, in a CBC article, BC Conservative Party president Aisha

Estey, was quoted saying, “the changes will ‘repeal business’ and section 35 of the Constitution already facilitates the process that we are supposedly trying to facilitate with these Land Act amendments” (McKay, 2024). This statement is a direct example of how the epistemology of ignorance leads to misframing. Estey’s statement reaffirms the belief that section 35 provides a “full box of rights”, which creates a normative perception that Indigenous rights are adequately protected, while enforcing these rights through state controlled processes that provide little room for Indigenous legal orders to operate within this framework (McCrossan & Ladner, 2016) and, in turn, prevents mechanisms that address colonial power disparities, such as the proposed amendments to the Land Act from being enforced.

Estey was also quoted in the same article stating, "[w]e disagree that six per cent of the population should have essentially a veto power over 95 per cent of the land” (McKay, 2024). Again, this statement misframes the proposed solution to the current *Land Act*, that directly impedes on Indigenous peoples’ decision-making authority, as both the First Nations Leadership Council and Nathan Cullen, Minister of Water, Land and Resource Stewardship stated that the amendment would not give First Nations veto power (McKay, 2024; The Union of B.C. Indian Chiefs, 2024). By framing the proposed amendments as solely just concerning “veto power”, the statement fails to acknowledge that the current *Land Act* does not acknowledge Indigenous peoples’ decision-making authority (The Union of B.C. Indian Chiefs, 2024b). Thus, even though there is some momentum in amending policies to align with the UNDRIP, misframing, both systemic and strategic, can play a major role in interfering with the implementation of the Declaration, and in turn further perpetuate practices of misframing.

The Federal government has also been implementing actions that signal commitment to the Declaration. For example, in 2019 the federal government passed an *Act respecting First*

Nations, Inuit and Métis children, youth and families with the goal of minimizing the number of Indigenous children in foster care (Trusedal et al., 2024). The Act protects and affirms Indigenous peoples' rights to have governing authority over child and family services (2024). This Act is significant as it is the first time that the federal government has passed legislation that addresses Indigenous child and family services (2024). Further, this Act indicates Canada's commitment to implement the UNDRIP (2024), as it is addresses actions and policies that breach the rights outlined and protected under the Declaration. However, the Attorney General of Quebec made a claim to the Quebec Court of Appeal (QCCA) to strike the Act down (2024). The Attorney General claimed that Canada does not have the jurisdictional powers to pass legislation that impinges the provinces jurisdictional responsibilities (2024). The Attorney General's arguments exemplify how settler governments have historically used the ambiguities between the division of powers to continue colonial ideals and actions that further perpetuate power disparities between Indigenous and settler governments. However, the QCCA affirmed the Act was constitutional except for section 21 and 23(a) of the Act. Sections 21 and 23(a) allow for federal laws pertaining to child and family services to override provincial laws that relate to child and family services (2024).

Quebec appealed the QCCA decision to the SCC. The SCC rejected Quebec's arguments and affirmed the Act was constitutionally valid (Trusedal et al., 2024). Further, the court claimed that the legislation is consistent with article 28 and s. 5 of the federal UNDRIP Act, as it is required to collaborate with Indigenous parties on legislation that affects Indigenous rights and laws (2024). The SCC used the UNDRIP to interpret the A*ct Respecting First Nations, Inuit and Metis Children, Youth and Family*. Though this case involved federal legislation, the outcome and ruling of the case could potentially influence how the UNDRIP is upheld within the province

of British Columbia. Specifically, it is significant that the court had recognized and affirmed that the UNDRIP has been implemented into Canada's positive law, as well as rejected Quebec's claim that the Act is unconstitutional as it breaches provincial jurisdiction (2024). As this exemplifies that the implementation of the Declaration has the potential to limit settler governments getting away with leveraging the ambiguities within the division of powers between federal and provincial jurisdictions as a means of either ignoring Indigenous concerns or continuing to pass assimilatory policies and actions.

As discussed above, the implementation of the Declaration in provincial legislation has shown both promise as well as questions as to whether the BC's *Declaration Act* will challenge institutional norms that have historically led to the province completely ignoring or imposing settler colonial frames of justice as a means of addressing injustices of Indigenous sovereignty and land dispossession. The pause to the *Land Act* amendments exemplifies that even despite provincial efforts to align laws and policies with the *Declaration Act*, practices of misframing can directly impede and derail these efforts. Further, the interpretation of BC's *Declaration Act* in the *Gitxaala v. British Columbia* case is concerning, as it affirms that the Act does not implement UNDRIP into provincial legislation, and as such this follows the pattern of what political scientist Glen Coulthard refers to as colonial politics of recognition. Where the reconciliation efforts only seek to reconcile Indigenous assertions of nationhood while prioritizing state sovereignty, and in turn further perpetuate power disparities that enable settler governments to pass legislation that further oppress Indigenous peoples and communities (Coulthard, 2014). And if BC's *Declaration Act* does not actually obligate the province to implement and adhere to the UNDRIP, this would potentially create another failed attempt of reconciliation, as it would result in a lack of substantive change. As lawyer Lisa Fong states that,

if the *Declaration Act* does not create justiciable rights, rather than creating substantive change in common law pertaining to Aboriginal rights and title, the Act is rather "simply vacuous political bromide" (Fong 2023).

However, on both a federal and provincial level there has been significant efforts to uphold and adhere to the Declaration. For example, the province acknowledging that the MTA triggers a duty to consult, the Montour decision, as well as the federal governments Act pertaining to child services and the related SCC decision, all show that the federal and provincial UNDRIP legislations are starting to influence common law to align with the rights contained in the UNDRIP. To further investigate if the *Declaration Act* is going to create substantive change to Aboriginal law it is imperative to gain Indigenous perspectives on BC's *Declaration Act*. Obtaining Indigenous perspectives and voices will provide a better understanding of the current situation from the perspectives of those who are directly affected by the legislation. Within the next chapter I will further analyze the *Declaration Act's* potential to change institutional norms by reviewing Indigenous voices and perspectives.

Conclusion

To successfully shift institutional norms, such as the duty to consult and overriding settler sovereignty to potential emergent norms, such as the FPIC principles that would aid in mitigating practices of misframing and buck-passing, it is imperative that the *Declaration Act* is interpreted and applied consistently. However, as described throughout this chapter there is inconsistencies in the way the courts are interpreting and adhering to the *Declaration Act.* The BCCA ruling within the *Gitxaala v. British Columbia* case that determined the *Declaration Act* does not obligate the province to implement the UNRIP into provincial legislation, weakens the Act and

its potential to challenge state-centric notions of self-determination that perpetuate colonial agendas and diminish Indigenous peoples' decision-making powers. If the Act does not create enforceable rights, it leads to questions around the validity and purpose of the Act. That is not to say that using the Act as merely an interpretive aid would not create change in the way Aboriginal laws are viewed and practiced, but justiciable rights would aid to really protect and align policies with the rights outlined in the Declaration and in turn create additional challenges in passing the buck and misframing injustices.

Institutional norms, such as the duty to consult and overriding settler sovereignty re-enforce institutional practices like buck-passing and misframing. Thus, if the *Declaration Act* can shift institutional norms to reflect international Indigenous rights norms as outlined in the Declaration, such as the FPIC principles this would also impact practices of buck-passing and misframing. However, as demonstrated by the pause to the *Land Act* amendments, practices of misframing could impede the successful implementation of the Declaration, which in turn would prevent institutional norms from reflecting international norms and standards of Indigenous human rights. Similarly, to injustices of misframing, practices of buck-passing could also impede the successful implementation of the Declaration. Thus, in order for the *Declaration Act* to create substantive change in the way Aboriginal law is viewed and practiced, both institutional norms, the duty to consult and overriding settler sovereignty need to shift to reflect emergent norms such as the FPIC principles, which would result in the mitigation of practices of buck-passing and injustices of misframing.

Despite the interpretation of the *Declaration Act* in the Gitxaala case creating confusion and concern as to whether the *Declaration Act* will actually create substantive change to Aboriginal law within the province. There have also been many examples of both federal and

provincial action that indicate that the UNDRIP is creating a legal and political shift in the way Aboriginal rights and laws are viewed, discussed, and applied. For instance, the province affirming the MTA triggers a duty to consult, the ruling in the Montour case, the federal governments legislation regarding Indigenous child and family services and the related SCC ruling, all indicate the UNDRIP is starting to shift the overarching norm of overriding settler sovereignty. If the Declaration and the *Declaration Act* continues to create positive shifts in the way the province handles Indigenous relations, this could significantly aid in reconciling Indigenous relations and further mitigate practices of buck-passing and misframing, that have been persistent problems and strategies employed within the province to maintain power disparities and protect state sovereignty over Indigenous.

The purpose of this chapter was to investigate the changes that have occurred since the *Declaration Act* had been passed, to gain a better understanding of how and if the Declaration is starting to challenge colonial norms, that have dictated the province's actions in regards to Indigenous relations. Based off the evidence presented in the chapter it appears that the *Declaration Act* is not ending the era of buck-passing and misframing, however due to the slight change in the way the norms overriding settler sovereignty and the duty to consult are being viewed and applied does indicate that the *Declaration Act* is starting to shift the opportunity structures that division of powers have created, that allows for settler governments to pass the buck and misframe injustice. Thus, the *Declaration Act* is not necessarily ending the era of passing the buck and misframing injustices, but is making it more difficult to do so.

In the next and final chapter of this thesis I will continue to investigate the findings and conclusions of this chapter, by analyzing and reviewing Indigenous voices and perspectives on the *Declaration Act*. It is imperative to gain Indigenous perspectives on the *Declaration Act* and

relevant cases and legislation to determine if I have missed anything crucial from my analysis and conclusions thus far. Additionally, within the final chapter I will be leveraging Indigenous voices and perspectives to further investigate how and if the *Declaration Act* is creating a shift in the opportunity structures derived from the division of powers and section 35 that have led to practices of misframing and buck-passing. Specifically, examining if the *Declaration Act* is shifting the duty to consult and over-arching norm of overriding settler sovereignty to incorporate the rights outlined in the Declaration, such as the FPIC principles, and how that would impact practices of buck-passing and misframing.

Chapter Four
Indigenous Perspectives on BC's Declaration Act & Relevant Cases

In the last chapter of this thesis, I will review Indigenous perspectives pertaining to the *Declaration Act*. Specifically, I will review Indigenous perspectives on the progression of the Act since it was introduced in 2019 as well as government action or lack of action since the Act was first introduced. In this thesis thus far, it has been identified that the province's history of misframing and buck-passing pose challenges in addressing injustices of land and sovereignty dispossession. However, as discussed in chapter two, the principles contained within the Declaration hold potential in addressing injustices of misframing and buck-passing, which would aid in diminishing injustices of land and sovereignty dispossession. Historically, Indigenous peoples have been forced to participate in legal structures and systems that do not prioritize Indigenous interests and lead to discrimination and focus on state-centered versions of human rights (Lightfoot, 2016). The Declaration aims to address how Indigenous rights have historically been applied and viewed through a state-centric lens by providing a framework and standard for Indigenous rights that can be implemented domestically (2016). Specifically, the UNDRIP can be used as a political tool to introduce new mechanisms to advance and protect Indigenous rights beyond the constraints of state-sovereignty (2016). If the implementation of the Declaration into provincial legislation can successfully challenge the constraints of state sovereignty as a means of defining and protecting Indigenous rights, this would also address practices of buck-passing and misframing.

The Declaration has the potential to deconstruct state-centric versions of self-determination that derived from international norms, such as the saltwater thesis, that have historically denied Indigenous peoples rights to self-determination (Lightfoot, 2016). Thus, if the UNDRIP were to be successfully implemented in British Columbia, this would also result in a

shift in institutional norms such as the duty to consult and overriding settler sovereignty and, in turn, would likely mitigate practices of passing the buck and misframing injustices and solutions. As explained in the previous chapter the duty to consult and overriding settler sovereignty in the Canadian legal context inform practices that apply visions of "self-determination" that prioritize state sovereignty and interest over Indigenous. Thus, if the *Declaration Act* successfully addresses the way self-determination is applied, potential norms emerging from the Declaration, such as the FPIC principles could be incorporated into the duty to consult. As previously explained, if the FPIC principles were to be incorporated into provincial legislation, this would also significantly aid in confronting practices of buck-passing and injustices of misframing, as the Declaration would uphold Indigenous rights regardless of the jurisdiction that a certain issue/injustice falls under.

Institutional norms, such as the duty to consult, and the over-arching norm of overriding settler sovereignty, further reinforce and lead to injustices of misframing and buck-passing, as these actions and norms reinforce one another. The duty to consult and overriding settler sovereignty inform practices that lead to both misframing of injustices and solutions, as these practices place the wrong avenue and institution for addressing how Indigenous rights to self-determination should be applied and protected. Further, the legal and political landscape that exists in a multi-level governance system enables governments to avoid responsibility in addressing issues of land and sovereignty dispossession (Harrison, 1996; James, 2009). Further, as analyzed in chapter three, recent examples of cases and policies show that the implementation of the Declaration is both addressing, as well as further perpetuating institutional norms that then lead to misframing and buck-passing. For example, the province affirming the MTA triggers a duty to consult indicates that BC's *Declaration Act* is creating a shift in the way Aboriginal laws

are viewed and practiced. However, the proposed *Land Act* amendments being put on hold further perpetuate injustices of misframing. In order to conclude this thesis, it is imperative to review Indigenous perspectives to gain insight from those who are directly affected by the *Declaration Act*. Indigenous perspectives on the *Declaration Act* are necessary to consider when making conclusions on whether the Act is addressing or exacerbating issues of misframing and buck-passing, ensuring the conclusions made within this thesis align with Indigenous views, as well as assessing if there are any crucial aspects or perspectives missing from my own analysis.

In this chapter, I will review Indigenous perspectives collected from various Indigenous news outlets and organizations. I will mainly be reviewing perspectives and news releases obtained from the Union of British Columbia Indian Chiefs (UBCIC), and the BC Assembly of First Nations. I also review a special report examining the BC *Declaration Act* published by the Yellowhead institute, which is an Indigenous led think tank. The UBCIC advocates for Indigenous Nations across the province of British Columbia to protect and promote each Nations rights and concerns (The Union of B.C. Indian Chiefs, n.d.). The BC Assembly of First Nations, meanwhile, represents and advocates for 203 First Nations in British Columbia (British Columbia Assembly of First Nations, 2024). Thus, collecting perspectives and news releases from these organizations provide insight from Indigenous leaders and representatives of First Nations across the province on their perspectives on BC's *Declaration Act.* Specifically, I will use these perspectives to answer the research question posed in the introductory chapter which is: will the implementation of the *Declaration Act* in provincial legislation surmount or exacerbate injustices of misframing and buck-passing? And will the *Declaration Act* have more of an impact in mitigating practices of buck-passing and injustices of misframing in certain areas more than others? I will answer these questions by applying the conclusions and analyses made in this

thesis this far in relation to Indigenous perspectives on government action or lack of action since the *Declaration Act* was introduced.

Throughout this chapter, I argue that the implementation of the Declaration in BC is reshaping the opportunity structures established by the division of powers and section 35 that lead to misframing injustices and solutions (both systemic and strategic), as well as settler governments passing the buck and avoiding responsibility for given injustices. I argue that the shift in the opportunity structures as a result of BC's *Declaration Act* is making it more difficult to pass the buck and misframe injustices, but does not necessarily end the era of buck-passing or misframing. Even though the province has made progress in amending policies to align with the Declaration, in order to end the era of misframing injustices and passing the buck, the government needs to do more to address assimilatory policies and practices in the province of BC. As identified in previous chapters the Declaration does have the potential to significantly change the way Aboriginal law and rights are viewed and practiced; however, in order to reach its potential government action needs to be conducted at a quicker rate than it currently is. Specifically, settler governments need to actually work with, collaborate, and cooperate with Indigenous peoples on all areas of policy development in regards to the *Declaration Act* and relevant legislation.

In chapter two it was concluded that the Declaration, specifically the FPIC principles hold potential in addressing issues of misframing and buck-passing. Through the analysis of the *Haida Nation v. British Columbia* and *Taku River Tlingit First Nation v. British Columbia* case it was revealed that the FPIC principles provide a more robust protection of Indigenous rights to decision making than the duty to consult. Further, the implementation of the FPIC principles in provincial legislation would address issues of buck-passing as the Declaration would affirm the

rights to self-determination would be protected regardless of the jurisdiction. Further, the FPIC principles could potentially address issues of misframing (both systemic and strategic) as the FPIC principles enable Indigenous peoples to define their own consultation mechanisms and incorporate Indigenous legal orders into decision making processes which would limit state-centric definitions of self-determination from being enforced on Indigenous communities (Morales, 2019; Papillon & Rodon, 2020). Chapter three concluded that the *Declaration Act* is shifting institutional norms such as the duty to consult and overriding settler sovereignty in a way that is not yet fully mitigating practices of buck-passing and misframing, but challenges the opportunity structures that empowers settler governments to pass the buck and misframe injustices. In this chapter I will continue to investigate how and if the *Declaration Act* is shifting the opportunity structures that are derived from jurisdictional ambiguities and section 35 of the Constitution, by reviewing Indigenous perspectives and comparing those perspectives to my analysis thus far.

Within the following sections I will review Indigenous perspectives from when the *Declaration Act* was first introduced to opinions on recent court cases and policies in relation to the *Declaration Act*. I will then use the analysis and concepts developed in the thesis thus far to examine the Indigenous perspectives in order to determine in accordance to Indigenous groups, if the *Declaration Act* is creating a substantive change in the way Aboriginal rights and laws are viewed and perceived. Obtaining Indigenous perspectives and voices will aid in contextualizing my analysis and providing insight from those who are directly impacted by the *Declaration Act.* Finally, I will highlight the limitations to this study, specifically recognizing the gaps within my own conclusions by comparing what I have learned and concluded in this thesis thus far verse what First Nations are saying regarding BC's *Declaration Act* and relevant cases and policies.

Overview of Indigenous perspectives on the *Declaration Act*

When the BC UNDRIP legislation was first introduced in October 24, 2019, the Union of British Columbia Indian Chiefs (UBCIC) released a news release, in which they covered and quoted perspectives from Indigenous leaders on the new UNDRIP legislation. Within this news release they quoted Terry Teegee, Regional Chief of the BC Assembly of First Nations, Cheryl Casimer, the First Nations Summit political executive, and the Grand Chief Stewart of the Union of BC Indian Chiefs. The three leaders had the following to say:[2]

> "I applaud Premier Horgan and his cabinet for their **bravery** and perseverance in moving this forward. Implementing the UN Declaration is a non-partisan move, and we have been waiting 12 long years for this. Businesses and investors will benefit from this as it creates **certainty and predictability for projects** in this province - British Columbians will benefit from **job creation** and First Nations will benefit by having a **seat at the table**. Mussi Cho [thank you] to all British Columbians. We are finally moving forward together."
>
> ~ Terry Teegee, Regional Chief of the BC Assembly of First Nations

> "The provincial government has a long **history of denying** the very existence and rights of Indigenous peoples. We are pleased that this changes today, and the Province of British Columbia is working with us in turning the page in our collective history and embarking on a new era and path for building a respectful and modern **government-to-government relationship** - a relationship built on recognition, respect, co-operation and partnership with a goal to improve the lives of our citizens and bring reconciliation to the forefront of society."
>
> ~ Cheryl Casimer, the First Nations Political Executive

> "Today is a good day. Without a doubt, this unifying bill represents an incredible step forward in Crown-Indigenous relations in the Province of British Columbia. We are incredibly proud of how far we've come together, and we eagerly anticipate next steps. This landmark bill is not only aspirational but includes **tangible and practical tools for implementation**. We hold up our hands to our ancestors and past leaders for paving the way for this critical work, and we look to

[2] The citation for the following quotes can be found at The Union of B.C Indian Chiefs, 2019.

our grandchildren, who will enjoy a more certain future."
~ Stewart Phillip, Grand Chief of the Union of BC Indian Chiefs

It is evident that the introduction of the UNDRIP legislation in BC was well received and praised by Indigenous leaders (The Union of B.C Indian Chiefs, 2019). In Regional Chief Terry Teegee's statement, he noted that the Declaration will create certainty and predictability and enable First Nations to have a seat at the table, which alludes to the fact that historically processes of decision making have not been clear and Indigenous peoples have not had a say in matters that directly impact them. Thus, these points are important to note when considering the *Declaration Act* and its potential to mitigate practices of buck-passing and misframing. As discussed in chapter three, the legal norm the duty to consult and the overarching norm of overriding settler sovereignty inform legal process and outcomes that apply state-centric frameworks of consultation, that fail to consider and incorporate Indigenous legal orders and voices, which then further perpetuates issues of misframing and buck-passing (Allard & Curran, 2021; Curran, 2019; Morales, 2019; McCrossan & Ladner, 2016; Papillon & Rodon, 2020). As such, if the implementation of the Declaration does provide consistency and a seat at the table for Indigenous peoples as Teegee suggested, this will also aid in preventing practices of buck-passing and misframing injustices, that have played a prominent role in the way the province has handled Indigenous relations. The potential the Declaration holds in addressing legal processes that have prioritized state interest and legal mechanisms over Indigenous, such as consultation mechanisms like the duty to consult (Papillon & Rodon, 2020), can explain why Teegee applauded the province for its "bravery" for implementing the Declaration. As the Declaration could potentially create an unprecedented shift in the way the province addresses Indigenous relations.

It is also worth paying special attention to Cheryl Casimer's statement, specifically the claims that the government has a long history of denying the "very existence and rights of Indigenous peoples" (The Union of B.C Indian Chiefs, 2019). As explained in chapter two, through the analysis of the *Haida v. British Columbia* [2004] and the *Taku River Tlingit First Nation v. British Columbia* [2004], the province has historically denied Indigenous rights by leveraging the political and legal landscape that exists in the multi-level governance structure in Canadian federalism. As seen with the Haida and TRTFN cases, the province had attempted to completely deny the existence of Indigenous rights, as well as their moral and legal responsibility to uphold and honour these rights by claiming the federal government has jurisdictional responsibilities over Indigenous peoples. Thus, it was not the provinces responsibility to address the rights or concerns that were being brought to attention in these cases (*Haida Nation v. British Columbia*, 2004; *Taku River Tlingit First Nation v. British Columbia* 2004). Further, Casimer recognized that the BC *Declaration Act* would create a government-to-government relationship (The Union of B.C Indian Chiefs, 2019). If the implementation of Declaration into provincial legislation did create a government-to-government relationship, this would mitigate practices of passing the buck as seen in the Haida and TRTFN cases. The province would be less likely to refer all Indigenous concerns, rights, and issues to the federal government, as the successful implementation of the Declaration would foster a direct relationship between the government of British Columbia and Indigenous governments in the province.

Grand Chief Stewart claimed the *Declaration Act* applies tangible and practical tools for implementation. Throughout the remainder of this chapter, I will examine what exactly these practical tools are, and if and how these tools will enable Indigenous peoples to actually work

with settler governments to ensure Indigenous peoples have a seat at the table, and that the Act is fostering a government-to-government relationship. Further, noting that the implementation of the Declaration will create a "more certain future for their grandchildren", also echoes the statement made by Teegee pertaining to uncertainty, which again alludes to the fact that, currently, the way Indigenous rights are upheld and practiced in the province does not guarantee the full recognition and respect for Indigenous rights. Thus, if the Declaration is successfully implemented this will create more certainty in how Indigenous rights are practiced and applied, and if the government of BC actually works with and collaborates with Indigenous peoples on all aspects of the policy development in regards to the *Declaration Act,* this will also mitigate practices of buck-passing and misframing.

In 2020 the Yellowhead institute conducted an assessment on BC's *Declaration Act*. Within the report there is an interview between Christina Gray, a Yellowhead Research fellow, and Anishinaabe legal scholar John Borrows. Within the interview, Gray asked Borrows about section 3 of the *Declaration Act,* and specifically questioned the language used within section 3 and what exactly "consultation" means in this context. Additionally, she asked in what ways could the province comply with section 3. As previously mentioned, section 3 states, "in consultation and cooperating with Indigenous peoples of B.C., the government must take all measures necessary to ensure the laws of B.C. are consistent with the Declaration" (Declaration on the Rights of Indigenous Peoples Act, 2019). Within the interview Borrows stated that to comply with section 3 of the *Declaration Act* that:

> "[o]ne way of doing that is by creating legislation that commits itself to a process of working with Indigenous peoples, and in that process, figuring out what are those measures that are necessary to bring its laws in line or to be consistent with the Declaration …But in order to do that in the most human rights compliant way, **you actually work with the people concerned to make sure your legislative**

> **action aligns with the international instrument**" (Gray & Borrows, 2020, p. 10).

Now while Borrows did not specify whether BC is currently committing to work with Indigenous peoples to ensure its laws are in line with the Declaration, it remains important to keep Borrows' analysis in mind as we review and examine Indigenous perspectives on the *Declaration Act*, in order to better assess if the Declaration is seriously changing the way the province has historically handled Indigenous concerns. The province has a history of failing to engage with Indigenous peoples on matters that directly impact them (James, 2009; Sayers, 2020), which in turn leads to injustices being misframed. Failing to engage with those who are directly impacted by a given injustice blocks potential avenues and actors that would be able to effectively remedy the given injustice (Fraser, 2008). Thus, if the Declaration is implemented in accordance to Borrows' advice, this would ensure that the government of British Columbia would work with and collaborate with Indigenous peoples on all areas of policy development on matters and legislation that directly impact them, and in turn this would diminish injustices of misframing.

Within the same Yellowhead institute report Nuu-Chan-nulth Environmentalist and Business scholar Judith Sayers, stated that in order for the province to fulfill its commitments to the UNDRIP, BC will have to amend its legislative drafting process to ensure Indigenous peoples are aware of new legislation, as well as actually work with Indigenous peoples on matters that would affect them (Sayers, 2020). Further, Sayers noted that nine months after the legislation had been introduced, the majority of First Nations in BC did not see a draft of the UNDRIP Action Plan nor were they asked for their input on the implementation of the Declaration into provincial legislation. Sayers, also noted that at the time the report was conducted, the government of BC tabled three bills that would amend existing laws and failed to

notify First Nations of these changes or ask for their opinions. One of the tabled Bills was to amend the *Clean Energy Act,* with amendments that would have allowed the government to define what clean energy is. Additionally, these amendments would allow the government to buy its power from outside the province. These proposed amendments to the *Clean Energy Act* would prevent First Nations from being able to create clean energy (2020). As Sayers stated, not involving First Nations in the legislative process for amendments like the *Clean Energy Act* sends a clear message to First Nations, that the province is not serious about implementing the Declaration into provincial legislation (2020).

Additionally, Sayers explained that there are only two mechanisms in which the province can implement the Declaration, and if there were more options this would improve the effectiveness of the legislation (Sayers, 2020). One mechanism is to amend legislation to ensure consistency with the Declaration. Although, as Sayers explained, there are over 5000 laws in BC, meaning that determining which laws should be prioritized will be extremely difficult (2020). And the second mechanism is joint decision making and consent. However, Sayers expressed skepticism that this will happen given that the province does not have a track record of engaging in joint decision making (2020). Despite providing pointed criticism of how the province is progressing and implementing the *Declaration Act,* she did state that, "[t]here are some big challenges with implementing DRIPA, but if these challenges can be met, there is great opportunity to change the landscape of laws, development, and real working relationships" (Sayers, 2020, p. 15). It appears to be a common theme of recognizing the potential that the *Declaration Act* holds in changing the way the province applies, views, and interprets Indigenous rights, while still criticizing the government and legislation for failing to actually work with Indigenous peoples on the policy development process of the Declaration or relevant legislation.

And as I have argued throughout the thesis thus far, if the government does not work, cooperate, consult, and incorporate Indigenous perspectives on matters that directly impact Indigenous peoples this will inevitably lead to misframing injustices and solutions.

Criminologist Shiri Pasternak also contributed to the Yellowhead report, stating that, "[t]he first and most significant way that UNDRIP principles may be contained through their domestication into provincial law are constitutional in nature. In other words, though DRIPA's implementation over the past year in B.C. has been extremely flawed, its relationship to Canadian constitutionalism presents further challenge" (Pasternak, 2020, p. 17). Essentially, Pasternak explained that one of the main ways of implementing the principles outlined in the UNDRIP is directly connected to section 35 of the Constitution. However, given the limitations of section 35 and the uncertainty in what role provincial jurisdiction plays in section 35 rights (Nichols, 2019), this presents challenges in successfully implementing the UNDRIP principles into domestic legislation. Pasternak further explained that it is imperative to address the colonial framework of Canada's constitution, otherwise the UNDRIP will merely implicate policy interpretation of section 35 rights.

Both federal and provincial governments stated that the implementation of UNDRIP will align with Section 35. However, Pasternak explained that this could be problematic because, "[t]his means that domestic legal precedents will be paramount over international principles. While this may protect Aboriginal and treaty rights in some cases, it also may narrow the realm of possibility from what is being imagined through UNDRIP" (Pasternak, 2020, p. 18). The domestic legal precedents that Pasternak referred to are the whole body of Aboriginal law that has been developed by non-native judges and courts over decades, which I have argued directly misframes injustices, as well as solutions to injustices, and completely undermines Indigenous

self-determination. Further, as mentioned within previous chapters, section 35 does not provide a full box of rights for Indigenous peoples (Nagy, 2022; Nichols, 2019); thus, in order to fully align and adhere to the Declaration, there needs to be more action implemented than just aligning interpretations of section 35 with the UNDRIP.

Pasternak further critiqued the provinces implementation of the Act by stating that, "[a] year into DRIPA's enactment, we're still waiting to see whether it will be integrated into the environmental regulatory processes. Judging by the poor integration of FPIC into the Impact Assessment Act, we may not hold our breath. However, this is a critical containment of UNDRIP law if not amended" (Pasternak, 2020, p. 19). She further explained that despite the Wet'suwet'en expressing their disapproval for the Coastal GasLink, the project still obtained approval. Further, Pasternak highlighted another critical problem that occurs in relation to section 35, Aboriginal rights are passed on to corporations to negotiate, as seen with the Impact Assessment Agreement regarding the Coastal GasLink in 2016 (2020). Thus, one of the major problems facing the successful implementation of the Declaration into domestic legislation, is that it is currently used as an interpretive aid within the constraints of settler state sanctions and right frameworks. It is imperative the Declaration is not only used as an interpretive aid in domestic legislation, but is leveraged as a legal tool that forces courts and governments to ensure that laws and policies align with the rights contained within the Declaration.

The 2020 Yellowhead special report on the implementation of the Declaration in the province of BC, provides insightful information on the challenges of implementing the UNDRIP, an international human rights standard, that is considered "soft law" into domestic legislation by colonial states, such as Canada, that have created the very colonial realities that the Declaration aims to address (Pasternak, 2020). For example, the colonial framework of the constitution and

treating Section 35 as a full box of rights, adds another level of complexity and challenge in fulfilling the intent of the Declaration. However, despite recognizing the many challenges in implementing the UNDRIP into provincial legislation, the Yellowhead report also recognized that the Declaration still does have potential to create transformative change in the way the province handles and views Aboriginal law. The report addressed challenges and concerns in the initial stages of implementing the Act. Below I will continue to review perspectives on the *Declaration Act* in the years since its introduction.

On November 19th, 2021, two years after the BC *Declaration Act* was passed, the Windspeaker, an Indigenous news outlet, published an article entitled, "New BC bills welcomed, but UNDRIP Implementation moving at a Snail's Pace." The article discussed Bill 18 and Bill 29 which were introduced November 17th, 2021. Bill 18 is the *Human Rights Amendment Act,* which amended the Human Rights Code to include Indigenous identity as a protected ground against discrimination (Narine, 2021). And Bill 29 is the *Interpretation Amendment Act*, which amended the *Interpretation Act* to clarify that all provincial laws are to uphold and not diminish rights protected under section 35 (2021). However, the BC Assembly of First Nations Regional Chief, Terry Teegee, and the Union of British Columbia Indian Chiefs president, Grand Chief Stewart Phillip, did not share the same enthusiasm and optimism that they did back in 2019 when the *Declaration Act* was introduced. In response to Bill 18 and Bill 29, they both stated that there needs to be more action implemented at a faster rate in order to move the principles outlined within the Declaration (2021). When discussing Bill 18 and 29, Teegee stated, "[t]hese are small incremental steps. There are others coming up but what we're looking for two years after Bill 41 has passed is more substantial movement. These are all good. But it's too small. We need more substance, more movement and alignment of laws" (Narine, 2021, para. 4). It is clear that two

years after the *Declaration Act* was passed, there is frustration in the rate that the province is moving with the new legislation. If the province does not start to make more substantive changes to laws and policies to ensure that they align with the Declaration, this will not only delegitimize the *Declaration Act*, but will also impact the Declaration's potential in ending the era of buck-passing and misframing, which will be further examined and discussed in the preceding section of this thesis.

Additionally, on February 7, 2022, the UBCIC submitted a complaint to the UN, entitled, "The Militarization of Indigenous Land: A Human Rights Focus". Within the submission the UBIBC outlined resource extraction projects that it claimed either had the potential to "spark the militarization of Indigenous lands", or have already created disputes between police and Indigenous Nations and land defenders. These resource extraction projects include the Trans Mountain Expansion Project, lodging of old growth forest, including the watershed, the Coastal GasLink in Wet'suwet'en First Nations' Land, fish farms in the traditional waters of various First Nations, and Site C dam on Treaty 8 First Nations' territory (The Union of B.C. Indian Chiefs, 2022). The submission explained that the militarization of Indigenous lands means advancing resource extraction on Indigenous territories while disregarding Indigenous title and rights, which in turn has led to violence and oppression against Indigenous peoples (2022). Further, the report explained that the on-going dispute between the Wet'suwet'en people and the Coastal GasLink exemplifies the impacts of militarization on Indigenous lands. Additionally, the approval of the Coastal GasLink and the following dispute between Wet'suwet'en people and the Coastal GasLink completely disregards international law and standards as outlined in the UNDRIP (2022). The province's failure to address this dispute and to intervene in the Coastal GasLink project directly undermines the legitimacy of the *Declaration Act*, as the government's

actions do not align with the rights outlined in the Declaration.

In addition to the UN submission in 2022, the UBCIC also wrote an open letter in November 29, 2023 condemning the RCMP's efforts to stall the Civil Review and Complaints Commission (CRCC) into the Community-Industry Response Group (C-IRG). The letter claimed that the RCMP has provided little information to the CRCC which has significantly impacted the commissions' ability to complete and conclude the review (The Union of B.C. Indian Chiefs, 2023). Further the letter explained that in accordance to both the federal and provincial UNDRIP legislation all provincial and federal legislation must align with the rights outlined in the Declaration. However, the RCMP's failure to adhere to the CRCC investigation does not align with the rights outlined in the UNDRIP (2023). It is important to note that the RCMP is a federal institution, however, it does enforce federal laws in the province of British Columbia (Government of British Columbia, 2021). Further, BC has an agreement with the RCMP to serve as both the provincial and municipal police force (Regional District of Okanagan-Similkameen, 2020). Given that there is a lingering jurisdictional complexity in regard to the RCMP, the province of British Columbia has little leverage over the RCMP, however the RCMP's actions or lack of actions do affect Indigenous communities in British Columbia. Issues similar to the RCMP, specifically jurisdictional ambiguities and complexities stopping or preventing the province from intervening in issues that directly undermine Indigenous peoples' rights, casts doubt as to whether the BC *Declaration Act* will change the legal and political environment in British Columbia. This will be discussed in more-depth in the following section, but it is also important to recognize that if the province continues to fail to address issues like the Coastal GasLink and the RCMP's failure to comply with the CRCC, this will also further perpetuate issues of misframing and buck-passing.

Despite the criticisms outlined above on how the province is implementing the Declaration into provincial legislation, UBCIC had also originally praised the government of British Columbia for the proposed *Land Act* amendments. However, as mentioned in the previous chapter the amendments to the *Land Act* have since been put on pause due to non-Indigenous push back (McKay, 2024). Before the amendments to the *Land Act* had been withdrawn the UBCIC claimed that the proposed *Land Act* amendments were a crucial step in implementing and upholding the Declaration in the province of British Columbia (The Union of B.C. Indian Chiefs, 2024a). As mentioned in the previous chapter, the amendments would have included Indigenous peoples in decision making under the *Land Act* (Hunter, 2024). However, despite initially gaining praise for introducing the amendments to the *Land Act*, the First Nations Leadership Council (FNLC) has expressed extreme disappointment over the *Land Act* amendments being withdrawn (The Union of B.C. Indian Chiefs, 2024b). The Grand Chief Stewart Phillip, UBCIC President stated, "We are absolutely disgusted that the opposition leaders of the B.C. United and the B.C. Conservatives leveraged the proposed Land Act amendments as a shameless opportunity for partisan political gain" (The Union of B.C. Indian Chiefs, 2024b, para. 2). Further the UBCIC stated that Indigenous rights and human rights should not be up for debate and the whole legislature needs to work together to amend policies and adhere to the *Declaration Act* (2024b).

The FNLC also praised the SCC decision regarding the implementation of Indigenous Jurisdiction over children and families. Grand Chief Stewart Philip of the Union of BC Indian chiefs stated, "[t]his decision ends the colonial era of Canada and the provinces controlling Indigenous child welfare. Our inherent right to protect our children and to hold them within their families and communities is reaffirmed" (First Nations Leadership Council, 2024, para. 2). As

explained in the previous chapter, even though the SCC decision pertains to federal legislation it does have the potential to impact the way UNDRIP is implemented and upheld in the province of British Columbia. And as Chief Stewart stated not only does this SCC decision end a colonial era in child welfare policy in Canada, but as well as the province, as this ruling will impact child welfare policies that impact Indigenous families in British Columbia (2024). The SCC decision regarding Indigenous child and family services indicate the UNDRIP legislations are starting to challenge and change colonial laws and policies, which in turn would limit settler governments opportunity to pass the buck or misframe injustices, as Indigenous governments would have a say and equal footing in decisions pertaining to Indigenous child welfare.

At the eighth annual B.C. Cabinet and First Nations leaders' Gathering, on November 1-2, 2023, Indigenous leaders argued that there needs to be more action in order to implement the Declaration into provincial legislation (Hemens, 2023). More than 190 Indigenous groups registered for the gathering. At the meeting, Teegee said that "we've had some measured and limited success in the implementation, and noted that parties can go a lot further in terms of how to bring the act into motion" (Hemens, 2023, para. 8). Further, Teegee explained that despite section four of the Declaration stating that the Action Plan, "must be prepared and implemented in consultation and cooperation with Indigenous peoples" (Declaration on the Rights of Indigenous Peoples Act, 2019), when Indigenous groups are included in discussions on completing this action, they often face bureaucratic challenges and roadblocks (Hemens, 2023). After reviewing the above Indigenous perspectives, a central theme emerges: the Declaration is creating a shift in the opportunity structures that the division of powers creates, which is creating more challenges for settler governments to pass the buck and misframe injustices. However, as seen within the failed amendments to the *Land Act*, the complexities and challenges surrounding

the RCMP, and failing to actually work with Indigenous peoples on the *Declaration Act* Action Plan and relevant legislation, also indicate that these changes derived from the UNDRIP legislation are not completely ending the era of passing the buck and misframing. In the following section, I will continue to examine what this over-arching theme means for the province in the context of addressing injustices of buck-passing and misframing, through the *Declaration Act*.

Connecting Indigenous Perspectives to Injustices of Buck-passing and Misframing

In this section, I analyze the above Indigenous perspectives in relation to the research question central to this thesis. As this thesis has developed, the research questioned that has guided it has become more specific, asking not only will the implementation of the Declaration into provincial legislation, including the FPIC principles address or further exacerbate issues of buck-passing and misframing, but in also what ways and areas (e.g., land claims) will these institutional practices be addressed. In considering the excitement and praise that the BC *Declaration Act* received when it was first introduced compared to the skepticism and disappointment that has been expressed in the years following the bill being passed, it is evident that there needs to be more government action to address policies and practices that do not align with the rights outlined in the Declaration. If the government is not able to address challenges, such as bureaucratic processes, that prevent or prolong Indigenous involvement in the policy development process, instead of surmounting injustices of misframing and buck-passing the *Declaration Act* will further exacerbate these injustices.

It is imperative to recognize, that due to the colonial framework of the constitution (Pasternak, 2020), to seriously implement and adhere to the principles outlined in the

Declaration, the province's relationship to the Constitution will create challenges in implementing the principles into domestic law (2020). Thus, it cannot be expected that the Declaration will be implemented in provincial legislation without jurisdictional ambiguities or the constraints of the Constitution impeding the implementation of the Declaration into provincial legislation. However, the question, that is important to ask is: what measures, if any, is the government taking to promptly address the challenges of implementing the Declaration into a colonial state like Canada? As indicated above, the government is making positive changes, but it is not doing enough to ensure that the Declaration is fully and seriously implemented in the province. If the government does not start making prompt substantive changes to align laws and policies with the principles outlined in the Declaration, then the trust and hope that the *Declaration Act* can significantly change the way the province addresses Aboriginal rights and law will start to diminish.

As Borrows explained in the Yellowhead report, in order for the *Declaration Act* to be successfully implemented into provincial legislation the government needs to co-develop legislation within Indigenous communities. However, as Sayers noted in the same report within the first 9 months of the *Declaration Act* being passed, Indigenous peoples were not consulted on the *Declaration Act*'s Action Plan. If the province does not start to actively engage and work with Indigenous peoples in the policy development of the *Declaration Act*, instead of the *Declaration Act* addressing issues of misframing, this will further perpetuate issues of misframing, similarly to how state sanctioned decision-making processes such as the Environmental Assessment misframes injustices, because it does not include Indigenous legal orders and processes (Curran, 2019). If Indigenous peoples are not involved in the entire policy development, planning and maintaining of the *Declaration Act*, the Act will also misframe

injustices.

Further, the *Declaration Act* in a way is a redress mechanism for addressing injustices that Indigenous communities have faced in the province of British Columbia, as implementing the Declaration into provincial legislation, if successfully implemented, would enable Indigenous peoples to define their own rights, and address injustices such as land and sovereignty dispossession in accordance to their own legal orders and governance. Thus, if Indigenous perspectives are not included in determining how the province implements, interprets and adheres to the Declaration, not only will the lack of Indigenous perspectives weaken the potential of the Act, but will result in an ineffective redress mechanism. Specifically, the Declaration challenges Western-centric definitions of "self-determination" (Lightfoot, 2021), and can be applied in a way that mitigates the possibility of state-centric perspectives of self-determination. Over time, self-determination has been constrained within the Westphalian system of independent sovereign nation states (2021), leading to practices of consultation like the duty to consult, that still prioritizes state sovereignty over Indigenous. The FPIC principles challenge state-centric definitions of self-determination, as they can be leveraged to enable Indigenous peoples to define their own mechanisms of consultation, instead of being forced to comply with settler legal frameworks that prioritize state sovereignty (Curran, 2019; Papillon & Rodon, 2020). Thus, it is imperative that Indigenous groups are involved in state decisions pertaining to the *Declaration Act*, as well as any other policy that directly impacts them.

Additionally, in order to mitigate the likelihood of the *Declaration Act* further perpetuating issues of misframing, it is imperative that the rights entailed in the Declaration create justiciable rights, and the Declaration is not treated as merely an interpretive aid. As Pasternak had stated in the Yellowhead report, treating the UNDRIP solely as an interpretive aid

in reviewing section 35 creates many barriers to successfully implementing the Declaration. Specifically, viewing the Declaration as solely an interpretive aid then limits the effect that the Declaration has on ensuring laws and policies align with the Declaration. As only treating the UNDRIP as an interpretive aid prioritizes domestic legal precedents over international principles (Pasternak, 2020). Further, as explained in the analysis of the Haida and the TRTFN case, section 35 is interpreted in a way that treats Aboriginal title rights as a form of common law, rather than acknowledging inherent Indigenous legal orders and governance (McCrossan & Ladner, 2016). And as further explained in chapter three, treating section 35 as a full box of rights leads to an institutional norm that overrides settler sovereignty, while simultaneously claiming Indigenous rights are protected. For example, the duty to consult aims to reconcile relations with Indigenous peoples while still prioritizing state interest and in turn undermines Indigenous rights to self-determination (Do, 2020a; Morales, 2019). Thus, the application of section 35 misframes injustices and does not affectively address injustices of land and sovereignty dispossession. The FPIC principles do have the potential to address injustices of land and sovereignty dispossession; however, in order to realize this potential, it is imperative that the Declaration is utilized as more than just an interpretive aid, but actually creates policy and legislative changes that not only create justiciable rights, but as well as shapes decision making processes in accordance to Indigenous peoples' legal orders and governance.

If the provincial government does not affectively address and change the provinces history of applying colonial frames of justice and legal frameworks as a means of addressing Indigenous concerns, the Declaration will also fail in shifting and challenging institutional norms, such as the duty to consult and the overarching norm of overriding settler sovereignty. As explained in chapter three, these norms contribute to injustices of misframing and buck-passing.

The duty to consult misframes injustices as it is not a recognition of Indigenous peoples' decision-making authority, and does not truly foster a nation-to-nation collaborative process that ensures First Nations shape the process (Papillon & Rodon, 2020), and in turn does not effectively address injustices of land and sovereignty dispossession. And the over-arching norm of overriding Indigenous sovereignty facilitates both misframing and buck-passing. As both injustices of misframing and buck-passing are used to continue to prioritize state sovereignty and interest over Indigenous. If the legal norm, the duty to consult, shifts in a manner that incorporates emergent norms derived from the Declaration, such as the FPIC principles, this will aid in creating substantive change in the way that the province handles consultation processes with Indigenous peoples. The FPIC principles could aid in facilitating decision-making processes that Indigenous peoples co-develop and approve of (Curran, 2019; Papillon & Rodon, 2020). Thus, if the FPIC principles were incorporated into decision making processes, this would lead to a reduction in both institutional norms and practices that limit Indigenous peoples' from contributing to creating decision making processes.

Both the UBCIC submission to the UN on the militarization of Indigenous lands and the open letter condemning the RCMP's failure to comply with the CRCC review into the C-IRG, is indicative that there needs to be more concrete action to ensure BC's actions align with the Declaration. If the province were to seriously adhere to the principles outlined within the Declaration, including the FPIC principles, they need to do more to address policies and decisions that impact Indigenous peoples in the province of BC. It is important to note that the RCMP is a federal institution and despite enforcing laws in British Columbia (Government of British Columbia, 2021), the province does not hold much power over the RCMP. Thus, the issues pertaining to the RCMP and its failure to comply with the CRCC exemplify how

jurisdictional complexities can prevent the successful implementation of the Declaration. In order to end the era of leveraging jurisdictional ambiguities between the federal and provincial division of powers as a means of avoiding Indigenous demands and concerns, the province needs to address all Indigenous concerns. It is imperative that the province stops treating Indigenous peoples as objects of jurisdiction, and instead views Indigenous peoples and communities as equal governing partners at both the federal and provincial level (Pasternak, 2014).

Despite some negative comments on the province's implementation of the Declaration into provincial legislation, there has also been positive reactions to certain policies that have been introduced in light of the *Declaration Act*. For example, the favourable responses regarding the amendments to the *Land Act*, before these amendments were withdrawn, indicate that the province was attempting to take positive steps towards implementing the Declaration into provincial legislation (The Union of B.C. Indian Chiefs, 2024a). As previously mentioned, the amendments to the *Land Act* would have included shared authority regarding decisions pertaining to development on Crown land (Hunter, 2024). Thus, these amendments would have aligned with the FPIC principles contained in the Declaration, as Indigenous peoples would have had a say in development decisions that impact them and their territories. However, pausing these amendments, exemplifies how practices of misframing injustices and solutions could impede the implementation of the Declaration, and in turn further perpetuate injustices of misframing. The province attempted to align the *Land Act* amendments with the Declaration, but due to non-Indigenous pushback the government retracted the amendments (McKay, 2024). This pushback can be linked to the epistemology of ignorance and the idea that section 35 already protects Indigenous rights in regards to land claims and decision making on their lands; as such, the proposed amendments are not necessary (McKay, 2024).

As previously mentioned, the UBCIC complained that party politics have resulted in the amendments to the *Land Act* being put on pause, as there was non-Indigenous pushback, and the B.C. United and the B.C. Conservatives openly expressed opposition towards the amendments to the *Land Act* (The Union of B.C. Indian Chiefs, 2024b). Prolonging the amendments to the *Land Act* exemplifies how misframing adds another level of complexity to implementing an international standard, such as the UNDRIP into provincial legislation. Due to the B.C. United and the B.C. Conservatives stating opposition to the amendments, this led to non-Indigenous pushback, and ultimately the government withdrawing the proposed amendments (2024b). The UBCIC argued that the B.C. United and the B.C. Conservatives leveraged the proposed amendments as an opportunity for political gain (2024b). Thus, even if there is effort and momentum to adhere to the principles outlined in the Declaration, the organizational structure of government and partisan party politics creates significant challenges in implementing the Declaration, and in turn addressing injustices of misframing and buck-passing. However, despite party politics and injustices of misframing interfering with the proposed *Land Act* amendments, it is worth noting that the government did not try to "pass the buck", to explain or avoid blame for why these amendments were not enforced. Which does show promise that even though the *Declaration Act* is not seamlessly addressing injustices of misframing and buck-passing, it is creating a shift in the way the province has historically relied on these institutional practices to completely ignore Indigenous concerns.

In addition to the proposed amendments to the *Land Act*, the positive reactions expressed towards the SCC decision regarding Indigenous child and welfare rights, also indicate that the UNDRIP legislations (both federal and provincial) are changing the way that Aboriginal law and rights are perceived (Truesdale et al., 2024). As mentioned within chapter three, the SCC

decision pertaining to Indigenous child and welfare rights involves federal legislation, however, this could impact the way that the UNDRIP is implemented in the province. As previously mentioned, the SCC rejected Quebec's claim that the Act breaches provincial jurisdictional responsibilities and as such it is unconstitutional. Further, the judge used the principles outlined in the Declaration to interpret this case (2024). Thus, this ruling indicates that the UNDRIP legislation at both the provincial and federal level has the potential to reduce using jurisdictional ambiguities and the division of powers to advance assimilatory policies. If the principles of the UNDRIP are seriously implemented, this would render the jurisdiction of a particular issue irrelevant, as the province would still need to comply with the rights outlined in the Declaration. Additionally, the FNLC also believe that this is a ground breaking decision that shows the UNDRIP legislations are starting to create substantive changes in the legal and political environment pertaining to Indigenous rights (First Nations Leadership Council, 2024).

A general theme emerging from the analysis and review of Indigenous perspectives is that the *Declaration Act* is shifting the opportunity structures that the division of powers and section 35 have created and historically enabled settler governments to pass the buck and misframe injustices, as an attempt to maintain and uphold state interest, sovereignty, and power over Indigenous. Throughout the analysis of this thesis, it is evident that the *Declaration Act* is not ending the era of passing the buck or misframing, as these institutional practices are still prominent, and in certain circumstances, have impeded the successful implementation of the Declaration, as seen with the *Land Act* amendments being withdrawn. However, the implementation of the Declaration is creating a shift in institutional norms such as the duty to consult and the overarching norm of overriding settler sovereignty, which in turn mitigates practices of buck-passing and misframing. For example, the BCCA ruling in the *Gitxaala v.*

British Columbia case affirming that the MTA triggers the duty to consult does indicate that the norms of overriding settler sovereignty are starting to shift to acknowledge Indigenous peoples' rights to decision making. However, it can be further concluded that the UNDRIP is creating more changes in how Aboriginal rights are viewed and practiced in cases that do not impact the economic interest of the state, as seen within the SCC ruling regarding the legislation on Indigenous and child family services compared to the proposed *Land Act* amendments being withdrawn.

Research Limitations

Throughout this thesis I focused on buck-passing and misframing and the relationship between institutional norms such as the duty to consult and overriding settler sovereignty. More specifically, I investigated how these institutional norms and practices could potentially create challenges in actually moving beyond state-controlled practices of self-determination. As well as, investigated how the *Declaration Act* could also create a shift in the opportunity structures that enable settler governments to take advantage of jurisdictional ambiguities as a means of avoiding to acknowledge and address Indigenous concerns and rights. However, what I underestimated, which was brought to light through the analysis of Indigenous perspectives, was the actual language used within the Act, and how the structure of the Act and tools/ lack of tools of implementation outlined within the Act, presents challenges in implementing the Declaration into provincial legislation.

As Sawyers noted, there are only two mechanisms of implementation as outlined in the *Declaration Act* (Sayers, 2020). One is to ensure all laws align with the UNDRIP, and the other mechanism is joint decision making and consent (2020). However, there are problems to both

mechanisms as there are over 500 laws in BC, and the province has a poor history of engaging with Indigenous peoples. Further, the Act does not specify or outline a legislation that would commit the province to fully working with Indigenous peoples (2020). As Borrows noted, in order to fulfill section 3 of the Act which states: "in consultation and cooperating with Indigenous peoples of B.C., the government must take all measures necessary to ensure the laws of B.C. are consistent with the Declaration" (Declaration on the Rights of Indigenous Peoples Act, 2019). There needs to be a legislation that is created specifically outlining how the province will actually work with Indigenous peoples and communities (Gray & Borrows, 2020). I focussed mainly on examining cases and relevant legislation in relation to the Declaration to analyze how and if the BC *Declaration Act* would create a shift in the opportunity structures that enables governments to completely disregard or undermine Indigenous concerns. However, a further study would be required to conduct an in-depth analysis on how the structure, language, and tools of implementation outlined within the Act would impact practices of buck-passing and injustices of misframing.

Additionally, the political party that is in power has a significant impact on the policies that are put forward (The Legislative Assembly of British Columbia, 2017), thus, if the party changes this could then affect the progress that the province has made since implementing the *Declaration Act*. Additionally, given that the *Declaration Act* is still relatively new, subsequent laws and policies are subject to change, which could alter the conclusion of this thesis. Further, reviewing Indigenous perspectives mainly from the Yellowhead Institute, the UBCIC, and the BC Assembly of First Nations, do provide valuable Indigenous perspectives and insight, but these perspectives cannot be assumed to be an overarching perspective of all Indigenous peoples and Nations in the province of British Columbia. Thus, to obtain a more thorough understanding

and diverse perspectives of these policies it would be required to cast a bigger net in either the form of interviews or analyzing more Indigenous news outlets and organizations. However, due to ethics and time constraints that would not have been feasible for this thesis.

This thesis provides a base-knowledge for understanding the different challenges posed in successfully implementing the Declaration into provincial legislation, as well as the way in which the Act has addressed issues of misframing and buck-passing. However, as subsequent laws and policies continue to be introduced as a result of the *Declaration Act*, further research will be required to gain an in-depth understanding of how and if the *Declaration Act* will exacerbate or address issues of buck-passing and injustices of misframing. Specifically, being able to compare how the legal and political reality in relation to Aboriginal rights has changed between 5 and 10 years since the *Declaration Act* has been introduced. It is important to continue this research because if the province can successfully address or at least seriously mitigate injustices of misframing and buck-passing, not only will it significantly improve Indigenous relations in the province of BC, but can also be used as a model to improve Indigenous relations in other provinces as well.

Conclusion

The BC *Declaration Act* is shifting the opportunity structures that the division of powers and section 35 have created and historically enabled settler governments to pass the buck and misframe injustices. For example, even though the *Land Act* Amendments had been withdrawn, which was due to non-Indigenous push back, the province is taking responsibility for withdrawing the amendments and is not trying avoid blame for doing so (McKay, 2024). Additionally, with cases like the federal governments legislation on Indigenous and child family

services, as well as the related SCC ruling, it is evident that in certain instances the Declaration is aiding to align laws and legislation with principles out lined in the Declaration, and in turn is mitigating injustices of misframing, as Indigenous peoples are given the opportunity to address injustices in accordance to their own legal and governance systems. However, in other instances, specifically in cases pertaining to land claims and resource extraction, the Declaration has not yet fully mitigated injustices of misframing. For example, the statement the Conservative Party president said about the *Land Act* Amendments, stating that section 35 already facilitates the goals/intentions behind the *Land Act* Amendments (McKay, 2024), exemplifies injustices of misframing. Comments like the Conservative Party president's indicate that the *Declaration Act* has not completely addressed injustices of misframing. Further, it can be concluded that the *Declaration Act* seems to be creating more of an impact on addressing issues of buck-passing and misframing pertaining to Indigenous rights that don't affect the economic interest of the province (e.g., the *Human Rights Agreement Act*), but these institutional practices are still persistent in land claim and resource extraction/development cases, as seen with the proposed *Land Act* amendments.

Additionally, as indicated throughout the review of Indigenous perspectives, the legislation itself causes challenges in successfully implementing the Declaration into provincial legislation, as the Act outlines only two mechanisms to implementation. One of the mechanisms is to align all laws in the province with the UNDRIP, and the second mechanism is joint decision making and consent between the government of BC and Indigenous peoples (Sayers, 2020). However, both of these mechanisms present many challenges, for one there are over 5000 laws in BC, which would make it extremely challenging to determine which laws should be prioritized (2020). And, as examined throughout this thesis, BC does not have a record of

working, engaging, or co-operating with Indigenous communities, which provides skepticism as to whether the province will successfully engage and actually work with Indigenous communities to implement all stages of the *Declaration Act*.

In addition to the legislation itself raising some concerns, since the *Declaration Act* has been passed there has been expressed discontent for the lack of Indigenous involvement in developing the Declaration Act Action Plan, as well as other relevant policies that impact Indigenous communities. For example, Indigenous groups in BC were not only not involved as co-developers of the amendments, and not only were they not given FPIC opportunities—they were not even consulted, on the amendments to the *Clean Energy Act*. Additionally, Indigenous peoples in BC have expressed disgust over development projects such as the Coastal Gaslink, as well as failure from the RCMP to comply with the CRCC, as these actions directly undermine Indigenous rights and do not align with the principles outlined within the Declaration. Despite acknowledgment of some positive changes such as the *Human Rights Amendment Act* and the amendments to the *Interpretation Act*, there has been concern expressed at the rate in which the province is implementing the Declaration into provincial legislation and aligning legislation and laws with the UNDRIP principles (Hemens, 2023). In order for the Declaration to create substantive changes in the way the province practices and upholds Aboriginal law and rights, the government needs to start to actually work with Indigenous peoples and implement the FPIC principles to establish consultation mechanisms developed by Indigenous peoples.

Further, as discussed in chapter three, the BCCA ruling on the *Gitxaala v. British Columbia* case, determined that the *Declaration Act* does not obligate the province to implement the Declaration into provincial legislation. This ruling has the potential to drain the Act of meaning and its potential to surmount injustices of buck-passing and misframing. In order for the

Declaration Act to create transformative changes in the way the province handles Indigenous relations and concerns, it is imperative that the *Declaration Act* creates justiciable rights as well as ensures settler governments actually work with Indigenous communities to create consultation frameworks that incorporate the FPIC principles. However, it is important to note that creating justiciable rights would aid in mitigating injustices of misframing, but ultimately Canadian courts would be in charge of interpretating these rights and are operating on the assumptions of settler sovereignty. Thus, it is crucially important that settler governments actually work with Indigenous peoples to develop decision making processes and venues that truly foster nation-to-nation building, in order to shift institutional norms such as the duty to consult and overriding settler sovereignty, to norms that protect Indigenous peoples' rights to self-determination, and ensure they have at least equal say in decisions that impact them.

As discussed in chapter three the court recognizing that the MTA triggers a duty to consult, the province attempting to amend the *Land Act*, and the federal government legislation on Indigenous and child family services, as well as the related SCC ruling, do indicate that the UNDRIP legislations at both the provincial and federal level are starting to shift institutional norms that have historically prioritized state interests over Indigenous. Despite a pushback on policies that indicate a shift in the overarching norm of overriding settler sovereignty, the fact that the province had attempted to amend the *Land Act* shows that the *Declaration Act* is at least starting to get the province to think about policies that undermine Indigenous rights to self-determination. Institutional norms, such as the duty to consult and overriding settler sovereignty, directly relate to buck-passing and misframing injustices, as they reinforce one another. As explained throughout this thesis the duty to consult is utilized to misframe injustices, and the overarching norm of overriding settler sovereignty not only informs practices that misframes

injustices, but as well as buck-passing in order to avoid addressing concerns pertaining to self-determination. Thus, if the *Declaration Act* can create substantive change and shift/challenge institutional norms; practices of buck-passing and injustices of misframing will be reduced. On the other hand, if the *Declaration Act* fails to create substantive change, not only will this perpetuate institutional norms that have historically shaped how the province has handled Indigenous relations, it will further exacerbate injustices of misframing and buck-passing.

Through the analysis of the *Haida Nation v. British Columbia* and *TRTFN v. British Columbia* cases, I explained the negative impacts of misframing and buck-passing. Further, I examined how buck-passing and misframing both systemic and strategic create a reproducing cycle; misframing creates more misframing. Buck-passing is not only leveraged to avoid blame for a given injustice, but also used as a tactic to continue assimilatory policies and actions without any consequences. Further, when buck-passing fails, an injustice is often misframed by applying colonial frames of justice and state-centric legal frameworks and orders as a means of "redressing" given injustices. As such, injustices of misframing and buck-passing prevent other injustices such as land and sovereignty dispossession from being realized and addressed. Thus, if the *Declaration Act* continues to shift the opportunity structure, that has been discussed throughout this thesis, in a manner that mitigates injustices of misframing and buck-passing, on all areas of concern, specifically land claims and resource extraction cases/issues, this would significantly aid in reconciling relations in the province and amending colonial structures, laws, and policies, to reflect the UNDRIP principles.

It is evident that the Declaration holds potential to mitigate injustices of misframing and buck-passing. However, further research is required to really examine how the language within the Act can be leveraged to facilitate practices of buck-passing and misframing. Further it is

necessary to compare how the *Declaration Act* has progressed in five years, specifically examining how the opportunity structures that have been referenced throughout this thesis, have or have not continued to shift in a way that makes it more challenging to pass-the buck or misframe injustices. This research is important to continue; if the *Declaration Act* continues to create a shift in the opportunity structures, and starts to create more challenges related to buck-passing and misframing injustices concerning resource extraction/development cases and policies; this research could be used by other provinces to better understand how it can implement the Declaration into provincial legislation, in a way that addresses injustices of misframing and buck-passing.

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