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Interpreting UNDRIP: Exploring the Relationship Between FPIC, Consultation, Consent, and Indigenous Legal Traditions

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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Abstract

This thesis addresses an interpretive question at the heart of the discourse surrounding the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); the meaning of the principle of Free, Prior, and Informed Consent (FPIC). It argues that interpreting and implementing UNDRIP and specifically the articles requiring FPIC needs to be done in a way that meaningfully engages with and incorporates the laws of Indigenous peoples (Indigenous Legal Traditions or ILTs). This thesis explores why it is essential to discuss UNDRIP through the lens of ILTs, explores the scholarship and major interpretive schools of thought regarding FPIC, and concludes that at least within the Canadian context, they have not meaningfully engaged with ILTs. This thesis also addresses the ways in which Canada's current approach to consultation (the duty to consult) engages with ILTs. It concludes with an examination of the impact that Anishinaabe law can have on the interpretation of FPIC.

Keywords

Aboriginal, Indigenous, Law, United Nations Declaration on the Rights of Indigenous Peoples, Anishinaabe, FPIC, Duty to Consult, Section 35, Constitution, Legal Tradition, Interpretation

Summary for Lay Audience

The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) is an international human rights declaration. UNDRIP addresses a variety of subject matters including the health, traditional knowledge, economic development, and children’s rights of Indigenous peoples around the world. It also requires states to secure the free, prior, and informed consent (“FPIC”) of Indigenous peoples in a number of different circumstances, including: (i) when a state wishes to remove Indigenous peoples from their lands; (ii) when adopting laws that may affect Indigenous peoples; (iii) when states plan to store or dispose hazardous materials on Indigenous territories; and (iv) when planning things like resource development projects that affect the territories of Indigenous peoples.

There are debates amongst politicians, academics, Indigenous leaders, and others about how to define FPIC and precisely when it is required. Some in Canada suggest that since Canadian law already includes a duty to consult Indigenous peoples that Canada is in compliance with the UNDRIP articles referencing FPIC. This thesis takes the position that any interpretation of FPIC should be informed by a consideration of the laws of Indigenous peoples. It examines the debate over how to interpret FPIC for the purposes of UNDRIP through a detailed examination of the scholarship to try and determine if the scholarly writing about FPIC is engaging with the laws of Indigenous peoples. This thesis also explores whether Canada’s duty to consult makes room for ILTs, before providing the reader with an example of how the laws of Indigenous peoples can impact the interpretation of FPIC.

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Introduction

In 1982, Canada repatriated its constitution from the United Kingdom, via the *Constitution Act, 1982*. Section 35 of the *Constitution Act 1982* recognizes and affirms the existing aboriginal and treaty rights of Canada's aboriginal peoples:

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of *aboriginal peoples of Canada*

(2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada.¹

Despite this constitutional recognition concerns were raised about the possibility of infringement of these Aboriginal and treaty rights by the Crown. Given the Canadian economy's reliance on extractive industries, Indigenous peoples are concerned about significant and perhaps irreparable harm that could be caused by mining, pipelines, or other resource development projects on their lands, resources, and way of life. In order to address these concerns the Supreme Court of Canada has imposed an obligation on the Crown to consult Indigenous peoples before taking action that may adversely affect rights under s.35 of the *Constitution Act, 1982*² (the "duty to consult" or "the duty to consult framework").

This duty to consult framework has guided government, Indigenous peoples, and industry on the proper process for consultation (and sometimes accommodation) when potential or established Aboriginal or treaty rights may be affected by resource development projects. Despite the significant impact that the duty to consult framework has had on the protection of Indigenous

¹ *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. [*Constitution 1982*].

² *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35 [*Haida*].

rights in Canada, the duty remains subject to intense political and legal debate. Questions remain regarding the appropriate level of Indigenous participation in resource development, the ability of Indigenous peoples to control what occurs in their traditional territories, and the role that Indigenous systems of law should have in how the duty to consult is interpreted and applied. Recent developments in international law have also become relevant to these debates.

In September 2007, the United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (“UNDRIP” or the “Declaration”). The Declaration was the culmination of several decades of work by Indigenous leaders, the UN Working Group on Indigenous Populations (“WGIP”), and the UN Human Rights Council. The Declaration addresses a variety of subject matters, and includes several references to the free, prior, and informed consent (“FPIC”) of Indigenous peoples.³

Since 2007 the meaning of FPIC has been the focus of debate amongst pundits, journalists, politicians, and academics. Anyone who follows Canadian politics will have noted the lack of consensus about the definition of FPIC and the implications of the UNDRIP articles that refer to it. This was exemplified by the high-profile opposition by Wet’suwet’en hereditary chiefs (and others) to the Coastal GasLink pipeline in February 2020. In countless op-ed pieces and statements before the Canadian Senate individuals have presented entirely different conceptions of what FPIC requires.⁴ The conversation has largely focused on whether the articles requiring

³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/res/61/295 (13 Sept 2007), 46 ILM 1013 (2007), Articles 10, 11, 19, 28, 29, and 32 [UNDRIP]

⁴ Brian L. Cox, “Wet’suwet’en supporters should stop distorting law to promote protest agenda” (28 February 2020), online: *The Star* <<https://www.thestar.com/opinion/contributors/2020/02/28/wetsuweten-supporters-should-stop-distorting-law-to-promote-protest-agenda.html>>; Alicia Elliott, “A pipeline offers a stark reminder of Canada’s ongoing colonialism” (13 February 2020), online: *Washington Post* <<https://www.washingtonpost.com/opinions/2020/02/13/pipeline-offers-stark-reminder-canadas-ongoing-colonialism/>>; Senate of Canada, Proceedings of the Standing Senate Committee on Aboriginal Peoples, 43-2 (May 31, 2021) (Shannon Joseph, Vice President, Government Relations and Indigenous Affairs for the

FPIC grant Indigenous communities a “veto” over things like resource projects if UNDRIP is made part of Canadian law. In other words, many have asked whether UNDRIP recognizes the right of Indigenous peoples to say no and forestall certain projects that may impact Aboriginal or Treaty rights. Academics, politicians, Indigenous leaders, and others have presented conflicting answers to this question⁵ with responses ranging from “consent as a preferable but not necessarily mandatory outcome of consultation procedures...[to] more substantive/robust conceptions of FPIC as a right to say ‘yes’ or ‘no’ to a given project”.⁶

For example, in testimony before the Standing Committee on Aboriginal Peoples, Ross Pattee Assistant Deputy Minister (Crown-Indigenous Relations and Northern Affairs Canada) stated that FPIC was “...not defined in the UN Declaration, and there is no international or domestic agreement on the meaning of the principle of free, prior and informed consent”.⁷ However, the Deputy Minister went on to note that there was support from people like James Anaya, former UN Special Rapporteur, for interpreting FPIC as requiring parties to make “...every effort towards mutually acceptable arrangements, allowing Indigenous peoples to generally influence the decision-making processes”.⁸ In contrast, Senator Murray Sinclair, speaking before that same

Canadian Association of Petroleum Producers); Senate of Canada, Proceedings of the Standing Senate Committee on Aboriginal Peoples, 43-2 (May 28, 2021) (Mauro Barelli); Senate of Canada, Proceedings of the Standing Senate Committee on Aboriginal Peoples, 43-2 (May 14, 2021) (Ross Montour, Chief, Mohawk Council of Kahnawake); Senate of Canada, Proceedings of the Standing Senate Committee on Aboriginal Peoples, 43-2 (May 10, 2021) (Dr. Sheryl Lightfoot)

⁵ Mia Rabson, “Without Indigenous consent for pipelines, experts say there will be more confrontations” (5 March 2020), online: *CTV News* <<https://www.ctvnews.ca/politics/without-indigenous-consent-for-pipelines-experts-say-there-will-be-more-confrontations-1.4839713>>.

⁶ Martin Papillon et al, “Free, Prior and Informed Consent: Between Legal Ambiguity and Political Agency” (2020) 27:2 *Int J on Minority and Group Rights* 223 at 224 [*Papillon FPIC Between*].

⁷ Senate of Canada, Proceedings of the Standing Senate Committee on Aboriginal Peoples, 42-1, Issue 55 (May 28, 2019) (Ross Pattee, Assistant Deputy Minister, Implementation Sector, Crown-Indigenous Relations and Northern Affairs Canada).

⁸ *Ibid.*

Committee, rejected the idea of FPIC constituting a veto. In Senator Sinclair’s opinion FPIC is about a right to give or withhold consent.⁹

Recent political events have only served to heighten the debates surrounding FPIC. Although Canada was one of four countries that initially voted in opposition to UNDRIP, Canada has removed its permanent objector status¹⁰ and committed to implementing UNDRIP as soon as possible. On December 3, 2020 the Trudeau Government tabled Bill C-15,¹¹ *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*. The legislation, which received Royal Assent on June 21, 2021, commits that Canada will implement the Declaration and “affirm[s] the Declaration as a universal international human rights instrument with application in Canadian law.”¹² In announcing Bill C-15, the Department of Justice indicated that the legislation will be “...a key building block in fully recognizing, respecting, protecting, and fulfilling the rights of Indigenous peoples”.¹³

Although the passage of Bill C-15 appears to demonstrate a serious commitment to the principles in UNDRIP, some fundamental questions remain: How should we interpret the articles requiring FPIC? And what do these articles obligate state actors to do? Establishing a well-grounded answer to these questions is essential since, as Professor Dwight Newman has pointed out,

⁹ Senate of Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 42-1, Issue 55 (May 28, 2019) (Senator Murray Sinclair).

¹⁰ Tim Fontaine, “Canada removing objector status to UN Declaration on the Rights of Indigenous Peoples” (8 May 2016), online: *CBC News* <<https://www.cbc.ca/news/indigenous/canada-position-un-declaration-indigenous-peoples-1.3572777>> [Fontaine].

¹¹ Ryan Patrick Jones, “Liberal introduce bill to implement UN Indigenous rights declaration” (3 December 2020), online: *CBC News* <<https://www.cbc.ca/news/politics/liberals-introduce-undrip-legislation-1.5826523>> [Jones].

¹² Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2020 at s 4(a) (assented to 21 June 2021) [Bill C-15].

¹³ Department of Justice, “Implementing the United Nations Declaration on the Rights of Indigenous peoples in Canada” (last visited 29 April 2021), online: *Government of Canada* <<https://www.justice.gc.ca/eng/declaration/index.html>> [Justice UNDRIP].

“...the Court’s interpretation of FPIC is...subject to uncertainties that have enormous implications for Canada.”¹⁴ In addition, Bill C-15 requires the federal government to ensure that the laws of Canada are consistent with the Declaration and recognizes that measures taken to implement UNDRIP should take Indigenous legal traditions into account.¹⁵ This recognition of Indigenous law is commendable. However, it raises some practical questions regarding the relationship between international law and Indigenous legal traditions as well as the extent to which Canadian law already accounts for Indigenous systems of law within the existing duty to consult framework.

This thesis argues that interpreting and implementing UNDRIP and specifically the articles requiring FPIC needs to be done in a way that meaningfully engages with and incorporates the laws of Indigenous peoples (“Indigenous Legal Traditions” or “ILTs”). Indigenous peoples turned to the international community in order to “...decolonize the colonized Indigenous peoples”.¹⁶ As James (Sa’ke’j) Youngblood Henderson has stated Indigenous peoples’ “...vision of human rights was to have ourselves implement our ancient knowledge and laws in our daily lives and struggles, through community or collective solidarity and individual sensibilities”¹⁷ and to ensure that “all aspects of our inherent human rights belong to and serve our distinct and diverse knowledge systems, languages and laws, rather than the artificial settler states or their

¹⁴ Canada, Senate of Canada, *Submission to Senate Standing Committee on Aboriginal Peoples Re Bill C-262* (May 26, 2019), online: *Senate of Canada* <https://sencanada.ca/content/sen/committee/421/APPA/Briefs/D.Newman_UofSask_e.pdf> [*Newman C-262*].

¹⁵ *Bill C15*, *supra* note 12 at preamble, s.5.

¹⁶ James (Sa’ke’j) Youngblood Henderson, “The Art of Braiding Indigenous Peoples’ Inherent Human Rights into the Law of Nation-States” in John Borrows et al. eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 13 at 16 [*Youngblood Braiding*].

¹⁷ *Ibid* at 16-17.

Eurocentric legal traditions of civil or common law.”¹⁸ For Henderson, any attempt to implement UNDRIP must be mindful of these aspirations and avoid simply reproducing Eurocentric approaches.¹⁹

This thesis engages with how Canadian law and the scholarship have addressed questions surrounding FPIC in order to determine the extent to which they have meaningfully engaged with ILTs. In particular, the thesis explores: (i) why it is essential to discuss the Declaration through the lens of ILTs; (ii) the interpretations of FPIC offered by the scholarship and the extent to which these interpretations account for ILTs; (iii) the extent to which ILTs are already reflected in Canada’s duty to consult framework; and (iv) how to approach the articles referencing FPIC in a way that acknowledges and incorporates ILTs by highlighting some relevant Anishinaabe principles to serve as an example of the approach suggested in this dissertation.

Chapter Overview

In order to properly assess the relationship between ILTs, FPIC, and UNDRIP, Chapter One reviews the terms of the Declaration and its evolution, including: (i) a discussion of its negotiation at the UN; (ii) the steps taken to achieve the endorsement of the Declaration in 2007; and (iii) Canada’s political response to the Declaration, including legislative attempts to implement it. This background provides necessary context to some of the scholarship that has interpreted the FPIC articles in UNDRIP. This chapter also demonstrates why the existence and

¹⁸ *Ibid* at 18.

¹⁹ *Ibid* at 16-18.

content of ILTs must be considered when interpreting and implementing UNDRIP and specifically the articles referencing FPIC.

Chapter Two examines the potential interpretations of FPIC identified in the scholarship and determines whether there are key interpretative considerations that have been ignored in the literature. In particular, this chapter considers the extent to which the scholarship has engaged with ILTs in the interpretation of FPIC. Its goal is to determine whether there are currently any widely accepted interpretations of FPIC that meaningfully engage with ILTs in their interpretive methodology.

Chapter Three examines Canada's current duty to consult framework. Many scholars argue that this framework is already consistent with International Human Rights Law principles as well as what the UNDRIP articles referencing FPIC require. This chapter assesses that claim by examining: (i) the role of consent in the duty to consult framework; (ii) the extent to which the courts have incorporated ILTs as a part of their duty to consult analysis; and (iii) the extent to which Canada's duty to consult has informally embraced ILTs via provincial consultation protocols, joint Crown-First Nations consultation protocols, the government of Canada's consultation protocols, and the consultation protocols of Indigenous communities.

Chapter Four provides insight into how ILTs might contribute to the interpretation of FPIC, via a brief review and analysis of certain key Anishinaabe legal principles. This chapter introduces the Anishinaabe legal tradition before examining some of the principles that are relevant to a discussion of FPIC (consultation, leadership, decision-making processes, persuasive compliance, consent, environmental stewardship, etc.).

Chapter Five provides some concluding remarks as well as a series of proposals to help ensure that ILTs play a meaningful role in the interpretation and implementation of the FPIC Articles moving forward.

Methodology

This thesis uses a doctrinal approach to provide a clear understanding of the substance of Canada's duty to consult framework, particularly as it relates to the honour of the Crown and consent. I have engaged in a literature review that includes both primary and secondary legal sources. Some of the primary legal sources include: UNDRIP itself, ILO Convention 169, ILO Convention 107, Canadian legislation addressing UNDRIP, testimony before Parliamentary committees, and the common law. Cases examining the duty to consult and the judicial treatment of Indigenous legal traditions have also been examined. Relevant case law, legislation, and international law instruments were collected by utilizing legal databases, including LexisNexis Quicklaw and Westlaw. In terms of case law, the project primarily focused on decisions from the Supreme Court of Canada.

I have also engaged in a review of the secondary literature on the duty to consult, the implementation of UNDRIP, and FPIC. This thesis is focused on Canadian law. As a result, this review focused on literature situated in the Canadian context. However, I have also examined the work of leading scholars discussing these issues in an international context.

While I engaged primarily in legal research, it was also necessary to identify and utilize some non-legal sources, particularly with respect to the history of UNDRIP, Canada's political response to UNDRIP, and the perspectives of UNDRIP espoused by activists, journalists, and

academics from outside the legal field. I utilized a doctrinal approach for addressing these sources as well.

My thesis also utilizes a comparative method, albeit within a doctrinal analysis. I have engaged with scholarship that has discussed how the international community has responded to UNDRIP, particularly the articles requiring FPIC.

With respect to the use of Indigenous methodologies, this project is more focused on doctrinal sources in Aboriginal law than Indigenous Law. Aboriginal law focuses on Canadian law as it is applied to resolve legal disputes between Indigenous peoples and governments, or third parties. In contrast, Indigenous law addresses the values, norms, worldviews, and legal traditions that guide Indigenous Nations, in other words, the laws of Indigenous peoples. However, Aboriginal law has begun to acknowledge the relevance of Indigenous laws in disputes before the Canadian legal system, so to suggest that these two areas of law can be separated entirely would be inaccurate. Furthermore, my thesis includes the work of authors who have written about Indigenous legal traditions, with a particular focus on Anishinaabe principles as they pertain to issues such as consent, persuasive compliance, leadership, and decision-making. I utilize a doctrinal approach for addressing secondary sources for this part of my analysis in chapter four.

Although my methodology does not include research in Indigenous communities, all of my work is mindful of Indigenous methodological approaches.²⁰ As Shawn Wilson points out in his seminal piece *Research is Ceremony: Indigenous Research Methods*, "...Indigenous methodology must be a process that adheres to relational accountability. Respect, reciprocity,

²⁰ Particularly those highlighted and described in: Shawn Wilson, *Research is ceremony: indigenous research methods* (Halifax: Fernwood Pub, 2008) [Wilson]; Linda Tuhiwai Smith, *Decolonizing methodologies: research and indigenous peoples* 2nd ed (London: Zed Books, 2012).

and responsibility are key features of any healthy relationship and must be included in an Indigenous methodology.”²¹

Wilson writes that when utilizing an Indigenous methodology one should ask a series of questions, including: “how do my methods help to build respectful relationships between the topic that I am studying and myself as a researcher (on multiple levels)?”;²² and “Am I being responsible in fulfilling my role and obligations to the other participants, to the topic and to all of my relations”.²³ The work that I have done with primary and secondary sources is mindful of these questions. My approach is to incorporate Indigenous perspectives and scholarship throughout this thesis to ensure that these principles of responsibility and respect are taken into account.

²¹ *Wilson, supra* note 20 at 77.

²² *Ibid* at 77.

²³ *Ibid* at 77.

Chapter One

1 Introduction to UNDRIP and Indigenous Legal Traditions

In September 2007, the United Nations General Assembly adopted the Declaration by a vote of “144 states in favour, four votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions”.²⁴ In contrast to a convention or treaty, the Declaration is not (in and of itself) legally binding; however, it represents “...the dynamic development of international legal norms and reflects the commitment of states to move in certain directions, abiding by certain principles.”²⁵

The Declaration includes several articles referencing the FPIC of Indigenous peoples. Some of these articles clearly state that FPIC is required in certain circumstances, while others include more ambiguous language. The relevant articles for the purposes of this paper are as follows:

Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 29(2): States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

²⁴ United Nations Department of Economic and Social Affairs, Indigenous Peoples, “United Nations Declaration on the Rights of Indigenous Peoples” (last visited April 23, 2021), online: *United Nations* <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> [*UNDRIP Website*].

²⁵ United Nations Permanent Forum on Indigenous Issues, “Frequently Asked Questions – Declaration on the Rights of Indigenous Peoples” (last visited April 23, 2021), online: *United Nations* <<https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>>.

Article 32 (1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. **(2)** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.²⁶

This chapter sets the context for this thesis and proceeds in five parts. Part one provides a definition of ILTs. This is essential as the bulk of this thesis is dedicated to examining how ILTs intersect with FPIC and Canada's duty to consult framework. Part two includes a brief history of colonialism in Canada as well as the Crown's early treatment of Indigenous self-determination. This sets the context for the Indigenous rights movement that informed the development of the Declaration. Part three covers the origins and negotiation of UNDRIP, with a particular focus on the evolution of the FPIC Articles. This background is essential for two reasons. First, it informs some of the scholarship that has interpreted the FPIC Articles. Second, examining the development of UNDRIP demonstrates how issues of Indigenous sovereignty and self-determination lie at the heart of the Declaration. Debates over the meaning and scope of self-determination continue to inform responses to FPIC and impact any analysis of FPIC.

Part four covers Canada's response to the Declaration including its concerns regarding FPIC and the efforts to implement UNDRIP federally. This discussion provides the context for why debates over the meaning of FPIC have come to dominate the Indigenous rights discourse in Canada. Canada's evolving stance from opposing to embracing UNDRIP has made it necessary to seriously consider the proper interpretation of FPIC as well as the place of ILTs in debates about the implementation of the Declaration.

²⁶ *UNDRIP*, *supra* note 3 Articles 10, 19, 29.2, 32.

Part five includes a discussion of why it is essential to examine UNDRIP through the lens of ILTs. This thesis develops the proposition that ILTs have an essential role to play in interpreting FPIC and this part includes a series of arguments in support of this position.

1.1 What are Indigenous Legal Traditions?

John Borrows endorses the Oxford English Dictionary definition of law as “ the body of rules, whether proceeding from an enactment or from custom, which a particular state or community recognizes as binding on its members or subjects.”²⁷ Borrows has adopted John Henry Merryman’s definition of legal traditions, which is as follows:

A legal tradition . . . is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.²⁸

Borrows goes on to describe legal traditions as “cultural phenomena that ‘provide categories into which the untidy business of life may be organized’ and through which disputes may be resolved”.²⁹ When we are discussing a legal tradition, we are also discussing the value system, worldviews, and moral principles that inform the legal system of an identifiable group.³⁰ These aspects of ILTs are discussed further in chapter four.

²⁷ John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 165, endnote 8 citing Oxford English Dictionary, 2nd ed. (Oxford: Clarendon Press, 1989) sub verbo “law” at 712.

²⁸ John Borrows, “Indigenous Legal Traditions in Canada” (2005) 19 *Washington U J L & Pol’y* 167 at 174 [*Borrows Traditions*] citing John Henry Merryman et al, *The Civil Law Tradition: Europe, Latin America, and East Asia* 2d ed (Charlottesville: Michie, 2000) 3-4.

²⁹ *Borrows Traditions*, supra note 28 at 174, citing M.B Hooker *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford: Clarendon Press, 1975)

³⁰ Aaron Mills, “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today” (2016) 61:4 *McGill LJ* 847 at 869 [*Mills*].

The Federal Court has described ILTs as “the rules by which Aboriginal people have organized themselves into distinctive societies with their own social, cultural, legal and political structures that predated contact with the Europeans in North America”.³¹ Although this definition of ILTs is accurate, it is also very generic. Anishinaabe scholar Dawnis Kennedy provides a more meaningful reflection on what legal traditions mean from an Indigenous perspective:

The traditions of Indigenous peoples have existed within these lands for thousands of years. They reflect Indigenous peoples’ collective understandings of creation and the roles of individuals within creation and within community. They serve to support the efforts of Indigenous peoples to maintain good relations in this world: relations within communities, relations between communities, and relations with the other beings of creation. For generations, Indigenous peoples have continued the efforts of those who came before them, efforts to maintain their communities, their traditions, and their roles within creation.³²

Many Canadians are familiar with two legal traditions: the common law system, which applies in most of the country, and the civil law system which applies in the Province of Quebec.

Canadians are less familiar with the legal traditions of Indigenous peoples. As Borrows has noted, these systems of law pre-date the arrival of Europeans and are as diverse as the peoples indigenous to this continent:

The earliest practitioners of law in North America were its original indigenous inhabitants. These peoples are variously known as the “Aboriginal,” “Native,” or “First” peoples of the continent and include, among others, the ancient and contemporary nations of the Innu, Mi’kmaq, Maliseet, Cree, Montagnais, Anishinabek, Haudenosaunee, Dakota, Lakota, Nakota, Assinaboine, Saukteaux, Blackfoot, Secwepemec, Nlha’kapmx, Salish, Kwakwaka’wakw, Haida, Tsimshian, Gitksan, Tahltan, Gwich’in, Dene, Inuit, Metis, etc. Indigenous peoples’ traditions can be as historically different from one another as other nations and cultures in the world. For example, Canadian indigenous peoples speak over fifty different Aboriginal languages from twelve distinct language families, which have as wide a variation as do the language families of Europe and Asia. These nations’ linguistic, genealogical, political and legal descent can be traced back

³¹ *Alderville First Nation v Canada*, 2014 FC 747 at para 22 [*Alderville*].

³² Dawnis Kennedy, “Reconciliation without Respect? Section 35 and Indigenous Legal Orders in Law Commission of Canada, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2008) at 77 [*Kennedy*].

through millennia to different regions or territories in northern North America. This explains the wide variety of laws among indigenous groups.³³

Despite their deep roots, ILTs are not simply stuck in history. There is a significant amount of work ongoing by Indigenous peoples and scholars like Karen Drake, Hadley Friedland, John Borrows, Aaron Mills, Val Napoleon, and Aimee Craft to revitalize ILTs and to bring them back to the forefront both within Indigenous communities and within existing Canadian legal structures. As Darlene Johnston noted in her welcome address at the U of T Faculty of Law, ILTs have always been here, but work is required in order to access and study them more closely:

Before the University was here, and before the city of Toronto was here, there was a creek that ran from the high ground up north, all the way down to the lake. By pioneer times, this creek was known as Taddle Creek. When Hart House was first built, the southern part of Taddle Creek was dammed up, which resulted in quite a lovely pond. But the creek still flowed from the north, down through what is now Philosopher's Walk. By the 1870s, people started to complain about the creek because it had become a sewer for the Victorian mansions built along it. The pond was starting to smell. The city's solution was to bury the creek. So the creek went underground, and this facilitated the development of other buildings on the university grounds, including a rugby field at Hart House, our soccer pitch, and eventually the expansion of this law school. Now we are underground in a space that used to be shared by the creek, and from time to time the creek makes its reappearance, as anyone engaged in construction efforts in this vicinity knows. For those of us who are familiar with the vagaries of the elevator in this building, it is clear that Taddle Creek is still at work underground. The reason I mention the creek is twofold: first, to situate us here in this particular landscape, and second, because it serves as an analogy to Indigenous legal traditions. Indigenous legal traditions have also been forced underground by the transformations that newcomers brought. We might think that things that are buried are lost, or gone, or dead. Thus, people sometimes speak of the work of some of our Aboriginal scholars as a type of archaeology; we are digging down into the past to find relics or artifacts of our traditions. But the underwater creek is still a creek; the water is still running. There is still a spirit. And insofar as our languages, our values and our ethics are still flowing in our communities, the legal traditions of our peoples are still alive. Our legal traditions have been overlaid with all kinds of other constructions, but they are still flowing. Given the work that I have been able to do here at the University of Toronto, I think of myself as a well digger. I know that our

³³ *Borrows Traditions*, *supra* note 28 at 175-176.

jurisprudential river is underground, and I am determined to get down to the level where the waters still flow.³⁴

1.2 Colonialism in Canada: Canada's Historical Treatment of ILTs and Indigenous Self-Determination

A full treatment of the history of Canada's relationship with Indigenous peoples is beyond the scope of this thesis. However, it is important to briefly discuss the history of settler-colonialism in Canada in order to establish the groundwork for the movement in the 20th century supporting self-determination and rights recognition that informed the development of UNDRIP.

It is a trite point but is worth repeating that Indigenous peoples exercised powers of governance for millennia prior to the arrival of Europeans and others in North America. Indigenous peoples were living here, governing themselves, forming alliances, establishing nations, and engaging in diplomatic relations well before the arrival of the earliest settlers. This point is well established in Canadian jurisprudence, including in *R v Van Der Peet* where the Supreme Court of Canada confirmed that it was an undisputed fact that "...aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures".³⁵ Indigenous peoples, both historically and to this day, have asserted that given their history they possess an inherent right of self-government. As Alex Christmas, a Mi'kmaq representative before Canada's Royal Commission on Aboriginal Peoples stated: "We see our rights of self-government as an inherent right which does not come from other governments. It does not originate in our treaties...the

³⁴ Darlene Johnston, "Welcome Address" (2007) 6:1 Indigenous L J.

³⁵ *R v Van Der Peet* [1996] 2 SCR 507 at para 31 [*Van Der Peet*].

treaties reflect the crown's recognition that we were, and would remain self-governing, but they did not create our nationhood".³⁶

Things obviously changed with the arrival of the earliest settlers in North America. Scholars like John Borrows and Leonard Rotman have stated that it was "the arrival of others [that] challenged the governing structures of aboriginal nations and tested their ability to perpetuate their institutions".³⁷ This is not to suggest that immediately upon arriving in North America European settlers disregarded the nationhood or self-determination of Indigenous peoples. As Borrows and Rotman have noted, there are historical examples of a reciprocal recognition of British and Indigenous governance in the years preceding the creation of the Dominion of Canada. This was exemplified by the British use of diplomatic and treaty making practices that were previously unknown to them, including gift giving, the use of wampum belts, the periodic re-affirmation of treaties, etc.³⁸

Furthermore, in "Wampum at Niagara", John Borrows establishes that the Royal Proclamation and Treaty of Niagara included an affirmation of the self-determination of Indigenous peoples.³⁹ This was demonstrated by the words of Sir William Johnson, the British Crown's superintendent of Indian Affairs who in the aftermath of the Treaty of Niagara wrote about how First Nations would not subjugate themselves to the laws of the British:

³⁶ John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 5th ed (Toronto: LexisNexis Canada, 2018) at 5 [*Borrows and Rotman*] citing "Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship, Vol 2" (Ottawa, Ministry of Supply and Services, 1996) at 105-106, 108-114.

³⁷ *Ibid* at 1.

³⁸ *Ibid* at 10-12, 18.

³⁹ John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, *Aboriginal and treaty rights in Canada: essays on law, equity, and respect for difference* (Vancouver: UBC Press, 1997) 155 at 159-165.

These people had subscribed to a Treaty with me at Niagara in August last, but by the present Treaty I find, they make expressions of subjection, which must either have arisen from the ignorance of the Interpreter, or from some mistake; for I am well convinced, they never mean or intend anything like it, and that they cannot be brought under our laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection, and should it be fully explained to them, and the nature of subordination punishment etc [sic], defined, it might produce infinite harm ... and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles.⁴⁰

We can also observe a formal recognition of the ILTs in the earliest days of Canada in the *Connolly v Woolrich*⁴¹ decision. The case involved a fur trader (Connolly) who married a Cree woman (Suzanne). The marriage was formed under Cree law but was never solemnized by a priest or minister. The two were married for 30 years and had six children. Connolly eventually returned to Montreal with Suzanne and several of their children. Connolly later decided to marry Woolrich, and decided to treat his first marriage as invalid. Suzanne left with the children to return to Manitoba. Connolly eventually died and bequeathed all his property to Woolrich and the children he had with her, effectively cutting Suzanne (and their children) out of his estate. Suzanne and Connolly's first son sued Woolrich for a share of the estate.⁴²

One of the central questions in the case was whether or not Connolly's first marriage to Suzanne was valid under Cree law. The Quebec Superior Court concluded that the laws of the Cree remained in force⁴³ and "the marriage was valid according to those laws".⁴⁴

⁴⁰ *Ibid* at 164; *Borrows and Rotman*, *supra* note 36 at 21-22.

⁴¹ *Connolly v Woolrich*, [1867] Q.J. No. 1 [*Connolly*], *aff'd Johnstone c Connolly*, [1869] JQ no 1 (QL).

⁴² *Borrows and Rotman*, *supra* note 36 at 25-26.

⁴³ *Connolly*, *supra* note 41 at para 179.

⁴⁴ Mark D. Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v. Woolrich* at 150", (2017) 22 *Review of Constitutional Studies* 347 at 357.

So what can we conclude from all of this? It would be naïve to suggest that the early relationship between French and English colonizers and Indigenous peoples in Canada was one built entirely on mutual respect, dialogue, and recognition. Colonial attitudes toward Indigenous peoples were often fueled by feelings of cultural superiority.⁴⁵ However, there was at least a tacit historical acknowledgment by the Europeans that they were treating with self-governing peoples⁴⁶, with their own practices, protocols, and laws.⁴⁷ This early recognition of a right to self-determination is something that Canada has committed to re-building.⁴⁸

However, in the aftermath of Confederation what occurred in Canada can be described as a concerted policy of control and forced assimilation, the implications of which continue to be felt to this day. After the creation of the Dominion of Canada the treaty making process intensified. This was an effort to acquire large areas of land⁴⁹ from the traditional territories of Canada's Indigenous peoples. Canada also developed federal legislation regarding Indigenous peoples, leading to the passage of the *Indian Act* in 1876.⁵⁰

The *Indian Act* regulates a number of different matters regarding reserves, status, and bands, including the establishment of band councils (and by-laws), taxation, education, etc. It does not apply to all Indigenous peoples as it specifically excludes Métis and Inuit peoples. Several elements of the legislation worked to undermine Indigenous laws and self-determination. One of

⁴⁵ Adam J Barker, "The Contemporary Reality of Canadian Imperialism: Settler Colonialism and the Hybrid Colonial State" (2009) 33:3 *American Indian quarterly* 325 at 341, 344, 346.

⁴⁶ Brenda Gunn, "Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination" (2015) 38:1 *Dal LJ* 237 at 247-248 [*Gunn Beyond*].

⁴⁷ *Borrows and Rotman, supra* note 36 at 10-11, 18-19, citing Leonard I. Rotman, *Fiduciary Law* (Toronto: Thompson Carswell, 2005) at 532-535, 544-549.

⁴⁸ "Principles respecting the Government of Canada's relationship with Indigenous peoples" (last accessed 24 June 2021), online: *Government of Canada* <<https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>> [*Principles*].

⁴⁹ *Borrows and Rotman, supra* note 36 at 285.

⁵⁰ *Indian Act*, RSC 1985, c I-5 [*Indian Act*].

the more accessible resources on this topic is Bob Joseph's book *21 Things You May Not Know About the Indian Act*.⁵¹ Joseph highlights two aspects of the *Indian Act* that are relevant to this discussion.

First, it imposed the Chief and Band Council system.⁵² Prior to the *Indian Act*, First Nations governed themselves in accordance with traditional systems that differed significantly from Western European representative democracy. Canada made a concerted effort to replace these traditional methods of governance with an elective system that was more reflective of European institutions.⁵³ This new model bore a striking similarity nineteenth century municipal government: the community would vote on a representative council, led by an elected Chief, that would be responsible for making decisions on behalf of the community.⁵⁴ Those First Nations who opposed this model and wished to retain a system of governance more consistent with their culture, customs, traditions, and laws were met with force.⁵⁵ For example, in 1924, despite repeated objections, the Government of Canada forcibly removed the confederacy council governing Six Nations and replaced them with an elected band council. No notice was provided to Six Nations and the RCMP seized the wampum belts used during council proceedings before announcing imposed election dates.⁵⁶ This served to undermine a governance structure that

⁵¹ Bob Joseph, *21 Things You May Not Know About the Indian Act* (Port Coquitlam BC: Indigenous Relations Press, 2018) [Joseph].

⁵² *Ibid* at 15-19.

⁵³ *Ibid* at 15-16.

⁵⁴ *Ibid* at 16.

⁵⁵ Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 3rd ed. (Don Mills, Ont: Oxford University Press, 2002) at 300-301; Yale D Belanger, "The six nations of grand river territory's: Attempts at renewing international political relationships, 1921-1924" (2007) 13:3 Canadian foreign policy J 29 at 37-40 [Belanger].

⁵⁶ Belanger, *supra* note 55 at 37-40.

operated in accordance with Haudenosaunee traditional laws (the Great Law of Peace) and has had an impact that continues to be felt today.⁵⁷

Second, for decades the *Indian Act* declared the potlatch and other cultural ceremonies to be illegal.⁵⁸ Due to this prohibition whole generations of Indigenous peoples had to live in fear that they would be charged for participating in their cultural practices.⁵⁹ This had a devastating effect not only on the cultural practices themselves but on ILTs. Indigenous law is intimately connected to ceremony, culture, language, and land. Ceremonies like potlatch were, and remain, a vital regulatory institution.⁶⁰

Even in the face of Canada's assimilative policies, Indigenous peoples were steadfast that they possessed an inherent right of self-government and would remain self-determining peoples.

Eventually, Indigenous peoples turned to the burgeoning area of international law, where their advocacy work, while initially unsuccessful, would eventually form part of the background to the development of the Declaration.⁶¹

⁵⁷ Brett Forester, "Six Nations elected council addresses controversial agreement with developer, condemns injunctions" (23 October 2020), online: *APTN* <<https://www.aptnnews.ca/national-news/six-nations-elected-council-addresses-controversial-agreement-with-developer-condemns-injunctions/>>.

⁵⁸ Ken Coates, "The Indian Act and the Future of Aboriginal Governance in Canada" (2008), online: *National Centre for First Nations Governance* <<https://fngovernance.org/wp-content/uploads/2020/05/coates.pdf>> at 3-5; *Delgamuukw v British Columbia*, 1993 104 DLR (4th) 470, [1993] BCJ No 1395 (QL) at para 540 [*Delgamuukw 1993*].

⁵⁹ Val Napoleon, "Living Together: Gitksan Legal Reasoning as Foundation for Consent in Between Consenting People" in Jeremy Webber & Colin M. Macleod eds *In Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) at 47-48 [*Napoleon Living*].

⁶⁰ *Delgamuukw 1993*, *supra* note 58 at para 1059.

⁶¹ Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (London: Duke University Press, 2010) at 17 [*Engle Elusive*]; Stephen Young, "Re-historicising dissolved identities: Deskaheh, the League of Nations, and international legal discourse on Indigenous peoples" (2019) 7:3 *London Rev Intl L* 377 at 377-385 [*Young*]; *Borrows and Rotman*, *supra* note 36 at 38; James (Sa'ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing Limited, 2008) at 24. [*Youngblood*].

1.3 History of UNDRIP

1.3.1 Precursors to UNDRIP

Although work on the Declaration did not formally begin until the 1980s, Indigenous leaders had been advocating for a recognition of their rights in international law since the early 20th century. Indigenous communities continued to appeal to International law during the post-World War Two era.⁶² Inspired by the creation of the UN, the UN Charter's focus on peoplehood rather than statehood, and a number of relevant UN studies and declarations, Indigenous peoples pushed for recognition of their rights in the international sphere.⁶³

This work first bore fruit with the creation of two International Labour Organization (ILO) conventions that could be viewed as precursors to the Declaration:⁶⁴ C107 and C169. C107 recognized: (i) the economic, social, territorial, and cultural rights of Indigenous peoples; and (ii) the status of ILTs (Indigenous customary law).⁶⁵ C169 built upon C107⁶⁶ and recognized a right to community decision making, which may be seen as a precursor to FPIC:

The right most relevant to FPIC and community referenda is found in the strong language of Article 7(1): "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual

⁶² *Youngblood*, *supra* note 61 at 24-28.

⁶³ *Youngblood*, *supra* note 61 at 24-28.

⁶⁴ Andrew Erueti, "The International Labour organization and the Internationalisation of the Concept of Indigenous Peoples" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, (Oxford: Hart Publishing, 2011) at 93-94 [Erueti]; *Engle Elusive*, *supra* note 61 at 36-38; Jessie Hohmann & M. Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018) at 41-44 [Hohmann].

⁶⁵ International Labour Organization (ILO) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent countries (ILO No 107), 328 UNTS 247, entered into force 26 June 1957

<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107> [C107].

⁶⁶ International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169) (1989), 72 ILO Official Bull, entered into force Sep 5, 1991 <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUM ENT,P55_NODE:REV,en,C169,/Document> [C169].

well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.⁶⁷

C107 and C169 have not been ratified by Canada and have gained limited international support.⁶⁸ Despite this fact, the principles enshrined in these conventions laid the foundation for what was to come.

By the 1970s, there were a number of campaigns by elders, organizations, leaders, and lawyers,⁶⁹ that appealed to structures within the UN in an attempt to gain recognition of Indigenous rights.⁷⁰

Throughout the decade, Indigenous leaders established organizations designed to place Indigenous issues on the UN agenda, including the International Indian Treaty Council, the World Council of Indigenous Peoples, and the Inuit Circumpolar Conference.⁷¹

1.3.2 *The Creation of the WGIP*

The advocacy work of Indigenous leaders resulted in the establishment of the UN Working Group on Indigenous Populations (“WGIP”) in 1982.⁷² The WGIP’s initial mandate was “to

⁶⁷ Brant McGee, “The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development” (2009) 27:2 Berkeley J Int’l Law 570 at 586 [McGee]; *Ibid*.

⁶⁸ See: Ratifications of C107 – Indigenous and Tribal Populations Convention, 1957 (No. 107) (last accessed 29 April 2021), online: *ILO* <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252>; See: Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169) last accessed 29 April 2021), online: *ILO* <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252>

⁶⁹ *Youngblood*, *supra* note 61 at 30, 33-34.

⁷⁰ *Youngblood*, *supra* note 61 at 34.

⁷¹ *Engle Elusive*, *supra* note 61 at 18, 52; Ken Coates and Carin Holroyd, “Indigenous Internationalism and the Emerging Impact of UNDRIP in Aboriginal Affairs in Canada” in CIGI, *The Internationalization of Indigenous Rights, UNDRIP in the Canadian Context* (last accessed 29 April 2021) online: CIGI <https://www.cigionline.org/sites/default/files/indigenous_rights_special_report_web.pdf> at 6; Kenneth Deer, “Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples” in Jackie Hartley et al, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing Limited, 2010) at 18. [Deer].

⁷² Marco Odello, “The United Nations Declaration on the Rights of Indigenous Peoples” in Corrine Lennox & Damien Short (eds), *Handbook of Indigenous Peoples’ Rights* (Milton Park, Abdingdon Routledge, 2016) at 53 [Odello]; United Nations Department of Economic and Social Affairs Indigenous Peoples, “Indigenous

review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations and to give special attention to the evolution of standards concerning the rights of Indigenous populations”.⁷³ In 1985, the WGIP began work on what would eventually become the Declaration.⁷⁴ According to James (Sa’ke’j) Youngblood Henderson (“Henderson”), over time many states left the WGIP, criticizing both the discussions and the draft declaration principles as being “...unrealistic or impractical”.⁷⁵ Despite the withdrawal of many member states, work on the draft declaration continued. In 1993 the WGIP completed its work and submitted the draft declaration to the Sub-Commission on Prevention of Discrimination and Protection of Minorities⁷⁶ (“SCPDPM”) for review. In 1994, the SCPDPM “adopted the draft version of the [D]eclaration and submitted it to the Commission on Human Rights for consideration”.⁷⁷

1.3.3 Content of the 1993 Draft⁷⁸

The 1993 version of the Declaration had several similarities to the final text of UNDRIP but there are some notable differences. There are two changes from what was initially proposed in

Peoples at the United Nations” (last accessed 26 April 2021), online: *UN* <<https://www.un.org/development/desa/indigenouspeoples/about-us.html>>; Andrew S. Thompson, “The Slow ‘Evolution of Standards’: The Working Group on Indigenous Populations and UNDRIP” in CIGI, *The Internationalization of Indigenous Rights, UNDRIP in the Canadian Context* (last accessed 29 April 2021) online: *CIGI* <https://www.cigionline.org/sites/default/files/indigenous_rights_special_report_web.pdf> at 29 [Thompson].

⁷³ Thompson, *supra* note 72 at 29 citing *Study of the Problem of Discrimination Against Indigenous Populations*, ECOSOC Resolution, Economic and Social Council Resolution, 1982/34.

⁷⁴ Deer, *supra* note 71 at 20.

⁷⁵ Youngblood, *supra* note 61 at 51.

⁷⁶ Odello, *supra* note 72 at 53;

⁷⁷ *Ibid*; See also: UN Sub-commission on Prevention of Discrimination and Protection of Minorities, 46th session, 36th Mtg, UN Doc E/CN.4/Sub.2/RES/1994/45.

⁷⁸ UNGA, Report of the Working Group on Indigenous Populations on its 11th Session, 45th Sess. UN Doc E/CN.4/SUB.2/1993/29 at Annex 1.

1993 and what was eventually agreed to in 2007 that are relevant to the debates over the scope and content of FPIC that will be examined in further detail in Chapter two.

First, the language regarding FPIC was quite different in the 1993 draft. For example, Article 30 in the 1993 draft, which is similar to Article 32 in the UNDRIP, included stronger language that expressly states that the consent of Indigenous peoples is *required*:

Article 30: Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.⁷⁹

Article 20 in the 1993 draft, which is similar to Article 19 in the UNDRIP, also included stronger language requiring consent when adopting or implementing legislative or administrative measures that may affect them:

Article 20: Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.⁸⁰

Second, the 1993 draft did not include an equivalent of Article 46 of the UNDRIP which guarantees the territorial integrity and sovereignty of members states and imposes limits on the enunciated rights:

Article 46 (1) Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

⁷⁹ *Ibid* (emphasis added).

⁸⁰ *Ibid*.

(2) In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

(3) The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.⁸¹

These changes inform some of the academic treatment of the interpretation of the FPIC articles in UNDRIP, as will be seen in chapter two.

By the mid 1990s progress on the Declaration had slowed significantly and it became apparent that there was conflict surrounding the draft declaration's definition of Indigenous peoples, its articles regarding self-determination, its competing conceptions of individual versus collective rights, and its potential effect on state sovereignty.⁸² Work on the Declaration stalled⁸³ until the early 2000s when the parties began to engage in serious negotiations about potential amendments to the draft Declaration.⁸⁴ These negotiations led to a compromise final text⁸⁵ and a new version was sent to the body that later became the Human Rights Council ("UNHRC").⁸⁶

⁸¹ *Ibid.*

⁸² Jeremie Gilbert & Cathal Doyle, "A New Dawn over the Land: Shedding Light on Collective Ownership and Consent" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, (Oxford: Hart Publishing, 2011) at 296. [*Gilbert & Doyle*]; Erica-Irene Daes, "The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, (Oxford: Hart Publishing, 2011) at 30-31 [*Daes*]; *Youngblood*, *supra* note 61 at 67, 71.

⁸³ *Hohmann*, *supra* note 64 at 52-53.

⁸⁴ *Deer*, *supra* note 71 at 22; *Hohmann*, *supra* note 64 at 53-55.

⁸⁵ Karen Engle, "On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights" (2011) 22:1 *European J Intl L* 141 at 144 [*Engle Fragile*]; *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, UNESC, 62nd Sess, Annex I, UN Doc E/CN.4/2006/79 (22 March 2006).

⁸⁶ *Engle Fragile*, *supra* note 85 at 144; *Deer*, *supra* note 71 at 22-23.

In June 2006, after decades of work, the UN Human Rights Council adopted the draft text of the Declaration, with only Canada and Russia voting in opposition.⁸⁷ The next step was to bring the Declaration before the General Assembly for endorsement. A resolution to defer consideration of the Declaration at the General Assembly was passed in 2006.⁸⁸ What ultimately got state actors to drop their opposition was the inclusion of Article 46.⁸⁹ Finally, the draft declaration was adopted by the UNGA in 2007.

1.4 Canada's Evolving Response to the Declaration

This section will examine Canada's evolving response to UNDRIP, from its initial opposition to its eventual endorsement and commitment to implementation. Examining Canada's opposition to the Declaration is essential, as the concerns raised in 2007 regarding FPIC continue to dominate the discourse to this day.

In 2007, the four countries which voted against the Declaration all had significant Indigenous populations: Australia, Canada, New Zealand, and the United States. In the following 14 years, all four countries changed their positions on the Declaration. In 2009, the Australian government provided a formal statement of support for the Declaration⁹⁰ and New Zealand followed in April 2010.⁹¹ In December 2010, then President Barack Obama announced that the United States

⁸⁷ *Odello, supra* note 72 at 53; *Deer, supra* note 71 at 24; *Hohmann, supra* note 64 at 56-57.

⁸⁸ *Engle Fragile, supra* note 85 at 144.

⁸⁹ *Hohmann, supra* note 64 at 59-60.

⁹⁰ Michael Dodson, "Australian government announcement on the UN Declaration on the Rights of Indigenous Peoples" (last visited 23 April 2021), online: *United Nations* <https://www.un.org/esa/socdev/unpfii/documents/Australia_endorsement_UNDRIP_Michael_Dodson_statement.pdf>.

⁹¹ NZ, Hansard, *Ministerial Statements – UN Declaration on the Rights of indigenous peoples – Government Support* 20 Apr 2010 (Simon Power) <https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of>.

would reverse its previous position and endorsed the Declaration.⁹² Canada endorsed the Declaration in 2010 via a Statement of Support,⁹³ removed its permanent objectors status in May 2016 and committed to adopting and implementing the Declaration.⁹⁴

It is worth exploring why Canada initially opposed the Declaration. Canada raised a number of concerns about the Articles in the Declaration referring to FPIC.⁹⁵ Canada focused its attention on the following Articles:

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.⁹⁶

Article 32 (2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.⁹⁷

Canada argued that these articles were unduly restrictive and would grant Indigenous peoples a veto that was incompatible with Canada's democratic institutions.⁹⁸ Canada's ambassador to the

⁹² ACLU, "United States Endorses International Declaration on Indigenous Rights" (17 December 2010), online: ACLU <<https://www.aclu.org/press-releases/united-states-endorses-international-declaration-indigenous-rights#:~:text=NEW%20YORK%20%E2%80%93%20In%20an%20important,of%20Indigenous%20Peoples%20>>.

⁹³ Indigenous and Northern Affairs Canada, "Archived – Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: Government of Canada <<https://www.rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904>>. [*Canada Support*].

⁹⁴ *Fontaine, supra* note 10.

⁹⁵ For a detailed discussion of Canada's grounds for opposition to the Declaration See: Paul Joffe, "Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?" in Jackie Hartley et al, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing Limited, 2010) 70 [*Joffe*].

⁹⁶ *UNDRIP, supra* note 3 at Article 19.

⁹⁷ *Ibid* at Article 32.2.

⁹⁸ UN General Assembly, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights For All, Says President", GA/10612, UNGAOR 61st Sess. (13 September 2007), online: *UN* <<https://www.un.org/press/en/2007/ga10612.doc.htm>>. [*UNDRIP Press*].

UN at the time, John McNee, suggested that Canada supported promoting Indigenous rights, but that Canada had a number of significant concerns with respect to the text of the UNDRIP, notably the articles referencing FPIC:

Similarly, some of the provisions dealing with the concept of free, prior and informed consent were unduly restrictive, he said. Provisions in the Declaration said that States could not act on any legislative or administrative matter that might affect indigenous peoples without obtaining their consent. While Canada had a strong consultative process, reinforced by the Courts as a matter of law, the establishment of complete veto power over legislative action for a particular group would be fundamentally incompatible with Canada's parliamentary system.⁹⁹

Paul Joffe has suggested that one of the other reasons for opposing the Declaration was due to the fact that the Conservative government of the time "opposed the right of Indigenous peoples to self-government".¹⁰⁰ This is notable, given that several of the articles specifically address Indigenous peoples' right to self-determination and self-government.¹⁰¹

1.4.1 Canada's Lukewarm Endorsement

As noted above, Canada's position on the Declaration changed in 2010 when the Government of Canada released a Statement of Support of the Declaration.¹⁰² However, this support came with significant caveats. Canada argued that the Declaration: (1) was an "aspirational document";¹⁰³ (2) was "non-legally binding";¹⁰⁴ (3) did "not reflect customary international law";¹⁰⁵ and (4) did not "change Canadian laws".¹⁰⁶ Canada also reiterated its concerns about the Declaration's articles referencing FPIC and the possibility of these articles creating a veto power for

⁹⁹ *Ibid*; For a more detailed discussion of Canada's grounds for opposition to the Declaration See: *Joffe, supra* note 95 at 70.

¹⁰⁰ *Joffe, supra* note 95 at 80.

¹⁰¹ *UNDRIP, supra* note 3 Articles 3 and 4.

¹⁰² *Canada Support, supra* note 93.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

Indigenous peoples.¹⁰⁷ Canada also maintained its permanent objector status to the Declaration, suggesting that while it supported the spirit of the Declaration, it did not intend to be bound by its contents.

1.4.2 *Trudeau Government Changes Course - 2016*

Canada maintained this position until May 2016, when Minister Carolyn Bennett indicated that Canada would remove its permanent objector status and commit to adopting and implementing the Declaration.¹⁰⁸ Around this time, MP Romeo Saganash introduced a private member's bill, Bill C-262, which sought to implement the UNDRIP in Canadian law. The Bill was passed by the House of Commons but faced opposition by a group of Conservative Senators. Their reasons for opposing Bill C-262 echoed the concerns expressed by the Government of Canada in 2007 and 2010, specifically that the Bill "...could give Indigenous peoples a veto over resource development projects".¹⁰⁹ The Bill was procedurally delayed by the Senate until it ultimately dropped from the order paper when the Fall 2019 federal election was called.¹¹⁰ In the face of Canada's stated commitment to UNDRIP questions continued to be raised by politicians and commentators regarding the interpretation of FPIC as well as the impact of the Declaration on Indigenous sovereignty and self-determination.¹¹¹

¹⁰⁷ *Ibid.*

¹⁰⁸ *Fontaine, supra* note 10.

¹⁰⁹ Justin Brake, "Conservatives on cusp of killing Indigenous rights legislation, C-262" (6 June 2019) online: *APTN News* <<https://www.aptnnews.ca/national-news/conservatives-on-cusp-of-killing-indigenous-rights-legislation-c-262/>>

¹¹⁰ Justin Brake, "Let us rise with more energy: Saganash responds to Senate death of C-262 as Liberals promise, again, the legislate UNDRIP" (24 June 2019), online: *APTN News* <<https://www.aptnnews.ca/national-news/let-us-rise-with-more-energy-saganash-responds-to-senate-death-of-c-262-as-liberals-promise-again-to-legislate-undrip/>>.

¹¹¹ Ken S. Coates & Blaine Favel, "Understanding UNDRIP: Choosing Action on Priorities Over Sweeping Claims About the United Nations Declaration on the Rights of Indigenous Peoples" (May 2016), online: *Macdonald-Laurier Institute* <<https://www.macdonaldlaurier.ca/files/pdf/MLI-10-UNDRIPCoates-Flavel05-16-WebReadyV4.pdf>>; James Wilt, "Implementing UNDRIP is a Big Deal for Canada. He's What You Need

1.4.3 Canada Introduces Bill C-15 to Implement UNDRIP

On December 3, 2020, the Trudeau Government tabled Bill C-15,¹¹² *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*. The legislation includes an extensive preamble that, among other things: refers to the UNDRIP as a “framework for reconciliation”,¹¹³ confirms that the rights in the UNDRIP are a minimum standard¹¹⁴ and must be “implemented in Canada”,¹¹⁵ affirms that the UNDRIP emphasizes “the inherent rights of Indigenous peoples”,¹¹⁶ recognizes the “right to self-determination”¹¹⁷ of Indigenous peoples, and affirms the UNDRIP as “a source for the interpretation of Canadian law”.¹¹⁸

Bill C-15 itself is a relatively short piece of legislation. First, it affirms UNDRIP “as a universal international human rights instrument with application in Canadian law”.¹¹⁹ Second, it requires the Government of Canada to “...ensure that the laws of Canada are consistent with the Declaration”.¹²⁰ Third, it requires the Government of Canada to develop “...an action plan to achieve the objectives of the Declaration”.¹²¹ Fourth, it requires the Government of Canada to

to Know” (12 December 2017), online: *The Narwhal* <<https://thenarwhal.ca/implementing-undrip-big-deal-canada-here-s-what-you-need-know/>>; Brian Platt, “Six provinces object, but Liberals still move ahead with UN declaration on Indigenous rights” (3 December 2020), online: *National Post* <<https://nationalpost.com/news/politics/bill-to-enshrine-un-declaration-on-the-rights-of-indigenous-peoples-in-canadian-law>>; Tonda MacCharles, “Alberta pushes to kill Liberal plan to enshrine UN declaration on Indigenous rights” (24 February 2020), online: *The Star* <<https://www.thestar.com/politics/federal/2020/02/24/alberta-pushes-to-kill-liberal-plan-to-enshrine-un-declaration-on-indigenous-rights.html>>; Canadian Press, “Legault won’t endorse UN declaration on Indigenous peoples, fears veto on economic projects” (14 August 2020), online: *CTV News* <<https://montreal.ctvnews.ca/legault-won-t-endorse-un-declaration-on-indigenous-peoples-fears-veto-on-economic-projects-1.5064919>>.

¹¹² *Jones, supra* note 11.

¹¹³ *Bill C-15, supra* note 12 at preamble.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid* at s.4(a).

¹²⁰ *Ibid* at s.5.

¹²¹ *Ibid* at s.6(1).

report to Parliament annually on the measures taken to implement UNDRIP.¹²² Fifth, as noted above, the preamble of the Declaration states that “measures to implement the Declaration in Canada must take into account the...legal traditions of First Nations, Inuit, and the Métis and of their institutions and governance structures, their relationships to the land and Indigenous knowledge”.¹²³ On June 21, 2021 Bill C-15 received Royal Assent.

1.5 Why It Is Important to Examine UNDRIP through the lens of ILTs

This thesis argues that interpreting and implementing UNDRIP and specifically the articles referencing FPIC, needs to be done in a way that meaningfully engages with and incorporates ILTs. I offer six arguments in support of this position.

First, it is obvious from reviewing the work of those involved in the creation of the Declaration that their intention was to challenge the legacy of settler-colonialism and to ensure that the culture and laws of Indigenous peoples could be protected.¹²⁴ Indigenous peoples saw the UN as a body working on the issue of decolonization¹²⁵ and that the creation of the Declaration would allow Indigenous peoples to Indigenize human rights covenants by extending “Indigenous legal traditions to comprehend how a self-determining people or individual would behave”.¹²⁶

Scholars like Youngblood Henderson considered the Declaration itself to be reflective of the teachings from ILTs¹²⁷ and this was demonstrated by the approach he and others took to the drafting process. Youngblood Henderson described the drafting of the Declaration as being

¹²² *Ibid* at s.7.

¹²³ *Ibid* at preamble.

¹²⁴ *Youngblood, supra* note 61 at 23.

¹²⁵ *Ibid* at 27.

¹²⁶ *Ibid* at 52.

¹²⁷ *Ibid* at 75.

grounded in dialogue, mutual respect, and a recognition of the plurality of legal traditions represented at the United Nations:

The text of the Indigenous declaration was drafted through trans-systemic legalism; it was not the voice of a single tradition, but a voice shared through, across, and beyond many distinct legal traditions. The process demonstrated that the human rights regime was consistent with Indigenous legal traditions and knowledge that predated European colonization.¹²⁸

The various legal traditions represented in the United Nations, the structure and style of the Human Rights Covenants, and distinct Indigenous traditions converged in the drafting of the proposed declaration...The declaration was drafted to confirm the existing international human rights standards that apply to other peoples...Eleven years in consultation, the text was a product of wrongs committed against Indigenous peoples. It was drafted as a dialogue between Indigenous peoples and the independent legal experts of the Working Group.¹²⁹

It would be a mistake to ignore the context in which the Declaration emerged as well as the intentions of Indigenous peoples to ensure that International Human Rights Law was reflective of their legal traditions. We would do well to honour those who worked tirelessly to ensure the Declaration was adopted by embracing a meaningful role for ILTs with respect to the interpretation and implementation of UNDRIP.

Second, the Declaration itself recognizes the right of Indigenous peoples to maintain and develop their legal traditions, to have disputes with state actors resolved via processes that consider the laws of indigenous peoples, and to ensure that Indigenous peoples are able to engage with state actors through their own representative institutions:

Article 20 (1): Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities

¹²⁸ *Ibid* at 50.

¹²⁹ *Ibid* at 51.

Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 32 (2): States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.¹³⁰

As will be discussed in Chapter Two, there is broad support amongst the International Human Rights Law scholarship for the idea that one cannot read the articles referencing FPIC in isolation. Many now advocate for a consideration of the inter-connectedness of the issues of self-determination, sovereignty, land rights, and FPIC. To ignore ILTs in the interpretation of FPIC would demonstrate a disregard for the inter-connectedness of the articles in UNDRIP, many of which are designed to protect and uphold the laws of Indigenous peoples. Article 34, for example, recognizes a broad right of Indigenous peoples to promote, develop, and maintain their juridical systems or customs.¹³¹ Furthermore, Article 32(2), which includes a reference to FPIC, specifically discusses states consulting and cooperating with Indigenous peoples *through their own representative institutions*.¹³² These representative institutions should remain grounded in the customary laws and practices of Indigenous peoples.¹³³

¹³⁰ UNDRIP, *supra* note 3.

¹³¹ *Ibid* Articles 20, 27, 32, 34.

¹³² *Ibid* Article 32.2.

¹³³ *Gilbert & Doyle, supra* note 82 at 315.

Third, the Government of Canada has expressly stated that to effectively implement UNDRIP, it is essential that Canada recognize and consider ILTs. For example the preamble of Bill C-15 states:

And whereas measures to implement the Declaration in Canada must take into account the diversity of Indigenous peoples and, in particular, the diversity of the identities, cultures, languages, customs, practices, rights and legal traditions of First Nations, Inuit and the Métis and of their institutions and governance structures, their relationships to the land and Indigenous knowledge.¹³⁴

Although this language is in the preamble, and not in an operative provision, Canada's *Interpretation Act* states that "The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object".¹³⁵ Canada's choice of language here is sending a clear signal that ILTs are to play a role regarding the implementation of the Declaration, even if this role is not explicitly defined. Bill C-15 requires Canada to ensure the laws of Canada are consistent with the Declaration, suggesting that if Canada were to, for example, engage in a review of its existing duty to consult framework in light of FPIC, there would be an obligation to incorporate ILTs in some capacity.

Fourth, the Supreme Court of Canada has confirmed that the customary laws of Indigenous peoples may continue to apply in Canada. In *Mitchell v MNR*, Chief Justice McLachlin, writing for the majority, stated that "English law...accepted that aboriginal peoples possessed pre-existing laws"¹³⁶ and that these laws are presumed to survive the assertion of Crown sovereignty to form part of the common law¹³⁷ unless:

¹³⁴ C-15, *supra* note 12.

¹³⁵ *Interpretation Act*, RSC 1985, c 1-21 at s 13.

¹³⁶ *Mitchell v MNR*, 2001 SCC 33 at para 9.

¹³⁷ *Ibid* at para 10

(1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them: see B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.¹³⁸

If ILTs continue to operate in Canada, then it would arguably be incumbent on the Court to consider and apply any relevant ILTs to a discussion regarding the interpretation of the articles requiring FPIC.

Fifth, a recognition and incorporation of Indigenous perspectives, including the laws of Indigenous peoples, is essential to the process of reconciliation. The Supreme Court of Canada and scholars have both recognized that a respect for ILTs will further serve to advance the reconciliation¹³⁹ that Canada publicly advocates.¹⁴⁰

Sixth, adopting an approach to interpreting FPIC that incorporates ILTs is consistent with a purposive reading of FPIC as well as International Human Rights Law more broadly. Article 46(3) of UNDRIP states that "[t]he provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith".¹⁴¹ This appears to establish that any interpretation of UNDRIP should be grounded in a purposive rather than a purely textual analysis and in such a manner that it is consistent with International Human Rights Law.¹⁴² However, a

¹³⁸ *Ibid* at para 10.

¹³⁹ *Van Der Peet*, *supra* note 35 at para 49; Karen Drake, "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law", (2015) 11:2 *McGill J of Sustainable Development* L 184 at 214 [*Drake Mining*].

¹⁴⁰ Government of Canada, "Reconciliation" (last accessed 24 June 2021), online: *Government of Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1400782178444/1529183710887>>.

¹⁴¹ *UNDRIP*, *supra* note 3 at Article 46.

¹⁴² Dwight Newman, "Interpreting FPIC in UNDRIP" (2020) 27:2 *Intl J on Minority and Group Rights* 233 at 240-241 [*Newman FPIC*].

few questions remain. What is the purpose of UNDRIP? And what does the broader human rights law discourse suggest regarding the relationship between ILTs and the interpretation of UNDRIP?

Opinions on this first question may vary, but for many the promotion of Indigenous self-determination is at the core of the rights expressed in the Declaration¹⁴³ particularly when it comes to the right to FPIC.¹⁴⁴ For example, in 2001 Rodolfo Stavenhagen was named the Special Rapporteur on the rights of Indigenous peoples. In his 2003 report to the Commission on Human Rights, he highlighted how resource development and human rights “...involves a relationship between indigenous peoples, Governments and the private sector which must be based on the full recognition of indigenous peoples’ rights to their lands, territories and natural resources, which in turn implies the exercise of their right to self-determination”.¹⁴⁵

Former Special Rapporteur James Anaya has highlighted the importance of respecting Indigenous self-determination when discussing the consultation process. Anaya suggests that a duty to consult Indigenous peoples derives from International Human Rights Law’s recognition of self-determination and sovereignty¹⁴⁶ and that the focus should remain on ensuring procedures

¹⁴³ Richard Healey, “From Individual to Collective Consent: The Case of Indigenous Peoples and UNDRIP.” (2020) 27:2 Intl J on Minority and Group Rights 251 at 253, 265-268 [Healey].

¹⁴⁴ Gilbert & Doyle, *supra* note 82 at 312; Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: a human rights-based approach*, UNHRC, 39th Sess, Agenda Items 3 and 5, UN Doc A/HRC/39/62 at para 3 [EMRIP]

¹⁴⁵ Rodolfo Stavenhagen, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Commission on Human Rights, 59th Sess, Agenda Item 15, UN Doc E/CN.4/2003/90 at para 66 [Stavenhagen].

¹⁴⁶ James Anaya, *Analysis of the duty of States to consult with indigenous peoples on matters affecting them: insight into how duty to consult may be addressed by Governments, indigenous peoples, the United Nations system, and other stakeholders*, UNHRC, 12th Sess, Agenda Item 3, UN Doc A/HRC/12/34 at para 41 [Anaya 12/34]

are in place to avoid “...the imposition of the will of one party over the other, and...[a] striving for mutual understanding and consensual decision-making”.¹⁴⁷

In terms of International Human Rights Law, engagement with ILTs appears to be an essential element to the approach International Human Rights Law has taken to the interpretation of FPIC. For example, in discussing FPIC, the UN’s Expert Mechanism on the Rights of Indigenous Peoples (“EMRIP”) came to two notable conclusions in 2018. First, that engagements with Indigenous peoples must be ‘free’ which should include ensuring that “Indigenous peoples...have the freedom to be represented as traditionally required under their own laws, customs, and protocols”¹⁴⁸ and that they “should have the freedom to guide and direct the process for consultation”.¹⁴⁹ Second, the EMRIP noted that consultation with Indigenous peoples should be informed, meaning that Indigenous peoples should be provided information relevant to the consultation that is “culturally appropriate, [and] in accordance with their inherent traditions”.¹⁵⁰

Scholars writing on this subject have pointed out that “internal governance and decision-making structures [are] central to the right to self- determination, [so] it is necessarily the case that Indigenous peoples engaged through FPIC processes enjoy a right to be engaged through institutions of their choosing and design”¹⁵¹ and that in order for these “institutions to function and be effective, Indigenous peoples must be able to maintain their own legal systems”.¹⁵²

¹⁴⁷ *Ibid* at para 49.

¹⁴⁸ *EMRIP*, *supra* note 144 at para 20(c).

¹⁴⁹ *Ibid* at para 20(d).

¹⁵⁰ *Ibid* at 19.

¹⁵¹ Nathan Yaffe, “Indigenous Consent: A Self-Determination Perspective” (2018) 19:2 *Melb J Int’ L* 703 at 724. [*Yaffe*].

¹⁵² Felix Hoehn, “The Duty to Negotiate and the Ethos of Reconciliation”, (2020) 83 *Sask L Rev* 1 at para 79.

Other scholars have suggested: (i) that ensuring that consultations are adequately informed requires broad input from elders and traditional knowledge holders;¹⁵³ (ii) that Indigenous peoples should be able to reach a decision on a proposed project “...in accordance with their customary laws and practices”;¹⁵⁴ and (iii) that any scholarship on the interpretation of FPIC “...should be based on the actual experiences of indigenous communities and reflect their perspectives”.¹⁵⁵ There are also examples outside the context of the UNDRIP where International Human Rights Law has specifically recognized the importance of incorporating ILTs, notably the articles relating to incorporating ILTs approved by the Inter-American Commission on Human Rights:

The following articles relating to incorporating of Indigenous legal traditions and laws were approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session in Geneva, Switzerland and form part of the Proposed American Declaration On The Rights Of Indigenous Peoples: Article XVI. Indigenous Law 1. Indigenous law shall be recognized as a part of the states' legal system and of the framework in which the social and economic development of the states takes place. 2. Indigenous peoples have the right to maintain and reinforce their Indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony. 3. In the jurisdiction of any state, procedures concerning Indigenous peoples or their interests shall be conducted in such a way as to ensure the right of Indigenous peoples to full representation with dignity and equality before the law. This shall include observance of Indigenous law and custom and, where necessary, use of their language. Article XVII. National incorporation of Indigenous legal and organizational systems 1. The states shall facilitate the inclusion in their organizational structures, the institutions and traditional practices of Indigenous peoples, and in consultation and with consent of the peoples concerned. 2. State institutions relevant to and serving Indigenous peoples shall be designed in consultation and with the participation of the peoples concerned so as to reinforce and promote the identity, cultures, traditions, organization and values of those peoples.¹⁵⁶

¹⁵³ Andrea Carmen, “The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress” in Jackie Hartley et al, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing Limited, 2010) at 125.

¹⁵⁴ *Gilbert & Doyle, supra* note 82 at 315.

¹⁵⁵ *Ibid* at 315.

¹⁵⁶ Lisa D. Chartrand, “Accommodating Indigenous Legal Traditions” (31 March 2005), online: *Indigenous Bar Association* <<https://www.indigenousbar.ca/pdf/Indigenous%20Legal%20Traditions.pdf>> at 15.

What this all suggests is that in order to properly interpret UNDRIP and specifically the articles referencing FPIC, it is essential to engage with and consider the applicability of ILTs.

Chapter Two

2. The Meaning of FPIC and the Role of ILTs: A Review of the Existing Scholarship

As noted above, Aboriginal law scholar Dwight Newman has suggested that “...the Court’s interpretation of FPIC is...subject to uncertainties that have enormous implications for Canada”.¹⁵⁷ Fortunately there is no shortage of scholarship that has tackled this interpretive question. This chapter consists of three parts. Part 1 is an examination of how sources of International Human Rights Law, specifically UN representatives, international law bodies, international law tribunals, and other countries, have interpreted the UNDRIP Articles that refer to FPIC. Part 2 assesses the current state of the scholarship regarding the meaning and role of FPIC. This section analyzes whether the scholarship has: (i) accounted for Indigenous perspectives on FPIC; and (ii) assessed the relevance of ILTs in the interpretation/implementation of FPIC.

2.1 Perspectives from International Human Rights Law

Since the Declaration was endorsed in 2007, scholars and advocates working in International Human Rights Law have provided state actors with guidance on the interpretation and implementation of the UNDRIP articles referencing FPIC. As a reminder, the relevant articles in the Declaration (collectively referred to as the “FPIC Articles”) are as follows:

Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior

¹⁵⁷ Newman C-262, *supra* note 14.

and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 29(2): States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.¹⁵⁸

Article 32 (1): Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. **(2)** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.¹⁵⁹

This section will highlight some of the conclusions made by international bodies within the UN regarding the proper interpretation of the FPIC Articles.

2.1.1 *UN Special Rapporteurs*

UN Special Rapporteurs are “independent experts appointed by the U.N Human Rights Council...with the mandate to monitor, advise, and publicly report...on human rights violations worldwide (thematic mandates)”.¹⁶⁰ Over the past 20 years, the UN has appointed three Special Rapporteurs on the rights of Indigenous peoples, and each has attempted to provide the international community with guidance on the interpretation of the FPIC Articles. In 2001, Rodolfo Stavenhagen was appointed Rapporteur and, as noted above, in his 2003 report to the Commission on Human Rights he highlighted how resource development and human rights, “...involves a relationship between indigenous peoples, Governments and the private sector

¹⁵⁸ *UNDRIP*, *supra* note 3.

¹⁵⁹ *Ibid.*

¹⁶⁰ ACLU, “FAQs: United Nations Special Rapporteurs” (last accessed 24 June 2021), online: *ACLU* <<https://www.aclu.org/other/faqs-united-nations-special-rapporteurs#:~:text=Special%20Rapporteurs%20are%20prominent%20human,country%20visits%20by%20Special%20Rapporteurs%3F>>.

which must be based on the full recognition of indigenous peoples' rights to their lands, territories and natural resources, which in turn implies the exercise of their right to self-determination".¹⁶¹

Stavenhagen's view was that sustainable development would only be achieved if Indigenous peoples are able to determine "...their own vision of development, including their right to say no".¹⁶² Stavenhagen's view on FPIC is not discussed in detail in his reports but he appears to take the position that extractive resource development can only proceed if it includes a right for Indigenous peoples to withhold their consent to projects that affect their lands and resources.

In March 2008, S. James Anaya was appointed Special Rapporteur and during his tenure he released a series of reports that commented on the meaning of FPIC. Anaya's perspectives on FPIC have been widely embraced and endorsed in the International Human Rights Law discourse and are worth exploring in detail. Anaya has noted that that discussion of FPIC remains contentious, with entrenched and often "...conflicting points of view".¹⁶³ In his reports Anaya comes to several conclusions regarding the meaning of FPIC. First, he confirms the duty to consult is grounded in several "...universally accepted human rights, including the right to cultural integrity, the right to equality, and the right to property".¹⁶⁴ Anaya also concluded that a duty to consult Indigenous peoples derives from International Human Rights Law's recognition of self-determination and sovereignty.¹⁶⁵

¹⁶¹ *Stavenhagen, supra* note 145 at para 66.

¹⁶² *Ibid.*

¹⁶³ James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, UNHRC, 21st Sess, Agenda Item 3, UN Doc A/HRC/21/47 at para 47 [*Anaya 21/47*].

¹⁶⁴ *Anaya 12/34, supra* note 146 at para 41.

¹⁶⁵ *Ibid* at para 41; this view is echoed by the UNGC in United Nations Global Compact, "The Business Reference Guide to the United Nations Declaration on the Rights of Indigenous Peoples" (last accessed 26 April 2021) online: *UN*

Second, Anaya concludes that the duty to consult should apply in a broad set of circumstances, specifically “...whenever a State decision may affect indigenous peoples in ways not felt by others in society”.¹⁶⁶

Third, Anaya argues that Article 19 of the Declaration should not be regarded as granting Indigenous peoples a veto power, but instead should be understood as establishing that consent is the objective of consultations.¹⁶⁷ In general, Anaya expresses concern that discussions around the Declaration end up devolving into a discussion about a veto,¹⁶⁸ a concern he would no doubt share about the state of the discourse in Canada. In Anaya’s opinion, this discussion misses the point of how FPIC has developed in International Human Rights Law and how “...the principles of consultation and consent...have been incorporated into the Declaration”.¹⁶⁹ As noted above, Anaya asks that the focus remain on ensuring that procedures are in place to avoid “...the imposition of the will of one party over the other, and...[a] striving for mutual understanding and consensual decision-making”.¹⁷⁰

That being said, Anaya does acknowledge that the articles in the Declaration should impose a duty to obtain the consent of Indigenous peoples but only when a proposed project would have a significant impact on their lives or territories or when articles 10 and 29 are engaged:¹⁷¹

Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In

<https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FIndigenousPeoples%2FBusinessGuide.pdf> at 25.

¹⁶⁶ *Anaya 12/34*, *supra* note 146 at para 43.

¹⁶⁷ *Ibid* at para 45-46.

¹⁶⁸ *Ibid* at para 48.

¹⁶⁹ *Ibid* at para 48.

¹⁷⁰ *Ibid* at para 49.

¹⁷¹ *Ibid* at para 47.

certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent. The Declaration recognizes two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. These situations include when the project will result in the relocation of a group from its traditional lands, and in cases involving the storage or disposal of toxic waste within indigenous lands (arts. 10 and 29, para. 2, respectively).¹⁷²

...extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent. Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices. Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending upon the nature of and potential impacts of the activities on the exercise of their rights.¹⁷³

Fourth, Anaya has maintained that even when the Declaration requires the consent of Indigenous peoples, there are circumstances where state actors can justify proceeding with projects absent consent. Anaya concluded that consent may not be required in cases where "...it can be conclusively established that the activities will not substantially affect indigenous peoples in the exercise of any of their substantive rights in relation to the lands and resources within their territories"¹⁷⁴ or where it would impose limits that "...are permissible within certain narrow bounds established by international human rights law".¹⁷⁵ These limits would have to comply with relevant treaties¹⁷⁶ and "...with certain standards of necessity and proportionality with regard to a valid public purpose, defined within an overall framework of respect for human rights".¹⁷⁷ Anaya concluded that this is consistent with the inclusion of Article 46 of UNDRIP

¹⁷² *Ibid* at para 47.

¹⁷³ James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples*, UNHRC, 24th Sess, Agenda Item 3, UN Doc A/HRC/24/41 at para 27 [*Anaya 24/41*].

¹⁷⁴ *Ibid* at para 31.

¹⁷⁵ *Ibid*.

¹⁷⁶ *Ibid* at para 32.

¹⁷⁷ *Ibid* at para 32.

which specifically recognizes that the rights contained therein can be limited in certain circumstances.¹⁷⁸ However, Anaya expressed caution about relying on economic benefits as the grounds for limiting a right to FPIC.¹⁷⁹

In 2014, Victoria Tauli-Corpuz, an Indigenous leader from the Philippines, was appointed to replace Anaya as the Special Rapporteur on the rights of Indigenous peoples. In 2020, Tauli-Corpuz released her final report as Special Rapporteur and commented on international standards on FPIC by sharing her definition of prior, informed, and consent.

Tauli-Corpuz defined prior as meaning that “...consultations need to be carried out before the adoption of a measure, the granting of authorizations and permits, or the signing of contracts or other definite commitments by States related to activities or projects, can affect indigenous peoples”.¹⁸⁰ Tauli-Corpuz defined informed as meaning that Indigenous peoples would have the “...full knowledge of the scope, nature and impacts of a proposed measure or activity before its approval, including possible environmental, health and other risks”.¹⁸¹

With respect to the definition of consent Tauli-Corpuz’s conclusions largely echoed those of Anaya. Tauli-Corpuz maintained that focusing solely on the question of a veto “...would amount to losing sight of the spirit and character of these principles”.¹⁸² She states that FPIC “...should be understood as the objective of consultations and as an obligation in cases of significant impacts on the rights of indigenous peoples”.¹⁸³ Tauli-Corpuz also concluded that any

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid* at para 35.

¹⁸⁰ Victoria Tauli-Corpuz, *Rights of indigenous peoples*, UNHRC, 45th Sess, Agenda Item 3, UN Doc A/HRC/45/34 at para 52.

¹⁸¹ *Ibid* at para 56.

¹⁸² *Ibid* at para 59.

¹⁸³ *Ibid* at para 60.

restrictions on the broad right to FPIC should be consistent with international standards of “legality, necessity and proportionality in relation to a valid public purpose”.¹⁸⁴

2.1.2 Other UN Commentary on FPIC

Outside of the office of the Special Rapporteur, other UN bodies have commented on the meaning of FPIC. I will highlight three examples. First, the Expert Mechanism on the Rights of Indigenous Peoples (“EMRIP”), a body tasked with “...conduct[ing] studies to advance the promotion and protection of Indigenous peoples’ rights”,¹⁸⁵ has largely echoed the conclusions of the Rapporteurs regarding the interpretation of FPIC,¹⁸⁶ notably by concluding that the significance of the proposed impact should determine whether consent is required:¹⁸⁷

As to impact, if a measure or project is likely to have a significant, direct impact on indigenous peoples’ lives or land, territories or resources then consent is required (see A/HRC/12/34, para. 47). It has been referred to as a “sliding scale approach” to the question of indigenous participatory rights, which means that the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question. This view is supported by the Human Rights Committee, which uses the language “substantive negative impact”, and the Committee on Economic, Social and Cultural Rights.¹⁸⁸

¹⁸⁴ *Ibid* at para 61.

¹⁸⁵ United Nations Human Rights Office of the High Commissioner, “Expert Mechanism on the Rights of Indigenous Peoples” (last accessed 29 April 2021), online: UN <<https://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx>>.

¹⁸⁶ For example, they also recognize that FPIC is grounded in self-determination, that when consulting with Indigenous peoples consent should be the objective, and that Indigenous peoples must be able to freely participate in consultations and provided with appropriate and sufficient information (See: *EMRIP*, *supra* note 144 at para 3, 7, 15, 20(a), 22(a)(b)).

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid* at para 35.

The EMRIP has also opened the door to an interpretation of FPIC that embraces a role for ILTs by suggesting that Indigenous peoples' consent should be consistent with their "own laws, customs, protocols and practices".¹⁸⁹

Second, the UN has produced a series of handbooks for Parliaments and Parliamentarians examining a variety of UN Declarations and Conventions. In September 2015, the UN released a handbook entitled "Implementing the UN Declaration on the Rights of Indigenous Peoples". The handbook includes a chapter on FPIC and why it is important for Parliamentarians. In general, the conclusions reached in this handbook echo the commentary of the Special Rapporteurs, specifically that obtaining consent should always be the objective of consultations, and that consent is required if the potential impact is severe enough.¹⁹⁰

The handbook defines 'free' as meaning "no coercion, intimidation or manipulation";¹⁹¹ 'prior' as meaning that consent needs to be "sought sufficiently in advance of any authorization or commencement of activities and respective requirements of indigenous consultation/consensus processes";¹⁹² and 'informed' as meaning that the information provided to Indigenous peoples:

covers a range of aspects, [including, inter alia]...the nature, size, pace, reversibility and scope of any proposed project or activity; the reason/s or purpose of the project and its duration; locality or areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail.¹⁹³

¹⁸⁹ *Ibid* at para 30.

¹⁹⁰ Interparliamentary Union, "Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians" (8 September 2015), online: *UN* <<https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf>> at 27-29, 31.

¹⁹¹ *Ibid* at 27.

¹⁹² *Ibid* at 27

¹⁹³ *Ibid* at 27-28.

Another notable UN source is the Committee on the Elimination of Racial Discrimination (“CERD”), which has taken a particular interest in several of Canada’s resource development projects and the effect that these have had on Indigenous communities. In late 2019, CERD released a decision against Canada pursuant to its early-warning measures and urgent procedures. In the decision CERD expressed concerns that the Site C Dam (British Columbia) and Trans Mountain Pipeline Project (British Columbia and Alberta) were continuing without FPIC and called for a cease on construction of these projects until consent was obtained.¹⁹⁴ These projects are significant to the Canadian economy, will cross the territories of many Indigenous communities, and have been subject to steadfast opposition by Indigenous peoples who have yet to provide their consent to the projects.¹⁹⁵

Despite CERD’s concerns and in the face of Indigenous opposition, Canada has proceeded with work on these projects. In 2020 Canada responded to CERD explaining that Canada’s interpretation of FPIC was informed by its duty to consult framework, which mandated a *process* but not a particular result. This interpretation is somewhat similar to the one advocated by Anaya and others. In November 2020, CERD wrote to the Government of Canada expressing concern about this approach to FPIC, stating:

The Committee regrets the State party interprets the free, prior and informed consent principles as well as the duty to consult as a duty to engage in a meaningful and good faith dialogue with indigenous peoples and to guarantee a process, but not a particular

¹⁹⁴ Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedure, UNCERD, 100th Sess, Decision 1 (100)
<https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_EWU_CAN_9026_E.pdf>

¹⁹⁵ *Tsleil-Waututh Nation et al v Attorney General of Canada et al*, 2018 FCA 153 [*Tsleil-Waututh*]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater*].; The Narwhal, “Site C Dam” (last accessed 26 April 2021), online: *The Narwhal* <https://thenarwhal.ca/topics/site-c-dam-bc/>; Andrew Kurjata & Meera Bains, “Site C dam budget nearly doubles to \$16B, but B.C. NDP forging on with megaproject” (25 February 2021), online: *CBC News* <<https://www.cbc.ca/news/canada/british-columbia/site-c-announcement-friday-1.5928719>>.

result. In this regard, the Committee would like to draw its attention on [sic] the Committee's general recommendation No. 23 (1997) on the rights of Indigenous peoples, in which it calls upon States parties to ensure that no decisions directly relating to the rights or interests of Indigenous peoples is [sic] taken without their informed consent.¹⁹⁶

CERD has not explained precisely how they interpret the consent requirement, but they appear to be applying a fairly strict standard, one that provides Indigenous peoples with a clear right to withhold their consent.

In general, the Special Rapporteurs and the relevant UN bodies appear to interpret the FPIC Articles as being primarily about processes with consent as the goal. However, in instances where a proposed state action will have a significant impact, consent may be required. They have also concluded that even a right to consent can be limited pursuant to Article 46; however, the basis for these limits is still subject to debate. It is worth noting CERD's response to Canada's recent actions in British Columbia, but it remains to be seen whether this represents a meaningful shift in how some UN actors, including the Special Rapporteurs and the EMRIP, interpret FPIC.

2.1.3 International Developments Regarding FPIC

A full comparative analysis of how FPIC has been interpreted outside of Canada is beyond the scope of this thesis. However, it is worth noting: (i) some of the jurisprudence of international courts on the interpretation of FPIC; and (ii) some recent developments in countries that committed to implementing the Declaration.

¹⁹⁶ Yanduan Li, UNCERD, 102nd Sess, <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/CAN/INT_CERD_ALE_CAN_9296_E.pdf>.

Regarding the international jurisprudence, scholars often point to the Inter-American Court of Human Rights (“IACHR”) as the body responsible for some of most important and interesting developments in the area of Indigenous peoples’ rights to “lands, resources, consultation, and consent”.¹⁹⁷

There are two decisions of the IACHR that are worth noting. The first is *Saramaka People v Suriname*. In this case, the IACHR found that the Surinamese government “had issued a number of concessions for timber extraction to Chinese logging companies in the mid-1990s without obtaining the consent of the Saramaka and even without consulting them”.¹⁹⁸ The Saramaka petitioned, and the court issued its judgment in November 2007. The Court ruled that the rights of Indigenous peoples were not absolute and could be subject to restrictions but that safeguards were to be put in place, including a right to participate,¹⁹⁹ a right to benefit from plans within their lands,²⁰⁰ and a right to an “environmental and social impact assessment”.²⁰¹

The IACHR went on to note that “...regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions”.²⁰² This is largely consistent with the views expressed by the Special Rapporteurs noted above.

¹⁹⁷ S.J. Rombouts, “The Evolution of Indigenous Peoples’ Consultation Rights under the ILO and U.N. Regimes” (2017) 53:2 *Stan J Int’l L* 169 at 211.

¹⁹⁸ *Ibid* at 214.

¹⁹⁹ *Ibid*.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid*.

²⁰² *Ibid* at 215.

The second major case was *Sarayaku v Ecuador*. Although the case does not add much by way of analysis of FPIC, it did confirm “that consultations must be in good faith and with the explicit objective to obtain consent regarding the proposed activities”.²⁰³ The court also ruled that “...the obligations of States to consult with Indigenous peoples is [sic] now a general principle of international law”.²⁰⁴

It is also worth noting some recent developments in countries that have committed to implementing UNDRIP, specifically Chile and the Philippines.²⁰⁵ In November 2013, “Chile adopted Supreme Decree No. 66/2013, which regulates the procedure for consultation with indigenous people pursuant to the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169)”.²⁰⁶ At the time this decree was adopted, Chile noted that the consultation processes “...did not include a right of Indigenous peoples to veto”.²⁰⁷ In 1997, the Philippine government enacted the *Indigenous Peoples Rights Act* (IPRA). Pursuant to the IRPA, the FPIC of Indigenous peoples “...is needed before the implementation of any action or measure which may affect the ICCs/IPs”.²⁰⁸ The Act defines FPIC as meaning:

²⁰³ *Ibid* at 220.

²⁰⁴ UN Economic and Social Council - UN Permanent Forum on Indigenous Issues, *Tenth anniversary of the United Nations Declaration on the Rights of Indigenous Peoples: measures taken to implement the Declaration*, UNESCOR, 16th Sess, Agenda Item 8, UN Doc E/C.19/2017/4 at para 33 [*UN Tenth*].

²⁰⁵ Scholars have noted the progress made on FPIC in other places like Australia, Bolivia, Venezuela, Columbia, the Republic of Congo, Ghana, Guyana, and New Zealand but have suggested that in many of these places it is become more of a box ticking exercise than a meaningful embrace of FPIC. See: Philippe Hanna & Frank Vanclay, “Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent” (2013) 31:2 *Impact Assessment and Project Appraisal*, 146 at 151-152 [*Hanna & Vanclay*]; Matthew I. Mitchell & Davis Yuzdepski, “Indigenous Peoples, UNDRIP and Land Conflict: An African Perspective” (2019) 23:8 *Intl JHR* 1356. Sam Wex and Karen Campbell, “FNEMC Mining and Consent Discussion Paper” (March 2021), online: *British Columbia First Nations Energy and Mining Council* <https://sustain.ubc.ca/sites/default/files/2020-078_Mining%20and%20Consent%20Discussion%20Paper_Wex.pdf>.

²⁰⁶ *UN Tenth*, *supra* note 204 at para 34.

²⁰⁷ *Ibid* at para 34.

²⁰⁸ Sedfrey M. Candelaria, “Comparative analysis on the ILO Indigenous and Tribal Peoples Convention No. 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and Indigenous Peoples’ Rights Act (IPRA) of the Philippines (last accessed 29 April 2021) online: *International Labour Organization*

the consensus of all members of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.²⁰⁹

Despite the broad definition of FPIC expressed in the IPRA, some authors have expressed concerns over how it is being applied in practice.²¹⁰

It appears that, in general, the jurisprudence and international developments largely echo the approach that consent of Indigenous peoples should be the general goal that but that it will only be required for projects that will have a major impact on them.

2.2 Literature Review

There is a substantial amount of scholarship discussing the scope and meaning of the FPIC articles within UNDRIP, including its history and interpretation. Some of the notable scholars who have written on this subject include: Dwight Newman, James (Sa'ke'j) Youngblood Henderson, Gordon Christie, Karen Engle, Kenneth Deer, Erica-Irene Daes, Andrew Erueti, Jeremie Gilbert, Mauro Barelli, Cathal Doyle, Michael Coyle, Philippe Hanna, Martin Papillon, Roberta Rice, Jeremy Patzer, Avigail Eisenberg, Stuart Butzier, Tara Ward, Terry Mitchell, Ken S. Coates, Blaine Favel, Kathryn Tomlinson, Val Napoleon, Thierry Rodon, S.J. Rombouts, Nathan Yaffe, Brenda Gunn, Dominique Leydet, Jeffery Hewitt, and Claire Charters.

<https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms_171406.pdf> at 22.

²⁰⁹ *Hanna & Vanclay, supra* note 205 at 151-152 citing *Indigenous Peoples Rights Act of 1997*, Republic Act No. 8371, Metro Manila: Congress of the Philippines, online:

<<https://www.officialgazette.gov.ph/1997/10/29/republic-act-no-8371/>>.

²¹⁰ Cathal Doyle, “The Philippines Indigenous Peoples Rights Act and ILO Convention 169 on tribal and indigenous peoples: exploring synergies for rights realisation” (2020) 24:2-3 *The Intl J of Human Rights* 170.

This section will highlight the competing potential interpretations of FPIC identified in the scholarship, including what the scholarship has to say about when consent is required. As a reminder, the relevant articles in the Declaration (collectively referred to as the “FPIC Articles”)²¹¹ are set out in full on pages 41-42.

What emerges from a review of the literature are six areas of consensus regarding the interpretation of the FPIC Articles, and three differing schools of thought on what the FPIC Articles require.

The first point of consensus is that you cannot read the FPIC Articles purely in isolation. Many advocate for a consideration of the inter-connectedness of self-determination, sovereignty, land rights, and FPIC.²¹² Authors like Phillippe Hanna and Frank Vanclay acknowledge that “FPIC is intrinsically connected to the idea of self-determination, which basically argues that ‘human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly’”.²¹³ This is a perspective shared by several scholars writing in the area.²¹⁴

Second, although not discussed in detail in the literature, several scholars in the area have argued that focusing solely on the debate over a veto fails to engage with the Declaration in an

²¹¹ *UNDRIP*, *supra* note 3 articles 10, 19, 29(2), 32.

²¹² Victoria Tauli-Corpuz, *Rights of indigenous peoples*, UNGA, 72nd Sess, Agenda Item 73(b), UN Doc A/72/186 at para 62; M. Åhrén, *Indigenous Peoples’ Status in the International Legal System* (Oxford: Oxford University Press, 2016) at 220; Sylvanus Ghendazhi Barnabas, “The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law” (2017) 6:2 Int’l Hum Rts L Rev 242 at 256; Christopher Barbera, “Protecting Native Human Rights During Natural Disasters Through Free, Prior, and Informed Consent: A Case Study on Arguing FPIC as a Tool for Human Rights” (2020) 48:1 Denver J of Int L & Policy 107.

²¹³ *Hanna & Vanclay*, *supra* note 205 at 146.

²¹⁴ *Healey*, *supra* note 143; *Gilbert & Doyle*, *supra* note 82 at 312; C.M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (New York: Routledge, 2015) Chapter 5 at 140-147, 172 [*Doyle Transformative*]; *Yaffe*, *supra* note 151.

appropriate or meaningful way. This has led many to suggest that, when discussing the interpretation of the FPIC Articles, all parties should be focused on processes and not just outcomes.²¹⁵

Third, there is a general agreement that procedures put in place to secure FPIC should ensure Indigenous peoples' own institutions, representatives, and decision-making processes are respected.²¹⁶ Opinions over how this can be achieved may vary,²¹⁷ but there is little dispute that Indigenous peoples "should be able to participate [in consultations] through their own freely chosen representatives"²¹⁸ and reach a decision "through their traditional decision-making processes and...in accordance with their customary laws and practices".²¹⁹

Fourth, there appears to be no debate that Articles 10 and 29, which refer to the relocation of Indigenous peoples and the storage of hazardous materials, includes an obligation on the part of states to obtain the consent of Indigenous peoples in those specific circumstances.²²⁰

Fifth, the rights in the Declaration, including a right to FPIC are not absolute and can be subject to limits. Although there is still intense disagreement about what these limits are and who should

²¹⁵ Michael Coyle, "Shifting the Focus: Viewing Indigenous Consent Not as a Snapshot But As a Feature Film", (2020) 27:2 Intl J on Minority and Group Rights 357 [*Coyle Shifting*]; Avigail Eisenberg, "Consent, Resistance and the Duty to Consult", (2020) 27:2 Intl J on Minority and Group Rights 270 [*Eisenberg*]; Mauro Barelli, "Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead" (2012) The International Journal of Human Rights 16:1, 1-24 [*Barelli Aftermath*].

²¹⁶ *Barelli Aftermath*, *supra* note 215 at 2; Kathryn Tomlinson, "Indigenous rights and extractive resource projects: negotiations over the policy and implementation of FPIC (2019) 23:5 The Intl J of Human Rights 880 at 881-883 [*Tomlinson*]; *Gilbert & Doyle*, *supra* note 82 at 315; Claudia Iseli, "The Operationalization of the Principle of Free, Prior and Informed Consent: A Duty to Obtain Consent or Simply a Duty to Consult? (2020) 38 UCLA J Envtl L & Pol'y 259 at 262-263 [*Iseli*].

²¹⁷ For example, Tomlinson discusses funding arrangements or other financial support for Indigenous communities (See: *Tomlinson*, *supra* note 216 at 891).

²¹⁸ *Barelli Aftermath*, *supra* note 215 at 2.

²¹⁹ *Gilbert & Doyle*, *supra* note 82 at 315; See also: *Iseli*, *supra* note 216 at 263.

²²⁰ *Anaya 12/34*, *supra* note 146 at para 47; *UNDRIP*, *supra* note 3 articles 10, 29.

be determining them, there is a general consensus that, as established by Article 46(2), the exercise of the right to FPIC will be subject to limits.²²¹ This suggests that, in the event consent is not obtained, it is reasonable to expect the state to be able to infringe the right to FPIC in certain circumstances.

Sixth, despite a lack of consensus over the precise meaning of FPIC, many adopt a similar definition of ‘free’, ‘prior’ and ‘informed’ for the purposes of the FPIC Articles.²²² There is a consensus that “free” means “no coercion, bribery, rewards, intimidation, or manipulation...not being rushed by external timelines and that decisions are made voluntarily, with the rights holders determining the process, timelines, and decision-making structure”.²²³ What constitutes coercion is unclear but some have suggested that it includes circumstances where the state conditions basic services like education or health care upon the acceptance of a certain project.²²⁴

Prior means that consent should be sought early in the process, before decisions have been made on projects, and with enough time to satisfy “Indigenous consultation and consensus processes”.²²⁵ Informed means that Indigenous communities are provided with all of the

²²¹ *Gilbert & Doyle, supra* note 82 at 319-320; *Doyle Transformative, supra* note 214 at 147, 169, 172; Jeremy Patzer, “Indigenous rights and the legal politics of Canadian coloniality: what is happening to free, prior and informed consent in Canada?” (2019) 23:1-2 *The Int J of Human Rights*, 214 at 224-225 [*Patzer*]; *Barelli Aftermath, supra* note 215 at 13.

²²² Grace Nosek, “Re-imagining Indigenous Peoples' Role in Natural Resource Development Decision making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions”(2016) 50 *UBC L Rev* 95 at 118-119 [*Nosek*]; Hans Morten Haugen, “The Right to Veto or Emphasising Adequate Decision-Making Processes?: Clarifying the Scope of the Free, Prior and Informed Consent (FPIC) Requirement” (2016) 34:3 *Netherlands quarterly of human rights* 250–273.

²²³ Terry Mitchell et al, “Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)” (2019) 10:4 *The Intl Indigenous Policy J* at 3 [*Mitchell*].

²²⁴ *Iseli, supra* note 216 at 274

²²⁵ *Mitchell, supra* note 223 at 4.

information needed to make a decision, but also that the “...information is accurate, objective, and understandable”.²²⁶

Despite some areas of consensus, the scholarship is divided over the question of whether the FPIC Articles provide Indigenous communities with a right to say no to certain projects and what Articles 19 and 32 require state actors to do when either (i) adopting or implementing legislative or administrative measures that may affect them; or (ii) approving projects that will affect indigenous peoples’ lands, territories, or resources.

The literature appears particularly divided over the legal and political consequences if an Indigenous community refuses to provide its consent. Do the FPIC Articles impose “on states an obligation to obtain the consent of Indigenous peoples before initiating, or authorising developments projects on their lands”?²²⁷ If so, in what circumstances? What happens if they refuse? Are state actors obligated to respect this refusal? There are three prevailing schools of thought addressing these interrelated questions.

The first is the process over outcome approach. This school of thought would suggest that Articles 10 and 29(2) clearly require state actors to obtain consent, but Articles 19 and 32(2) which contain the phrase “in order to obtain” the FPIC of Indigenous peoples, only require state actors to engage in a good faith effort to obtain the consent of Indigenous peoples. In other words, the later Articles establish that state actors must consult with Indigenous peoples via processes where consent is the objective, but that there is no obligation to actually obtain consent.

²²⁶ *Iseli, supra* note 216 at 262-263.

²²⁷ *Barelli Aftermath, supra* note 215 at 2.

Dwight Newman has expressed support for this interpretation in the past, stating that “the FPIC requirement can be thought of more as a requirement to have certain types of processes in operation”²²⁸ and that it is possible that what UNDRIP actually guarantees is access to processes where obtaining consent is the overarching goal.²²⁹ This is also the position adopted by the Government of Canada, which announced a set of ten principles respecting the Government of Canada’s relationship with Indigenous peoples, one of which was a recognition “that meaningful engagement with Indigenous peoples *aims* to secure their free, prior, and informed consent”.²³⁰ Notice the emphasis on consent as an objective as opposed to an outcome.

Newman has raised two arguments in support of this process over outcome interpretation of the FPIC Articles. The first relies heavily on the drafting history of the Declaration, specifically the fact that early and ultimately rejected drafts of UNDRIP included an express requirement to obtain consent whereas the final version differs.²³¹

It is important to interpret the text of the UNDRIP in accordance with international law approaches to interpretation, and these approaches put a lot of emphasis on the wording of the text. The drafting history of the UNDRIP actually shows the development of wording that may not require that states obtain consent. Article 32(2) of UNDRIP, the most commonly referenced article on FPIC in the natural resource context (along with the more general article 19), states: States shall consult indigenous peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. The original draft of what has become article 32(2) from 1994 read slightly differently: Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development,

²²⁸ Dwight Newman, “Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada” (August 2017), online: *Macdonald-Laurier Institute* <https://macdonaldlaurier.ca/files/pdf/MLIAoriginalResources13-NewmanWeb_F.pdf> at 7 [*Newman Rhetoric*].

²²⁹ *Ibid* at 13-14.

²³⁰ *Principles*, *supra* note 48 (emphasis added).

²³¹ *Newman Rhetoric*, *supra* note 228 at 13 (emphasis added).

utilization or exploitation of mineral, water or other resources. (Article 30) The 1994 draft wording said that Indigenous peoples could “require that States obtain their free and informed consent”; the actual ultimate wording says that states “shall consult indigenous peoples in order to obtain their free and informed consent.” This difference in wording in a legal document is significant. The first wording, from the 1994 draft document, said states could be required to obtain consent. The actually adopted wording says they should take steps “in order to obtain” consent, meaning that they must try to obtain consent – they would not violate this article if they proceed without consent after having made a good faith effort to obtain it. Some might question whether this interpretation fits the spirit of UNDRIP and might object to seemingly formal and legalistic readings. But if the text was meant to be a legal text, as those arguing most strenuously for its application claim it to be, then it must be approached as a legal text.²³²

Newman concludes that this change in language is essential to the proper interpretation of FPIC, a claim that will be assessed in detail below.

Second, Newman points to the French language text of UNDRIP which clearly refers to good faith processes rather than requiring consent to be obtained for every project.²³³ For example, as Newman points out, the French-language version references “the idea of a good faith process (“bonne foi”) and the idea of consent being an objective (“en vue d’obtenir”). The wording actually makes clear that the actual obtaining of consent is not mandatory – what is mandatory is a legitimate, good faith process”.²³⁴

I would challenge this strict process over outcome interpretation of FPIC for three reasons. First, Newman seems to be suggesting it is obvious that the use of the phrase “in order to” means that consent is not required and is simply a goal. I disagree that this is the only possible interpretation. ‘In order to’ is a phrase usually meant to express “the purpose of something”.²³⁵ In

²³² *Ibid* at 13.

²³³ *Ibid* at 13-14.

²³⁴ *Ibid*.

²³⁵ Cambridge Dictionary, “in order to” (last accessed 24 June 2021), online: *Cambridge* <https://dictionary.cambridge.org/grammar/british-grammar/in-order-to>, *sub verbo* “in order to”.

its ordinary usage, the phrase ‘in order to’ can serve to tell the reader why you are doing something without reducing the action itself to a mere aspiration. For example, in the sentence ‘I am going to leave in 15 minutes in order to pick up my son from day care’, picking up my son is not something I hope to accomplish. I am going to pick up my son. The inclusion of the phrase ‘in order to’ is there to connect the main and subordinate clauses;²³⁶ in other words, to tell the reader why I am leaving in 15 minutes. It is not apparent that the inclusion of the phrase ‘in order to’ in Articles 19 and 32(2) shifts it from a substantive right to an aspiration.

Second, an interpretation of the FPIC Articles that focuses primarily on a textual analysis of the final language is overly formalistic and positivist in its approach, a point that Newman freely acknowledges.²³⁷ This process over outcome approach often relies exclusively on a strict reading of the text or the drafting history of the Declaration to support a limited scope of the right to FPIC. Authors like Newman and Mauro Barelli do not commit themselves to this interpretation;²³⁸ however their understanding of the Declaration is clearly greatly informed by the negotiation of the text itself. Newman and Barelli allude to a purposive reading of the Declaration in their work²³⁹ but it is clear that their thinking remains firmly rooted in a discussion of the language included in the final version of the Declaration and its drafting history.²⁴⁰

²³⁶ *Ibid.*

²³⁷ *Newman Rhetoric*, *supra* note 228 at 13.

²³⁸ In fact both Newman and Barelli acknowledge the possibility of various interpretations of FPIC with Barelli going so far as to highlight a flexible approach to FPIC whereby “when a development project is likely to have a serious (negative) impact on the cultures and lives of indigenous peoples, states must obtain their consent before implementing it” (*Barelli Aftermath*, *supra* note 215 at 17).

²³⁹ *Newman FPIC*, *supra* note 142; *Barelli Aftermath*, *supra* note 215 at 11.

²⁴⁰ *Newman Rhetoric*, *supra* note 228; *Barelli Aftermath*, *supra* note 215.

While I cannot say that this approach is without merit, it is missing an essential element, a recognition of ILTs. In his piece “Interpreting FPIC in UNDRIP”, Newman recognizes that there are different interpretive methodologies that could be adopted when examining the Declaration. Newman mentions a textual analysis and a purposive reading but fails to discuss the possibility of ILTs serving as an interpretive methodology. Newman’s work is rooted in how traditional principles of international law would approach the question of interpreting UNDRIP.²⁴¹ Given the important role that UNDRIP can play in advancing meaningful reconciliation between Indigenous peoples and the Crown, I would argue that a textual analysis, which relies heavily on the drafting history of the Declaration, fails to achieve this reconciliation. It fails to account for Indigenous perspectives and, as Youngblood Henderson has noted, represents a “pre-occupation of the nation-states with legalism...[and worrying] about the implications of indigenous rights”.²⁴²

Third, I would echo and expand upon the concerns of Nathan Yaffe who has suggested that conceiving of FPIC through proponent driven consultative processes can fuel what he calls “FPIC’s normative drift”,²⁴³ whereby FPIC is separated from its normative foundation, which he maintains is rooted in self-determination.²⁴⁴ In his piece “Indigenous consent: A self-determination perspective”, Yaffe highlights how proponents interests can result in approaches to consultation that may serve to undermine the very reasons for FPIC’s existence.²⁴⁵ In conceiving of FPIC as solely limited to a process aiming for consent rather than a substantive right to provide or withhold consent, supporters of this process over outcome approach can also work to

²⁴¹ *Newman FPIC*, *supra* note 142 at 12-13.

²⁴² *Youngblood*, *supra* note 61 at 70.

²⁴³ *Yaffe*, *supra* note 151 at 703.

²⁴⁴ *Ibid* at 705.

²⁴⁵ *Ibid* at 739.

undermine FPIC's normative basis. Processes matter, but if state actors retain the ability to act unilaterally vis-à-vis Indigenous peoples and their consent is not a required outcome, I would question whether it can be said that Indigenous people have any real ability to exercise self-determination under this interpretation of FPIC.

The second school of thought, which is widely supported in the literature, is the “sliding-scale approach”.²⁴⁶ This approach maintains that the inclusion of the phrase “in order to obtain” means that Articles 19 and 32 do not require state actors “...to obtain the consent of indigenous peoples before implementing any project on their lands”.²⁴⁷ As a result, Indigenous peoples are not granted a universal right to veto certain projects. Instead, the focus should remain on developing processes whose objective is obtaining the consent of Indigenous peoples,²⁴⁸ similar to the first school of thought discussed above. However, unlike the process over outcome approach, this school of thought suggests that the Declaration goes further than simply ensuring Indigenous peoples are consulted and able to actively participate in that consultation. Instead consent will be considered essential “when there is a potential for a profound or major impact on the property rights of an indigenous people or where their physical or cultural survival may be endangered”.²⁴⁹ According to Mauro Barelli:

Article 32 must be necessarily approached with a certain degree of flexibility. In particular, it would seem difficult to argue that this provision categorically excludes that at least under exceptional circumstances indigenous peoples might be entitled to oppose a development project. Intuitively, the problem with such a reading is that Article 32 does not specify under what circumstances indigenous peoples should be entitled to veto a project.²⁵⁰

²⁴⁶ *EMRIP*, *supra* note 144 at para 35.

²⁴⁷ *Barelli Aftermath*, *supra* note 215 at 11.

²⁴⁸ *Anaya 12/34*, *supra* note 146 at paras 45-46.

²⁴⁹ *Gilbert & Doyle*, *supra* note 82 at 317.

²⁵⁰ *Barelli Aftermath*, *supra* note 215 at 11.

In other words, this approach maintains that while there is no absolute veto found in the Declaration, it does permit Indigenous peoples to “...refuse to grant their consent when a project would have a significant impact”.²⁵¹ This is the approach supported by the UN Special Rapporteurs (particularly James Anaya), the International Human Rights Law Jurisprudence, and the Expert Mechanism for the Rights of Indigenous peoples. The Expert Mechanism has stated:

..if a measure or project is likely to have a significant, direct impact on indigenous peoples’ lives or land, territories or resources then consent is required....It has been referred to as a “sliding scale approach” to the question of indigenous participatory rights, which means that the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question.²⁵²

This approach is also supported by Mauro Barelli, who rejects the argument some states make that Indigenous peoples should never have the power to withhold their consent to projects²⁵³ and instead appears to adopt the approach that: (i) consent should always be the goal;²⁵⁴ (ii) “Indigenous people should always have a realistic chance to affect the outcome of the relevant consultations”;²⁵⁵ and (iii) “there may be circumstances in which Indigenous peoples should have the right not just to give consent but also to withhold it. In other words, when a project is likely to produce a major negative impact on the lands, rights and, ultimately, lives of Indigenous peoples, then states will have a duty, not only to consult, but also to obtain their consent”.²⁵⁶

²⁵¹ Shin Imai, “Consult, Consent, and Veto: International Norms and Canadian Treaties”, in Michael Coyle and John Borrows (eds.), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 387 [*Imai Consult*].

²⁵² *EMRIP*, *supra* note 144 at para 35.

²⁵³ *Barelli Aftermath*, *supra* note 215 at 2.

²⁵⁴ Senate of Canada, Proceedings of the Standing Senate Committee on Aboriginal Peoples, 42-1, Issue 55 (May 29, 2019) (Mauro Barelli)

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

Cathal Doyle has described this interpretation of FPIC as one of the two prevailing schools of thought on the subject.²⁵⁷

There are several issues with this approach to interpreting FPIC. First, simply from a textual analysis of the Declaration, there is nothing contained within it that suggests that the identified rights are to be interpreted, understood, or applied based on the severity of the impact of the proposed state action. While I can appreciate the effort to avoid a narrow reading of the Declaration that places consent as an objective rather than an outcome, to impose a sliding scale where consent is only required in certain circumstances is not grounded in any reasonable reading of the Declaration itself. As mentioned above, a strict reading of the Declaration carries with it its own shortcomings, however, it is valid to consider the basis for this “sliding scale” approach and whether it has its origins in the text of the Declaration itself.

Second, I would echo the concerns of some scholars who have pointed out that the sliding-scale approach does not do enough to challenge the power imbalances that exist between state actors and Indigenous peoples. For example, under this approach it is unclear who determines what state action is severe enough to trigger an obligation to obtain consent. As Dominique Leydet has pointed out, embracing this sliding scale approach can have consequences given that it will likely be the state that has to make this ultimate decision regarding the potential impact:

The question of who is to determine the potential impact of a project, whether it is important enough to trigger the requirement of consent, will now either be up to another agent (like the government) or will involve different agents in processes of adjudication or negotiations that may well reflect existing power imbalances. For Indigenous peoples, this means abdicating a crucial condition of effective agency; the ability to determine for

²⁵⁷ *Gilbert & Doyle, supra* note 82 at 316-317.

themselves, according to criteria that they endorse, the impact that a project may have and whether it is acceptable.²⁵⁸

Although it is possible, and perhaps preferable, that Indigenous peoples should be the ones who decide if an impact is significant enough to trigger a duty to obtain consent,²⁵⁹ the sliding scale approach provides no answer to this issue, leaving open the possibility for state actors to set the circumstances where consent is required. Furthermore, the sliding-scale approach fails to meaningfully address the circumstances where a right to consent exists, no consent is reached, and the state wishes to proceed anyway. As discussed above, the rights expressed in the Declaration are subject to limits, but it is unclear who determines those limits and what grounds could justify a limitation. If the state, whether through the judiciary or the legislature, retains the unilateral power to determine what circumstances warrant consent and what limits on rights should be set, then it is difficult to argue that this interpretation of FPIC serves to meaningfully promote Indigenous self-determination.

It also raises alarm bells to observe the striking similarities between this sliding scale approach and Canada's current duty to consult framework. One cannot help but think about the concerns raised by Indigenous communities about how the current framework has been applied when evaluating this sliding-scale approach.²⁶⁰

As noted above, there is a consensus that self-determination, something guaranteed by several articles in UNDRIP, is a fundamental aspect of the Declaration and a principle that informs any

²⁵⁸ Dominique Leydet, "The Power to Consent: Indigenous Peoples, States, and Development Projects" (2019), 69 *Univ. of Toronto L J* 371 at 22 [*Leydet*].

²⁵⁹ *Doyle Transformative*, supra note 214 at 156-157.

²⁶⁰ Shin Imai, "Indigenous Self-Determination and the State" (2008) *Comparative Research in Law & Political Economy* <<https://digitalcommons.osgoode.yorku.ca/clpe/196>> at 24-25 [*Imai Self-Determination*]; Sarah Cox, "UN Committee rebukes Canada for failing to get Indigenous Peoples' consent for industrial projects" (15 Jan 2021), online: *The Narwhal* <<https://thenarwhal.ca/un-rebukes-canada-industrial-projects/>>.

analysis of a right to FPIC. Some have argued that FPIC is essential to meaningful self-determination because it provides Indigenous peoples with “...the right to reject projects or measures that direct impact on a people and thereby enable them to exercise control over their destiny”.²⁶¹

I share the concerns of scholar Joshua Nichols, who has suggested that the duty to consult framework in Canada does not always serve to promote Indigenous self-determination but instead can work to undermine it.²⁶² In his testimony before the Standing Senate Committee on Aboriginal Peoples, Nichols stated that the duty to consult case law says quite clearly that Indigenous peoples do not have a veto but what they are really saying is that “...Indigenous parties lack the capacity to say no because, ultimately, unilateral infringement is on the table. That has led to a problem in the case law because if a party can’t say no to a negotiation, that’s not a negotiation”.²⁶³

Supporters of Canada’s duty to consult framework often reject this line of argument by pointing to the Supreme Court of Canada’s decision in *Tsilhqot’in Nation v British Columbia*²⁶⁴ where the court confirmed that where a group holds title over an area of land, “...governments and others seeking to use the land must obtain the *consent* of the Aboriginal title holders”.²⁶⁵ However, this is at best lip service to the notion of consent as the government retains the ability to unilaterally act via the principle of justified infringement. In *Tsilhqot’in* the court held that if consent was withheld, the Crown retained the ability to unilaterally act so long as the Crown discharged its

²⁶¹ *Gilbert & Doyle, supra* note 82 at 312.

²⁶² Senate of Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 42-1, Issue 55 (May 29, 2019) (Joshua Nichols).

²⁶³ *Ibid.*

²⁶⁴ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44. [*Tsilhqot’in*]; *Newman Rhetoric, supra* note 228 at 10.

²⁶⁵ *Tsilhqot’in, supra* note 264 at para 76 (emphasis added).

duty to consult and cleared a series of legal hurdles to justify its infringement.²⁶⁶ While these hurdles do provide some protection to Indigenous communities whose interests are at stake, I do not believe this constitutes consent in any meaningful sense of the word.

For example, in its analysis the Court discusses some of the interests that could justify an infringement on Aboriginal title. The Court concludes that:

the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.²⁶⁷

If the Crown retains the ability to infringe established Aboriginal title and therefore unilaterally impose a decision based on grounds as vague as “general economic development” I would question whether it can be properly said that Indigenous people have any real ability to withhold consent and therefore exercise meaningful self-determination. An argument can be made that Canada’s duty to consult framework, as currently constituted is inconsistent with the spirit and intent of UNDRIP as it fails to promote Indigenous self-determination. To the extent this framework shares any similarities with the “sliding-scale approach” to FPIC, I would raise similar concerns.

The third issue with this sliding scale approach is that it also relies on an overly formalistic and textual analysis of the Declaration. Scholars like Barelli who appear to embrace this approach rely on the drafting history of the Declaration as the starting point for their analysis:

²⁶⁶ *Ibid* at paras 77-88.

²⁶⁷ *Ibid* at para 83 citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 165 [*Delgamuukw*].

The starting point should be the text of the draft declaration adopted in 1994 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Crucially, this version of the Declaration constituted the basis for the negotiations that took place between 1995 and 2006 at the Working Group on the Draft Declaration (WGDD), that is, the body created by the Human Rights Commission to further elaborate on the draft text with a view to presenting a final version of the Declaration to the General Assembly for its adoption.²⁶⁸

Much like Newman's own approach to this issue, Barelli's conception of FPIC is based on a rather strict reading of the text of UNDRIP and focuses far too much on the evolution of the language within the Declaration rather than on the purpose of the Declaration itself. Given the important role that UNDRIP can play in achieving meaningful reconciliation between Indigenous peoples and the Crown I argue that a less strict and more purposive interpretation should guide this analysis.

The third school of thought conceives of FPIC primarily as a tool for protecting Indigenous sovereignty and self-determination. This approach suggests "that FPIC is required for *any project or activity* affecting their [Indigenous peoples] lands, territories and resources or their well-being".²⁶⁹ No sliding-scale of impact, no guarantee of process but not outcomes, instead an interpretation of FPIC as a universal right which ensures Indigenous peoples have the ability to either give or withhold their consent at any time.

The reasons for embracing this approach can vary but it may stem from a belief, expressed by Roberta Rice, that "...for a FPIC process to be genuine, it must offer the possibility of

²⁶⁸ Mauro Barelli, "Free, Prior, and Informed Consent in the UNDRIP" in Jessie Hohmann and Marc Weller eds, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford, UK: Oxford University Press, 2018) at 252 [*Barelli Commentary*].

²⁶⁹ *Gilbert & Doyle, supra* note 82 at 317 (emphasis added).

withholding consent”.²⁷⁰ Others like Cathal Doyle have suggested that an interpretation of FPIC that requires state actors to obtain consent for all activities that may impact the lands, territories, resources, or well-being of Indigenous people is more consistent with the principle of self-determination that is at the heart of UNDRIP.²⁷¹ In Doyle’s view, a consultation and negotiation regime that does not obligate the state to obtain consent “...freezes existing power relations and leaves indigenous peoples with no leverage to influence the outcome of decision-making processes”.²⁷²

Scholars who have written about this approach have also directly tackled the idea of FPIC as a veto. Papillon and Rodon have stated that discussing FPIC as a veto misses the point of the Declaration. They call for a shift in thinking to view FPIC as a relational concept, where self-determining partners (Indigenous peoples and the state) come together in an effort to provide their mutual consent.²⁷³ In their view conceiving of FPIC as a veto fundamentally misunderstands the relationship between the Crown and Indigenous peoples. They argue that each of these parties are independent decision-makers, partners in a nation-to-nation relationship.²⁷⁴ In their piece “Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach” they quote Roshan Danesh who argues that: “the Crown and Aboriginal groups are different decision-makers acting under different authorities. One does not

²⁷⁰ Roberta Rice, “The Politics of Free, Prior and Informed Consent: Indigenous Rights and Resource Governance in Ecuador and Yukon, Canada” (2020) 27:2 Intl J on Minority and Group Rights 336 at 340 [Rice].

²⁷¹ Gilbert & Doyle, *supra* note 82 at 312-314; Doyle *Transformative*, *supra* note 214 at 147.

²⁷² Gilbert & Doyle, *supra* note 82 at 326; A view shared by Brant McGee who argues in favour of a right to veto in McGee, *supra* note 67 at 634 and in Brant McGee, “Participation with a Punch: Community Referenda on Dam Projects and the Right to Free, Prior, and Informed Consent to Development” (2010) 3 *Water Altern* 162–184.

²⁷³ Martin Papillon & Thierry Rodon, ‘Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach’, *Choice* (2017), <https://irpp.org/research-studies/insight-no16/> at 5 [Papillon *Made in Canada*].

²⁷⁴ *Ibid* at 6.

‘veto’ the decision of the other. Neither has the power to reach into the other’s jurisdiction and trump the decision of the other. The relationship is one of difference and distinction — not of inferiority and superiority”.²⁷⁵ Scholars like Shin Imai have also written about how Indigenous peoples themselves do not conceive of FPIC as a veto right, as the rights in the Declaration are not absolute.²⁷⁶

In contrast, scholars like Dominique Leydet suggest that we should not shy away from interpreting FPIC as a veto right and instead embrace this as something which Indigenous peoples are entitled to as self-determining peoples. Leydet argues that once we accept that FPIC means that Indigenous peoples can prevent projects from proceeding, we can turn our attention to the circumstances where a refusal to consent could be overridden:

Cancelling the veto dimension of consent in FPIC denies Indigenous peoples the capacity to exercise significant control over some of their most fundamental interests. Such an interpretation is difficult to square with the basic purpose of the Declaration as expressed in its preamble as well as with the right to self-determination affirmed in its third operative article. Following the standard grammar, we should instead accept the veto dimension of consent and clarify the circumstances in which a refusal to consent can be overridden, given that rights (including Indigenous rights) are not absolute.²⁷⁷

Leydet’s point regarding limitations is an important one. As mentioned above, even the most ardent supporters of a broad interpretation of FPIC acknowledge that the right is not absolute. Scholars have written about the inclusion of Article 46(2) within UNDRIP and the circumstances in which a right to withhold consent could be overridden. For example, Doyle has suggested that broad appeals to public interest or national development cannot be invoked to justify limiting

²⁷⁵ Roshan P Danesh, “Opinion: Understanding the relationship between consent and veto” (24 December 2016), online: *Vancouver Sun* <<https://vancouversun.com/opinion/opinion-understanding-the-relationship-between-consent-and-veto>>.

²⁷⁶ *Imai Consult*, *supra* note 251 at 386 quoting Matthew Coon Come.

²⁷⁷ *Leydet*, *supra* note 258 at 22.

FPIC²⁷⁸ and that perhaps the only grounds for justifying infringement would be to ensure that Indigenous peoples' exercise of self-determination is consistent with the rights to self-determination of others in the state.²⁷⁹

Generally speaking, this third school of thought regarding the interpretation of FPIC seems to strike the appropriate balance between a recognition for self-determination and the content of the Declaration itself. It is a reading that is justifiable on the face of the text of UNDRIP and provides the greatest support for Indigenous self-determination. However, this approach does leave a number of important questions unaddressed. For example, whose consent is required? What if a community is split over whether or not to provide consent to a proposed project? It also remains to be seen what effect historic treaties might have on this conception of FPIC.²⁸⁰ If the affected lands/territories were at one time the subject of a “taking up” clause, which permitted “the ‘taking up’ of lands for non-Indigenous settlement, mining, lumbering, and other purposes”,²⁸¹ might the existence of these treaties affect the right to provide or withhold consent? This appears to be unaddressed by the literature and remains an outstanding question that even the most ardent defenders of a broad conception of FPIC will likely have to tackle, particularly within the Canadian context.

²⁷⁸ *Doyle Transformative*, *supra* note 214 at 168-169.

²⁷⁹ *Ibid* at 147.

²⁸⁰ Michael Coyle, “From consultation to consent: squaring the circle?” (2016) 67 UNBLJ 235 at 247 [*Coyle Squaring*].

²⁸¹ Bruce McIvor, “The Question Behind: What are the Limits on Provincial Jurisdiction over Treaty Lands?” (30 September 2013), online: *First Peoples Law* <<https://www.firstpeopleslaw.com/public-education/blog/the-question-behind-what-are-the-limits-on-provincial-jurisdiction-over-treaty-lands>>.

2.3 What's Missing from the Discussion of FPIC?

2.3.1 General Approaches to ILTs When Examining FPIC

Although a significant amount has been written about the interpretation of FPIC, the scholarship, with a few notable exceptions discussed below, has failed to account for Indigenous perspectives and has not meaningfully assessed the relevance of ILTs in the interpretation of the FPIC Articles. In fact, the bulk of the scholarship either ignores or makes passing reference to ILTs in its interpretation and implementation of the FPIC Articles. Authors will instead focus on examining corporate-generated guidelines regarding FPIC,²⁸² the wealth of International Human Rights Law on the subject,²⁸³ or the commentary coming out of international institutions like the World Bank.²⁸⁴ This does not mean that there are not some scholars who have recognized the importance of ILTs to this discussion. Martin Papillon has specifically commented on the relevance of Indigenous views on consent as well as the lack of attention paid to ILTs.²⁸⁵ Cathal Doyle has written about Indigenous models of FPIC albeit in fairly general terms.²⁸⁶ Deborah Curran has discussed FPIC as a framework for evaluating the effect of projects on water sustainability while relying upon ILTs.²⁸⁷

²⁸² Stuart R Butzier & Sarah M Stevenson, “Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent” (2014) 32:3 J of Energy & Natural Resources L 297 at 319-323 [*Butzier*].

²⁸³ *Barelli Aftermath*, *supra* note 215.

²⁸⁴ *Barelli Aftermath*, *supra* note 215.

²⁸⁵ Martin Papillon & Thierry Rodon, “The Transformative Potential of Indigenous-Driven Approaches to Implementing Free, Prior and Informed Consent: Lessons from Two Canadian Cases” (2020) 27:2 Intl J on Minority and Group Rights 314 [*Papillon Transformative*].

²⁸⁶ *Doyle Transformative*, *supra* note 214 at 265-271.

²⁸⁷ Deborah Curran, “Indigenous Processes of Consent: Repoliticizing Water Governance through Legal Pluralism” (2019) 11:3 Water (Basel) 571 [*Curran*].

Scholars like Avigail Eisenberg have argued that Indigenous claims to FPIC largely end up getting conceptualized through the language of the state and not only does this fail to account for ILTs but can actually distort the claims being made: “As Toby Rollo explains, Indigenous claims are ‘transposed into a conceptual and linguistic idiom that conforms to the language of territorial state sovereignty’. This transposition can distort Indigenous reasons for acting, especially reasons that reject modernisation, economic development and globalisation”.²⁸⁸

However, at best, most of the scholarship regarding FPIC that attempts to engage with the laws of Indigenous peoples amounts to: (i) references to a few examples of laws created by Indigenous peoples;²⁸⁹ (ii) the need to include indigenous perspectives or traditions when it comes to how consultation processes or impact assessments are designed pursuant to FPIC;²⁹⁰ (iii) the importance of providing culturally appropriate information during the consultation process;²⁹¹ and (iv) the need to respect customary laws and decision-making processes.²⁹² All of these points are relevant, but they are largely just stated without further analysis or consideration of the precise influence that these principles should have in either interpreting or implementing the FPIC Articles themselves.²⁹³

²⁸⁸ Eisenberg, *supra* note 215 at 280 citing Toby Rollo, “Mandates of the State: Canadian Sovereignty, Democracy, and Indigenous Claims” (2014) 27:1 *The Can JL & Jur* 225.

²⁸⁹ Butzier, *supra* note 282 at 323.

²⁹⁰ Barelli *Aftermath*, *supra* note 215; Sam Adkins et al, “UNDRIP as a Framework for Reconciliation in Canada: Challenges and Opportunities for Major Energy and Natural Resources Projects” (2020) 58:2 *Alta L Rev* 339.

²⁹¹ Tara Ward, “The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law (2011) 10:2 *Nw J Int'l Hum Rts* 54 at 64 [*Ward*].

²⁹² Viviane Weitzner, “Tipping the Power Balance: Making Free, Prior and Informed Consent Work” (March 2011), online: *The North-South Institute* <<http://www.nsi-ins.ca/wp-content/uploads/2012/10/2011-Tipping-the-Power-Balance-Making-Free-Prior-and-Informed-Consent-Work.pdf>>.

²⁹³ See for example: Claire Charters, “The Sweet Spot Between Formalism and Fairness: Indigenous Peoples' Contribution to International Law” (2021) 115 *AJIL Unbound* 123.

Some go further and point to the fact that Indigenous led consultation protocols and processes are being established across Canada (discussed further in chapter three) as proof that Canada's current approach to project consultation has a role for ILTs.²⁹⁴ They argue that the success of Indigenous led impact assessments like the Woodfibre and Tlicho Nico Project are important because they place "...indigenous laws and norms at the center of the decision-making process".²⁹⁵

Through these cases, we see there is the potential for a strong confluence of western and Indigenous law in Indigenous-led processes. In each case, the Indigenous party identified its knowledge base, and brought it bear to ensure that their values, language, and way of life were considered in the review. Because of this, they also were able to ensure that projects were changed substantially as a result of the review. Indigenous-led impact assessment can greatly change the project in order to protect and accommodate the culture and way of life.²⁹⁶

The success of these protocols is noteworthy, and it is correct to suggest that Canada is starting to account for Indigenous traditional knowledge when engaging with Indigenous communities.²⁹⁷ However, the creation of Indigenous-led protocols does not necessarily amount to a recognition and application of ILTs at the stage of interpreting FPIC itself.

²⁹⁴ C. O'Faircheallaigh, "Shaping Projects, Shaping Impacts: Community-Controlled Impact Assessments and Negotiated Agreements" (2017) 38:5 Third World Quarterly 1181; *Ward, supra* note 291 at 54-84

²⁹⁵ Ginger Gibson et al, "Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review" (April 2018), online: *Gwich'in Council International* <https://gwichincouncil.com/sites/default/files/Firelight%20Gwich%27in%20Indigenous%20led%20review_FINAL_web_0.pdf> at 13 [*Gibson*]; See also: The Firelight Group, "Impact Assessment in the Arctic: Emerging Practices of Indigenous-Led Review" (24 April 2018), online: *The Firelight Group* <<https://firelight.ca/2018/04/24/gwichin-council-international-releases-report-titled-impact-assessment-in-the-arctic-emerging-practices-of-indigenous-led-review/>>.

²⁹⁶ *Gibson, supra* note 295 at 39.

²⁹⁷ Stephen S. Crawford, "The Canadian Crown's Duty to Consult Indigenous Nations' Knowledge Systems in Federal Environmental Assessments" (2018) 9:3 The Intl Indigenous Policy J at 1 [*Crawford*].

2.3.2 Examples of Applying ILTs to the Interpretation of FPIC

There are only a few examples in the scholarship of meaningful attempts to engage with ILTs in the interpretation of the FPIC Articles. Emily Martin has written about the need to work more closely with Indigenous communities about their understanding of FPIC and has undertaken the work to speak with the Little Salmon Carmacks First Nation precisely about this issue.²⁹⁸ In 2018, she completed a Master of Arts Thesis highlighting her findings.²⁹⁹ Leah Temper has discussed Wet'suwe'e traditional laws and their influence on the development of FPIC protocols within the context of pipeline disputes in British Columbia.³⁰⁰ This work will be referenced further in chapter four.

Terry Mitchell from Laurier University has begun some fairly ground-breaking work, examining Indigenous views regarding FPIC. In her study, "Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent (FPIC)", Mitchell and her co-authors engaged in "...a multi-year university-community research partnership with Matawa First Nations".³⁰¹ The study sought to understand Anishinaabe perspectives on the Declaration by meeting with chiefs, staff, and members of several First Nations³⁰² in order to document their understanding of FPIC. Mitchell's study included findings regarding the meaning of: 'free consent'; 'coercion'; 'prior'; 'consensus processes'; 'informed'; and 'collective decision making'. It also included a

²⁹⁸ Emily Martin, "Free, Prior, and Informed Consent (FPIC) in the Yukon: Established Practice or Untravelled Path?" 47:47 *The Northern Review* 113–134.

²⁹⁹ Emily M.W. Martin, "Free Prior and Informed Consent to mine development in the Yukon: Norms, Expectations, and the Role of Novel Governance Mechanisms" (MA Thesis, University of Guelph) (Available Online: <https://atrium.lib.uoguelph.ca/xmlui/handle/10214/14141>)

³⁰⁰ Leah Temper, "Blocking pipelines, unsettling environmental justice: from rights of nature to responsibility to territory" (2019) 24:2 *Local environment* 94 [*Temper*].

³⁰¹ *Mitchell*, *supra* note 223 at abstract.

³⁰² *Ibid* at 10.

discussion of Indigenous values, laws, and philosophy relevant to the communities’ understanding of FPIC.

The study included first-hand accounts of the communities’ experiences with proponents, and highlighted the importance of: (i) “honouring...Indigenous Peoples in making decisions about their traditional lands”;³⁰³ (ii) recognizing the inherent stewardship responsibilities of the community;³⁰⁴ (iii) ensuring a role for traditional knowledge;³⁰⁵ and (iv) recognizing the central role of land to their communities.³⁰⁶ The study also concluded that the implementation and fulfillment of FPIC will require further understanding of an Indigenous perspective on the importance of developing and sustaining relationships.³⁰⁷ Despite these meaningful contributions by Martin and Mitchell their work is only a first step in exploring this subject and will require further elaboration and study.

Other attempts to discuss UNDRIP with reference to ILTs are not particularly substantive and are only beginning to explore the possible relevance of Indigenous legal orders to the interpretation of FPIC. Jeffery Hewitt contributed to one of the leading texts on Indigenous perspectives on implementing the Declaration, *Braiding Legal Orders*. In his chapter, entitled “Options for implementing UNDRIP without creating another empty box”, he discusses how the Declaration contemplates the use of Indigenous laws within member states which have endorsed it.³⁰⁸ In order to implement the Declaration in accordance with ILTs, Hewitt advocates for new

³⁰³ *Ibid* at 13.

³⁰⁴ *Ibid* at 18, 21.

³⁰⁵ *Ibid* at 9, 12, 15-16.

³⁰⁶ *Ibid* at 12-19.

³⁰⁷ *Ibid* at 22-23.

³⁰⁸ Jeffery G Hewitt, “Options for Implementing UNDRIP without creating Another Empty Box” in John Borrows et al. eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 153 at 156-157 [Hewitt].

institutions to be developed based on Indigenous systems of law that are mandated to interpret the Declaration when it is applied in Canada.³⁰⁹

Another piece that also appears in *Braiding Legal Orders* is entitled “Braiding the Incommensurable : Indigenous Legal Traditions and the Duty to Consult”. In this piece Sarah Morales argues that “FPIC, as recognized in UNDRIP, could be used to braid together the duty to consult and Indigenous legal traditions”.³¹⁰ Morales does an effective job of highlighting the role that ILTs can play when discussing the duty to consult by invoking principles from her Coast Salish community.³¹¹ What is missing from Morales’ treatment of this issue is a detailed consideration of whether ILTs could inform the substance of FPIC itself. Morales is effective at summarizing the state of the discourse in International Human Rights Law regarding FPIC but does not consider the role of ILTs in this discussion. Instead, her analysis is limited to a brief discussion of Coast Salish principles of consensus and how broadly speaking these principles should be considered when implementing UNDRIP.³¹² Despite the limited analysis, Morales’ piece represents one of the few meaningful attempts to weave together discussions of FPIC and ILTs.

Michael Coyle has written about the relationship between FPIC and the duty to consult framework.³¹³ Coyle acknowledges that within Canada there is a growing recognition that Indigenous peoples have a right to shape consultation processes³¹⁴ but argues that the duty to

³⁰⁹ *Ibid* at 157.

³¹⁰ Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in John Borrows et al. eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 65 at 67 [*Morales*].

³¹¹ *Ibid* at 78-81.

³¹² *Ibid* at 80-81.

³¹³ *Coyle Squaring, supra* note 280.

³¹⁴ *Ibid* at 239.

consult framework “pays little heed to the interest of Aboriginal peoples in helping to shape the process through which the dialogue will occur to ensure that it takes due consideration of their own unique worldviews”.³¹⁵ Coyle has highlighted, at least at a general level, the contribution that Indigenous values and worldviews can have on consultation processes.³¹⁶ His work is also one of the few examples of assessing the relationship between the duty to consult and FPIC, while referencing the importance of Indigenous customs, values, and norms to the development of Canadian law.

Aimee Craft has highlighted the relevance of Anishinaabe law to UNDRIP in broad and general terms, but does not specifically discuss its relevance to FPIC. Craft’s analysis has centered around water law principles, relationality, and the relevance of ILTs to the implementation of UNDRIP.³¹⁷

Another notable attempt to connect FPIC and ILTs is Grace Nosek’s publication “Re-Imagining Indigenous Peoples’ Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada Through Indigenous Legal Traditions”. In her piece Nosek argues that “To fully realize FPIC’s ability to empower Indigenous peoples, each community must be allowed to engage with its own legal traditions and define for itself the meaning of consent”.³¹⁸

³¹⁵ *Ibid* at 248.

³¹⁶ *Ibid* at 251-253; *Coyle Shifting, supra* note 215.

³¹⁷ Aimee Craft, “Navigating Our Ongoing Sacred Legal Relationship with Nibi (Water)” in John Borrows et al eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 101 [*Craft*]; Aimée Craft & Lucas King, “Building the Treaty #3 Nibi Declaration Using an Anishinaabe Methodology of Ceremony, Language and Engagement” (2021) 13:4 *Water* (Basel) 532.

³¹⁸ *Nosek, supra* note 222 at 118

Nosek appears to put a lot of faith in what she calls the ‘FPIC regime’ and suggests that under FPIC, indigenous viewpoints “would predominate and communities would be empowered to make decisions about how to balance development and sustainability rather than be forced to entreat external decision makers to understand the profound consequences of development projects through their communities’ perspectives”.³¹⁹ However, while Nosek makes a compelling case for the implementation of FPIC in Canada, relying on human rights, environmental justice, and economic arguments³²⁰ she does not engage with the treatment or interpretation of FPIC in International Human Rights Law which, as identified above, may conceive of FPIC in a much more limited way than she anticipates.

The real strength of Nosek’s work is her advocacy regarding the benefits of implementing FPIC through ILTs. Nosek argues that embracing FPIC would support the revitalization of ILTs by giving communities “space and financial resources to struggle through what consent looks like through the lens of their own unique legal traditions, thereby fortifying those legal traditions in the process”.³²¹ Although Nosek does not go so far as to suggest any substantive applications of ILTs to the interpretation of the Declaration, this contribution is noteworthy.

Another author writing in the area is Gordon Christie whose article “Indigenous Legal Orders, Canadian Law and UNDRIP” explores a vision for how to meaningfully incorporate ILTs into the process of implementing UNDRIP. Christie advocates for two changes to ensure that UNDRIP implementation accounts for ILTs: (i) education and training for the legal profession to

³¹⁹ *Nosek, supra* note 222 at 121.

³²⁰ *Nosek, supra* note 222 at 125-141

³²¹ *Nosek, supra* note 222 at 158-159.

ensure a greater respect for legal pluralism;³²² and (ii) improved allocation of resources to Indigenous communities.³²³ Christie does not attempt to identify specific principles that may be relevant to the interpretation of FPIC; rather, he provides a commentary on structural issues that must be addressed in order to ensure that ILTs are treated respectfully in this process.

Christie's other publication on this subject, "Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges", provides an excellent rebuttal to the grounds of opposition to UNDRIP frequently invoked by conservative commentators and even Canada in its initial opposition to UNDRIP back in 2007.³²⁴ However Christie does not choose to engage with ILTs as a part of this discussion.

2.3.3 ILTs and the Duty to Consult

Many scholars who are writing about UNDRIP in Canada tend to ignore ILTs and focus their attention on broader issues related to UNDRIP. Still others have refrained from examining ILTs in the context of the interpretation of UNDRIP and have instead explored the relationship between these systems of law and Canada's duty to consult framework. Some of the latter authors include Aimee Craft,³²⁵ Alan Hanna,³²⁶ Karen Drake,³²⁷ Val Napoleon,³²⁸ Brenda

³²² Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP" in John Borrows et al. eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 47 at 51-52.

³²³ *Ibid* at 52.

³²⁴ Gordon Christie, "Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges" in John Borrows et al. eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 199.

³²⁵ *Craft, supra* note 317 at 101-110.

³²⁶ Alan Hanna, "Reconciliation Through Relationality in Indigenous Legal Orders", (2019) 56:3 *Alberta L Rev* 817 at 827 [*Hanna*].

³²⁷ *Drake Mining, supra* note 139.

³²⁸ Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 *University of British Columbia L Rev* 873 [*Napoleon Tsilhqot'in*].

Gunn,³²⁹ Rachel Gutman, Andrew Costa, Kristen Manley-Casimir, Patricia Hania, Doug Anderson, and Alexandra Flynn.³³⁰ Their work is notable for its contribution to the discourse surrounding the duty to consult and often intersects with issues relevant to the debates surrounding FPIC, including consent, reconciliation, and self-determination.

For example, in “The Trials and Tribulations of Ontario’s Mining Act: The Duty to Consult and Anishinaabek Law”, Karen Drake highlights how Canada’s duty to consult framework might be critically examined from an Anishinaabe legal perspective. Drake’s position is that Canada’s duty to consult framework should be informed by ILTs³³¹ as “the recognition of Indigenous laws within consultation procedures would advance the goal of achieving reconciliation”.³³² Drake demonstrates how the duty to consult framework falls short of achieving this reconciliation by examining Ontario’s *Mining Act*³³³ and some of its regulatory amendments.³³⁴ Drake argues that the *Mining Act* consultation procedures conflict with Anishinaabek legal principles including: “(i) the obligation to wait, make observations and gather information prior to making a decision; and (ii) the obligation to engage in collective, rather than individual, decision-making”.³³⁵ She points to the three week timeframe for responding to exploration plans and the 50-day timeframe to respond to exploration permits in support of her conclusion.³³⁶

³²⁹ *Gunn Beyond*, *supra* note 46 at 258–259.

³³⁰ I would also be remiss if I did not re-iterate that there are many other Indigenous authors writing on the subject of ILTs, including Hadley Friedland, John Borrows, and Aaron Mills. Although some of their work is not directly relevant to the content of this thesis I am confident that their work will impact the interpretation and implementation of the Declaration in the future.

³³¹ *Drake Mining*, *supra* note 139 at 214.

³³² *Ibid* at 214.

³³³ *Mining Act*, RSO 1990, c M14

³³⁴ *Exploration Plans and Exploration Permits*, O Reg 308/12, s 22

³³⁵ *Drake Mining*, *supra* note 139 at 214.

³³⁶ *Drake Mining*, *supra* note 139 at 215.

Although Drake's work does not apply these principles to a discussion of FPIC or the Declaration, it does demonstrate, in a very concrete and practical way, precisely how ILTs could influence Canada's duty to consult framework. The lessons drawn from her article are equally applicable to a discussion of the FPIC Articles and will be covered in chapter four.

Alan Hanna, in his piece "Reconciliation through relationality in Indigenous Legal Orders", critically examines Canada's duty to consult framework and argues that it forces Indigenous peoples to participate in a consultation process that: (i) will not guarantee an agreeable outcome; and (ii) may force Indigenous peoples to risk litigating in a system that cannot grapple with their legal traditions.³³⁷ Part of Hanna's proposed solution is to train governments and courts on ILTs³³⁸ however he also argues that Canada should engage with ILTs in order to appreciate "Indigenous relationality toward peoples' natural relations to the land".³³⁹ Hanna highlights the Gitksan legal order as an example of a tradition which contains very particular conceptions of kinship, family, accountability, and reciprocity.³⁴⁰ Similar to Drake, Hanna does not apply ILTs to the interpretation of FPIC but instead focuses on the relevance of ILTs to Canada's current duty to consult framework.

Val Napoleon is an Indigenous scholar well known for her work on the revitalization of ILTs and although she has yet to tackle the question of FPIC in UNDRIP in detail she has examined the meaning of consent in Tsilqot'in law. Because debates over consent are the heart of the scholarship regarding FPIC, her work is worth highlighting. In "Tsilhqot'in Law of Consent", Napoleon critically examines Canada's duty to consult framework. She suggests that the

³³⁷ *Hanna, supra* note 326 at 826-827.

³³⁸ *Ibid* at 828.

³³⁹ *Ibid* at 831.

³⁴⁰ *Ibid* at 829-831.

framework's treatment of consent is problematic as it leaves Indigenous peoples with a right to consent that "may be overridden by a legal test that still considers the interests of the larger Canadian public against the land ownership of Indigenous peoples".³⁴¹ Rather than simply critique Canada's duty to consult framework, Napoleon offers an alternative vision of consultation and consent grounded in Tsilhqot'in legal traditions. Napoleon highlights how Tsilhqot'in law "emphasizes and protects individual and collective agency, and relationships within Tsilhqot'in society and with those outside their society".³⁴²

Napoleon proceeds to examine "standards of consultation and consent in Tsilhqot'in law and how they...apply to the actions of the Province of British Columbia".³⁴³ Napoleon creates a mock judgment from several different judges to illustrate a set of Tsilhqot'in legal principles and how they would specifically influence the duty to consult, including:³⁴⁴ (i) the use of various decision making groups in Tsilhqot'in society;³⁴⁵ (ii) the importance of community wide decision making processes (in cases where the whole community may be affected by a proposed action);³⁴⁶ (iii) the traditional processes for information gathering or responding to harms;³⁴⁷ (iv) the importance of community safety, proportionality, and accountability;³⁴⁸ and (v) the four key legal obligations that bind Tsilhqot'in people: "to protect and help one's family and community; to share resources and knowledge; to learn, respect, and communicate laws; and to show respect for generosity or teachings".³⁴⁹ Napoleon's analysis begins to scratch the surface of how ILTs

³⁴¹ *Napoleon Tsilhqot'in*, *supra* note 328 at 883.

³⁴² *Ibid* at 883.

³⁴³ *Ibid* at 884.

³⁴⁴ *Ibid* at 884.

³⁴⁵ *Ibid* at 884.

³⁴⁶ *Ibid* at 884.

³⁴⁷ *Ibid* at 886-887.

³⁴⁸ *Ibid* at 887.

³⁴⁹ *Ibid* at 889.

can be used to frame and understand discussions regarding consultation and consent more broadly.

Several other authors have written about ILTs and the Duty to Consult, however their analysis has remained quite general, leaving significant gaps in the scholarship. For example, Rachel Gutman in her piece “The Stories We Tell: Site-C, Treaty 8, and the Duty to Accommodate”, discusses the sources of Dane-zaa law in the context of Treaty 8 and the duty to consult.³⁵⁰

Andrew Costa in his piece “Across the Great Divide: Anishinaabek Legal Traditions, Treaty 9, and Honourable Consent” begins to explore treaty interpretation through the lens of Indigenous cultural values.³⁵¹ Kristen Manley-Casimir’s PhD dissertation has offered a vision for utilizing ILTs “to create a normative framework to guide the development of a relational approach to the duty to consult and accommodate”.³⁵²

Patricia Hania has examined the use of Impact Benefit Agreements in the consultation process and has argued for a greater recognition of “Indigenous governance, law, women and stories...as a way to ground Indigenous women’s representation in IBA law-making”.³⁵³ In their article, “Rethinking ‘Duty’: The City of Toronto, A Stretch of the Humber River, and Indigenous-Municipal Relationships”,³⁵⁴ Doug Anderson and Alexandra Flynn examined the relationship

³⁵⁰ Rachel Gutman “The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate” (2018) 23:3 Appeal [*Gutman*].

³⁵¹ Andrew Costa, Across the Great Divide: Anishinaabek Legal Traditions, Treaty 9, and Honourable Consent, (2020) 4:1 Lakehead LJ [*Costa*].

³⁵² Kirsten Manley-Casimir, “Reconceiving the Duty to Consult and Accommodate Aboriginal Peoples: A Relational Approach” (PhD Thesis, University of British Columbia), online: <https://open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0223352> at 5.

³⁵³ Patricia Hania, “Revitalizing Indigenous Women’s Water Governance Roles in Impact and Benefit Agreement Processes Through Indigenous Legal Orders and Water Stories”, (2019) 60:2 *Les Cahiers de droit* 519 at 529.

³⁵⁴ Doug Anderson and Alexandra Flynn, “Rethinking “Duty”: The City of Toronto, A Stretch of the Humber River and Indigenous-Municipal Relationships”, (2020) 58:1 *Alberta Law Review* 107.

between Indigenous peoples and municipalities and the relevance of Anishinaabe laws to the Duty to Consult.³⁵⁵

Despite the notable contributions of these authors, their work does not specifically engage with Indigenous conceptions of consent or the principle of FPIC as found in UNDRIP. This has left a significant gap in the research that this thesis is attempting to address.

2.4 Conclusion

Generally speaking, the scholarship discussing the Declaration and the FPIC Articles has failed to meaningfully engage with ILTs. Although there are a few Indigenous and non-Indigenous voices highlighting the relevance of ILTs to FPIC, with some going so far as to engage in preliminary studies of the subject or offer substantive analysis of Canada's duty to consult framework through the lens of ILTs, the discourse is still lacking. By applying ILTs to Canada's well-established duty to consult framework, scholars are already attempting to fit ILTs within a common law construct, suggesting that the duty to consult framework can be reformed rather than re-imagined entirely, with Indigenous legal traditions at the forefront.

The leading scholarship continues to be dominated by non-Indigenous voices who interpret FPIC and the Declaration through strict textual analysis or with reference to established principles of international law. Little, if any attention is paid to the relevance of ILTs. Although the work of these scholars serves an important function there is an opportunity to do more.

³⁵⁵ *Ibid* at 126.

Chapter Three

3. Canada's Duty to Consult Framework

As noted above, Canada has a well-established common law duty to consult framework. That framework, which predates the adoption of the Declaration, has guided government, Indigenous peoples, and industry, on consultation (and sometimes accommodation) requirements when potential or established Aboriginal or treaty rights may be impacted by resource development projects. Some have suggested that Canada's framework is largely consistent with the obligations imposed by the Declaration³⁵⁶ with Dwight Newman going so far as to suggest that "one might properly draw the conclusion that the Canadian legal requirements on duty to consult – and the role of consent in the context of established claims – already meets or exceeds the UNDRIP's requirements on FPIC".³⁵⁷

There are several ways to critique this particular claim but in this chapter the focus will remain on ILTs. Chapters one and two established that: (i) FPIC needs to be understood as interconnected to Indigenous self-determination; (ii) Indigenous self-determination is interconnected with the revitalization of ILTs; (iii) there is an emerging consensus that procedures put in place to secure FPIC should ensure Indigenous peoples' own institutions, representatives, and decision-making processes are respected; and (iv) interpreting and implementing UNDRIP and

³⁵⁶ Dwight Newman, "Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Roles?" in A. Byrnes et al (eds), *International Law in the New Age of Globalization* (Brill: Leiden, 2013) at 276; Frank Iacobucci et al, "Free, Prior and Informed Consent in Canada: Towards a New Relationship with Indigenous Peoples" (12 July 2016), online: Torys LLP <<https://www.torys.com/insights/publications/2016/07/free-prior-and-informed-consent-in-canada-towards-a-new-relationship-with-indigenous-peoples>> at 29; Senate of Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 43-2 (May 28, 2021) (Mauro Barelli).

³⁵⁷ *Newman Rhetoric*, *supra* note 228 at 14.

specifically the articles referencing FPIC, needs to be done in a way that meaningfully engages with and incorporates ILTs.

If the existing duty to consult will constitute Canada's approach to addressing the FPIC Articles then it is worth testing the extent to which the duty, as currently developed, acknowledges, incorporates, or otherwise makes space for ILTs. This chapter proceeds in three parts. First, I provide an introduction to Canada's duty to consult framework, focusing on elements directly relevant to the FPIC Articles. Second, I review Canada's duty to consult jurisprudence in order to determine the extent to which Canadian courts have utilized ILTs in the formulation and application of Canada's duty to consult framework. Third, I consider the extent to which Canada's duty to consult framework has informally embraced ILTs in its consultation processes by examining: (i) provincial consultation protocols; (ii) joint Crown-first nations consultation protocols; (iv) the Government of Canada's consultation protocols; and (v) the consultation protocols of Indigenous communities.

3.1 The Duty to Consult

Broadly speaking, Canada's duty to consult flows from the honour of the Crown in its dealings with Indigenous peoples.³⁵⁸ This honour of the Crown "...recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples".³⁵⁹

³⁵⁸ *Haida*, *supra* note 2 at para 32.

³⁵⁹ *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 21 [*Mikisew*].

Pursuant to this obligation the Crown is required to consult Indigenous peoples before taking action that may adversely affect their asserted or established rights under s.35 of the *Constitution Act, 1982*.³⁶⁰ For example, imagine the Crown is proposing to build an oil pipeline that would cross the traditional territories of several Indigenous communities. The duty ensures that the Crown acts honourably by preventing it from simply making decisions unilaterally in a way that may undermine section 35 rights.³⁶¹

Section 35 of the Constitution Act recognizes and affirms the existing aboriginal and treaty rights of Canada's aboriginal peoples:

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of *aboriginal peoples of Canada*

(2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada.³⁶²

Section 35 protects both historic and modern treaty rights. The content of these rights can vary depending on the relevant treaty. However, some common treaty provisions include: land rights, annuities, hunting/harvesting rights, the right to self-government, consultation obligations, etc.

Aboriginal rights on the other hand are subject to judicial interpretation. In *R. v Van Der Peet* the Supreme Court concluded that "...in order to be an aboriginal right an activity must be an

³⁶⁰ *Ibid* at para 29; *Haida*, *supra* note 2 at para 29.

³⁶¹ *Haida*, *supra* note 2 at para 26.

³⁶² *Constitution 1982*, *supra* note 1.

element of a practice, custom, or tradition integral to the distinctive culture of the aboriginal group claiming the right”.³⁶³

In determining whether an activity satisfies this part of the test the Supreme Court made the following observations:

- “In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right.”³⁶⁴
- In order to be integral a practice, custom, or tradition must be “...a central and significant part of the society's distinctive culture...in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was”.³⁶⁵ The significance of the practice, custom, or tradition to the community is an important but not determinative consideration of whether it constitutes a section 35 right.³⁶⁶
- The practice, custom, or tradition must be independently significant, meaning it cannot simply be incidental to another practice, custom, or tradition.³⁶⁷
- The practice, custom, or tradition must be distinctive, it does not need to be distinct. This means that the practice, custom, or tradition can be shared by multiple groups so long as it is distinguishing or characteristics of the group asserting the right.³⁶⁸

³⁶³ *Van Der Peet, supra* note 35 at para 46.

³⁶⁴ *Ibid* at para 49.

³⁶⁵ *Ibid* at para 55.

³⁶⁶ *Ibid* at para 52.

³⁶⁷ *Ibid* at para 70.

³⁶⁸ *Ibid* at paras 71-72.

- The practices, customs, and traditions which constitute aboriginal rights must have originated prior to contact between aboriginal and European societies.³⁶⁹ There must be some continuity between these historic practices and those that exist today. This does not mean that Indigenous peoples must provide an unbroken chain of continuity as it may be permitted for the group to cease engaging in a practice, custom, or tradition and this is acceptable.³⁷⁰
- Asserted Aboriginal rights, while identified historically, are permitted to evolve and to be exercised in a modern form. For example, a right to fish does not limit the group to fish utilizing historic means, the group would be entitled to engage in the practice using modern tools, equipment, etc.³⁷¹
- Courts should soften the rules of evidence given the difficulty in proving rights which originate in a time with no written records.³⁷²

3.1.1 *What is the Duty to Consult?*

*Haida Nation v British Columbia*³⁷³ is considered a landmark decision regarding the duty to consult. This 2004 Supreme Court of Canada decision involving the Haida's claim to their traditional territory.³⁷⁴ The Haida had brought a title claim for the territory but it had yet to be heard by the courts.³⁷⁵ The case involved a transfer of a license to cut trees in the territory that was approved by the relevant BC Minister without the Haida's consent and over their

³⁶⁹ *Ibid* at para 60

³⁷⁰ *Ibid* at paras 63-65.

³⁷¹ *Ibid* at paras 172-173.

³⁷² *Ibid* at para 68.

³⁷³ *Haida, supra* note 2.

³⁷⁴ *Ibid* at para 1.

³⁷⁵ *Ibid* at para 1.

objections.³⁷⁶ The Haida people sued seeking to have the transfer set aside.³⁷⁷ The Court had to determine whether the Crown was required to consult with the Haida about their decisions, and if so, whether they had to accommodate any of their concerns.³⁷⁸

The Supreme Court held that, broadly speaking, the Government had a duty to consult the Haida however precisely what was required to satisfy this duty depended on the specific facts of the case and would be proportionate to: (i) the strengths of the claim to Aboriginal or treaty rights; and (ii) the seriousness of the potentially adverse impact on those rights.³⁷⁹ At a minimum the duty would require the Government to give notice of the decision, disclose information, and discuss issues raised in response to the notice.³⁸⁰ At the other end of the scale, "...deep consultation aimed at finding a satisfactory interim solution, may be required".³⁸¹ The Court even went so far as to suggest that in certain circumstances the Government may be required to *accommodate* a group's concerns over a proposed project.³⁸²

The Supreme Court has defined deep consultation as perhaps entailing "...the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision".³⁸³

³⁷⁶ *Ibid* at paras 1-5.

³⁷⁷ *Ibid* at paras 1-5.

³⁷⁸ *Ibid* at para 6.

³⁷⁹ *Ibid* at para 39.

³⁸⁰ *Ibid* at paras 37, 43.

³⁸¹ *Ibid* at para 44.

³⁸² *Ibid* at para 47 (emphasis added).

³⁸³ *Ibid* at para 44; See also: *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 47 [*Clyde River*]

This has been referred to as a “spectrum” analysis by the Supreme Court, where every case should be approached individually and flexibly.³⁸⁴ Although the standards of consultation can vary, the Crown is always expected to engage with Indigenous peoples in good faith³⁸⁵ and to demonstrate a willingness “...to make changes based on information that emerges during the process”.³⁸⁶ In other words, the expectation is that consultation will be more than “blowing off steam” and represent a meaningful two-way dialogue.³⁸⁷ In terms of what might constitute a satisfactory accommodation, again this depends on the facts of the case. However, accommodations may include: (i) adopting mitigation strategies proposed by the effected Indigenous peoples;³⁸⁸ or (ii) “changing a development project’s scope, location or timing”.³⁸⁹

3.1.2 *When does the duty to consult arise?*

Generally speaking, the duty to consult arises “when the Crown has real or constructive knowledge of the potential existence of an Aboriginal right or title and contemplates action which might adversely affect that right or title”.³⁹⁰ To satisfy the first part of this test: (i) the Crown could have actual knowledge of a claim;³⁹¹ (ii) the lands in question are “known or reasonably suspected to have been traditionally occupied by an Aboriginal community”,³⁹² or

³⁸⁴ *Haida*, *supra* note 2 at para 45.

³⁸⁵ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 29 [*Taku River*].

³⁸⁶ *Ibid* at para 29.

³⁸⁷ *Coldwater*, *supra* note 195 at para 41.

³⁸⁸ *Taku River*, *supra* note 385 at para 44-46.

³⁸⁹ Isabelle Brideau, “The Duty to Consult Indigenous Peoples” (12 June 2019), online: *Parliament of Canada* <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201917E#a3-5>; *Beckman v Little Salmon* 2010 SCC 53 at para 15 [*Beckman*].

³⁹⁰ *Ross River Dena Council v Yukon*, 2020 YKCA 10 at para 10 [*Ross River*]; See also: *Haida*, *supra* note 2 at para 35.

³⁹¹ *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 40 [*Rio Tinto*].

³⁹² *Ibid* at para 40.

(iii) the Crown could know or reasonably anticipate that the proposed action would impact on a groups aboriginal or treaty rights.³⁹³

The second part of the test, ‘contemplated action’ is to be interpreted broadly³⁹⁴ “...and is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights”.³⁹⁵ However, the Supreme Court has also concluded that despite high level decision-making potentially triggering the duty to consult, the duty does not apply to the development, passage, and enactment of legislation. This was decided in *Mikisew Cree First Nation v Canada (Governor General in Council)*³⁹⁶, which dealt with a claim regarding broad changes to Canada’s environmental protect regime that were introduced in April 2012 via “...two pieces of omnibus legislation”.³⁹⁷ The Mikisew Cree claimed that they “...were not consulted on either of these omnibus bills”³⁹⁸ and that a duty to consult was owed to them.³⁹⁹

The majority of the court dismissed the claim and held that “the law-making process – that is, the development, passage, and enactment of legislation – does not trigger the duty to consult”.⁴⁰⁰

The court relied on constitutional principles such as the separation of powers and parliamentary sovereignty in support of this conclusion.⁴⁰¹ The Court commented that “Applying the duty to

³⁹³ *Ibid* at para 40.

³⁹⁴ *Ibid* at para 43.

³⁹⁵ *Ibid* at para 44.

³⁹⁶ *Mikisew, supra* note 359.

³⁹⁷ *Ibid* at para 6.

³⁹⁸ *Ibid* at para 8.

³⁹⁹ *Ibid* at para 9.

⁴⁰⁰ *Ibid* at para 32.

⁴⁰¹ *Ibid* at para 34-36.

consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment”.⁴⁰²

The third element of the test, adverse effect, requires claimants to “...show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice”⁴⁰³ as the duty is not considered to be a “vehicle to address historical grievances”.⁴⁰⁴ Speculative impacts will also not satisfy this third element of the test.⁴⁰⁵

3.1.3 *Duty to Consult – Is Consent Required? Do Indigenous Peoples Have a “Veto”?*

The court in *Haida* was quick to note that the duty to consult “...does not give Aboriginal groups a veto over what can be done”⁴⁰⁶ and that while there was jurisprudence that suggested the duty might require the consent of Indigenous people in certain circumstances⁴⁰⁷ this would only apply “...in cases of established rights, and then by no means in every case”.⁴⁰⁸ In other words, the jurisprudence has established that the duty to consult (at least as it is currently understood) does not necessarily require the consent of Indigenous communities to be satisfied. Put differently, “there is no ultimate duty to reach agreement”⁴⁰⁹ as the duty to consult framework guarantees a process but not a result.⁴¹⁰

⁴⁰² *Ibid* at para 38.

⁴⁰³ *Rio Tinto*, *supra* note 391 at para 45.

⁴⁰⁴ *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 41 [*Chippewas*].

⁴⁰⁵ *Rio Tinto*, *supra* note 391 at para 46.

⁴⁰⁶ *Haida*, *supra* note 2 at para 48; *Newman Rhetoric*, *supra* note 228 at 9.

⁴⁰⁷ *Delgamuukw*, *supra* note 267 at para 168.

⁴⁰⁸ *Haida*, *supra* note 2 at para 58.

⁴⁰⁹ *Taku River*, *supra* note 385 at para 2.

⁴¹⁰ *Haida*, *supra* note 2 at para 63; *Tsleil-Waututh*, *supra* note 195 at para 494.

As noted above, in *Tsilhqot'in Nation v British Columbia*⁴¹¹ the SCC did confirm that in cases where Aboriginal title exists then the government may be obligated to obtain consent.⁴¹²

However, the consent right may still be subject to a justified infringement analysis.⁴¹³

3.1.4 *Who Owes the Duty? The Role for Administrative Tribunals and Proponents*

Generally speaking, the duty to consult is owed by the Crown, meaning that it “always holds ultimate responsibility for ensuring consultation is adequate”.⁴¹⁴ That being said there are often scenarios in which the Provinces⁴¹⁵, administrative tribunals⁴¹⁶ and regulatory bodies are engaged in the consultation process.⁴¹⁷ The Supreme Court has affirmed that the Crown is able to delegate some of its responsibilities in fulfilling the duty to consult,⁴¹⁸ however, should it choose to proceed in this manner, the Crown is expected to inform the Indigenous groups that the Crown is doing so.⁴¹⁹

In addition, any statutory or regulatory body that has been delegated consultation responsibility must possess the necessary “statutory powers to do what the duty to consult requires in the particular circumstances”.⁴²⁰ Ultimately, even if the regulatory tribunal has the ability to assess the Crown’s duty to consult, the Crown still retains all of its constitutional obligations, including the honour of the Crown.⁴²¹

⁴¹¹ *Tsilhqot'in*, *supra* note 264.

⁴¹² *Ibid* at para 76 (emphasis added).

⁴¹³ *Ibid* at para 2, para 83 citing *Delgamuukw*, *supra* note 267 at para 165.

⁴¹⁴ *Clyde River*, *supra* note 383 at para 22.

⁴¹⁵ Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd., 2014) at 73 [*Newman Duty to Consult*].

⁴¹⁶ *Rio Tinto*, *supra* note 391.

⁴¹⁷ *Newman Duty to Consult*, *supra* note 415 at 75; *Clyde River*, *supra* note 383 at para 22

⁴¹⁸ *Clyde River*, *supra* note 383 at para 21

⁴¹⁹ *Ibid* at para 23.

⁴²⁰ *Chippewas*, *supra* note 404 at para 32.

⁴²¹ *Ibid* at paras 35-37.

Practically speaking, much of Canada's duty to consult process has been delegated in some capacity to relevant administrative/regulatory tribunals, but it is also important to note the essential role that proponents (i.e. those who would like to see certain projects go ahead, such as mining companies, oil and gas companies, etc.) play in the duty to consult framework.

Proponents are often required to conduct the actual consultation itself as a prerequisite to regulatory approval.⁴²² Some scholars suggest that proponents can serve an essential function in both consultation and reconciliation, given the significant level of interaction that industry has with Indigenous communities:

Reconciliation with Aboriginal peoples can be advanced by project proponents themselves in the environmental assessment and regulatory review process, just as proponents themselves can reconcile environmental protection with project development in these processes. Industry can liaise with Aboriginal peoples well in advance, often years in advance, of making a regulatory application. As noted, such engagement of this kind is mandated by tribunals such as the National Energy Board. These require evidence of Aboriginal consultation by the proponent as a precondition of making a regulatory application.⁴²³

Proponents are often expected to reach out to Indigenous communities well in advance of a project's approval in order to secure their support. What this engagement looks like can vary, but in general, they may be expected to meet with the Indigenous community, share information on the potential impact of a proposed project, document concerns, take steps to mitigate risks posed by the project, etc.⁴²⁴ It is also possible that a proponent may provide capacity funding to the

⁴²² Kirk N Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) at 47 [Lambrecht]

⁴²³ *Ibid* at 11.

⁴²⁴ *Chippewas*, *supra* note 404 at para 48; British Columbia, "Guide to Involving Proponents When Consulting First Nations" (last accessed 24 June 2021), online: *British Columbia* <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations>> at 8.

community to support the consultation process. This may also involve funding the community's own environmental impact studies⁴²⁵ that are often reflective of ILTs.⁴²⁶

After engagement and negotiations proponents and Indigenous communities may also enter into Impact Benefit Agreements (“IBAs”) as part of the consultation process. IBAs are “...negotiated, private agreements [that] serve to document in a contractual form the benefits that a local community can expect from the development of a local resource in exchange for its support and cooperation”.⁴²⁷ All of this is done in an effort to obtain a social license (or consent) from the community in order to satisfy the concerns of regulators and to forestall any challenges that the duty to consult was not satisfied.⁴²⁸ As Dwight Newman has noted:

In part simply to face up to various legal uncertainties and in part to address any risks arising from the duty to consult, many responsible resource companies now engage with Aboriginal communities and pursue good relationships with the hope also of negotiating win-win arrangements for economic development. An appropriately developed impact benefit agreement (IBA) may provide gains for all.⁴²⁹

Despite some of the apparent benefits to the relationship between proponents and Indigenous communities (negotiated benefits, consultation processes that reflect Indigenous knowledge, etc.) there are reasons to be critical of this element of Canada's duty to consult framework. For example, as Papillon and Rodon have noted simply because Indigenous knowledge is incorporated into a consultation process “there is no guarantee they will succeed in shaping the

⁴²⁵ Keith Bergner, “Navigating a Changing Landscape: Challenges and Practical Approaches for Project Proponents and Indigenous Communities in the Context of the Review and Assessment of Major Projects” in Dwight Newman ed, *Business Implications of Aboriginal Law* (Toronto: LexisNexis Canada, 2018) at 203-204; Tomlinson, *supra* note 216 at 891-892.

⁴²⁶ *Ibid.*

⁴²⁷ Lambrecht, *supra* note 422 at 51-52.

⁴²⁸ For a discussion of these agreements see: Ibironke T Odumosu-Ayanu & Dwight G Newman, eds, *Indigenous-industry agreements, natural resources and the law* (New York: Routledge, 2021).

⁴²⁹ Newman *Duty to Consult*, *supra* note 415 at 82.

actual decision-making process”.⁴³⁰ In addition, although IBAs have a number of benefits,⁴³¹ their negotiation is often carried out amongst Indigenous leadership and without input from the community.⁴³² These negotiations also require Indigenous communities to give up their right to say no and therefore put FPIC rights on the table.⁴³³ The resulting agreements are not usually public which makes it difficult for other Indigenous communities to examine and scrutinize them.⁴³⁴

3.1.5 *Who is entitled to be consulted?*

Generally speaking, the duty to consult is owed to First Nations, Inuit, or Metis whose aboriginal or treaty rights may be impacted by a proposed state action.⁴³⁵ One question that has been raised in litigation is whether the duty is owed to every Indigenous individual in a community that may be affected by a proposed action, or whether it is owed to the community as a whole.⁴³⁶ In *Behn v Moulton Contracting Ltd* the Supreme Court addressed this question and concluded that the duty is not owed to individuals but to the Indigenous community as a whole. However, the group could authorize an individual to represent the community for the purposes of making a claim: “The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s.35 rights, which are collective in nature...But

⁴³⁰ Martin Papillon & Thierry Rodon, “Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada” (2017) 62 Environmental Impact Assessment Review at 219 [*Papillon & Rodon*].

⁴³¹ *Ibid* at 220.

⁴³² *Ibid*.

⁴³³ *Ibid*.

⁴³⁴ Chris Hummel, “Behind the Curtain, Impact Benefit Agreement Transparency in Nunavut” (2019) 60:2 *Cahiers de droit (Québec)* 367 at 369.

⁴³⁵ *Newman Duty to Consult*, *supra* note 415 at 65-66.

⁴³⁶ *Newman Duty to Consult*, *supra* note 415 at 65.

an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights”.⁴³⁷

This raises a number of important, and challenging questions, such as: who is entitled to speak for the community?⁴³⁸ What should the court do when multiple parties claim to speak for the community, with some arguing the duty to consult has been satisfied, and others saying it has not? What about instances where multiple communities have overlapping claims with respect to a particular territory?⁴³⁹ A discussion of these issues is beyond the scope of this thesis but are important practical challenges that often need to be addressed in the context of duty to consult litigation.

3.1.6 What Does the Duty to Consult Expect from Indigenous Communities?

Canada’s duty to consult framework imposes obligations on the Crown, tribunals, and proponents but also imposes reciprocal duties on Indigenous peoples. Indigenous peoples are expected “to carry their end of the consultation, to make their concerns known, to respond to the government’s attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution”.⁴⁴⁰ They are also expected to act in good faith and to avoid placing obstacles in the way of the consultation process.⁴⁴¹ Although Indigenous peoples are permitted to engage in hard bargaining the court will not permit Indigenous peoples to interfere with the efforts to engage in consultation and accommodation.⁴⁴²

⁴³⁷ *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 30.

⁴³⁸ *Newman Duty to Consult*, *supra* note 415 at 67.

⁴³⁹ *Sambaa K’e Dene First Nation v Duncan*, 2012 FC 204.

⁴⁴⁰ *Lambrecht*, *supra* note 422 at 64 citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 65.

⁴⁴¹ *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212 at para 52.

⁴⁴² *Coldwater*, *supra* note 195 at para 195-196.

3.1.7 What happens if the duty is breached?

Consultation processes are subject to judicial review. If the court finds that the duty to consult has been breached the remedy ordered can vary and “range from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct”.⁴⁴³

3.2 Duty to Consult, Canadian Courts, and Indigenous Legal Traditions

There is a long line of jurisprudence confirming “the important role that Aboriginal perspectives play in establishing the existence of Aboriginal rights and in interpreting treaty rights”.⁴⁴⁴ As John Borrows has stated “Indigenous legal traditions are inextricably intertwined with the present-day Aboriginal customs, practices, and traditions that are now recognized and affirmed in section 35(1) of the Constitution Act, 1982”.⁴⁴⁵ There are court decisions: (i) establishing that the Court will qualify witnesses to testify on ILTs;⁴⁴⁶ (ii) engaging with Anishinaabe law;⁴⁴⁷ and (iii) acknowledging the customary law of a particular Indigenous group.⁴⁴⁸ What is less clear is the role of ILTs with respect to the Crown’s duty to consult.

⁴⁴³ Nigel Bankes, “Clarifying the parameters of the Crown’s duty to consult and accommodate in the context of decision-making by energy tribunals” (2018) 36:2 *Journal of Energy & Natural Resources Law* 163 at 169, citing *Rio Tinto*, *supra* note 391 at para 37.

⁴⁴⁴ *Drake Mining*, *supra* note 139 at 213.

⁴⁴⁵ *Drake Mining*, *supra* note 139 at 213 citing John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) 11 [*Borrows Constitution*].

⁴⁴⁶ *Alderville*, *supra* note 31 at paras 55-59.

⁴⁴⁷ *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 [*Restoule*].

⁴⁴⁸ *Canadian Forest Products Inc v Sam*, 2011 BCSC 676 at 14-18, 124-128.

While a compelling argument can, and in fact has been made, that “Indigenous laws *should* inform...the duty to consult”,⁴⁴⁹ one cannot help but conclude that, in general, Canadian courts have failed to meaningfully engage with ILTs in either the formulation or application of Canada’s duty to consult framework.⁴⁵⁰

At times, the jurisprudence makes a general reference to the need to consider ILTs. For example, in *Delgamuukw v British Columbia*, the Supreme Court heard an appeal of an Aboriginal title claim in British Columbia brought on behalf of the Gitskan and Wet’suwet’en. Although the case is primarily about Aboriginal title, the decision laid the groundwork for Canada’s duty to consult framework that would inform the Supreme Court of Canada’s decision in *Haida* several years later.

In its decision, the Supreme Court acknowledged that it should ensure that “...the aboriginal perspective on their practices, customs, and traditions, and on their relationship with the land, are given due weight by the courts”.⁴⁵¹ The Supreme Court also considered the Adaawk and Kungax of the Gitskan and Wet’suwet’en nations, which are oral histories that were a “recital of the most important laws, history, traditions and traditional territory of a House”.⁴⁵² These were put before the court in part to establish proof of a system of land tenure law that pre-existed the arrival of Europeans. The trial judge admitted the Adaawk and Kungax but afforded them no weight.⁴⁵³ The Supreme Court cautioned against taking this approach to law based on oral histories⁴⁵⁴ and

⁴⁴⁹ *Drake Mining, supra* note 139 at 214. (emphasis added); See also *Napoleon Tsilhqot’in, supra* note 328 at 894-896 for Val Napoleon’s discussion of the relevance of Tsilqot’in law to Canadian laws of consultation and consent.

⁴⁵⁰ *Napoleon Tsilhqot’in, supra* note 328 at para 12.

⁴⁵¹ *Delgamuukw, supra* note 267 at para 84.

⁴⁵² *Ibid* at para 93.

⁴⁵³ *Ibid* at para 96.

⁴⁵⁴ *Ibid* at para 98.

suggested they should be afforded some weight.⁴⁵⁵ The Supreme Court drew no specific conclusions on the content or persuasiveness of the Adaawk and Kungax, due in large part to the fact that this case was sent back for another trial. However, the Supreme Court at least tacitly acknowledged the importance of Indigenous laws in the resolution of the dispute, and the attempt to embrace ILTs is noteworthy.

Similarly, in *Tsilhqot'in Nation v British Columbia*, the Supreme Court did not provide any specific conclusions on the place of ILTs within the duty to consult but echoed the reasoning from *Delgamuukw* by noting that for the purposes of Aboriginal title claims, the aboriginal perspective which “focuses on laws, practices, customs and traditions of the group”⁴⁵⁶ are to be considered.⁴⁵⁷

In addition, the courts have provided some commentary on the applicability of ILTs in the context of resource development projects in *Coastal Gaslink Pipeline Ltd. v Huson* (“*Huson*”) a 2019 decision of the Supreme Court of British Columbia⁴⁵⁸ and in the *Tsleil-Waututh Nation v Canada (Attorney General)* (“*Tsleil*”).⁴⁵⁹ In *Huson*, the Coastal Gaslink Pipeline Ltd. was seeking an interlocutory injunction preventing the defendants from blockading a service road and bridge. This blockade was preventing the plaintiff from constructing a pipeline project. In the case the court expressed an openness to relying on Indigenous customary law, governance structures, and processes in the resolution of this application for injunctive relief.⁴⁶⁰ However, the court also concluded that:

⁴⁵⁵ *Ibid*

⁴⁵⁶ *Tsilhqot'in*, *supra* note 264 at paras 35

⁴⁵⁷ *Ibid* at paras 34-35.

⁴⁵⁸ *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 [*Huson*].

⁴⁵⁹ *Tsleil-Waututh*, *supra* note 195.

⁴⁶⁰ *Huson*, *supra* note 458 at paras 130-133.

Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions.⁴⁶¹

In this case none of these things had happened so the court suggested that at best Indigenous laws could be admitted as fact evidence of the Indigenous legal perspective but it would not be treated as law.⁴⁶² The court also pointed out that there was a lack of consensus in the community about the project, about who spoke for the community, and the content of the relevant ILT.⁴⁶³ So despite the court's acknowledgement of the possible relevance of ILTs, the court demonstrated an apprehension around the applicability of Indigenous customary law.

In *Tsleil* the Federal Court of Appeal ("FCA") concluded that Canada had failed to satisfy the duty to consult with respect to the Trans Mountain Pipeline Expansion project.⁴⁶⁴ In its reasons the FCA noted the Tsleil-Waututh had conducted their own assessment of the proposed project based on their traditional knowledge (including Tsleil-Waututh law).⁴⁶⁵ The FCA noted that the National Energy Board failed to address the concerns raised by the assessment process and considered this to be relevant to its determination that the duty to consult had not been satisfied.⁴⁶⁶ Although the court did not assess the duty to consult through the lens of Tsleil-Waututh law, there was at least an acknowledgment of its relevance to its analysis. This case demonstrates that the court will, to some extent, engage with ILTs, particularly in the context of

⁴⁶¹ *Ibid* at para 127 citing *Alderville*, *supra* note 31 at para 40.

⁴⁶² *Ibid* at para 129

⁴⁶³ *Ibid* at paras 134-138.

⁴⁶⁴ *Tsleil-Waututh*, *supra* note 195 at para 767

⁴⁶⁵ *Ibid* at para 649; Tsleil-Waututh Nation Sacred Trust, "Tsleil-Waututh Nation Release Landmark Independent Assessment of Kinder Morgan Trans Mountain Proposal" (26 May 2015), online: *TWN Sacred Trust* <<https://twnsacredtrust.ca/tsleil-waututh-nation-release-landmark-independent-assessment-of-kinder-morgan-trans-mountain-proposal/>> [*Sacred Trust*].

⁴⁶⁶ *Ibid* at para 650-661.

a consideration of traditional knowledge in project assessments. This is a topic that will be discussed in further detail later in this chapter.

There are also examples where the court will provide at least a tacit acknowledgment of some generic principles broadly attributed to numerous ILTs. For example, in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*⁴⁶⁷, the Supreme Court described the duty to consult as being “...grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples”.⁴⁶⁸ One might read this statement by the Supreme Court as some sort of acknowledgment of a responsibility to future generations or principles of stewardship, concepts that have been identified in numerous ILTs⁴⁶⁹ and will be discussed further in chapter four. Others may point to the court’s commitment to reconciliation and the requirement imposed on the Crown “to adopt the attitude of honour that is essential for the reconciliation of peoples to flourish”.⁴⁷⁰ Some authors have suggested that the court’s focus on relationships “provides a connection to an aspect common to several Indigenous legal traditions – that maintaining good relationships with and between communities, with all beings, and with the land is the overall role or purpose of law”.⁴⁷¹

Moving beyond these tacit acknowledgments of some common conceptions within ILTs I would argue that the duty to consult framework is actually quite antagonistic towards a meaningful

⁴⁶⁷ *Rio Tinto*, *supra* note 391.

⁴⁶⁸ *Ibid* at para 50.

⁴⁶⁹ Michael Coyle, “Indigenous Legal Orders in Canada – a literature review” (2017) Law Publications 92 (Scholarship @ Western) at 6 [Coyle].

⁴⁷⁰ Rachel Ariss et al “ Crown Policies on the Duty to Consult and accommodate: Towards Reconciliation?” (2017) 13:1 *McGill J of Sustainable Development L* at 13, citing Mark Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165 at 186.

⁴⁷¹ *Ibid* at 13 citing James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 119–176.

recognition of ILTs. In order to appreciate this antagonism we must first consider the interconnected nature of ILTs and self-determination. As John Borrows has stated “[w]hen Indigenous peoples practice their own laws they identify and apply the principles they want to guide their lives”.⁴⁷² In his 2007 piece, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions”, Gordon Christie discusses the relationship between ILTs and self-determination.⁴⁷³ Christie concludes that efforts to revitalize ILTs are part of a broader movement towards self-determination⁴⁷⁴ and the regeneration of identity:

The reinvigoration of Indigenous legal traditions holds out the promise of being an integral component in a modern project of regaining control over processes that not only lead into the instantiation of certain structures and institutions (the legal and political structures of Indigenous societies), but, more importantly, that would play a role in the potential regeneration of Indigenous (i.e., “traditional” cultural) identities.⁴⁷⁵

Although the courts have not gone so far as to express opposition to ILTs within the duty to consult framework, they have mischaracterized and mistreated Indigenous self-determination within the context of the duty to consult, most notably by framing Indigenous expressions of self-determination as: (i) an effort to establish a veto right; and/or (ii) merely the interest of a particular group of people to be compared and balanced against other competing societal interests.

⁴⁷² John Borrows, “Policy Paper: Implementing Indigenous Self-Determination Through Legislation in Canada” (20 April 2017), online: *AFN* <<https://www.afn.ca/wp-content/uploads/2018/09/2017-04-20-Implementing-Indigenous-self-determination-through-policy-legislation.pdf>> at 7.

⁴⁷³ Gordon Christie, “Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions” (2007) 6 *Indigenous LJ* 13 at 14.

⁴⁷⁴ *Ibid* at 25.

⁴⁷⁵ *Ibid* at 25.

This is perhaps best exemplified by the Federal Court of Appeal's decision in *Coldwater First Nation v Canada (Attorney General)*.⁴⁷⁶ In this case the court considered whether the duty to consult had been satisfied in connection with the Trans Mountain Pipeline Expansion Project. In its decision, the court noted that one of the controlling concepts in Canada's duty to consult framework is reconciliation⁴⁷⁷ and that even though the consultation process may not result in an accommodation agreeable to the affected Indigenous peoples, this does not mean that reconciliation has not been advanced.⁴⁷⁸ The court was quite clear that the need to achieve reconciliation does not mean that a result must satisfy the Indigenous community in question otherwise Indigenous peoples would have a veto, something the court has repeatedly rejected.⁴⁷⁹

Rather than considering the community's opposition to the project as an expression of self-determination, the court seemed to frame it as an attempt to engage in tactical behaviour and veto the project: "The applicants' submissions are essentially that the Project cannot be approved until all of their concerns are resolved to their satisfaction. If we accepted those submissions, as a practical matter there would be no end to consultation, the Project would never be approved, and the applicants would have a *de facto* veto right over it".⁴⁸⁰

The Court also seems to characterize Indigenous opposition to a proposed project as merely an "interest" to be weighed against those of the public, without regard to the fact that what was being expressed via this opposition was self-determination: "At some juncture, a decision has to be made about a project and the adequacy of the consultation. Where there is genuine

⁴⁷⁶ *Coldwater*, *supra* note 195.

⁴⁷⁷ *Ibid* at para 43.

⁴⁷⁸ *Ibid* at para 52.

⁴⁷⁹ *Ibid* at para 53.

⁴⁸⁰ *Ibid* at para 86.

disagreement about whether a project is in the public interest, the law does not require that the interests of Indigenous peoples prevail”.⁴⁸¹

What the Court is doing in this decision, whether intentional or not, is equating Indigenous self-determination with an “interest” and Indigenous peoples with stakeholders, largely indistinguishable from other groups within Canada. The court states that the law does not require Indigenous interests to prevail but provides no meaningful justification for why this is not the case. There is perhaps an unintentional sleight of hand occurring in the court’s reasoning here. By framing Indigenous opposition to a proposed project as an interest, it lends itself to being weighed against competing interests, whether those interests are economic development, the needs of industry, or the largely undefinable “public interest”.

I would argue that this premise mischaracterizes what is happening within the context of a duty to consult dispute. Industry has an interest in a project (financial), the “Canadian public” may have an interest in the project to the extent it might provide infrastructure or jobs. Indigenous peoples, however, are claiming their human rights, notably their right to self-determination. They may also be seen as expressing cultural values in relation to the land. As Michael Coyle has noted:

A dialogic process that seeks to take Indigenous concerns seriously must come to grips with a cultural reality in which one of the parties to the dialogue does not typically conceive of development decisions concerning traditional lands as merely affecting their rights and “interests”. For most, if not all, Aboriginal peoples in Canada, traditional norms dictate that living properly requires a focus on maintaining proper relationships – with other persons and with the natural and spiritual world.⁴⁸²

⁴⁸¹ *Ibid* at para 53.

⁴⁸² *Coyle Squaring, supra* note 280 at 251.

Coyle has specifically warned against how the courts might frame Indigenous “interests” in the context of the duty to consult, and suggests that “care must be taken to ensure that in cross-cultural consultations the word “interests” is not interpreted by Crown representatives solely in accordance with its frequent Euro-Canadian connotation of material, legal, or economic priorities”.⁴⁸³ Unfortunately, the manner in which the courts have approached the duty to consult framework appears to reduce self-determination of Indigenous peoples to the “interest” of a subgroup within Canadian society. This undermines self-determination, and indirectly diminishes the ability of Indigenous peoples to meaningfully exercise their laws, customs, and traditions.

Beyond this more conceptual argument, the duty to consult framework’s antagonism to ILTs can be observed by the specific consultation procedures developed by various levels of government. Scholars like Karen Drake have been quick to note how specific consultation procedures can, and are developed without due regard to ILTs, resulting in conflicts. For example, in her article “The Trials and Tribulations of Ontario’s Mining Act: The Duty to Consult and Anishinaabek Law” Drake concluded that Ontario’s Mining Act consultation procedures, designed as part of Ontario’s approach to the duty to consult, were in conflict with Anishinaabek legal principles, specifically: “(i) the obligation to wait, make observations and gather information prior to making a decision, and (ii) the obligation to engage in collective, rather than individual, decision-making”.⁴⁸⁴ What this demonstrates is that, despite the attempt by courts to acknowledge ILTs, the practical realities of Canada’s approach to consultation often serves to conflict with or undermine these traditions.

⁴⁸³ *Ibid* at 252.

⁴⁸⁴ *Drake Mining, supra* note 139 at 214.

3.2.1 *Why the Court's Failure to Meaningfully Engage With ILTs is Unsurprising*

Although Canadian courts have failed to meaningfully engage with ILTs in the context of the duty to consult, this should not be surprising. As Joshua Nichols and Robert Hamilton have suggested, “while offering procedural protection for asserted claims and judicial oversight of discretionary Crown action, the DCA [Duty to Consult and Accommodate] framework fits awkwardly with Indigenous understandings of international norms and Indigenous peoples’ own inherent jurisdiction”.⁴⁸⁵ Indigenous legal scholar Hadley Friedland has also pointed out that the framework is a creation of the Canadian legal system and not intended to be reflective of Indigenous systems of law:

Many have criticized how the duty to consult is implemented in practice, but for our purposes, what is crucial to underscore, again, is that it is Canadian law, as opposed to the many Indigenous legal traditions across the country, that defines what consultation looks like and, most problematically, when and how it is necessary or fulfilled. The Supreme Court has referred to pre-existing Indigenous law in Aboriginal rights cases, and we can imagine conversations that include Secwépemc law in these spaces of engagement. However, they should not be confused with interactions between legal traditions that could exist within horizontal, Nation-to-Nation relationships.⁴⁸⁶

Still others, like Aaron Mills, would suggest that the duty to consult could not be reflective of ILTs, given that the entirety of Canadian aboriginal law operates in tension with Indigenous legal interests:

Canadian law regulating relationships to land in which the Anishinaabek and other indigenous peoples have an interest (and for the Crown, a constitutional obligation) is articulated primarily in respect of the doctrines associated with s. 35 rights, and the correlative doctrines of consultation and accommodation emergent from this

⁴⁸⁵ Joshua Nichols & Robert Hamilton, “Conflicts or Complementarity with Domestic Systems? UNDRIP, Aboriginal Law and the Future of International Norms in Canada” in John Borrows et al. eds, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) at 211 [*Nichols & Hamilton*].

⁴⁸⁶ Hadley Friedland et al, “Porcupine and Other Stories: Legal Relations in Secwepemculecw” (2018) 48:1 *Revue Generale de droit* 153 at 186-187 [*Friedland*].

jurisprudence. Regardless of which specific legal doctrines are relevant in a given circumstance, this entire area of Canadian law (generally termed "aboriginal law" because of the definition of "aboriginal peoples" provided in s. 35(2) of the Constitution Act, 1982) is limited in scope to land over which a state-recognized aboriginal group has proven (or has a reasonable future claim to) unextinguished aboriginal rights (including aboriginal title) or treaty rights pursuant to the respective legal tests established in the case law. However even at the broadest, most general level of abstraction, neither the concept of aboriginal rights nor of aboriginal title fits comfortably with the Anishinaabe foundations we've explored for Anishinaabe legal interests in their territory and its resources.⁴⁸⁷

Critics like Mills and others essentially conclude that given this tension, the duty to consult, like much of Canadian Aboriginal law, can at best "offer Indigenous laws and legal orders a severely restricted role within Euro-derived legal orders, [and that] this role is affirmed only when it is in accordance with colonial law".⁴⁸⁸ If we accept this premise then it is perhaps unsurprising that Canada's duty to consult framework has not meaningfully incorporated ILTs.

In fact, even if we do not accept the conclusions drawn by Friedland, Mills, and others, I suggest that the failure to meaningfully incorporate ILTs into Canada's duty to consult framework is unsurprising for several other reasons. First, when we speak of ILTs it is important to recall that we are not discussing a singular or monolithic legal tradition. As John Borrows has pointed out, "Indigenous peoples' traditions can be as historically differently from one another as other nations and cultures in the world".⁴⁸⁹ When being asked to articulate a broad duty to consult in Canadian law the Supreme Court was in a position where it was attempting to generate a legal standard applicable throughout Canada. It would be impossible to generate a framework with broad applicability that accounts for the diversity of ILTs that exists in this country. This is not to excuse the Court for its failure to account for ILTs. There are ways in which the Supreme Court

⁴⁸⁷ Aaron Mills, "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9:1 Indigenous L J 107 at 151 [*Mills Aki*].

⁴⁸⁸ *Kennedy*, *supra* note 32 at 79.

⁴⁸⁹ *Borrows Traditions*, *supra* note 28 at 175-176.

could have generated a broadly applicable standard that better respects ILTs. For example, the Court could have mandated that in all instances of consultation the sufficiency of the consultation will be measured with reference to the relevant legal principles of the community being consulted. I am only suggesting that the Supreme Court's response is unsurprising given the tendency to want to articulate broad legal standards that could direct the Crown, proponents, and Indigenous peoples moving forward.

Second, there continues to exist a divide over whether the judiciary should even attempt to engage with indigenous legal principles,⁴⁹⁰ largely due the judiciary's inability to speak the relevant languages and a lack of exposure to the culture of the peoples whose ILTs may be relevant. There are also those like Alan Hanna, Assistant Professor at the University of Victoria, who argues that any attempts to turn to court-made legal frameworks may prove fruitless, simply because courts are unable to meaningfully engage with ILTs. Hanna argues that rather than provide Indigenous peoples with legal recourse that is representative of their values, all the duty to consult framework does is force Indigenous peoples into a consultation process that will either result in their agreement or force them to litigate⁴⁹¹ under a system that "is ill equipped to grapple with the complexity and interconnected relationality regulated under First Nations legal orders".⁴⁹² Given the fact that the judiciary is not well equipped to engage with ILTs, it may come as no surprise that they have been hesitant to integrate them into the formulation of something like the duty to consult.

⁴⁹⁰ Don Couturier, "Judicial Reasoning across Legal Orders: lessons from Nunavut" (2020) 45:2 Queen's L J 319 at 339, 348 [*Couturier*].

⁴⁹¹ *Hanna*, *supra* note 326 at 826-827.

⁴⁹² *Ibid* at 827.

Third, the judiciary has, in the past, expressed the need to acknowledge Indigenous perspectives but to do so in ways which are “cognizable to the Canadian legal and constitutional structure”.⁴⁹³ Given this fact, it is not surprising that the Supreme Court would establish a duty to consult framework whose approach shares similarities to other frameworks within Canadian common law, including the spectrum analysis regarding the severity of the impact on rights and the analytical framework for justifying infringement. These will both be discussed in the conclusions section below.

3.3 Duty to Consult and ILTs (Outside the Courtroom)

In order to accurately capture the extent to which Canada’s duty to consult framework has accounted for ILTs it is necessary to look beyond the jurisprudence and examine the extent to which ILTs have been incorporated into: (i) provincial consultation protocols; (ii) joint Crown-First Nations consultation protocols; (iv) the Government of Canada’s consultation protocols; and (v) the consultation protocols of Indigenous communities.

3.3.1 Provincial Consultation Protocols

As Michael Coyle has noted, “current federal and provincial consultation policies rarely require the participation of Aboriginal groups in the design of the processes through which their concerns will be discussed”.⁴⁹⁴ However, there are some provincial jurisdictions that have begun to embrace Indigenous traditional knowledge, laws, customs, and interests in their environmental

⁴⁹³ *Van Der Peet*, *supra* note 35 at para 49.

⁴⁹⁴ *Coyle Squaring*, *supra* note 280 at 254.

assessment processes.⁴⁹⁵ For example, in British Columbia the *Environmental Assessment Act*⁴⁹⁶ expresses support for the implementation of the Declaration⁴⁹⁷ and commits to utilizing Indigenous knowledge.⁴⁹⁸ In fact, the Environmental Assessment Office there has provided guidance regarding consensus-seeking under the Act which states that, among other things: (i) “Participating Indigenous nations make decisions on consent based on their own laws and traditions; this is an expression of their right to Indigenous self-determination and self-government”;⁴⁹⁹ and (ii) “A participating Indigenous nation may choose to provide a notification of consent or lack of consent and reasons (through the authorized representative of the participating Indigenous nation) and following the nation’s own governance and procedural requirements”.⁵⁰⁰

All that being said, in general, provincial consultation protocols and guidelines do not expressly define the role of ILTs in the consultation process, rather they tend to re-iterate the Supreme Court’s guidance regarding the duty to consult. For example, in Nova Scotia, the Policy and Guidelines for Consultation with the Mi’kmaq do not mention any relevant Mi’kmaq legal principles, rather it re-states leading case law on the duty to consult.⁵⁰¹ The aspects of the

⁴⁹⁵ Nunavut Parks, “Culturally-Appropriate Consultation Techniques for use in planning and managing Nunavut’s Territorial Parks and Special Places” (March 2015), online: *Government of Nunavut* https://www.gov.nu.ca/sites/default/files/community_consultation_guide.pdf; Michael d’Eca, “Proposed Administrative Tribunal Policies Concerning Indigenous Ecological Knowledge and Values, and the Duty to Consult” (2020) 50 *Northern Review (Whitehorse)* 207.

⁴⁹⁶ *Environmental Assessment Act*, SBC 2018 c 51.

⁴⁹⁷ *Ibid* s 2(2)(b)(ii)(a).

⁴⁹⁸ *Ibid* s 2(2)(b)(i)(c).

⁴⁹⁹ Environmental Assessment Office, “Guide to Consensus-Seeking under the Environmental Assessment Act, 2018” (April 2020), online: *Government of BC* <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/2018-act/guide_to_consensus_seeking_under_the_ea_act_v1_-_april_2020.pdf> at 6.

⁵⁰⁰ *Ibid* at pg 7.

⁵⁰¹ Government of Nova Scotia Policy and Guidelines, “Consultation with the Mi’kmaq of Nova Scotia” (April 2015), online: *Nova Scotia* <https://novascotia.ca/abor/docs/April%202015_GNS%20Mi%27kmaq%20Consultation%20Policy%20and%20Guidelines%20FINAL.pdf>.

provincial protocols and guidelines that account for the perspective of Indigenous communities tend to take the form of: (i) a general acknowledgment that internal deliberations within the community should be done in accordance with a format and methodology that they decide;⁵⁰² (ii) references to the importance of incorporating ‘traditional knowledge’ or land use studies, regarding the environmental or ecological impacts of proposed projects;⁵⁰³ (iii) a general commitment to “consider[ing] the perspectives of the Aboriginal community or communities to be consulted”⁵⁰⁴ and to have “...discussions with the affected Aboriginal community or communities, to determine what processes or approaches should be used to consult with the communities”;⁵⁰⁵ and (iv) in the case of some provinces, a commitment to ensuring Aboriginal communities have a role in the creation of consultation processes.⁵⁰⁶

3.3.2 *Joint Crown-First Nation Consultation Protocols*

In discussing the duty to consult, the Crown is quick to point to the number of joint consultation protocols entered into with Indigenous communities. There are dozens of examples of these types of consultation protocols, including one between the Government of Canada and the Metis Nation of Alberta, the Mi'kmaq Wolastoqiyik, and the Mississaugas of the New Credit First

⁵⁰² *Ibid* at 23.

⁵⁰³ *Ibid*.

⁵⁰⁴ Government of Ontario, “Draft guidelines for ministries on consultation with Aboriginal peoples related to Aboriginal rights and treaty rights” (last accessed 24 June 2021), online: *Government of Ontario* <<https://www.ontario.ca/page/draft-guidelines-ministries-consultation-aboriginal-peoples-related-aboriginal-rights-and-treaty>>; See also: *Government of Canada*, “Strengthening Partnerships: Consultation Protocols” (April 2014), online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-CNSLTENGE/STAGING/texte-text/consultation_protocols_brochure_may2014_1400092325879_eng.pdf>.

⁵⁰⁵ Government of Ontario, “Draft guidelines for ministries on consultation with Aboriginal peoples related to Aboriginal rights and treaty rights” (last accessed 24 June 2021), online: *Government of Ontario* <<https://www.ontario.ca/page/draft-guidelines-ministries-consultation-aboriginal-peoples-related-aboriginal-rights-and-treaty>>.

⁵⁰⁶ *Coyle Squaring*, *supra* note 280 at 255.

Nations⁵⁰⁷. These consultation protocols are valuable for establishing an agreed upon process for engaging in consultation with communities. They bring a certain amount of clarity and certainty to consultation on proposed projects, especially since they often impose a set of key responsibilities.⁵⁰⁸ However, for the most part, these consultation protocols are silent on the role for ILTs in the consultation process. The notable exceptions may be some of the modern treaties, for example, the Tsawwassen Consultation Protocols as these were agreed to pursuant to their self-government agreements, which include specific provisions regarding the law-making authority of this community.⁵⁰⁹

3.3.3 *Government of Canada and the Impact Assessment Act*

In 2019 Canada introduced the *Impact Assessment Act*⁵¹⁰ (“IAA”). This legislation and its regulations “establish[ed] the legislative basis for the federal impact assessment process”⁵¹¹ and created the Impact Assessment Agency of Canada (the “Agency”) which is responsible for “deliver[ing] high-quality impact assessments that contribute to informed decision making on major projects in support of sustainable development”.⁵¹² The Agency is responsible for leading and managing the impact assessment process for all federally designated major projects which

⁵⁰⁷ Government of Canada, “Government of Canada and the duty to consult” (last accessed 24 June 2021), online: *Government of Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810>>.

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Government of Canada, “Tsawwassen First Nation Final Agreement Implementation Report: 2011-2012” (last accessed 7 July 2021), online: *Government of Canada*, <<https://www.rcaanc-cirnac.gc.ca/eng/1500401159145/1543000637290>>;

⁵¹⁰ *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA].

⁵¹¹ Government of Canada, “Acts and Regulations” (last accessed 24 June 2021), online: *Government of Canada*, <<https://www.canada.ca/en/impact-assessment-agency/corporate/acts-regulations.html>>.

⁵¹² Government of Canada, “Mandate” (last accessed 24 June 2021), online: *Government of Canada*, <<https://www.canada.ca/en/impact-assessment-agency/corporate/mandate.html>>.

may include mining operations, oil or gas pipelines, or nuclear projects.⁵¹³ When the IAA was introduced in 2019 it incorporated a consideration of Indigenous knowledge and culture into the assessment process:⁵¹⁴

Canada's Impact Assessment Act

22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:

- (g) Indigenous knowledge provided with respect to the designated project;
- (l) considerations related to Indigenous cultures raised with respect to the designated project.⁵¹⁵

In recent years the Government of Canada has gone beyond what is provided in the IAA and has stated that: (i) Canada's impact assessment regime should be taking Indigenous customs into account;⁵¹⁶ and (ii) the IAA will “work with Indigenous communities to find opportunities for innovative engagement practices that reflect the needs of communities and respect Indigenous cultures, traditions, customary laws and protocols”.⁵¹⁷ In its guidance for proponents, Canada has also expressed the need to consider Indigenous knowledge during an impact assessment and that proponents should include Indigenous knowledge, including “Indigenous governance, traditional laws, customs and use of resources”⁵¹⁸ when engaging in a technical assessment. All of this

⁵¹³ Government of Canada, “Impact Assessments in Canada: Frequently Asked Questions” (last accessed 24 June 2021), online: *Government of Canada*, <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessments-canada-faq.html>>.

⁵¹⁴ For a critical discussion of the process that led to amendments to Canada's IAA, see *Crawford, supra* note 297.

⁵¹⁵ *IAA, supra* note 510 at s 22.

⁵¹⁶ Government of Canada, “Policy Context: Indigenous Participation in Impact Assessment” (last accessed 24 June 2021), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/policy-indigenous-participation-ia.html>>.

⁵¹⁷ *Ibid.*

⁵¹⁸ Government of Canada, “Indigenous Knowledge under the Impact Assessment Act” (last accessed 24 June 2021), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/services/policy->

represents at least a stated commitment to ensuring a role for ILTs within Canada’s duty to consult framework, despite the fact that some critics have pointed out that “embedded in the IAA is the stark Canadian legal reality that a “no” from an Indigenous community in relation to a designated project does not necessarily mean no under the Act”.⁵¹⁹

3.3.4 *Indigenous Consultation Protocols*

Over the past 15 years, Indigenous communities have developed:

their own decision-making mechanisms, often in parallel to state-sponsored regulatory processes. They do so through the development of community-driven impact assessment for example, or through the negotiation of protocols and agreements with project proponents, under which the latter recognise Indigenous ways of expressing consent as a precondition for a project to proceed.⁵²⁰

As Grace Nosek as pointed out, this work on guidelines and protocols on the part of Indigenous communities suggests an “advance towards an FPIC regime”⁵²¹ in Canada.

These consultation protocols may include: (i) how the community wishes to be consulted; (ii) the principles that would govern these consultations; and (iii) the responsibilities of various actors participating in the consultation. Although not necessarily determinative of the substance of consultations, these protocols are insightful as they have established a clear role for ILTs by requiring government, proponents, and others to engage in a consultation that is reflective of

guidance/practitioners-guide-impact-assessment-act/indigenous-knowledge-under-the-impact-assessment-act.html>.

⁵¹⁹ David V. Wright “Public Interest Versus Indigenous Confidence: Indigenous Engagement, Consultation and “Consideration” in the Impact Assessment Act” (2020) 33:3 J of Environmental L and Practice 185 at 208.

⁵²⁰ *Papillon Transformative*, *supra* note 285 at 316.

⁵²¹ *Nosek*, *supra* note 222 at 141.

their relevant legal traditions.⁵²² There are a number of examples of these protocols,⁵²³ some of which even define a vision of FPIC,⁵²⁴ but this thesis will focus on five of them.

First, the Federation of Sovereign Indian Nations (formerly the Federation of Saskatchewan Indian Nations), which is an organization representing 74 First Nations in Saskatchewan, has developed a template for consultation guidelines for its members. Part of this consultation guideline includes a requirement that consultation processes respect First Nations decision making processes inherent in their governance structures.⁵²⁵

Second, the Stk'emlupsemc te Secwepemc Nation ("SSN") in British Columbia has developed its own Environmental Assessment process and Plan. This was initially created in response to a proposed mining project (the "Ajax Mine Project"), which was going to be located near a significant historical site for the nation. This SSN-created process was designed to be pursued alongside the federal/provincial consultation process, and allow the SSN to make a decision on a proposed project that was, in their words "consistent with our laws, traditions, and customs and assess project impacts in a way that respects our knowledge and perspectives".⁵²⁶

This process was built on the SSN's systems of law and included a role for elders, youths, families, chiefs, and council.⁵²⁷ At the end of this assessment process the SSN would announce

⁵²² *Gibson*, *supra* note 295 at 13 and 39.

⁵²³ See for example: *Rice*, *supra* note 270; *Papillon Transformative*, *supra* note 285; Brendan Boyd & Sophie Lorefice, "Understanding consultation and engagement of Indigenous Peoples in resource development: A policy framing approach" (2018) 61:4 *Canadian public administration* 572.

⁵²⁴ Sheryl Lightfoot, "Indigenous Laws and Governance in Indigenous Self-Developed FPIC Protocols" (October 2020), online: *FNEMC* <<http://fnemc.ca/wp-content/uploads/2015/07/Sheryl-Lightfoot-Expert-Paper-Indigenous-Legal-Framework.pdf>>.

⁵²⁵ Federation of Saskatchewan Indian Nations, "Consultation Policy" (last accessed 24 June 2021), online: *FSIN* <<http://caid.ca/FSINConPol.pdf>>.

⁵²⁶ *Friedland*, *supra* note 486 at 188.

⁵²⁷ *Ibid.*

whether to give a project its FPIC.⁵²⁸ In the case of the Ajax Mine Project, the SSN rejected the proposal and the study they conducted was at least partially responsible for BC's decision to not permit the project to go ahead. According to Minister Heyman, who was the Minister of the Environment at the time, the SSN assessment also informed B.C.'s own assessment of the project.⁵²⁹ It is worth noting that this assessment has been touted by the Government of Canada as a meaningful example of Indigenous-led Assessment processes that are reflective of Indigenous "laws, governance, traditions, and customs".⁵³⁰

Third, the Chippewas of the Thames have called upon both the Crown and project proponents to participate in consultation in accordance with their own set of protocols. The Chippewas of the Thames created these protocols in 2016 and maintain that they can help to guide positive working relationships. The protocols specifically recognize that their nation's rights and responsibilities are recognized within traditional Anishinaabe law⁵³¹ and make reference to Anishinaabe legal principles regarding governance, communication, co-existence, and economy.⁵³² The protocols also require that traditional knowledge should inform the assessment of a proposed project⁵³³ and that both government and proponents must embrace the community's traditional governance principles regarding internal consultation.⁵³⁴

⁵²⁸ *Ibid* at 189.

⁵²⁹ Carol Linnitt, "B.C. Denies Ajax Mine Permit Citing Adverse Impacts to Indigenous Peoples, Environment" (14 December 2017), online: *The Narwhal* <<https://thenarwhal.ca/b-c-denies-ajax-mine-permit-citing-adverse-impacts-indigenous-peoples-environment/>>.

⁵³⁰ Government of Canada, "Guidance: Collaboration with Indigenous Peoples in Impact Assessments" (last accessed 24 June 2021), online: *Government of Canada* <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/collaboration-indigenous-peoples-ia.html>>.

⁵³¹ Chippewas of the Thames First Nation, "Consultation Protocol" (26 November 2016), online: *Chippewas of the Thames* <<https://www.cottfn.com/wp-content/uploads/2016/02/Wiindmaagewin-CONSULTATION-PROTOCOL-Final-Nov-2016-2.pdf>> at 10-11.

⁵³² *Ibid* at 8-11.

⁵³³ *Ibid* at 17.

⁵³⁴ *Ibid* at 17.

Fourth, several years ago Woodfibre LNG Limited proposed a Liquefied Natural Gas (LNG) export facility near Squamish, British Columbia. This project would be located “in the heart of Squamish Nation territory”.⁵³⁵ As a part of the consultation process, the proponent worked with the Squamish Nation to establish its own “independent environmental review and decision making process that [was] parallel to but separate from, the *BC Environmental Assessment Act process*”.⁵³⁶ As a part of this process the proponent worked with the Squamish Nation to identify a set of community values that would form the basis for the assessment. This involved community input, working with elders and land stewards, etc.⁵³⁷ The Squamish eventually agreed to the project subject to a number of conditions that would have to be met. This example demonstrates that proponents can ensure that assessments are led by Indigenous communities and informed by the communities’ values and principles.

A fifth example is the Tsleil-Waututh Nation’s independent environmental assessment of the Kinder Morgan Trans Mountain Pipeline Expansion Project.⁵³⁸ The project was intended to increase the capacity of an existing pipeline between Edmonton, Alberta and Burnaby BC in addition to building new pipeline and pump stations.⁵³⁹ The Tsleil-Waututh Nation was dissatisfied with the existing regulatory review process for the project and established its own process conducted in accordance with its own laws and stewardship responsibilities.⁵⁴⁰ The Tsleil-Waututh Nation ultimately denied approval for the project to proceed in its territory.⁵⁴¹ In

⁵³⁵ PGL Environmental Consultants, “First Nation Independent Environmental Assessment” (last accessed 24 June 2021), online: *PGL Environmental Consultants* <<https://www.pggroup.com/case-studies/first-nation-independent-environmental-assessment/>>.

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

⁵³⁸ *Nosek, supra* note 222 at 142.

⁵³⁹ Transmountain, “Expansion Project” (last accessed 24 June 2021), online: *Transmountain* <<https://www.transmountain.com/project-overview/>>.

⁵⁴⁰ *Sacred Trust, supra* note 465.

⁵⁴¹ *Ibid.*

its final report the Tsleil-Waututh Nation highlighted that Tsleil-Waututh law: (i) would require that the “territory be maintained and restored”;⁵⁴² (ii) “includes the obligation to protect, defend, and steward our territory”;⁵⁴³ and (iii) includes “the responsibility to restore the conditions that provide the foundation our nation requires to thrive”.⁵⁴⁴ The report also concluded that the project’s marine shipping and oil spill effects would constitute a violation of their laws.⁵⁴⁵ Despite this detailed analysis of the project through the lens of the Tsleil-Waututh’s legal tradition, the report was insufficient to put a stop to the project⁵⁴⁶ which has continued despite persistent and ongoing opposition.

3.4 Conclusions

Based on the foregoing, we can draw several conclusions regarding the relationship between Canada’s duty to consult framework and ILTs. First, despite the court’s stated openness to considering ILTs, the jurisprudence has yet to meaningfully engage with them in the formulation or application of Canada’s duty to consult framework. The problem lies with the fact that ILTs are not properly considered when determining: (i) what the duty requires; (ii) what principles the duty is rooted in; or (iii) the analytical framework for assessing the sufficiency of consultations. Nearly every significant element of the framework itself is rooted in expressions of the common law as opposed to principles found within ILTs.

⁵⁴² Tsleil-Waututh Nation, “Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal” (last accessed 24 June 2021), online: *TWN* <https://twnsacredtrust.ca/wp-content/uploads/TWN_assessment_final_med-res_v2.pdf> at 54.

⁵⁴³ *Ibid* at 86.

⁵⁴⁴ *Ibid* at 86.

⁵⁴⁵ *Ibid* at 80.

⁵⁴⁶ Although it was relied upon in the initial Federal Court of Appeal case where the court ruled that additional consultation was required (See: *Tsleil-Waututh*, *supra* note 195).

For example, the honour of the Crown which forms the basis for the duty to consult is grounded in a desire to reconcile “the pre-existence of aboriginal societies with the sovereignty of the Crown”⁵⁴⁷ as well as “prior Aboriginal occupation of the land with the reality of Crown sovereignty”.⁵⁴⁸ At this point we see that baked into the duty to consult framework is an unquestioning belief in the validity of Crown sovereignty and the assumption that this implies a denial of Indigenous sovereignty. This is perhaps unsurprising, as the Supreme Court is highly unlikely to question its own validity by challenging Canada’s very foundation. In fact the Supreme Court stated unequivocally in *R. v Sparrow*, that there was “never any doubt that sovereignty and legislative power and indeed the underlying title to such lands vested in the crown”.⁵⁴⁹

However, this has very real implications. The court does not take into consideration Indigenous conceptions of sovereignty, the true meaning and intention behind the treaties, and never questions whether there is an absence of Crown sovereignty in territories that were never subject to treaties. By taking Crown sovereignty as assumed, with Indigenous peoples ultimately subject to the will of the sovereign, it should come as no surprise that in sketching out the duty to consult, Indigenous peoples are not permitted to “veto” government action, nor is the Crown under a duty to reach an agreement.⁵⁵⁰

It should also come as no surprise that, in the event a project lacks the consent of Indigenous peoples, the Crown is permitted to justify its infringement of Indigenous rights, thus retaining the ability to act unilaterally or otherwise impose its will on Indigenous peoples. These elements of

⁵⁴⁷ *Haida*, *supra* note 2 at para 17.

⁵⁴⁸ *Haida*, *supra* note 2 at para 26.

⁵⁴⁹ *R v Sparrow*, [1990] 1 SCR 1075.

⁵⁵⁰ *Haida*, *supra* note 2 at para 10.

the duty to consult framework are a natural result of the court's fundamental assumptions regarding Crown sovereignty, that:

...Indigenous peoples exist within a sovereign-to-subjects relationship to the Crown; and...Indigenous peoples' claims are only cognizable within a contingent rights/duties context. The unilateral assertion of Crown sovereignty could have vested legal powers supporting these presuppositions in the Crown only if Europeans brought to North America a system of law superior to the systems of law that already existed or if Europeans had found a legally vacant landscape. In other words, while the DCA [Duty to Consult and Accommodate] framework does open up the possibility of Indigenous participation, it relies on a foundational logic that can only be supported by the doctrines of discovery and terra nullius. Although attenuating some of the more damaging features of these doctrines, the DCA incorporates these notions of European legal superiority, thereby relying on a racist ideology and pernicious legal fiction that is widely considered illegitimate.⁵⁵¹

As Joshua Nichols and Robert Hamilton have noted, the “incongruities between international consent-based norms, such as those articulated in UNDRIP, and Canada’s domestic consultation framework, continues to allow the Crown to supersede Indigenous interests on the basis of unilaterally asserted sovereign claims”.⁵⁵² They maintain that a meaningful implementation of the Declaration will only occur if these assumptions surrounding Crown sovereignty are challenged.⁵⁵³ Although this is a topic beyond the scope of this thesis, their point is an important one as assumed conceptions of Indigenous peoples as sovereign subjects does inform every element of the duty to consult framework. This ends up influencing the extent to which the framework can meaningfully engage with the laws of Indigenous peoples.

Other elements of the duty to consult framework are notable for how similar they are to well-established practices within the common law. For example, the duty to consult’s spectrum

⁵⁵¹ *Nichols & Hamilton, supra* note 485 at 211.

⁵⁵² *Ibid* at 208.

⁵⁵³ *Ibid* at 212.

analysis, where the severity of the impact on an established right has a correlating effect on the standard the Crown must meet, is a common judicial approach, particularly within the context of fundamental rights. In the development of the Oakes test for justifying infringement of Charter rights, the Supreme Court stated that “the more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society”.⁵⁵⁴ Given that the duty to consult emerged as a tool by which to protect established and asserted Aboriginal/Treaty rights, it is not surprising that the Supreme Court has adopted a similar analytical approach, where the severity of the impact influences what will be required of the Crown. It is also not surprising that the Supreme Court’s approach to justifying the infringement of Charter rights is strikingly similar to the justification for infringing established Aboriginal/Treaty rights in circumstances where Indigenous peoples withhold their consent to a project.⁵⁵⁵

The similarities include: (i) a requirement to demonstrate a compelling and substantial objective;⁵⁵⁶ (ii) a “requirement that the incursion is necessary to achieve the government’s goal”;⁵⁵⁷ and (iii) a requirement of proportionality, “that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest”.⁵⁵⁸

In summation, the formulation of the duty to consult framework is rooted in colonial and well established common law concepts. There are elements of the duty to consult framework that would look quite different if the Court had utilized ILTs in a meaningful way. For example, who

⁵⁵⁴ *R v Oakes*, [1986] 1 SCR 103 at para 71 [*Oakes*].

⁵⁵⁵ For further discussion of the similarity between the Oakes test and the justified infringement of s.35 rights see: *Leydet*, *supra* note 258 at 371–403.

⁵⁵⁶ *Tsilhqot’in*, *supra* note 264 at para 77; *Oakes*, *supra* note 554 at para 69.

⁵⁵⁷ *Tsilhqot’in*, *supra* note 264 at para 87; *Oakes*, *supra* note 554 at para 70.

⁵⁵⁸ *Tsilhqot’in*, *supra* note 264 at para 87; *Oakes*, *supra* note 554 at para 71.

the duty is owed to within Indigenous communities, how impacts are assessed, the ability for one party to act unilaterally, all might look quite different through the lens of ILTs. This topic will be discussed in further detail in chapter four.

In terms of the application of the duty to consult framework, subject to what I have noted above, I am not aware of any decided cases that have suggested courts are required to apply the laws of the impacted Indigenous community when conducting a duty to consult analysis. This is not to suggest that ILTs are never applied or referenced within the context of the duty to consult. There are cases that suggest the courts would look favourably on consultations that engage with things like traditional knowledge,⁵⁵⁹ demonstrating that ILTs are at least a relevant factor for the court to consider. In addition, there are circumstances where consultation protocols, agreements, or legislation may require parties to engage with the traditional knowledge, laws, or customs of Indigenous peoples. However, it is also important to note that there are instances where the court has stated that the Crown retains the "...discretion as to how it structures the consultation process and how the duty to consult is met...what is required is a reasonable process, not perfect consultation".⁵⁶⁰ This suggests that the court retains a significant amount of discretion regarding how and when it will engage with ILTs.

I would not doubt that the court would be more likely to deem a consultation to be satisfactory if it were conducted in such a way so as to respect and account for the laws of the relevant Indigenous peoples. However, I am not aware of any cases establishing that this is a pre-requisite in all circumstances.

⁵⁵⁹ *Shell Canada Energy (Re)*, 2013 LNABAER 1 (QL) at para 537 (Alberta Energy Regulator); *Tsleil-Waututh*, *supra* note 195 at paras 712, 715.

⁵⁶⁰ *Gitxaala Nation v Canada*, 2016 FCA 187 (CanLII), [2016] 4 FCR 418 at para 203.

Some might take issue with this conclusion and suggest that Indigenous peoples can, and frequently do, participate in assessments that rely upon traditional knowledge in determining whether to proceed with a project. Critics might also point to recent efforts both provincially and federally to ensure that assessment processes include a role for the laws of Indigenous peoples.

While this may all be true, we have to question whether the ability to provide feedback, request accommodation, and express concerns which may be based on a people's system of laws constitutes a sufficient recognition of ILTs when the framework itself that the court is applying in the event a project gets litigated, is not, in any meaningful way, reflective of ILTs.

As discussed above, outside the courtroom provincial and federal consultation protocols have begun to embrace a model of consultation that acknowledges a role for Indigenous knowledge, governance, traditional laws, and customs. Although this represents a meaningful commitment to recognizing the validity and importance of ILTs within the consultation process, it still falls short. As Sarah Morales has noted,

...to date, most Canadian Indigenous groups have not had a meaningful voice in impact assessment...when Indigenous groups are included in regulatory processes, other parties severely limit their involvement, requesting only baseline traditional knowledge...As a result, Indigenous culture, spirituality, laws and legal processes...have not been taken into account in the Crown-led and proponent-driven Canadian environmental assessment processes.⁵⁶¹

Furthermore, there are examples where an Indigenous community can formulate its own assessment process designed in accordance with their own laws, that result in the rejection of a project and government may still refuse to adhere to these conclusions and permit projects to

⁵⁶¹ Sarah Morales, "Indigenous-led Assessment Processes as a Way Forward" (4 July 2019), online: *CIGI* <<https://www.cigionline.org/articles/indigenous-led-assessment-processes-way-forward/>>.

continue.⁵⁶² This demonstrates a disregard for the legally binding nature of these processes and serves to undermine Indigenous self-determination. I am confident that Indigenous communities will continue to try to address this issue by formulating consultation protocols and assessment processes that reflect their worldviews, values, and systems of law. I am even confident that these will have a meaningful impact on how consultations are conducted. However, until the Crown and proponents treat these processes as law, the duty to consult framework cannot be said to be integrating ILTs in any meaningful sense. This calls for a further institutionalization of what is already occurring.

⁵⁶² *Tsleil-Waututh*, *supra* note 195; *Coldwater*, *supra* 195.

Chapter Four

4. Anishinaabe Law

One way to ensure that Canada's interpretation of FPIC furthers the process of reconciliation is by grounding this interpretation in ILTs. As demonstrated above, Canada's current approach to consultation through the duty to consult framework fails to meaningfully engage with ILTs.

Furthermore, although the scholarship acknowledges the need to engage with ILTs within the context of interpreting and implementing the Declaration, few have taken the time to discuss precisely what this could look like.

Jeffery Hewitt has advocated for new institutions to be developed based on Indigenous systems of law that are mandated to interpret the Declaration when it is applied in Canada.⁵⁶³ This suggestion raises a few questions, including, what might these institutions look like? How might ILTs be applied when interpreting UNDRIP and specifically the FPIC Articles? The Government of Canada has suggested that it is impossible to define FPIC⁵⁶⁴ so in order to answer these questions it is worth exploring what contributions a specific ILT (Anishinaabe) could make to the discussion surrounding consultation, consent, and FPIC more broadly. Put differently, how might Anishinaabe legal principles help to define the obligations of both Indigenous peoples and the Crown in seeking consensus about proposed resource developments? This chapter will explore these questions in further detail.

The discourse surrounding FPIC as explored in chapter two is currently dominated by non-Indigenous voices, whose analysis of FPIC is often built on common law principles that are not

⁵⁶³ *Hewitt, supra* note 308 at 157.

⁵⁶⁴ Rachel Emmanuel, "Lametti says consent impossible to define in Bill C-15" (31 May 2021), online: *iPolitics* <<https://ipolitics.ca/2021/05/31/lametti-says-consent-impossible-to-define-in-bill-c-15/>>.

universally shared. It is worth exploring what contributions a specific ILT (Anishinaabe) can make to the discussion surrounding consultation, consent, and FPIC more broadly. This chapter is not proposing to provide definitive statements on the precise content of the Anishinaabe legal tradition. I am not an Anishinaabe person and it would be inappropriate to suggest I can speak on behalf of their communities or to provide a definitive statement on the content of this vibrant, diverse, and complex legal tradition. However, by exploring the work of some noted Anishinaabe scholars and their articulation of Anishinaabe principles and values I will be able to draw some conclusions about how they may (or should) effect our understanding of FPIC.

This chapter proceeds in two parts. Part one consists of an introduction to Anishinaabe constitutionalism with a particular focus on the work of authors like John Borrows, Karen Drake, and Aaron Mills. Part 2 includes a high-level introduction to some notable Anishinaabe legal principles which may be informative of how we conceive of FPIC, including: community decision-making processes; the seven grandfather teachings; the agency of the natural world; leadership (persuasive compliance); stewardship principles; consent; and diplomacy.

4.1 Anishinaabe Constitutionalism

4.1.1 Who are the Anishinaabe?

The Anishinaabe are an Indigenous people whose territory “span[s] a vast geographic region from the Great Lakes to the Plains and also reside in other urban and rural communities

throughout North America”.⁵⁶⁵ The Anishinaabe are also commonly referred to as Anishnawbe, Anishinape, Anicinape, Neshnabe, Nishnaabe, Nishnawbe, Anishinaubae, and Nishinabe.⁵⁶⁶

Despite possessing a collective identity, “the Anishinaabe comprise distinct, separate bands that span a vast geographic region from the Great Lakes to the Plains. Historically and today, the Anishinaabe are a people who share many beliefs and practices, yet individual bands are influenced by their particular histories, geographic locations, political relationships, and internal conflicts”.⁵⁶⁷ There are many different communities throughout this territory including the Ojibwa, Ojibwe, Chippewa, Ojibway, Saulteaux, Mississauga, Nippising, Potawatomi, and Odawa. The language of the Anishinaabe is Anishinabemowin.

4.1.2 Sources of Anishinaabe Law

If the intention is to determine what Indigenous law has to say about FPIC, it is natural to ask where we can look to identify these relevant legal principles. As John Borrows has noted the sources of Indigenous law include: Sacred Law, laws that “stem from the creator, creation stories, or revered ancient teachings”;⁵⁶⁸ Natural Law, laws found and developed “...from observations of the physical world”;⁵⁶⁹ Deliberative Law, the law “...formed through processes of persuasion, deliberation, council and discussion”;⁵⁷⁰ Positive Law, law made by people/government, including “...rules, regulations, codes, teachings, and axioms that are

⁵⁶⁵ Jill Doerfler et al ed, *Centering Anishinaabeg Studies: Understanding the World Through Stories* (East Lansing: Michigan State University, 2013) at xvii [Doerfler].

⁵⁶⁶ *Ibid* at xvii.

⁵⁶⁷ Heidi Kiiwetinepinesiik Stark, “Respect, Responsibility, and Renewal: The Foundations of Anishinaabe Treaty Making with the United States and Canada” (2010) 34:2 *American Indian Culture and Research Journal* 145 at 148 [Stark]

⁵⁶⁸ *Borrows Constitution, supra* note 445 at 24.

⁵⁶⁹ *Ibid* at 28.

⁵⁷⁰ *Ibid* at 35.

regarded as binding or regulating people's behaviour";⁵⁷¹ and Customary law, "...practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them".⁵⁷² Val Napoleon has noted the particular importance of customary law as "inher[ing] in each Aboriginal cultural system as a whole, forming legal orders that enable large groups of people to live together and to manage themselves accordingly".⁵⁷³

In terms of how this law might be expressed, it can be codified⁵⁷⁴ but it is also shared orally, particularly through the use of stories. Stories are a particularly important aspect of the Anishinaabe legal tradition:

Anishinaabeg stories are roots; they are both origins and the imaginings of what it means to be a participant in an ever-changing and vibrant culture in humanity. In the same vein, stories can serve as a foundation and framework for the field of Anishinaabeg Studies, providing both a methodological and theoretical approach to our scholarship. They embody systems that form the basis for law, values, and community. Stories are rich and complex creations that allow for the growth and vitality of diverse and disparate ways of understanding the world.⁵⁷⁵

In *Law's Indigenous Ethics*, John Borrows describes the importance of stories by sharing something that Anishinaabe elder Basil Johnson taught him: "There was but one abiding principle that guided all life and that was 'to live in harmony with the world and within one's being'. Instead of laws that are guidelines, our ancestors made up stories to guide us along on the right course".⁵⁷⁶

⁵⁷¹ *Ibid* at 46.

⁵⁷² *Ibid* at 51.

⁵⁷³ *Napoleon Living, supra* note 59 at 45.

⁵⁷⁴ *Ibid* at 54-55.

⁵⁷⁵ *Doerfler, supra* note 565 at 1.

⁵⁷⁶ John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019) at 5 [*Borrows Ethics*].

Scholars like Val Napoleon and Hadley Friedland have been writing extensively about utilizing stories as a form of legal precedent that could be relied upon to resolve disputes. They have even begun to establish specific methods for engaging with ILTs through stories.⁵⁷⁷ These methods involve applying a legal analysis to stories similar to how this would be done in the common law tradition.⁵⁷⁸ Napoleon and Friedland have described bringing some groups together to analyze Cree and Dene stories “...to collectively synthesize the principles identified through the legal analysis of the stories”.⁵⁷⁹

Given the central importance of stories to ILTs, it should come as no surprise that the bulk of the scholarship discussed throughout the rest of this chapter will invoke stories as the basis for legal principles.

4.1.3 An Introduction to Anishinaabe Constitutionalism

Aaron Mills is one of the leading scholars in the area of Anishinaabe law. His work over the last several years has primarily focused on articulating his vision of ‘Anishinaabe Constitutionalism’, “the total relational structure that allows for Anishinaabe political communities to come into being, to maintain their integrity over time, and to adapt to new realities”.⁵⁸⁰ In his article “The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today”, Mills describes his struggles as a first year law student. Mills attributes some of these struggles to the fact that the Canadian (liberal) legal order he was being taught differed from his foundational Anishinaabe

⁵⁷⁷ Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2016) 61:4 McGill LJ 725.

⁵⁷⁸ *Ibid* at 752.

⁵⁷⁹ *Ibid* at 750.

⁵⁸⁰ Mills, *supra* note 30 at 874.

understandings of the world.⁵⁸¹ The conclusion Mills makes is a common sense, but important one. Mills points out that all systems of law are built on constitutional foundations. They have a world beneath them consisting of values, principles, worldviews, etc. Mills argues that only once we accept this fact and recognize that all law, legal processes, and legal institutions are built on a foundation that they can never separate from⁵⁸² can we begin to appreciate the tensions that can exist between Canadian law and ILTs.

In the “Lifeworlds of Law” Mills argues that Canadian law and Canada’s constitution is a species of liberal constitutionalism that contrasts with ILTs. Mills argues that Canada’s constitutional liberalism has specific conceptions of the individual, consent of the governed, social contract, the rule of law, the agency of the natural world, and freedom that differ greatly from his Anishinaabe conception of these ideas.⁵⁸³ For this reason he suggests that if one were to possess a different set of worldviews, foundational values, or understanding about “what there is and how one can know [lifeworld]”,⁵⁸⁴ the systems of law and legal institutions one would design might look quite different.⁵⁸⁵

Mills creates an analogy between constitutional orders and a tree (specifically the roots, trunk, branches, and leaves) to further elaborate on his argument.⁵⁸⁶ Mills conceives of the roots as “...its lifeworld: the story it tells of creation, which reveals what there is in the world (ontology)

⁵⁸¹ *Ibid* at 852-853.

⁵⁸² *Ibid* at 883.

⁵⁸³ *Ibid* at 852,856, 864-867. A point also discussed in Karen Drake, “Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation” (2020) 48:4 *Federal Law Review* 570 at 575-577 [*Drake Dispute*].

⁵⁸⁴ *Ibid* at 847.

⁵⁸⁵ *Ibid* at 850, 855-861, 865-868.

⁵⁸⁶ Mills, Aaron; Drake, Karen; and Muthusamipillai, Tanya, "An Anishinaabe Constitutional Order" (2017) *Articles & Book Chapters* 2695 at 10-11 < https://digitalcommons.osgoode.yorku.ca/scholarly_works/2695> [*Mills et al*]

and how we can know (epistemology)”.⁵⁸⁷ The trunk is a constitutional order “...the structure generated by the roots, which organizes and manifests these understandings as political community”.⁵⁸⁸ The branches are legal traditions, “the set of processes and institutions we engage to create, sustain, and unmake law”.⁵⁸⁹ The leaves are the laws themselves.⁵⁹⁰

This chapter will touch on ideas that appear relevant to every aspect of Mills’ tree model but will primarily focus on the trunk or the constitutional order, which Mills and his co-authors describe as follows:

In a liberal democracy, the constitutional order is premised on the primacy of individual autonomy. Individuals exercise their autonomy when they enter into a contract (the social compact) in which they create rights and undertake obligations. The goal of entering into a political community is to achieve a state of justice, or in other words, a just state. In contrast, the ontological starting point of an Anishinaabe constitutional order is not individual autonomy, but interdependence. All members of the political community—which includes humans, animals, plants, earth and all other aspects of the natural world—are interdependent. Because of this interdependence, the political community sustains itself not through contract, but through mutual aid. Each member of the political community has a responsibility to coordinate the sharing of gifts with the needs of others within the political community. As we have said, the goal of political community is not justice, but harmony. If all members of the political community use their gifts to meet the needs of all others, then harmony can be achieved. Harmony does not refer to an absence of conflict; it refers to a web of relationships (interdependence) in which each member communicates gifts and needs.⁵⁹¹

4.2 Anishinaabe Approaches to Defining FPIC

This chapter will not seek to provide a conclusive definition of FPIC from an Anishinaabe perspective. It would be impossible to do so precisely given the diversity of perspectives contained within the Anishinaabe legal tradition. Instead, the rest of this chapter is dedicated to

⁵⁸⁷ *Ibid* at 10.

⁵⁸⁸ *Ibid* at 10.

⁵⁸⁹ *Ibid* at 10.

⁵⁹⁰ *Ibid* at 10.

⁵⁹¹ *Ibid* at 11-12.

examining some of the Anishinaabe principles relevant to the debates surrounding the interpretation and implementation of the FPIC Articles to highlight how ILTs can meaningfully influence this discourse.

There are some published examples of Anishinaabe communities defining consent. For example, in 1997 the GCT3 National Assembly enacted the Manito Aki Inako-nigaawin which defined consent as the “formal agreement on behalf of the Nation in accordance with traditional law”.⁵⁹² Others have approached defining consent at a conceptual level, with authors like Brett Allen Campeau stating that to interpret ‘consent’ consistently with Anishinaabe legal principles we need to move beyond the process over outcome model described in Chapter two, where interests can be accommodated but ultimately the Crown retains the unilateral right to act. According to Campeau this interpretation “does not honour Indigenous conceptions of respect and relationality”.⁵⁹³ Mitchell, on the other hand, determined that for the participants’ in her study the “definition of consent is premised on the practice of Indigenous collective and consensual decision making before their lands are accessed”.⁵⁹⁴

Except for this general guidance, I have not found declarative statements on the general meaning of FPIC from an Anishinaabe perspective. However, it is possible to identify broadly based Anishinaabe principles and values that appear to speak directly to: (1) the content of FPIC; and (2) the process by which FPIC should be interpreted and implemented. The rest of this chapter will be dedicated to exploring some of these principles and values.

⁵⁹² *Mills Aki*, *supra* note 487 at 146.

⁵⁹³ Allen Brett Campeau, “Indigenous Rights, Collective Responsibilities, and Relationship to Land in Haudenosaunee and Anishinaabe ‘Dish With One Spoon’ Territory” (2019) 7:1 International Human Rights Internship Program – Working Paper Series <https://www.mcgill.ca/humanrights/files/humanrights/ihri_v7_2019_campeau.pdf> [Campeau].

⁵⁹⁴ *Mitchell*, *supra* note 223 at 17.

4.2.1 *An Interpretation Centered on Relationships*

Martin Papillon and Thierry Rodon argue that the key to FPIC is understanding it less as a veto and more as a recognition of a relationship between “mutually consenting and self-determining partners”,⁵⁹⁵ wherein Indigenous rights are understood relationally.⁵⁹⁶ Fortunately, Indigenous law has always held relationships to be of central importance. As Michael Coyle has pointed out:

That focus on the primacy of relationships can be seen historically in the metaphors of the Two Row Wampum, the Covenant Chain and the use of clan *dodems*, for example, as “signatures” on the written forms of the treaties between Indigenous peoples and the Crown. That traditional Indigenous focus on harmonious relationships generally includes accountability to the natural world, a stewardship-like concept translated in Anishinaabemowin, for example, as “*bimeekumaugaewin*”. Indeed, this relational conception of the world often extends to the categorization of non-human entities as “kin” to the community or to particular clans in the community.⁵⁹⁷

Scholars like Aaron Mills suggest that Canadian law places a central focus on freedom in an individual sense, both “the self’s experience of non-interference from the choice-limiting actions of others (negative liberty)...[and] the self’s entitlement to a specified set of collective goods taken as necessary for establishing and securing its personal autonomy (positive liberty)”.⁵⁹⁸ One could see how Canadian law might not be best suited for achieving a relational understanding of FPIC if these are its underlying principles. Perhaps something can be gained by considering FPIC through the lens of the Anishinaabe legal tradition, which: (i) conceives of law itself as relational;⁵⁹⁹ and (ii) considers duties and obligations to be central to relationships:

⁵⁹⁵ Martin Papillon and Thierry Rodon, “Indigenous Consent and Natural Resource Extraction: Foundations for a Made-in-Canada Approach” (4 July 2017), online: *Institute for Research on Public Policy* <<https://irpp.org/research-studies/insight-no16/>> at 5.

⁵⁹⁶ *Ibid* at 5-6.

⁵⁹⁷ Coyle, *supra* note 469.

⁵⁹⁸ Mills, *supra* note 30 at 865.

⁵⁹⁹ Mills, *supra* note 30 at 865; Craft, *supra* note 317 at 104-106.

Duties or obligations are central to relationships under Anishinabek law. This is demonstrated in formalized patterns of speech. For example, when Anishinabek people historically met, they would first ask one another: ‘Weanaesh k’dodem?’ (‘What is your totem?’). Once clan and family were determined, people would be asked: ‘Ahniiish aen-anookeeyin?’ (‘What do you do for a living?’). Both of these questions are related to a person’s responsibility within the community. A person’s dodem indicates more than their lineage: obligations are attached to their clan affiliations. Like a dodem, a person’s anookeewin also connotes ideas of duty and right (dae-binaewiziwin). Anishinabek peoples have obligations (daebizitawau-gaewin) to their families and community: to support them, to help them prosper, and to exercise their rights to live and work. In an Anishinabek legal context, rights and responsibilities are intertwined.⁶⁰⁰

Karen Drake, in discussing the work of Mills frames this discussion of relationships around the logic of wiidookodaadiwin (mutual aid), whereby “we each have a responsibility to identify, develop, and use our own gifts to meet the needs of others, which entails responsibilities to identify the needs of others as well as their gifts, and to communicate our own needs”.⁶⁰¹

In their study, “Towards an Indigenous-Informed Relational Approach to Free, Prior, and Informed Consent”, Mitchell and her co-authors spoke to members of the Matawa First Nation who highlighted their disappointment with the failure of government and proponents to build a meaningful relationship with their community.⁶⁰² They concluded: “...that the implementation and fulfillment of FPIC will require further understanding of an Indigenous perspective on the importance of developing and sustaining relationships between communities and between Matawa First Nations, various levels of government, industry proponents, and the earth”.⁶⁰³

⁶⁰⁰ *Borrows Constitution*, *supra* note 445 at 79.

⁶⁰¹ *Drake Dispute*, *supra* note 583 at 576 citing Aaron James (Waabishki Ma’iingan) Mills, *Miinigowiziwin: All That Has Been Given for Living Well Together: One Vision of Anishinaabe Constitutionalism* (PhD Dissertation, Faculty of Law, University of Victoria, 22 July 2019).

⁶⁰² *Mitchell*, *supra* note 223 at 18.

⁶⁰³ *Ibid* at 18.

It is clear in reviewing this study, and the work of scholars like Aaron Mills and Karen Drake, that Anishinaabe perspectives on relationships can differ greatly from those that underlie Canada's liberal constitutional order. If moving forward the intention were to interpret the FPIC Articles in such a way as to put the relationship between Indigenous peoples and the Crown at the forefront, it would be beneficial to consider the relevance of the Anishinaabe legal tradition, where relationality plays a central role. Not only would this help to accommodate Anishinaabe perspectives on relationships, which are not necessarily reflected in Canada's legal institutions, it could provide a roadmap for implementation of the Declaration on Anishinaabe territories in a manner that would contribute to reconciliation.

4.2.2 How Should FPIC Be Interpreted and Who Should be Interpreting It?

As noted in Chapter Two above, scholars like Dominique Leydet have raised concerns about the state (whether through the judiciary or through legislatures) being tasked with applying FPIC, interpreting what it requires, and/or considering what impacts are significant enough to warrant consent being required.⁶⁰⁴ Anishinaabe principles would suggest that the appropriate way to approach the interpretation and application of the FPIC Articles should be through decentralized processes where a broad range of people have a role to play, as opposed to the judiciary or the Crown proclaiming how FPIC will be interpreted and applied. I would point to three sources in support of this conclusion.

First, in "Indigenous Legal Traditions in Canada", Borrows shares the story of the Creator calling a meeting of all the Animals:

⁶⁰⁴ *Leydet, supra* note 258.

IN THE TIME BEFORE there were human beings on Earth, the Creator called a great meeting of the Animal People. During that period of the world's history, the Animal People lived harmoniously with one another and could speak to the Creator with one mind. They were very curious about the reason for the gathering. When they had all assembled together, the Creator spoke. "I am sending a strange new creature to live among you," he told the Animal People. "He is to be called Man and he is to be your brother. "But unlike you he will have no fur on his body, will walk on two legs and will not be able to speak with you. Because of this he will need your help in order to survive and become who I am creating him to be. You will need to be more than brothers and sisters, you will need to be his teachers. "Man will not be like you. He will not come into the world like you. He will not be born knowing and understanding who and what he is. He will have to search for that. And it is in the search that he will find himself. "He will also have a tremendous gift that you do not have. He will have the ability to dream. With this ability he will be able to invent great things and because of this he will move further and further away from you and will need your help even more when this happens.

But to help him I am going to send him out into the world with one very special gift. I am going to give him the gift of the knowledge of Truth and Justice. But like his identity it must be a search, because if he finds this knowledge too easily he will take it for granted. So I am going to hide it and I need your help to find a good hiding-place. That is why I have called you here." A great murmur ran through the crowd of Animal People. They were excited at the prospect of welcoming a new creature into the world and they were honoured by the Creator's request for their help. This was truly an important day. One by one the Animal People came forward with suggestions of where the Creator should hide the gift of knowledge of Truth and Justice. "Give it to me, my Creator," said the Buffalo, "and I will carry it on my hump to the very centre of the plains and bury it there." "A good idea, my brother," the Creator said, "but it is destined that Man should cover most of the world and he would find it there too easily and take it for granted." "Then give it to me," said the Salmon, "and I will carry it in my mouth to the deepest part of the ocean and I will hide it there." "Another excellent idea," said the Creator, "but it is destined that with his power to dream, Man will invent a device that will carry him there and he would find it too easily and take it for granted." "Then I will take it," said the Eagle, "and carry it in my talons and fly to the very face of the Moon and hide it there." "No, my brother," said the Creator, "even there he would find it too easily because Man will one day travel there as well." Animal after animal came forward with marvellous suggestions on where to hide this precious gift, and one by one the Creator turned down their ideas. Finally, just when discouragement was about to invade their circle, a tiny voice spoke from the back of the gathering. The Animal People were all surprised to find that the voice belonged to the Mole. The Mole was a small creature who spent his life tunnelling through the earth and because of this had lost most of the use of his eyes. Yet because he was always in touch with Mother Earth, the Mole had developed true spiritual insight. The Animal People listened respectfully when Mole began to speak. "I know where to hide it, my Creator," he said. "I know where to hide the gift of the knowledge of Truth and Justice." "Where then, my brother?" asked the Creator. "Where should I hide this gift?" "Put it inside them," said the Mole. "Put it inside them because then only the wisest and purest

of heart will have the courage to look there.” And that is where the Creator placed the gift of the knowledge of Truth and Justice.⁶⁰⁵

Borrows suggests that the story “...teaches the importance of participation in the interpretation of indigenous legal traditions”⁶⁰⁶ as well as the importance of ensuring that powers of legal interpretation and judgment are not vested solely in greater beings, namely legislators or judges.⁶⁰⁷ Borrows advocates for those in society with less formal power having a role in decision making as opposed to decisions being made by those who are “distant, professionalized and impersonal”.⁶⁰⁸

Second, Mills and his co-authors make related points when discussing the dissemination of knowledge. They highlight a story shared by Lana Ray and Paul Nicolas Cormier in their article “Killing the Weendigo with Maple Syrup: Anishinaabeg Pedagogy and Post-Secondary Research”:

A long time ago when the world was new, Gitche Manitou made things so that life was very easy for the people. There were plenty of animals, good weather, and the maple trees were filled with thick, sweet syrup; they just had to break off a twig and collect it as it dropped off. Nanaboozhoo went to go see his friends the Anishinaabe, but when he arrived there was no one around – they were not fishing, working in the fields, or gathering berries. Nanaboozhoo finally found them in a grove of maple trees, lying on their backs with their mouths open, letting the maple syrup drip into their mouths. Upon seeing this, Nanaboozhoo said, “This will not do.” He went down to the river and took a big basket made of birch bark, bringing back many buckets of water. He went to the top of the maple trees and poured the water in so that it thinned out, making the syrup thin and watery and just barely sweet to the taste. “This is how it will be from now on”, he said. “No longer will syrup drip from the maple trees. Now there will be only watery sap. When people want to make maple syrup they will have to gather many buckets full of the sap in the birch bark baskets like mine. They will have to gather wood and make fires to

⁶⁰⁵ *Borrows Tradition*, *supra* note 29 at 194-195.

⁶⁰⁶ *Ibid* at 195.

⁶⁰⁷ *Ibid*.

⁶⁰⁸ *Ibid*. See also: *Drake Dispute*, *supra* note 583 at 577-579.

heat the stones to drop into the baskets. They will have to boil the water with the heated stones for a long time to make even a little maple syrup.⁶⁰⁹

Mills and his co-authors describe how this story analogizes maple syrup to knowledge and argue how approaches to learning utilized in higher education can lose their personal elements and context.⁶¹⁰ They allude to a shift in focus toward more active engagement with respect to learning.⁶¹¹

Third, authors like Campeau, Johnston, Drake, and Mills have pointed out how “Indigenous governance traditionally relies on persuasive authority in tight knit community groups...[where] leadership was predicated on persuasion”.⁶¹² Basil Johnston analogized this to the leadership demonstrated among migratory birds, where the “safety and autonomy of the species is best served by following diverse paths in small units”.⁶¹³ Johnston also described leadership positions to be more of a burden than something to be desired.⁶¹⁴ Mills and his co-authors have raised the story of the “Beaver Gives a Feast”⁶¹⁵ as an authority for persuasive compliance over coercive authority in the Anishinaabe tradition, where top-down force is not exercised, authority rests with community members, and leaders serve the role of facilitator or coordinator.⁶¹⁶

⁶⁰⁹ *Mills et al, supra* note 586 at 3-4, citing Lana Ray & Paul Nicholas Cormier, “Killing the Weendigo with Maple Syrup: Anishinaabe Pedagogy and Post- Secondary Research” (2012) 35:1 *Can J of Native Education* 163 at 165, citing MJ Caduto & J Bruchac, *Keepers of the Earth, Native Stories and Environmental Activities for Children* (Saskatoon: Fifth House Publishers, 1989) at 145.

⁶¹⁰ *Ibid* at 4.

⁶¹¹ *Ibid*.

⁶¹² *Campeau, supra* note 593 at 28, citing Basil Johnston, “Leadership” in *Ojibway Heritage* (Toronto: McClelland and Stewart Limited, 1976) 61 at 61 [*Johnston Leadership*]. See also: *Drake Dispute, supra* note 583 at 8.

⁶¹³ *Ibid* at 28 citing *Johnston Leadership, supra* note 612 at 61.

⁶¹⁴ *Johnston Leadership, supra* note 612 at 61-66.

⁶¹⁵ See: F G Speck, ed, “Beaver Gives a Feast” in *Myths and Folk-lore of the Timiskaming Algonquin and Timagami Ojibwa* (Ottawa: Government Printing Bureau, 1915) at 53-54: <http://publications.gc.ca/pub?id=9.818608&sl=0>

⁶¹⁶ *Mills et al, supra* note 586 at 10.

So what might this mean for the interpretation of FPIC? First, the foregoing principles suggest that any new institutions that are developed to interpret the Declaration, in order to respect Anishinaabe legal traditions, would have to ensure a decentralized role for decision makers. It would be essential not to rely solely on the judiciary or formally trained lawyers in determining the precise meaning and application of FPIC. As it currently stands, the interpretation of FPIC will likely rest in the hands of the judiciary, offering a top-down determination of when consent is required, to whom it is owed, what occurs if consent is not obtained, etc. If we truly want to build an interpretation of FPIC that is reflective of ILTs we should consider the possibility of building new institutions whereby interpretations can be made by community members most directly affected, alongside “a commitment to enhanced local consensus-building, akin to traditional persuasive authority models”.⁶¹⁷ Karen Drake has proposed such an institution in the past. Drake has written about the usefulness of talking circles, grounded in Anishinaabe constitutionalism, and suggests that they would create “...space and time for the voices of all those potentially affected by the dispute to be heard”.⁶¹⁸

Second, as Karen Drake has noted, there would likely be significant contributions that Anishinaabe law could make in tackling the key interpretive question of a “veto” over resource development projects. Drake has indicated that in her proposed forum for addressing legal disputes, one that is grounded in Anishinaabe constitutionalism, the principle of persuasive compliance would suggest that a veto power would not exist:

...an Anishinaabe nation would not possess a right to unqualifiedly quash a proposed project that being said, an Anishinaabe nation would be warranted in declining to consent to a proposed project within their territory for any reason that resonates within Anishinaabe constitutionalism (eg, if the project would prevent the nation from upholding

⁶¹⁷ *Campeau, supra* note 593 at 30.

⁶¹⁸ *Drake Dispute, supra* note 583 at 583.

their responsibilities including their responsibilities to the land, or if the federal and/or provincial government has not demonstrated a persuasive need for the project). But declining to give consent in this way is not a veto, as it would be open to Canadian governments to move a project to a different location or otherwise amend it to comply with our responsibilities within Anishinaabe constitutionalism. A veto is inconsistent with persuasive compliance.⁶¹⁹

Although Drake discusses this point seemingly within the context of the duty to consult, one could extend this logic to a discussion surrounding FPIC, in order to ground the interpretation of FPIC in principles of Anishinaabe Constitutionalism.

4.2.3 *Conservation and Stewardship Principles*

Principles of stewardship are central to the Anishinaabe legal tradition. As the Ontario Superior Court noted in *Restoule v Canada*: “In the Anishinaabe tradition, wherever a potential right exists, a correlative obligation can usually be found based on the individual’s relationship with the other orders of the world. These are stewardship-like concepts (*bimeekumaugaewin*) and apply to the Anishinaabe’s engagement with the land, plants, and other beings”.⁶²⁰

This is rooted in Anishinaabe stories including “The Year the Roses Died”, where “...we learn that the gift of creation requires careful stewardship”.⁶²¹ This principle may find its origins in what Mills and others describe as one of the structural features of Anishinaabe constitutionalism, interdependence and the reality that humans do not dominate the natural world.⁶²² Terry Mitchell and her co-authors captured this point quite well, quoting a member of the Matawa First Nation:

⁶¹⁹ *Drake Dispute*, *supra* note 583 at 584.

⁶²⁰ *Restoule*, *supra* note 447 at para 59.

⁶²¹ *Campeau*, *supra* note 593 at 15.

⁶²² *Mills et al*, *supra* note 586 at 7.

My understanding as an Anishinaabe is that we have sacred connection to the land, we are connected to everything, and that is my belief. That's something that I cherish, that is something that I carry with me every day. We are connected to the land. And like one of my colleagues said, money will run out. But our connection to the land as well as our stewardship to the land is something that we really need to look at when making our decisions in the future because we're only borrowing the land. We're only using it temporarily because we have to leave the rest to our children, for those that are going to live in the future.⁶²³

This principle of stewardship manifests itself in several important ways. First, it structures Anishinaabe conceptions of ownership. According to John Borrows Anishinaabe law does not conceive of ownership in the same way as other legal traditions.⁶²⁴ Borrows highlights that for something like land use, a trustee-like arrangement, although imperfect, is a more appropriate way of understanding Anishinaabe relationships with land:

Nevertheless, the analogy of a trustee when explaining limitations concerning Anishinabek land use is somewhat helpful in understanding Anishinabek law. A trust in equity, as merged through the common law, is a right held by one person (the trustee) for the benefit of another person (the beneficiary). Under Anishinabek law, land is held by the present generation for future generations. Land does not ultimately belong to a person or people in the sense that they have absolute discretion and control; land is provisionally held for (con)temporary sustenance and for those unborn.⁶²⁵

Second, many Anishinaabe characterize the earth as having its own agency⁶²⁶ whereby the “earth has a soul (*chejauk*) that animates its many moods and activities”.⁶²⁷ This is grounded in the Anishinabemowin language which is verb-oriented and results in describing the natural world in an active and living sense.⁶²⁸ As a result, many Anishinaabe prioritize “consult[ing] with the Earth’s Creator and...seek[ing] the Earth’s receptiveness before important decisions are

⁶²³ *Mitchell, supra* note 223 at 18.

⁶²⁴ *Borrows Constitution, supra* note 445 at 246.

⁶²⁵ *Ibid* at 246.

⁶²⁶ *Ibid* at 242

⁶²⁷ *Ibid* at 242

⁶²⁸ *Ibid* at 245

made”.⁶²⁹ As former Anishinaabe chief Gary Potts has put it, “the land is boss in our development decision-making”.⁶³⁰ This extends even to rocks, which have their own agency that needs to be respected. According to Borrows, “it would be inappropriate to use rocks without their acquiescence and participation because....it would be considered akin to using another person against his or he will”.⁶³¹

Aimee Craft makes a similar point in discussing Anishinaabe *Nibi Inaakonigewin* (Water Law Principles) and states that “[i]n other systems of law, water is treated as a subject or object, often to be owned and used. In inakonigewin, nibi (water) is treated as an actor in a relationship”.⁶³²

So what might this mean for the interpretation of FPIC? First, if our understanding of FPIC is to respect this principle of Anishinaabe law, Canadian law would need to change. As noted above, the Supreme Court of Canada has established a broad range of grounds for justifying the infringement of Aboriginal title:

the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title.⁶³³

As discussed in Chapter two, there is a broad consensus that the right to FPIC is subject to limits, in accordance with Article 42 of the Declaration. The Anishinaabe legal tradition would likely reject broad grounds like economic development, mining, forestry, and hydroelectric power, as

⁶²⁹ *Ibid* at 243

⁶³⁰ *Campeau, supra* note 593 at 29 citing Gary Potts, “The Land Is the Boss: How Stewardship Can Bring Us Together” in Diane Engelstad & John Bird, eds, *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Don Mills, Ont: House of Anansi Press, 1992) 35 at 37.

⁶³¹ *Borrows Constitution, supra* note 445 at 245.

⁶³² *Craft, supra* note 317 at 106.

⁶³³ *Tsilhqot’in, supra* note 264 at para 83 citing *Delgamuukw, supra* note 267 at para 165.

grounds that could justify an infringement of the right to FPIC. Given the central importance of stewardship and the agency of the natural world in the Anishinaabe tradition, it may be inconceivable to permit the unilateral infringement of this agency through the sort of justification analysis Canadian courts have adopted to date.

Second, I would argue that if we are to respect Anishinaabe legal principles we should not apply the sliding scale of impact approach to FPIC that scholars and UN representatives have supported. As a reminder, this approach suggests that only those decisions which will have a significant impact on Indigenous land rights should trigger a requirement to obtain the consent of those affected. If this approach is adopted and the power to determine what constitutes a “significant” impact is left in the hands of those outside of the community, one could argue that this would undermine the agency of the earth described by Borrows and others. Perhaps the only way to bridge this while respecting Anishinaabe law would be for the Indigenous community itself to be empowered to make the determination of what would constitute a severe impact. As the ones with the knowledge necessary to meaningfully consult with all members of their community, including the natural world, they may be the only ones positioned to ensure that its agency is properly respected. It may also require, as Campeau has suggested, embracing “Indigenous veto power for projects that would significantly affect Indigenous lands”⁶³⁴. Even if those outside the communities feel the impact is minimal, if after consultation it is determined that the proposed impact is inconsistent with Indigenous stewardship responsibilities, the project would not be permitted to proceed.

⁶³⁴ *Campeau, supra* note 593 at 30.

Third, a shift towards a focus on stewardship principles would likely require Indigenous knowledge and protocols to be meaningfully integrated into any FPIC regime.⁶³⁵ Although we can already see this occurring in the context of the duty to consult via Indigenous-led consultation protocols and assessment processes, formalizing a role for Indigenous traditional knowledge in the interpretation or implementation of FPIC would help to ensure respect for Anishinaabe legal principles.

4.2.4 *Seven Grandmother/Grandfather Teachings*

The seven grandmother/grandfather teachings are foundational in Anishinaabe culture, and have been described by Borrows as principles that could “...apply to Indigenous peoples’ relationship with the Canadian state and those of the broader world”.⁶³⁶ The seven teachings are: Love, Truth, Bravery, Humility, Wisdom, Honesty, and Respect. Borrows describes these as broad, general aspirations that might be ambiguous but should be aimed towards.⁶³⁷ It is possible to ground the work of interpreting and implementing FPIC in these seven foundational principles. For example, the City of Sarnia has established a working group whose mandate is to develop a plan to advance the implementation of UNDRIP within the City. Part of their terms of reference includes instructions to the group to act consistently with the seven grandfather teachings.⁶³⁸

Bill C-15 requires the Government of Canada to consult and cooperate with Indigenous peoples to prepare an action plan that will achieve the objectives of the Declaration.⁶³⁹ Grounding this

⁶³⁵ *Ibid* at 29-30.

⁶³⁶ *Borrows Ethics*, *supra* note 576 at 14.

⁶³⁷ Western University, “John Borrows – How Indigenous Ethics are Relevant to the Practice of Law” (29 October 2020) at 00h:42m:30s, online (video): *YouTube* <https://www.youtube.com/watch?v=oOr2dN0BAvE&ab_channel=WesternUniversity>.

⁶³⁸ UNDRIP Working Group, “Terms of Reference” (last accessed 10 July 2021), online: *City of Sarnia* <<https://sarnia.civicweb.net/document/122949>>

⁶³⁹ *Bill C-15*, *supra* note 12 at s 6(1)(2).

work in the values of Indigenous communities would help to ensure that whatever plan of action is taken is reflective of Indigenous worldviews and consistent with these teachings. The seven grandmother/grandfather teachings are just one example of a set of values that could inform the work of interpreting and implementing FPIC, but it would represent a significant shift in thinking if the judiciary and Parliament worked to ground their approach to the Declaration in these, and other, Indigenous teachings.

4.2.5 *Decision-Making Processes*

The Anishinaabe legal tradition has a lot to say about the manner in which decisions are to be made. As noted earlier, in her article “The Trials and Tribulations of Ontario’s Mining Act: The Duty to Consult and Anishinaabek Law”, Karen Drake identifies two interrelated Anishinaabek legal principles relevant to consultation procedures: “(i) the obligation to wait, make observations and gather information prior to making a decision; and (ii) the obligation to engage in collective, rather than individual, decision-making”.⁶⁴⁰

John Borrows identifies these principles operating within an 1838 account of a man from French River, Ontario, who was said to have become a windigo. The account was recorded by William Jarvis, Superintendent of Indian Affairs at the time. Over a period of weeks, the man in question gradually exhibited signs of becoming a windigo. Eventually, the Anishinaabek people, along with this man, set out to join other members of their community, walking through deep snow to get to them. They then formed a council to decide what to do. Jarvis emphasizes that the decision reached was “the deliberate act of this tribe in council.” Borrows notes that in this account, the group did not take action right away; even though the man was becoming dangerous, the group waited for two or three weeks, continuing to collect information by observing his behavior, before acting. The willingness to wait in order to continue to collect information in the face of growing danger illustrates the strength of this obligation.⁶⁴¹

⁶⁴⁰ *Drake Mining*, *supra* note 139 at 214.

⁶⁴¹ *Ibid.*

The importance of collective decision making is also demonstrated by John Borrows story about his community, the Chippewas of the Nawash, deliberating about the site of a pow-wow on their reserve.⁶⁴²

A move was contemplated to accommodate the increasing numbers of park users during this annual event. One suggestion was to move the pow-wow to ‘the prairie,’ a broad, flat, and largely treeless stretch of land lying below Jones Bluff just beyond the shores of Sydney Bay. The prairie had the advantage of being able to accommodate large crowds and offered easy access from the main road...However, when it became apparent that a road would be built to facilitate access to the prairie, a significant community movement developed that drew on Anishinabek legal principles. The land is host to a significant alvar, a rock-barren or natural pavement-like feature with little or no brush or tree cover... For many Anishinabek, the alvar is a storyteller who recounts the time when the land was younger and was covered by shallow tropical seas...The alvar is also home to spiritually significant ‘spirit trails’ that wend their way through the area.⁶⁴³

As a result, the community engaged in consultation, debate, discussion, direct experience on the land, prayer, and persuasion when deciding about the use of the alvar:

Scientists and Anishinabek lawyers, band councillors, grand-mothers, Elders, artists, medicine people, community employees, and others participated in a process that drew strongly on Anishinabek law respecting Anishinabek spiritual beliefs. Ceremonies were conducted and traditional teachings reviewed. This...led to a decision to stop the prairie’s development. Community deliberation, naturalistic observations drawn from scientists and Elders and sacred teachings were all drawn upon to respect and show reverence towards the life force of what others might regard as barren rock. This led to a positivist law resolution whereby the band declared that the alvar would not host our annual pow-wows in the community.⁶⁴⁴

According to Borrows this story demonstrates “that Anishinabek beliefs concerning the Earth as a living being can be legally recognized and affirmed. It also shows how Anishinabek law can

⁶⁴² Lindsay Borrows, “Accessing Justice and Reconciliation: Anishinabek Legal Summary” (last accessed 24 June 2021), online: *Indigenous Bar Association* <https://indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/anishinabek_summary.pdf> at 5.

⁶⁴³ *Borrows Constitution*, *supra* note 445 at 247.

⁶⁴⁴ *Ibid* at 248.

lead to land being accorded political citizenship with its other close relations. Attentiveness to the land's character and sacred power gives the Earth an important place within this jurisprudential system".⁶⁴⁵ The importance of collective decision making was also highlighted in Terry Mitchell's work with Matawa First Nations where she heard that "decisions that arise from a consensus building process are needed for community stability".⁶⁴⁶

What might this suggest about the proper interpretation or implementation of FPIC? First, it highlights that in order for consent to be properly obtained Indigenous communities must have: (i) the time they need to make decisions; and (ii) the opportunity/resources to have all relevant participants from the community contribute to the decision-making processes. These Anishinaabe principles would suggest that consent for the purposes of FPIC can only be obtained if it is provided after sufficient time and with the input of a wide variety of actors. As Drake has pointed out the manner in which consultations are carried out do not always ensure that these two Anishinaabe principles are respected⁶⁴⁷, so it would be beneficial for the courts to interpret and understand FPIC as including a pre-requisite to satisfy these conditions in order to obtain consent.

Second, it would likely require a broader understanding of whose consent is required in order to obtain FPIC. At the moment it is not clear that any reading of FPIC extends legal recognition to the natural world itself. However, if we embrace an interpretation of FPIC that accounts for ILTs then expanding the interpretation of consent to include non-human members of a particular

⁶⁴⁵ *Ibid.*

⁶⁴⁶ *Mitchell, supra* note 223 at 14.

⁶⁴⁷ Although as Drake acknowledges there are examples where the court will note a lack of time given to communities to engage in consultation as a reason for finding that the duty to consult had not been satisfied, see *Drake Mining, supra* note 139.

community may become necessary. This will likely mean a shift in thinking regarding environmental considerations, from a factor to be weighed in assessment processes, to an actual party whose consent must be obtained.

Third, when attempting to obtain consent from Indigenous communities, all parties (the Federal Government, Provincial Governments, proponents) will need to ensure that traditional methods of consultation are respected and that decisions are made by the entire community and not simply elected band council leadership. As was discussed above in Chapter two in the context of IBA negotiations many have noted that engagements between proponents and Indigenous communities occur at the senior level and without input from the community.⁶⁴⁸ Any process for interpreting or implementing FPIC should be mindful of the importance of collective decision making and ensure this is a pre-requisite to obtaining consent.

4.2.6 Principles of International Diplomacy

The Government of Canada has frequently described its relationship with Indigenous peoples as being one between nations. If we accept that the government is genuine in its commitment to a nation-to-nation relationship it is worth exploring Anishinaabe principles that govern relations between nations to observe if there is anything it might say that is relevant to the discourse surrounding consultation, consent, etc.

According to Leanne Simpson, a noted Anishinaabe scholar, “the ethics of respect and reciprocity were reflected in international Nishnaabeg diplomatic relations through the process

⁶⁴⁸ *Papillon & Rodon, supra* note 430 at 220.

known as “waiting in the woods” or “waiting at the woods’ edge”.⁶⁴⁹ Essentially this protocol established that “[i]t would have been expected that upon leaving one’s own territory to cross into someone else’s territory, that an individual or a group would build a fire to announce that they were waiting in the woods”.⁶⁵⁰ A delegation would then be sent out to welcome visitors, a feast would be prepared, and gifts would have been exchanged.⁶⁵¹

Heidi Bohaker in her book *Doodem and Council Fire: Anishinaabe Governance Through Alliance* also discussed Anishinaabe diplomacy and noted that:

Alliances, as consensual relationships, required mutual approval of changes. This was a central principle of Anishinaabe law with respect to alliance relationships. Unilateral changes could potentially harm the alliance. This practice of seeking consent from each other allowed allies to identify possible problems and to ensure that the alliance relationship remained strong.⁶⁵²

So what would be the relevance of these principles to FPIC? Interpretations could obviously vary but one might conclude that this demonstrates a need for Canada to approach engagements with Indigenous communities by: (i) recognizing that they are visitors to a particular nation’s traditional territory; (ii) recognizing their sovereignty; and (iii) waiting to be invited. It is worth noting that the Wet’suwet’en share similar protocols for visitors to their land and have made efforts to incorporate these into the protocols for visiting their camps in the context of the recent pipeline disputes in British Columbia.⁶⁵³ Given these aforementioned diplomatic principles it

⁶⁴⁹ Leanne Simpson, “Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships” (2008) 23:2 *Wicazo Sa Review* 29 at 35-36 [Simpson].

⁶⁵⁰ *Ibid* at 36, citing Paula Sherman, *Indawendiwan: Spiritual ecology as the foundation of Omàmìwinini relations* (PhD Dissertation, Trent University, 2007) (ProQuest Dissertations Publishing).

⁶⁵¹ *Ibid* at 36.

⁶⁵² Heidi Bohaker, *Doodem and Council Fire: Anishinaabe Governance Through Alliance* (Toronto: University of Toronto Press, 2020) at 11.

⁶⁵³ *Temper, supra* note 300 at 102.

would be difficult to share the conclusion of some scholars who suggest that FPIC does not require consent, that consent is simply an objective, or that it is only required in certain circumstances. Instead, an interpretation where FPIC is an absolute right strikes me as more consistent with Anishinaabe diplomatic principles, where Canada and proponents are under a duty to approach traditional territories, announce their intentions, wait to be invited, and permitted to enter only with the knowledge and permission from the community they are in contact with.

Second, the duty to consult would likely be examined quite differently if principles like “waiting in the woods” were a part of the court’s consideration. For example, in *Ross River Dena Council v. Yukon*⁶⁵⁴ the council was arguing that by issuing hunting licenses, Yukon was interfering with its claimed right to exclusive use and occupation of a particular area of land. The RRDC maintained that their claimed title could be impacted by allowing the land to be used and occupied by people outside of the RRDC’s members. They argued that Yukon had a duty to consult about the possibility of third parties entering RRDC’s claimed area to hunt.⁶⁵⁵

The court rejected their arguments on several grounds: (i) the RRDC had not established Aboriginal title to the area and without an established claim the RRDC did not have an exclusive right to control the use and occupation of the land;⁶⁵⁶ and (ii) no specific concerns had been raised and “...without explaining how the presence of hunters on its claimed territory could potentially adversely affect its claimed title, the duty to consult as a means to preserve interests in the interim is not engaged”.⁶⁵⁷

⁶⁵⁴ *Ross River*, *supra* note 390.

⁶⁵⁵ *Ibid* at para 20.

⁶⁵⁶ *Ibid* at para 22.

⁶⁵⁷ *Ibid* at para 27.

There are several concerns that one could raise regarding this decision. The treatment of title claims is one of them. However, the case also raises the question of whether it was correct for the court to conclude that an Indigenous community should only be able to ensure non-members were excluded from their land if they could point to an adverse effect on title. Certainly within the framework of established duty to consult jurisprudence this may have been a legally sound decision but what if we were to consider ILTs as part of the analysis?

Arguably the “waiting in the woods” principle might be a relevant consideration. Is it possible that if the court had to tackle this as an established legal principle that they might require those from outside of the RRDC membership to avoid accessing or trespassing on these territories until given permission? Perhaps the court would have determined that consultation should have occurred for any decisions which might encourage or permit individuals to access the RRDC territory in violation of this “waiting the woods” principle?

This is not to suggest that this case would have necessarily been decided differently. It is important to note that the Ross River Dena are not Anishinaabe and may not have a similar diplomatic principle in their legal tradition. This is just to suggest that it is quite easy to identify examples in the duty to consult jurisprudence where a consideration of ILTs might result in very different outcomes.

4.3 Conclusion

This chapter has established the valuable contributions that the Anishinaabe legal tradition can make to discussions surrounding consultation, consent, and FPIC more broadly. Anishinaabe law has engaged in a sophisticated treatment of issues regarding consent, relationship building, environmental stewardship, and nation-to-nation relations, all of which are relevant to an

examination of FPIC. Anishinaabe law also has a lot to say about the sort of institutions that should be charged with interpreting FPIC as Canada moves forward with implementing the Declaration. This is all to suggest that despite the lack of engagement with ILTs in the discourse surrounding UNDRIP, there are practical and meaningful contributions that ILTs can and should make moving forward.

Engaging with ILTs will pose challenges. The great diversity of ILTs amongst Indigenous communities means that in the context of any proposed project there may be multiple ILTs that are relevant to the interpretation and application of FPIC. Furthermore, although this chapter was only intended to discuss the possible relevance of Anishinaabe law, it would be correct to suggest that views on the content of Anishinaabe law may differ from community to community. These are challenges that will require further research and analysis in order to determine the appropriate approach to resolving these concerns.

That being said, there are also instances where ILTs will share similarities. As noted above, the Anishinaabe and the Wet'suwet'en appear to share similar principles regarding diplomacy. As the work to revitalize ILTs continues other similarities regarding principles of stewardship and relationality will almost certainly be identified. This may serve to simplify some of the challenges of meaningfully engaging with ILTs in the interpretation of FPIC.

Chapter Five

5. Conclusions

This thesis has highlighted the long and contentious history of UNDRIP, from its origins to its eventual endorsement in 2007. Over the past five years Canada's federal government has embraced the Declaration as a roadmap for reconciliation and a standard for Indigenous rights in this country. Implementing the Declaration will pose challenges, perhaps the most pressing of those challenges is the interpretation and application of the FPIC Articles.

Examining the guidance provided by the UN, as well the scholarly literature on the subject, has demonstrated that there is a lack of consensus over precisely what FPIC requires of state actors. It has also highlighted how as a legal principle, FPIC is an imperfect tool for advancing Indigenous self-determination and reconciliation. Its usefulness is far too dependent on one's interpretation of its scope and content.

This lack of clarity is a challenge, but also an opportunity. With the passage of Bill C-15 Canada has the opportunity to embrace the Declaration and to commit to a future where UNDRIP is the framework for reconciliation. However, if in implementing the Declaration, Canada were to revert to past practices by suggesting that the FPIC Articles are satisfied by our current duty to consult framework, this opportunity will be lost. It is far from certain that the duty to consult framework is consistent with what the FPIC Articles require of state actors. Furthermore, despite the courts' stated openness to considering ILTs, the jurisprudence has yet to meaningfully engage with them in the formulation or application of Canada's duty to consult framework.

I have argued here that one way to ensure that Canada's implementation of UNDRIP furthers the process of reconciliation is by moving beyond the duty to consult framework into an FPIC

regime that is grounded in ILTs. Although many acknowledge a need for engagement with ILTs within the context of interpreting and implementing the Declaration, few have taken the time to discuss precisely what this could look like. Chapter four of this thesis demonstrated how ILTs could influence the interpretation and implementation of the FPIC Articles moving forward.

Further research on this issue will be required particularly to extend a consideration of ILTs and UNDRIP outside the context of Anishinaabe legal traditions, but in the short term, Indigenous communities should be: (i) consulted on how they believe their legal traditions should affect Canada's action plan on the implementation of UNDRIP; and (ii) empowered to reflect upon their own unique legal traditions and how they may apply to the various issues raised by the interpretation and implementation of UNDRIP.

In addition, there are several steps that could be taken at an institutional level to help ensure that ILTs play a meaningful role in the interpretation and implementation of the FPIC Articles moving forward. First, Canada could mandate that consultations with Indigenous communities must be conducted in accordance with protocols negotiated with the relevant Indigenous community that are reflective of their own unique legal traditions. Canada could consider establishing a threshold in which the right to FPIC is only satisfied if these protocols are reasonably respected.

Second, as some of the literature examining this issue has already suggested,⁶⁵⁸ the introduction of mandatory cultural competency training for the legal profession (and specifically the judiciary), with a particular focus on ILTs, would be beneficial. TRC Call to Action 27 requested

⁶⁵⁸ *Hanna, supra* note 326 at 826-827.

this type of training,⁶⁵⁹ and to their credit several provincial law societies have introduced it for their lawyers.⁶⁶⁰ However, it is essential that if the Canadian legal system is going to meaningfully engage with ILTs, that all officers of the court be provided training to help ensure they are engaging with ILTs in a respectful manner. As noted above, there are some who suggest that the judiciary should not attempt to engage with indigenous legal principles,⁶⁶¹ and that the best option for respectfully applying ILTs is via new institutions developed wholly by and for Indigenous peoples. Although this would be an ideal long term solution, in the near term the judiciary is going to continue to be asked to consider and apply ILTs whenever litigation involving Indigenous communities arises. Ensuring that the judiciary is better equipped to address the sources and content of these ILTs respectfully will improve the judicial treatment of these systems of law.

Third, Canada could commit to introducing stable, long-term, and guaranteed funding for the development of Indigenous-led project assessment procedures. As noted above there are many recent examples of assessment processes created by Indigenous communities that have been applied to specific projects affecting their territory. These assessment processes are thoughtful, detailed, and, most importantly, representative of the values, culture, and traditions of the community itself. Canada could prioritize the development of similar assessment processes for every Indigenous community in Canada. This would require a significant commitment to long

⁶⁵⁹ TRC, “Truth and Reconciliation Commission of Canada: Calls to Action” (last accessed 26 July 2021), online: *TRC* <http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>.

⁶⁶⁰ Law Society BC, “Law Society adopts Indigenous intercultural competency training” (6 December, 2019), online: *The Law Society of British Columbia* <<https://www.lawsociety.bc.ca/about-us/news-and-publications/news/2019/law-society-adopts-indigenous-intercultural-compet/>>; Law Society of Alberta, “Indigenous Cultural Competency Education Update” (9 December, 2020), online: *Law Society of Alberta* <<https://www.lawsociety.ab.ca/indigenous-cultural-competency-education-update/>>.

⁶⁶¹ *Couturier*, *supra* note 490.

term, guaranteed funding to ensure that all Indigenous peoples are able to assess and consider consenting to projects based on processes that are reflective of their unique legal tradition.

These proposals are by no means exhaustive, but they represent a series of steps that could be taken to help ensure that ILTs play a meaningful role in the interpretation and implementation of the FPIC Articles moving forward. Canada is at an important cross-roads in its relationship with Indigenous peoples. As noted above, the implementation of UNDRIP represents a significant opportunity not only to recognize ILTs but to apply them to an important and emerging area of law.

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