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Centre for International  
Governance Innovation

# UNDRIP Implementation

## Braiding International, Domestic and Indigenous Laws

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SPECIAL REPORT



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Domestic and Indigenous Laws



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# Introduction



## Oonagh Fitzgerald and Risa Schwartz

In Canada, implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is an opportunity to explore and reconceive the relationship between international law, Indigenous peoples' own laws and Canada's constitutional narratives.

In May 2016, Indigenous and Northern Affairs Minister Carolyn Bennett addressed the Permanent Forum on Indigenous Issues at the United Nations and officially endorsed UNDRIP<sup>1</sup> — without the qualifications attached by the previous government, which held the declaration to be aspirational and not legally binding. While this announcement did not change the legal relevance of UNDRIP in Canada, it does express the political will to begin implementation and signals that Canada may be on a path toward reconciliation with Indigenous peoples. Thus, the announcement also raised legal and policy questions about how the federal government intends to adopt and implement this soft law instrument.

Canada generally takes a dualist approach to international treaties, meaning that such treaties operate as commitments between sovereign nations, and do not automatically impact domestic law or the rights of individuals within Canada. With this dualist approach for treaties, the most obvious way for international law to become part of domestic law is for the legislature with jurisdiction over the subject matter to enact implementing legislation.<sup>2</sup> Customary international law, meaning law that is recognized and practised

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1 Minister of Indigenous and Northern Affairs Carolyn Bennett, "Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples" (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <[www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/](http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/)>.

2 Canadian courts have taken a more liberal approach through the presumption of conformity to develop Canadian law in line with the values and principles underlying Canada's human rights obligations. See *R v Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292 [*Hape*], online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do>>.

≠by the community of nations as legally binding,<sup>3</sup> can seep into Canadian law through judicial decisions<sup>4</sup> under the common law. For international human rights obligations, the Canadian practice has been to conduct an internal governmental review of laws and policies to determine whether they already meet the international standard and, if they do, proceed to ratification. This internal legal review is not tabled in Parliament or the provincial legislatures, or otherwise made public, and there may be no obvious implementing legislation, especially if officials conclude that an existing law provides rights equivalent to those in the treaty under review.

Somewhat along those lines, Prime Minister Justin Trudeau recently announced that his government is forming a Working Group of Ministers to “examine relevant federal laws, policies, and operational practices to help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples; and supporting the implementation of the Truth and Reconciliation Commission’s Calls to Action.”<sup>5</sup>

After years of uncertainty, the SCC now seems to be coalescing around the notion that the Canadian Charter of Rights and Freedoms should encompass all of Canada’s binding international human rights obligations.<sup>6</sup> Whether this clarification will have an impact on how section 35 of the Constitution Act, 1982 is interpreted in light of UNDRIP has yet to be seen. In particular, questions remain about how rights *declared* in UNDRIP (as compared to rights *covenanted* in a treaty) will influence the interpretation of section 35 of the Constitution Act, 1982 as well as the Charter, and what this will mean for the future relationship between international law, Indigenous peoples’ laws and Canadian constitutional law. In a recent Federal Court case,<sup>7</sup> Justice Cecily Strickland seemed to adopt the notion that UNDRIP could be used contextually to reinterpret domestic law so as to favour an interpretation that respected relevant international law values, but drew the line at reinterpreting constitutional language, making a curious interpretative distinction between different parts of the Constitution. This case was decided prior to the government’s commitment to implement UNDRIP in accordance with Canada’s constitutional law, so one can hope to see evolution of the jurisprudence as appreciation for UNDRIP increases.

3 International Committee of the Red Cross, “Customary IHL”, online: <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_in\\_asofcuin](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin)>:

“It is generally agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*). As the International Court of Justice stated in the *Continental Shelf case [(Libyan Arab Jamahiriya v Malta) [1985] ICJ Rep 13 at para 27]*: ‘It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.’”

4 In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1717/index.do>>, the Supreme Court of Canada (SCC) considered whether Canada’s obligations under the *International Convention on the Rights of the Child* could influence interpretation of the *Immigration Act*. Justice Claire L’Heureux-Dubé for the majority quoted Ruth Sullivan at para 70: “[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.” In *Hape*, *supra* note 2, the SCC stated: “Every principle of customary international law is binding on all states unless superseded by another custom or by a rule set out in an international treaty.... These principles must also be drawn upon in [interpreting] the Charter” (at para 46); “In interpreting the scope of application of the Charter, the courts should seek to ensure compliance with Canada’s binding obligations under international law where the express words are capable of supporting such a construction” (at para 56); “Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law” (at para 39).

5 Prime Minister of Canada, News Release, “Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples” (22 February 2017), online: <<http://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>>.

6 Early on in jurisprudence under the Charter, SCC Chief Justice Brian Dickson, in a dissenting opinion in *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at para 59, stated: “I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.” It took another 20 years for the court to embrace this principle with some degree of confidence. In *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23 (quoting *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 at para 70), the SCC stated, “the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”

7 *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at paras 101–106, online: <<http://canlii.ca/t/gkqq5>>.



The metaphor of braiding international, domestic and Indigenous laws emerged from early discussions with John Borrows, Brenda Gunn and Joshua Nichols, sitting in a garden café at the University of Victoria and observing young turtles basking in the late May sunshine. The braiding metaphor is relevant to many Indigenous traditions in Canada. For example, braided Metis sashes represent the weaving together of different traditions. The braiding of sweetgrass indicates strength and drawing together power and healing. A braid is a single object consisting of many fibres and separate strands; it does not gain its strength from any single fibre that runs its entire length, but from the many fibres woven together. Imagining a process of braiding together strands of constitutional, international and Indigenous law allows one to see the possibilities of reconciliation from different angles and perspectives, and thereby to begin to reimagine what a nation-to-nation relationship justly encompassing these different legal traditions might mean.

The Centre for International Governance Innovation's (CIGI's) International Law Research Program (ILRP) is dedicated to exploring important international law and policy questions related to Indigenous peoples' rights. The publication of this first collection of papers marks the tenth anniversary of the adoption of UNDRIP. This year also happens to coincide with the 150th anniversary of Canada, which provides a much-needed opportunity to reflect on the past and envision what the future may hold for this country and its relationship with its Indigenous peoples.

To commence this research project, the ILRP convened a symposium in December 2016 with selected Indigenous legal scholars and policy leaders, hosted by the University of Arizona's Indigenous Peoples Law and Policy Program in Tucson, Arizona. CIGI invited Indigenous academics and policy leaders to explore UNDRIP implementation and provide thoughts, analysis and recommendations to Canadian policy makers through the lens of the braiding metaphor; many of the authors in this collection have woven the metaphor into their reflections. Graduate students from the University of Arizona's Indigenous Peoples Law and Policy Program also benefited from these discussions.

The day began with opening remarks that provided an overview of UNDRIP in the broader human rights context. In these remarks it was noted that, looking back to the 1970s, existing human rights treaties were still failing to impact the lives of Indigenous peoples. UNDRIP builds from other human rights treaties and is grounded in a broader context of self-determination than is found in other human rights agreements. There is a need to understand UNDRIP in part through the lens of those human rights treaties. One significant difference is that UNDRIP explicitly draws on Indigenous peoples' own legal traditions, customs and institutions. The preamble of UNDRIP tells a great story of the recognition of Indigenous peoples as part of the humanity of the world, with equal but different rights. UNDRIP provides guidance for how dominant political orders should relate to Indigenous peoples based on justice, equality and good faith.

One participant explained that declarations such as UNDRIP are not binding in international law, but are solemn and significant instruments that embody principles of great and lasting importance. Therefore, it was argued, the focus should be less on the legal character of the instrument and more on the normative content of its principles.

It was suggested that the announcement from Minister Bennett committing to implement UNDRIP into Canadian law ("We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution"<sup>8</sup>) could be viewed as simply a recognition that no Canadian government can operate outside the Constitution. The reference to Canada's Constitution can be seen as acknowledging that implementation of UNDRIP will require action by the provinces and territories as well as the

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8 Minister of Indigenous and Northern Affairs Carolyn Bennett, *supra* note 1.

federal government. There is no reason to view the reference to Canada's Constitution as necessarily implying any restraint on UNDRIP implementation.

Following the opening remarks, the day's discussions were structured around three thematic sessions. The first session, "Indigenous Peoples' Aspirations Regarding the Implementation of UNDRIP," opened with a participant quoting Sa'ke'j Henderson when he said that international law is necessary because we need a place to dream, where we feel untethered by domestic challenges, and a place to act. This participant noted that he was very hopeful that the papers written by Indigenous scholars about UNDRIP implementation will produce policy-relevant interventions in the Canadian context and have resonance in other places in the world as well. Hope must be informed and made real by despair. He recognized that there are huge challenges in working to implement international law into the Canadian state. He stressed that we should be drawing on Indigenous peoples' own laws — not only domestic law — in giving meaning to UNDRIP. UNDRIP implementation presents tremendous opportunity but carries great responsibility. Another participant similarly noted that it is the responsibility of Indigenous scholars to have a critical eye on both societies, Indigenous and non-Indigenous. Indigenous scholars must be open to ways to help heal their own communities through honest discourse, without exposing them to the kinds of distortions of Indigenous peoples that are sometimes portrayed through the media and government.

A few participants discussed the harms to Indigenous peoples created by the doctrine of discovery.<sup>9</sup> Canadian constitutional jurisprudence is a house built on a flawed foundation, and UNDRIP highlights this fact. The SCC has acknowledged that it can revisit issues and come to different conclusions, most recently in reversing the prohibition on assisted suicide. This is indicative that the scope of Aboriginal and treaty rights can also be reconsidered. Many scholars agreed that the decision in *R v Van der Peet*<sup>10</sup> needs reconsideration, and perhaps a place to start is the dissent in that decision. Rather than seeing Aboriginal rights as frozen in time, the dissent in *Van der Peet* recognized that Aboriginal rights must maintain contemporary relevance so that practices, customs and traditions can continue to evolve. Aboriginal rights are inherent rights, grounded in Indigenous legal traditions. Therefore, the SCC can rethink Aboriginal and treaty rights in light of UNDRIP. UNDRIP begins with identifying Indigenous peoples as peoples, which centres the conversation.

In the second session, "Challenges with Implementation," participants spoke to the values of human rights and Indigenous rights conveyed through the language of UNDRIP. It was explained that this language can and should be used to decolonize, as it is different from colonial languages and concepts. UNDRIP is a policy and linguistic tool, and its language is much more consonant with how Indigenous peoples think of themselves. One participant recommended choosing legal precedents wisely, as Indigenous peoples should be basing arguments on a human rights model. The Dakota Access Pipeline protest at the Standing Rock Sioux Reservation was identified as an example of human rights implementation on the ground, and it was observed that human rights implementation can carry heavy costs.

Some of the participants expressed the idea that Indigenous peoples may not be ready to discuss UNDRIP with their governments until it is implemented through Indigenous forms in their own communities. Questions were posed as to how Indigenous institutions of governance might be rebuilt.

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<sup>9</sup> The doctrine of discovery has its origins in common law in the United States (*Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823)) and can also be seen in Canadian law (*St Catherine's Milling and Lumber Co v R*, [1888] UKPC 70, 14 App Cas 46). The effect of the doctrine is that upon "discovery" of North America by Europeans, they gained absolute right to the lands. Europeans thereby acquired sovereignty, legislative power and underlying title, which left Indigenous peoples as occupants on the land, with only some rights of possession and use that could be unilaterally revoked. Underlying the doctrine's foundation were papal bulls from the fifteenth century that gave Christian explorers the right to claim lands they had discovered on behalf of their monarchs. Non-Christian inhabitants of those lands were treated as "savages" who could be converted, or killed.

<sup>10</sup> [1996] 2 SCR 507.

Part of the solution could lie in re-engaging, with new ways of talking and teaching. One participant noted that everyone has a responsibility to implement UNDRIP domestically, internationally and within Indigenous law.

Another participant felt that UNDRIP could be strengthened by increasing rights for Indigenous women. Some of the articles of UNDRIP are framed in a manner that suggests Indigenous women are intrinsically vulnerable to victimization, a notion that should be strenuously resisted. There is a need to recognize the policy shortcomings of UNDRIP and constructively move forward and raise questions about the roles of Indigenous women.

The final session, “Ideas on Moving Forward with Implementation,” focused on reconciliation through implementation of UNDRIP. It was noted that the Canadian constitutional concept of the duty to consult is a framework for infringement of rights, without safeguards, whereas there are safeguards in UNDRIP’s numerous requirements for “free, prior and informed consent.” Consultation in Canadian law uses a language of burden, but should be about participation in decision making and true partnership. The framework for reconciliation would need to be populated with Indigenous peoples’ own laws and Indigenous languages. Indigenous beliefs and perspectives must be treated with legitimacy and respect. Thus, UNDRIP and international law form one segment of the braid, with domestic constitutional law and Indigenous laws providing the other two segments to create a strong braid of legal reconciliation.

Another participant reminded the group about the importance of Indigenous languages in completing reconciliation. *Pastamowin* in the Swampy Cree language means “breaking law.” Like broken laws, shattered glass can be reconstructed, but it will never look the same again. There are broken laws in the nation-state, as well as in Indigenous communities. How can the glass be put back together? How can relationships be re-established that will benefit communities? How can communities re-establish the broken trust? Can Indigenous peoples consider how their actions will impact the next seven generations? Speaking one’s own language is a strong defence against assimilation. Colonizers understood that if they took away Indigenous peoples’ languages, they could make those peoples dysfunctional and unable to interact with the world. In New Zealand, the Maori language was endangered in the 1960s, but language became a main driver for self-determination. However, another participant argued that language is not enough, if all institutions are colonized (for example, the Sami are using their language in a system of Western governance).

After the symposium concluded, the Indigenous legal academics returned to their papers, inspired by the exchange of ideas with their peers. This collection of essays reflects their recommendations on how Canada can braid together a new legal framework through the implementation of UNDRIP, revive a stalled process of reconciliation and embrace a true nation-to-nation relationship with Indigenous peoples.

**Sa’ke’j Henderson** starts the collection with a paper on the inherent human rights of Indigenous peoples. He believes that further recognition of inherent human rights is inevitable for a new order of humanity, based on promoting and protecting inherent human rights and exercising Indigenous peoples’ right to determine the development of their lives.

**John Borrows** makes two important points in his paper. Borrows’ first conclusion is that UNDRIP should cause the Canadian Parliament and courts to reject constitutional distinctions based on pre- and post-contact, since UNDRIP is focused on “peoples” and rights are vested in peoples, rather than asserting the existence of a right from a point before European contact. Borrows labels this “constitutional originalism,” which he believes is contrary to Canada’s “living tree” jurisprudence. His second main conclusion is that UNDRIP allows for more explicit recognition and application of Indigenous law within Indigenous nations across Canada. He recommends that Indigenous

governments implement UNDRIP in accordance with their own legal and cultural worldviews, in order to strengthen their governance and provide for protection of their members.

**Brenda L. Gunn** provides a path forward for implementation of UNDRIP. In Gunn's view, this will require resetting the relationship between Indigenous peoples and Canada by recognizing and protecting Indigenous peoples' rights, according to their own legal traditions. Canada's pledge to implement UNDRIP provides the ideal moment to reconsider the federal government's relationship with Indigenous peoples, which should include how Indigenous rights are defined and protected. Implementation also affords the opportunity to no longer apply the "central and integral to the distinctive culture" approach adopted by the SCC in *Van der Peet*, and find a more appropriate way to articulate the scope of section 35(1) of the Constitution Act, 1982.

**Joshua Nichols** asserts that Canada should use the process of implementation to expose the problems with the current legal framework and remove the doctrine of discovery from Canadian law. He believes that UNDRIP offers Canada the opportunity to be a true world leader in the area of Indigenous rights, but only if the declaration is implemented in a historically informed manner that allows Canada to reconsider the history of the struggle for Indigenous self-determination. Only then will Canada be able to move toward a real nation-to-nation relationship with Indigenous peoples.

**Gordon Christie** believes that the real challenge of UNDRIP implementation is for Canada to recognize and accept the strong legal pluralism of Indigenous and Canadian law. The intent of UNDRIP implementation is for Canada to work in a collaborative fashion with Indigenous nations. Christie provides some recommendations for the Canadian government, which, if followed, would allow for Indigenous law and Canadian law to be interwoven in light of principles and provisions contained in UNDRIP.

**Jeffery G. Hewitt** provides insight as to why many Indigenous people remain skeptical about Canada's intention to implement UNDRIP in accordance with the Canadian Constitution. Hewitt explains that section 35 of Canada's Constitution Act, 1982 provides for the potential that Canada could make the rights found in UNDRIP — such as the right to self-determination, the right to free, prior and informed consent, and the right to lands and resources — less meaningful. He is concerned that implementation that is consistent with the common law stemming from section 35 will only serve to maintain the status quo. The paper provides recommendations for other means of implementing UNDRIP rather than through section 35, which Hewitt believes will meaningfully contribute to Canada's reconciliation discussion and advance the nation-to-nation relationship.

**Sarah Morales** discusses in her paper how free, prior and informed consent could be used to braid together the duty to consult and Indigenous legal traditions in a manner that may allow Canada to come closer to achieving the constitutional goal of reconciliation. Her paper examines why the duty to consult and accommodate, as recognized under section 35 of the Constitution Act, 1982, has been unable to achieve reconciliation, and questions whether free, prior and informed consent can be a useful interpretive framework for the duty to consult. As well, Morales emphasizes the importance of Indigenous legal traditions in implementing the duty to consult.

**Cheryl Knockwood** speaks to the hopes of the Mi'kmaw Nation of eastern Canada for the full implementation of self-determination and the full implementation of Aboriginal and treaty rights through UNDRIP. Her paper provides examples of the hard work that Mi'kmaw communities are currently undertaking to implement the spirit of UNDRIP in their communities.

**Lorena Sekwan Fontaine** writes about some of the challenges that may be faced by the Canadian government on its recent announcement that it will work on an Indigenous Languages Act to support the revitalization of Indigenous languages. The objective of Fontaine's paper is to provide a survey of Indigenous customary law regarding Indigenous languages, as well as examples of how countries have implemented Indigenous language rights. She also provides recommendations on promoting and advancing Indigenous language rights in a timely paper that should provide policy depth for Canadian lawmakers as they proceed with Canada's commitment to revitalize Indigenous languages.

As director of CIGI's ILRP, **Oonagh Fitzgerald** oversees a research agenda that includes international economic law, environmental law, intellectual property law and innovation, and Indigenous law. She has extensive experience as a senior executive in the federal government, providing legal services and leadership in international law. In her most recent posting before coming to CIGI in 2014, Oonagh served as national security coordinator for the Department of Justice.

Oonagh has a B.A. (honours) in fine arts from York University. She obtained her LL.B. from Osgoode Hall Law School, and was called to the Bar of Ontario in 1983. She obtained an LL.M. from the University of Ottawa, an S.J.D. from the University of Toronto and an M.B.A. from Queen's University.

**Risa Schwartz** joined CIGI in April 2016 as a senior research fellow with the ILRP. In this role, Risa has undertaken an in-depth examination into whether international environmental agreements have the potential to trigger the duty to consult and accommodate with Aboriginal people and what this would mean for policy makers in Canada and beyond.

Risa previously worked for the Ontario Ministry of the Attorney General as counsel to the Ministry of Aboriginal Affairs and, prior to that, as counsel to the Ministry of the Environment (now the Ministry of the Environment and Climate Change). From 1998 to 2000, Risa served as the legal officer, Trade and Environment Division, at the World Trade Organization in Geneva. Risa has an LL.B. from Osgoode Hall Law School and an LL.M. in environmental and international law from the London School of Economics.





# The Art of Braiding Indigenous Peoples' Inherent Human Rights into the Law of Nation-States



James (Sa'ke'j) Youngblood Henderson

In 1977, elder and medicine person Phillip Deere (Muscogee Nation) delivered his “Longest Walk” speech in Washington, DC, after hundreds of others had walked across the United States to support tribal sovereignty and conduct talks at the White House. He declared, “We must understand that we are all human beings, it is important to be human being, it is important to act like one. But if you can’t act like one, you might as well not be one.”<sup>1</sup> Elder Deere stressed that we must follow the natural laws of love, peace and respect that define Indigenous humanity, proclaiming that “The freedom that the Native people is seeking today is to be free to be who they are. They have a right to be who they are. That’s why I encourage the Indian people, you can be nobody else, there is no failure in life until you tried to be somebody else. So, you have to be who you are.”<sup>2</sup> He also acknowledged that “we must know both ways of life, and that way no matter how much education you get, you will

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1 A version of Elder Deere’s speech can be found online at <<http://descendantofgods.tripod.com/id108.html>> [Deere, “Longest Walk”]. The reassertion of the inherent rights of Indians was articulated by the National Congress of American Indians in the 1961 *Declaration of Indian Purpose*, drafted by D’Arcy McNickle from the Flathead Reservation, online <<http://www.declarationproject.org/?p=32>>. Elder Deere and others were also influenced by George Manuel and his book with Michael Posluns, *The Fourth World: An Indian Reality* (Toronto, ON: Collier-Macmillan Canada, 1974).

2 Deere, “Longest Walk”, supra note 1.

Previous pages:

*The One Percent*

Lawrence Paul Yuxweluptun



never forget who you are.”<sup>3</sup> He insisted that Indian youth could not continue to stand around any longer. At that time, Elder Deere told me that our next longest journey was to fly like an eagle to the nest of the nation-states in Geneva to reclaim for all Indigenous peoples the humanity and dignity that was being denied to them in the United States, Canada and beyond.

Elder Deere and his vision of human rights guided me and other young Indigenous attorneys and activists to the multi-faceted United Nations system in Geneva, Vienna and New York, and to the Russell Tribunal in Rotterdam to assist in negotiating the recognition of our humanity, personhood and human rights in international law for the benefit of Indigenous peoples and the states parties. We were guided by an ancient teaching that humans have to search for their vision. This vision quest is difficult and requires many sacrifices, but the knowledge learned has tremendous potential for the people. To unleash the potential of this blessed vision, people must perform their vision before their relatives. The act of performance of the vision — by discussion, song, dance and story — empowers the vision in the rhythmical cycles of life. To keep the vision private, however, is to ignore the collective source of the vision and its purpose.

Our involvement in declaring our human rights is an example of the validity of this ancient teaching. Three protracted decades later, Elder Deere and others' visions were pronounced as part of United Nations law in the International Labour Organization's Convention No 169 on Indigenous and Tribal Peoples (1989);<sup>4</sup> the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) (in which the UN General Assembly affirmed Deere's vision);<sup>5</sup> the outcome document from the World Conference on Indigenous Peoples (2014);<sup>6</sup> and the Organization of American States' American Declaration on the Rights of Indigenous Peoples (2016).<sup>7</sup> We demonstrated that, together, Indigenous people can master complexity and build the framework of inherent human rights for an extraordinary era.

In general, the idea of inherent human rights is an entirely new frame of reference in the history of Eurocentric legal thought and traditions. While theories of natural and civil rights existed in Eurocentric legal thought, it was not until after 1966 that the inherent human rights of individuals in the United Nations human rights covenants<sup>8</sup> began to replace political utopian thought constructions about the state and justice.<sup>9</sup> Samuel Moyn argues that 1977 was the “breakthrough year” for individual human rights. This was the same year that Elder Deere and the Indigenous delegations formed the International Non-Governmental Organization Conference on Discrimination Against Indigenous Populations in the Americas in Geneva, which was the first direct voice for Indigenous peoples and delegates at the United Nations. This conference began the

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3 *Ibid.*

4 *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (27 June 1989) (ILO No 169), 72 ILO Official Bull 59, 28 ILM 1382 (entered into force 5 September 1991).

5 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

6 *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, GA Res 69/2, 69th Sess, UN Doc A/Res/69/2 (2014).

7 AG/Res 2888 (XLVI-0/16).

8 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, GA Res 2200A (XXI), 21 UNGAOR, Supp No 16 at 49, UN Doc A/6316 (1966), 993 UNTS 3, Can TS 1976 No 46, 6 ILM 360 (entered into force 3 January 1976) [ICESCR] (Canada acceded to this covenant on 19 August 1976); *International Covenant on Civil and Political Rights*, 19 December 1966, GA Res 2200 (XXI), 21 UNGAOR, Supp No 16 at 52, UN Doc A/6316, 999 UNTS 171, Can TS 1876 No 47 (entered into force 23 March 1976) [ICCPR] (Canada acceded to this covenant on 19 August 1976); *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, GA Res 2200A (XXI), 21 UNGAOR, Supp No 16 at 59, UN Doc A/6316, 999 UNTS 302 (entered into force 23 March 1976) [Optional Protocol] (Canada acceded to this protocol on 19 August 1976).

9 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2012); RL Barsh & JY Henderson, “International Context of Crown-Aboriginal Treaties in Canada,” CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa, ON: Libraxus, 1997).

process of reclaiming the inherent rights of Indigenous people based on Indigenous knowledge systems and law. The conference gave rise to Indigenous diplomacy and legal warriors.<sup>10</sup>

One starting point in implementing human rights is the need to comprehend the deep tension between inherent human rights and Eurocentric legal traditions of sacred and immanent order and the will of sovereigns.<sup>11</sup> Human rights are related to, but not derivative from, the Eurocentric idea of law as immanent order: an inherent or moral order latent in an intelligible and justifiable scheme derived from either an order pre-existing in nature, a discovered divine revelation or an artificially constructed social or cultural life that produced sacred laws and legal doctrines. For thousands of years, humans have viewed nature and society as expressing an immanent or sacred order, self-subsisting, if not self-generating, and independent of the human will or reason. Discovering that imparate order has been the essence of the work of jurists in constructing legal doctrine throughout Eurocentric thought and jurisprudence. This quest led to some knowledge systems discovering that human life or society could be artificially made, devised and ordered by a sovereign ruler or reason, rather than apprehending the hidden harmony of nature and submitting to it. Thus, the search for implicit order was displaced by an imposed order. This led to the idea of law as the will of the sovereign, and the sovereign's distinct law-making institutions established law. The sovereign or state imposes law on society and humans to make a legal order. The source of all law is in the decisions of the constitutionally legitimated institutions; the sovereign or state delegates all private rights to its subjects or citizens. The assertion of the existence of inherent and inviolable human rights, arising either by nature or from other sources, becomes the antithesis of the will of the sovereign, even when the sovereign is viewed as residing in the people.

These two views of law — legal doctrines as founded on the latent normative order and law as the will of the sovereign — are incompatible; their relation to each other is that each of them is fundamentally incomplete and depends on religious beliefs or indigenous laws of the peoples that formed communities and societies.<sup>12</sup> The Eurocentric legal tradition of the imposed order of a sovereign has never been able to exclude the immanent or sacred, or customary, law. These residual laws have resulted in several legal revolutions or transformations in the Eurocentric legal tradition.<sup>13</sup>

UNDRIP is the latest revolution in legal thought. The inherent rights expressed in UNDRIP exist as a holistic reflection of the elusive implicit order of human life and behaviour developed by Indigenous thought and law. In the history of Eurocentric legal thought and transformations, inherent human rights have existed as a shadow realm that reveals and reflects the concept of law both as an immanent order and as the will of the sovereign. Both concepts have attempted to disguise or deny this implicit order of inherent human rights, which is now unfolding, by

10 James [Sa'ke'ij] Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon, SK: Purich Publishing, 2008).

11 Roberto M Unger, *The Universal History of Legal Thought*, online: <[www.robertounger.com/english/pdfs/UHLT.pdf](http://www.robertounger.com/english/pdfs/UHLT.pdf)>.

12 See *ibid* at 2–3; John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999); LM Findlay, "Always Indigenize! The Radical Humanities in the Postcolonial Canadian University" (2000) 31 *Ariel: Rev Intl English Literature* 307; H Patrick Glenn, "Doin' the Transsystemic: Legal Systems and Legal Traditions" (2005) 50 *McGill LJ* 863.

13 Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) and Harold Berman, *Law and Revolution II: The Impact of the Protestant Revolution on the Western Legal Traditions* (Cambridge, MA: Harvard University Press, 2003) [Berman, *Law and Revolution II*]. Professor Berman stated that "the word 'revolution' is often dated from the outbreak of the French Revolution of 1789, when the duke of Liancourt brought the news of the storming of the Bastille to King Louis XVI at Versailles. 'But that is a revolt,' exclaimed the king. 'No, Sire, said Liancourt, 'it is a Revolution'"; Berman, *Law and Revolution II* at 3. The national revolutions were the Lutheran (protestant) Reformation in Germany (1517–1648), the English revolution (1640–1689), the French revolution (1789), the American revolution (1776–1783) and the Russian revolution (1905 and 1917).

asserting that all rights are derived from the positive enactments of God or the sovereign.<sup>14</sup> The Eurocentric attempt to reconcile the conflict between inherent human rights and the idea of law of the sovereign based on social control and violence is a perennial, unresolved challenge. Indeed, Canada's assertion during constitutional talks in 1980 that the right to self-determination in ratified human rights covenants<sup>15</sup> did not apply to Indians because Indians were the wrong kind of people instigated our quest for the declaration of the human rights of Indigenous people.<sup>16</sup>

With the successful creation of a global consensus on inherent human rights of peoples, we have to find a way of braiding or implementing human rights of Indigenous peoples into national law of the states. The braiding will be more like contrapuntal music, rather than architectural blueprints. The quandary of how to implement the human rights of Indigenous peoples within the law of the nation-state is an important, pressing and daunting challenge, as these rights present an enigma to theories of Eurocentric law, as well as to Eurocentric theories of humanity and society. Indigenous peoples' human rights undermine and unsettle the arrangement of most nations, societies and politics, making these arrangements, derived from the institutions of the state, seem contingent, precarious and defective. These human rights reveal the innermost secrets of both Indigenous and Eurocentric approaches to humanity and leave unanswered many questions about the rule of law in forming or designing social order.

The initial goal of Indigenous peoples in articulating their human rights at the United Nations was to decolonize the colonized Indigenous peoples. It was to remind ourselves of our Indigenous teachings about how to be human and of the value of relying on these teachings, rather than following the Eurocentric version of humanity. Our 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. To renew these sensibilities in our legal traditions remains a challenging responsibility, the activation of which is commencing in most Indigenous communities. To live up to the concept of being a self-determining human, as expressed in UNDRIP, is our responsibility as Indigenous peoples; it is a new way to reform and empower our traditions and versions of humanities, to create a teaching to make us greater, individually and collectively.

A supplemental goal was to have the colonizing nations recognize and respect our inherent rights to Indigenous humanity and self-determination. This respect of our rights was designed to operate not only as a process to allow for mutual dignity and influence but also to distribute mutual competencies among the diversity of knowledge. This respect was reflected in the

14 Groups have always existed, and they have asserted rights against other groups. Eurocentric international law has vested the nation-states with a monopoly over group rights and the regulation of the conduct of nation-states, although nation-states have the ability to recognize rights in certain collectivities and individuals, such as minorities and Indigenous peoples. Self-determination as a human right in juxtaposition to the "nation" and "state" is a manifestation of the Eurocentric concept that the sovereign can establish rights and entitlements by legislation. In Eurocentric law, the sovereign can establish or recognize the collectivities of individuals, usually identified as ethnic, linguistic, gender and religious groups. Although numerous Eurocentric theorists' works have contained drifting references to group rights or collective rights, few have developed an analysis; Jeremy Waldron, "Taking Group Rights Carefully" in Grant Huscroft & Paul Pishworth, eds, *Litigating Rights: Perspectives from Domestic and International Law* (Oxford, UK: Hart Publishing, 2002). Most have avoided or refused to discuss these collective rights, choosing to focus on individual rights; Linda Cardinal, "Collective Rights in Canada: A Critical and Bibliographical Study" (2000) 12 NJCL 165; Dwight G Newman, "Collective Interests and Collective Rights" (2004) 41:1 Am J Juris 127.

15 The UN law establishes that the right of self-determination is a matter of state law affirming a people's right to determine political, economic, social and cultural development; *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Can TS 1945 No 7, art 55; ICCPR, *supra* note 8; ICESCR, *supra* note 9. As the *Optional Protocol*, *supra* note 8, signals, the state must respect self-determination in its national or provincial laws to be entitled to protection of its territorial integrity. In juxtaposition to this, as an aspect of external self-determination, is the recognized right of colonial peoples to break away from imperial powers that continue to subjugate, dominate or exploit them; *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, GA Res 2625, UNGAOR, 25th Sess, UN Doc A/RES/2625(XV).

16 See "Mi'kmaq Society v. Canada: The Right of Self-Determination and to be Involved in Public Affairs," online: Native Law Centre, University of Saskatchewan <[www.usask.ca/nativelaw/un-human-rights-first-nations/mikmaq-society-v.-canada.php](http://www.usask.ca/nativelaw/un-human-rights-first-nations/mikmaq-society-v.-canada.php)>.

subsections of UNDRIP; the first subsection stated the affirmation of human rights, and the second subsection stated ways in which the states parties could braid these minimum inherent rights into their constitutions and laws. The general orientation of the second subsections was articulated in article 38 of UNDRIP: “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

No obvious way exists to reconcile each of the inherent human rights with contemporary law as the will of the sovereign, although they coexist with the drafting of UNDRIP, the American Declaration on the Rights of Indigenous Peoples and a number of other instruments and devices. A positive model was presented in 2008 when the Canadian House of Commons passed a motion in favour of implementing UNDRIP. The motion recommended “that the government endorse the United Nations declaration on the rights of indigenous peoples as adopted by the United Nations General Assembly on 13th September, 2007, and that Parliament and the Government of Canada fully implement the standards contained therein.”<sup>17</sup>

Beyond gaining the recognition and compliance of the consenting states, Indigenous peoples had low expectations that the colonizing nations and their institutions would implement our inherent human rights.<sup>18</sup> Our apprehension was that the colonizing states would attempt to appropriate our inherent rights or dilute them in their attempt to implement our human rights. Inherent human rights belong to the people, not to the will of the sovereign, states or governments. 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 Eurocentric legal traditions of civil or common law. The Indigenous peoples’ view was that none of our human rights affirmed in the conventions and declarations could be delegated to any states or their institutions through consultation and cooperation. They could only be recognized and promoted by the state with our cooperation for the purposes of preventing violence or discrimination against, or assimilation of, Indigenous peoples in our full enjoyment and effective exercise of our humanity. Indigenous peoples have pointed out that the Eurocentric state, with its reliance on violence, rather than persuasion, to make law binding and its many attempts to enact non-discriminatory laws, has failed to make significant changes in its citizens’ thoughts or behaviour or to protect vulnerable peoples.

As Indigenous peoples enter the twenty-first century as self-determining people, the need is great to restore the Indigenous concept of humanity, to regenerate a consciousness that enables all peoples to enrich their situation and restore their dignity. To renew and live in accordance

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17 See Grand Council of the Crees, “Ottawa Adopts International Declaration on the Rights of Indigenous Peoples,” online: <[www.gcc.ca/newsarticle.php?id=133](http://www.gcc.ca/newsarticle.php?id=133)>.

18 Canada has a dismal record of implementing human rights covenants that it has ratified; see Senate, Standing Senate Committee on Human Rights, *Promises to Keep: Implementing Canada’s Human Rights Obligations: Report of the Standing Senate Committee on Human Rights* (December 2001), online: <[www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm](http://www.parl.gc.ca/Content/SEN/Committee/371/huma/rep/rep02dec01-e.htm)>. In Canada, no constitutional requirement exists for the involvement of or approval by Parliament or the provincial legislatures in the ratification or acceptance of United Nations legal obligations, the customary international law or United Nations treaties or declarations. However, Canadian legal conventions arising from its colonial status before constitutional reform in 1982 suggest that Parliament needs to enact the ratified United Nations human rights covenants and declarations. The colonial approach viewed the League of Nations and United Nations covenants and declarations as not being self-executing by executive ratification. Rather, the covenants ratified by the executives of the federal and provincial government had to be implemented through domestic legislation in order to have full force and effect. Such covenants and declarations can and do influence judicial interpretations of related constitutional or statutory rights; see *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at para 60. The validity of this colonial convention is questionable in light of constitutional reforms and the principles of fundamental justice. The Supreme Court of Canada has recognized that the exercise of patriated constitutional authority in Canada includes the global system of rules and principles that recognized the rights of a people to self-determination; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 32, 113–133. The resistance to implementation or the failure to implement these international obligations, which were consensually ratified by Canada or the provinces, makes them into false promises, which is contrary to the spirit of consensual promises and the terms of the international human rights instruments themselves.

with concepts of Indigenous humanity, law and human rights, both collectively and individually, is the meaning and goal of UNDRIP. This meaning amplifies not only the existing treaties and agreements of Indigenous peoples but also the fundamental rights of Indigenous peoples, according to their Indigenous knowledge, legal systems and new agreements. Canada has affirmed that the inherent rights in UNDRIP will be promoted through the constitutional rights of Aboriginal peoples, as set out in section 35 of the *Constitution Act, 1982*,<sup>19</sup> and will not be imposed on them. The appropriate measure of braiding or implementing these inherent rights in Canadian law will be through initiatives undertaken by Aboriginal peoples of Canada in their nation-to-nation approach.<sup>20</sup>

The concept of implementing the inherent human rights of Indigenous peoples through treaties, agreements, constructive arrangements and partnerships with the states to achieve the ends of UNDRIP appears to most Indigenous peoples as a preferred option. The actual spirit and intent of the consensual agreements, both old and new, have always been based on these inherent powers and rights, and may not be interpreted as diminishing or eliminating the inherent powers or rights of Indigenous peoples. The consensual arrangements can be sufficiently restructured with the state to empower the exercise of inherent human rights. In the inner unity of overarching and respectful arrangements, no need exists to devise a legal order that accommodates antagonistic or divergent ideas, interests and wills of other groups. This approach does not require braiding inherent human rights with the will of the sovereign. However, this approach requires a deeper insight into the higher order and prophetic nature of legal traditions and consciousness among Indigenous peoples and their right to self-determination than the present stage of my inquiry permits.

The vision of Elder Deere and the Indigenous advocates has been affirmed in the global consensus of the United Nations and has been endorsed by the states parties. Many challenging negotiations between the states and Indigenous peoples remain to be carried out to implement our inherent human rights, according to our choice and traditions, and to allow us to determine and nourish our own lives, as well as those of future generations. These negotiations are no longer seen as impossible, but rather as inevitable. Indigenous peoples are aware that in their attempts to live cooperatively and to braid their human rights into the national law of states through the development and implementation of national action plans, strategies and appropriate measures, they will be entangled in struggles with the states and other peoples. Nevertheless, these relentless struggles will unfold a new order of humanity based on promoting and protecting the inherent human rights of Indigenous peoples and on Indigenous peoples exercising their right to determine the development of their lives. These struggles will transform and decolonize the existing governance and legal systems, and will generate new visions of systemic justice to replace systemic injustices. To create systemic justice in the states, Indigenous peoples must encourage hope to prevail over past experiences, creativity over impossibility, constitutionalism over domination, prophecy over habit, kindness over the impersonal, place over time, solidarity over individualism, serenity over vulnerability, and empathic love and relationship over everything.

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

20 Statement of Prime Minister Justin Trudeau, online: <<http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter#sthash.o5wcHSgS.dpuf>>; Minister of Indigenous and Northern Affairs Carolyn Bennett, "Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples" (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <[www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/](http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/)>. See also Canada's 2010 Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, online: <[www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142](http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142)>: "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework. Aboriginal and treaty rights are protected in Canada through a unique framework. These rights are enshrined in our Constitution, including our Charter of Rights and Freedoms, and are complemented by practical policies that adapt to our evolving reality. This framework will continue to be the cornerstone of our efforts to promote and protect the rights of Aboriginal Canadians."

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# Revitalizing Canada's Indigenous Constitution

## Two Challenges



John Borrows

Canada's Constitution is Indigenous in at least two respects. First, it is not merely the product of its European origins. Its colonial seeds were cultivated in North American soil and transformed in the process. In this sense, Canada's Constitution is Indigenous, homegrown in a distinctively North American context. Second, the ground from which Canada's Constitution grows first belonged to non-European peoples. Indigenous peoples' governance and lifeways are rooted in this place. Indigenous peoples variously resisted, incorporated, assimilated and rejected colonial actions throughout their lands. These facts have had a significant impact on Canada's wider constitutional trajectory. In the process, Indigenous peoples' own laws became a broader source of Canadian law.<sup>1</sup> The recognition and affirmation of Aboriginal and treaty rights is simultaneously commingled with their persistent denial. Canada's Constitution has been shaped by this tension; its "living tree" is both nourished and constrained by Indigenous peoples' presence throughout the country.<sup>2</sup>

Unfortunately, more than 20 years ago, the Supreme Court of Canada (SCC) created a fiction that said Aboriginal rights could only be recognized and grow if they arose prior to European contact.<sup>3</sup> This was the *Van der Peet* case, which prevented Indigenous peoples from claiming constitutional rights related to practices, customs and traditions that

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1 *Connolly v Woolrich* (1867), 17 RJRQ 75 (Sup Ct), affirmed as *Johnstone v Connelly* (1869), 17 RJRQ 266 (QB).

2 The leading case on the Constitution as a living tree is *Edwards v Canada (Attorney General)*, [1930] AC 124. A history of the case is found in Robert Sharpe & Patricia McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto, ON: University of Toronto Press, 2007). An example of contemporary references to the living tree are found in *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 at para 22.

3 *R v Van der Peet*, [1996] 2 SCR 507 at para 46 [*Van der Peet*].

developed after European arrival. This has stunted Canada's constitutional evolution. Aboriginal peoples have not been able to persuade courts or legislatures that they have constitutionally protected rights to governance, education, health care, justice and so on, and thus they have been cut off from taking appropriate responsibility for their own affairs. Because Aboriginal peoples have had difficulty proving that these activities were integral to their distinctive culture prior to European arrival, they cannot shield the exercise of their rights from Crown restrictions and interference.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>4</sup> should cause the Canadian Parliament and courts to reject constitutional distinctions based on pre- and post-contact or assertions of sovereignty.<sup>5</sup> UNDRIP's application to Indigenous peoples does not rest on proof of pre-contact or pre-non-native sovereign assertions.<sup>6</sup> Rights are vested in peoples; peoples as identified in section 35(1) of the Constitution Act, 1982<sup>7</sup> should draw their meaning from international law and be regarded as a political category.<sup>8</sup> Peoples' rights within UNDRIP are also expressed in universal terms. Their exercise is not contingent on a non-Indigenous event (such as European contact with Indigenous peoples or the assertion of foreign sovereignty, as problematically required in Canadian case law). Article 1 of UNDRIP exemplifies this broad-based approach: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."<sup>9</sup>

The incorporation of universal human rights standards in the recognition of Indigenous law and governance is an important step in rejecting pre- and post-contact distinctions found in *Van der Peet* and the *Pamajewon*<sup>10</sup> decision (which measures Indigenous governmental rights by whether they were integral to the distinctive culture of Aboriginal peoples prior to the arrival of Europeans).

The *Pamajewon* case from the SCC problematically held that Aboriginal people did not have a "broad right to manage the use of their reserve lands" because "any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right."<sup>11</sup> As noted, this narrow conception of self-government built upon the court's earlier decision in *R v Van der Peet*.<sup>12</sup> Since the regulation of high stakes gambling at issue in the *Pamajewon* case was held to be not integral to the Ojibwe people prior to European arrival, the SCC applied the *Van der Peet* case to find that Ojibwe people could not claim governance rights over the activity on their lands in the present day.<sup>13</sup>

4 UNDRIP was enacted by the United Nations in 2007. GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

5 This idea is further developed in John Borrows, "Indigenous Law & Governance: Challenging Pre-Contact/Post-Contact Distinctions in Canadian Constitutional Law" (Article written for the Marx-Chevrette lecture, University of Montreal, September 2016) [unpublished].

6 For an argument that UNDRIP represents the development of international customary law relative to Indigenous peoples, see James Anaya, *Indigenous Peoples in International Law* (New York, NY: Oxford University Press, 1996).

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

8 Catherine Bell, "Métis Constitutional Rights in Section 35(1)" (1997) 36 *Alta L Rev* 180 ("Rights arising from peoplehood are uncertain because the word 'peoples' is not defined in Canadian constitutional law and minimal domestic judicial opinion has been rendered on this point. However, it is a term which was used frequently in international political discourse at the time s. 35 was negotiated to distinguish colonized indigenous populations from nation states and ethnic minority immigrant populations within those states" at 185).

9 UNDRIP, *supra* note 4, art 1.

10 *R v Pamajewon*, [1996] 2 SCR 821 at para 27.

11 *Ibid.*

12 *Van der Peet*, *supra* note 3 at paras 45-47.

13 For a critique of *Van der Peet* and *Pamajewon*, see Bradford W Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 *McGill LJ* 1011; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 *Am Indian L Rev* 37; Russell Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Native Imperialism and Ropes of Sand" (1997) 42 *McGill LJ* 993.

Restricting Aboriginal rights to historical analogues prevents Aboriginal peoples from governing in a contemporary context, since many governance fields will not rest on practices that were central to them when Europeans arrived. This form of constitutional originalism is contrary to Canada's living tree jurisprudence.<sup>14</sup> Freezing the development of Aboriginal rights at the "magic moment of European contact"<sup>15</sup> is also contrary to the broad framing of rights found in UNDRIP, as illustrated in article 1. In my view, UNDRIP's constitutionalization in a Canadian context should be used to challenge and overturn the SCC's jurisprudence, which rests on pre- and post-contact distinctions.

Fortunately, Canada has committed itself to implementing the Constitution in light of UNDRIP's provisions.<sup>16</sup> In 2010, Canada passed a Statement of Support for UNDRIP, which stated that by endorsing UNDRIP, Canada was "reaffirming its commitment to build on a positive and productive relationship with First Nations, Inuit, and Métis peoples to improve the well-being of Aboriginal Canadians, based on our shared history, respect, and a desire to move forward together."<sup>17</sup> In 2016, Minister of Indigenous and Northern Affairs Carolyn Bennett further announced to the United Nations that "[t]hrough Section 35 of its Constitution, Canada has a robust framework for the protection of Indigenous rights."<sup>18</sup> Minister Bennett said, "We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution.... By adopting and implementing the declaration, we are excited that we are breathing life into Section 35 and recognizing it as a full box of rights for Indigenous Peoples in Canada."<sup>19</sup> The "full box" approach to section 35 should also cause courts and governments to reject pre- and post-contact distinctions in implementing Aboriginal rights.<sup>20</sup>

The minister's promise to adopt and implement UNDRIP in a constitutional context puts the Crown's honour squarely on the line. As the SCC wrote in *R v Badger*, "the honour of the Crown is always at stake in its dealing with Indian people."<sup>21</sup> Minister Bennett's pledge to implement UNDRIP in order to "breathe life" into section 35(1) must lead the Crown to work diligently toward the fulfillment of her promises.<sup>22</sup> As the SCC wrote in the *Haida* case, "In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."<sup>23</sup> A promise to implement UNDRIP in relation to Canada's constitutional duties toward Aboriginal peoples must be interpreted generously and fulfilled in a diligent and timely manner.<sup>24</sup> Failure to advance UNDRIP's implementation in the ways discussed would be a serious setback for

14 John Borrows, "(Ab)originalism and Canada's Constitution" (2012) 58 SCLR 352.

15 *Van der Peet*, *supra* note 3 at para 247.

16 *The Globe and Mail* reported that "[t]hirteen out of the 94 recommendations of the Truth and Reconciliation Commission invoke the United Nations Declaration on the Rights of Indigenous Peoples – including, naturally, the one that calls on Canada to adopt and fully implement the declaration itself." See "Adopting UN Indigenous Rights Declaration Could Worsen Damaged Relationship", Editorial, *The Globe and Mail* (19 June 2015), online: <[www.theglobeandmail.com/opinion/editorials/adoptin-un-indigenous-rights-declaration-may-only-make-damaged-relationship-worse/article25048043/](http://www.theglobeandmail.com/opinion/editorials/adoptin-un-indigenous-rights-declaration-may-only-make-damaged-relationship-worse/article25048043/)>.

17 Canada, Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: <[www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142](http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142)>. Furthermore, Canada stated, "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework" (*ibid*).

18 Minister of Indigenous and Northern Affairs Carolyn Bennett, "Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples" (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <[www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/](http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/)>.

19 *Ibid*.

20 For a deeper discussion of the full box analogy of Aboriginal rights, see Ardith Walkem & Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, BC: Theytus Books, 2003).

21 *R v Badger*, [1996] 1 SCR 771 at para 41.

22 Gib van Ert, "Three Good Reasons Why UNDRIP Can't Be Law – and One Good Reason Why it Can" (January 2017) *Advocate* 29 at 30–31.

23 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 17.

24 *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 76–79, [2013] 1 SCR 623.

Indigenous–Crown relations, although it must be noted that failure to achieve the minister's promise would not necessarily, in itself, be a breach of the Crown's honour (if the Crown was diligent and other factors had prevented the fulfillment of its promises).<sup>25</sup>

The role of international law in Canada's constitutional system should also play a role in UNDRIP's implementation. Although international norms are not binding without legislative implementation,<sup>26</sup> such norms should be relevant sources for interpreting rights domestically.<sup>27</sup> While UNDRIP is technically not binding on Parliament because of its status as a declaration,<sup>28</sup> it should nevertheless inform the executive's (the Crown's) interpretation and implementation of the Constitution. For instance, the Crown could use its power to make arguments before the courts to directly insert UNDRIP into submissions related to Aboriginal and treaty rights, rejecting pre- and post-contact distinctions. The Crown could also do the same thing when developing, enacting and implementing statutes and policies to ensure that UNDRIP is the standard that animates its actions in the House of Commons, Senate, Cabinet and ministries. When the Crown more fully embraces UNDRIP's provisions, pre- and post-contact qualifications on Aboriginal rights can be rejected. The Crown's influence on Parliament is significant in our Westminster system. The Crown's active engagement in implementing UNDRIP would help to ensure, as the SCC wrote, that "the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred."<sup>29</sup>

In following the paths outlined above, for example, articles 4 and 5 of UNDRIP challenge the idea that Indigenous peoples can only exercise governmental power if that power was "integral to their distinctive culture" prior to the arrival of Europeans. Article 4 states, "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."<sup>30</sup> Article 5 states, "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."<sup>31</sup>

These articles contest *Pamajewon's* narrow view of Indigenous governance because they construe governance in a broad light. Self-determination in political, legal, economic, social and cultural matters is the subject of Indigenous self-determination. Indigenous peoples' own laws become a more prominent part of Canada's Constitution under this approach.

Article 27 supports this conclusion through its recognition that Canadian law must give effect to Indigenous peoples' law. It demonstrates that Indigenous law should form a part of how the Constitution recognizes and adjudicates in relation to Indigenous peoples. Article 27 reads: "States shall establish

25 *Ibid* ("However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts" at para 82).

26 *R v Sharpe*, [2001] 1 SCR 45 at para 175 [Sharpe], referring to *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 349–50 and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

27 *Sharpe*, *supra* note 26.

28 Under this view, Parliament is presumed to act in compliance with its international obligations and to respect the values and principles enshrined in international law through the presumption of conformity, as the courts have recognized; *R v Hape*, 2007 SCC 26 at para 54, [2007] 2 SCR 292. For reasons that UNDRIP is not directly applicable as law in Canada, see *van Ert*, *supra* note 22.

29 *Sharpe*, *supra* note 26, citing Ruth Sullivan & Elmer A Driedger, *Driedger on the Construction of Statutes*, 3rd ed (Toronto, ON: Butterworths, 1994) at 330.

30 UNDRIP, *supra* note 4, art 4.

31 *Ibid*, art 5.

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.<sup>32</sup>

Article 27's standard requires states to recognize Indigenous peoples' laws in their adjudicative processes. While there is much more work to do, Canada has already implicitly recognized Indigenous law as a foundation for Aboriginal title under the Constitution, as demonstrated in the *Tsilhqot'in*<sup>33</sup> case. *Tsilhqot'in* law had a pre-existing and continuing force that was prominent in establishing title.<sup>34</sup> As I have argued elsewhere:

*Tsilhqot'in* elders testified about the continuity of their ways of life in their own language using their legal traditions.<sup>35</sup> Indigenous law was key to establishing a sufficiency of Indigenous social organization that was necessary to prove title.<sup>36</sup> *Tsilhqot'in* rules of conduct were central to proving that the *Tsilhqot'in* historically and presently occupied land in the contested region....<sup>37</sup> [T]he SCC implicitly affirmed that Indigenous legal traditions can give rise to enforceable obligations within Canadian law.<sup>38</sup> Social organization should be treated as a synonym for self-government.<sup>39</sup> When a nation organizes itself socially on a territorial basis, and through its own laws controls land, makes decisions about its use and excludes others, we should conclude that such a nation governs itself.<sup>40</sup> First Nations governance is an important dimension of Aboriginal title.<sup>41</sup>

<sup>32</sup> *Ibid*, art 27 [emphasis added].

<sup>33</sup> *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 256.

<sup>34</sup> Continuity of occupation through social organization was necessary to prove Aboriginal title; *ibid* at paras 45–46, 57.

<sup>35</sup> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 149, 167, 176, 360, 362, 381, 397, 399, 403, 431–435.

<sup>36</sup> *Ibid* (“the *Tsilhqot'in* had laws, and that those for which there is evidence appear to have been broadly similar to the laws of other many North American Aboriginal groups’...[T]here was evidence ‘that supports the view that chiefs had specific lands within *Tsilhqot'in* territory and that these lands descended on some sort of hereditary principle.’ I too am satisfied that an examination of the historical records leads to a conclusion that *Tsilhqot'in* people did consider the land to be their land. They also had a concept of territory and boundaries, although this appears to have been enlarged following the movements of the mid-nineteenth century” at para 429).

<sup>37</sup> *Ibid* (“Some of the stories and legends told to the Court by *Tsilhqot'in* elders include: Lhin Desch’osh, the legend of how the land was transformed and the animals made less dangerous; Ts’il’os and ?Eniyudl; How Raven Stole the Sun; A Story of Raven Stealing Fire; The Story of Salmon Boy; The Story of the Woman and the Bear; The Story of Lady Rock; The Story of Qit’ax Xen, a boy raised by his grandmother; The Story of Guli, the Skunk; A Story About a Brother and a Sister; A Story About an Owl; Two Sisters and the Stars; and, Frog Steals a Baby. This is not a complete list but it is representative of the legends I heard. Each carries with it an underlying message or moral that is intended to instruct and inform *Tsilhqot'in* people in the way they are to lead their lives. They set out the rules of conduct, a value system passed from generation to generation” at paras 433–434 [emphasis added]). See also *ibid* (“Various *Tsilhqot'in* elders testified about dechen ts’ edilhtan (the laws of our ancestors)” at para 431).

<sup>38</sup> A similar point is made in Val Napoleon, *Tsilhqot'in Law of Consent* (on file with author). See also Jeremy Webber, “The Public-Law Dimension of Indigenous Property Rights” in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford, UK: Hart, 2013) 79.

<sup>39</sup> In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 159, Chief Justice Lamer observed, “the foundation of ‘aboriginal title’ was succinctly described by Judson J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, where, at p. 328, he stated: ‘the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries’” [emphasis added].

<sup>40</sup> For a discussion of contemporary *Tsilhqot'in* legal traditions as they relate to governance, see Hadley Friedland, Jessica Asch, Maegan Hough, Renee McBeth & Al Hanna, from the Indigenous Law Research Unit, *Tsilhqot'in Legal Traditions Report* (2014) [unpublished, archived with Val Napoleon and *Tsilhqot'in* National Government]. For related materials, see Indigenous Bar Association, online: <<http://indigenoubar.ca/indigenoulaw/>>.

<sup>41</sup> John Borrows, “Aboriginal Title and Private Property” (2015) 71 SCLR 91 at 109 [footnotes in original].

## Implementing UNDRIP within Indigenous Communities

Furthermore, the significance of Indigenous peoples' laws for internal governance matters should also be recognized as part of Canada's Indigenous constitution through UNDRIP's implementation. Article 18 makes this clear: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."<sup>42</sup>

The adoption of UNDRIP clears the path for a more explicit recognition and application of Indigenous law within Indigenous nations across Canada. As part of this development, Indigenous peoples themselves could also implement UNDRIP within their own nations to ensure that their own people are both empowered by and protected from their own governments. In this respect, UNDRIP would be further entrenched as part of Canada's Indigenous constitution.

UNDRIP is an Indigenous instrument; it was created broadly by Indigenous peoples as it was negotiated for more than 30 years at the United Nations.<sup>43</sup> Internal adoption of UNDRIP's principles would positively and radically challenge the calibration of Indigenous governance by reference to pre- and post-contact categories.

Rights identified by UNDRIP should be available within self-governing Indigenous nations across Canada. Once adopted, they can be interpreted in accordance with the Indigenous peoples' own legal traditions,<sup>44</sup> in Indigenous adjudicative forums.<sup>45</sup> While UNDRIP was drafted with the intent of securing United Nations recognition of Indigenous peoples' rights as against nation-states, its broad statements can also be construed as recognizing, affirming and protecting the human rights of Indigenous individuals in their relations with their own governments.<sup>46</sup> For instance, article 1 of UNDRIP indicates that Indigenous individuals possess human rights.<sup>47</sup> It proclaims, "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."<sup>48</sup> Under this view, it would not be contrary to the spirit of UNDRIP to recognize that Indigenous governments have obligations in relation to individuals who fall within their jurisdictions.<sup>49</sup> The adoption of UNDRIP by First Nations, Metis and Inuit communities would reinforce this view. It would be tragically

42 UNDRIP, *supra* note 4, art 18.

43 Lillian Aponte Miranda, "Indigenous Peoples as International Lawmakers" (2010) 32 U Pa J Intl L 210.

44 This argument is made in the Charter context in David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights in Canada* (Vancouver, BC: UBC Press, 2012).

45 In the United States, tribal courts generally deal with human rights issues, see *Santa Clara Pueblo v Martinez*, 436 US 49, 98 S Ct 1670 (1978). For further discussion of the development of human rights perspectives in US tribal forums, see Angela Riley & Kristen Carpenter, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights" (2014) 102 Cal L Rev 173.

46 UNDRIP, *supra* note 4 ("Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law", Preamble; "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law", art 1).

47 *Ibid*, art 1.

48 *Ibid*.

49 In fact, under article 35 of UNDRIP, the countries of the world proclaimed that "Indigenous peoples have the right to determine the responsibilities of individuals to their communities." While rights are not necessarily equivalent to obligations, such statements signal recognition of the importance of healthy international relationships within Indigenous governments.

ironic if nation-states began recognizing and protecting the rights of Indigenous individuals, while Indigenous governments did not take the same action.<sup>50</sup>

It is instructive to itemize UNDRIP provisions that could apply to individuals within Indigenous nations. UNDRIP lists the following rights and freedoms for Indigenous peoples: religion, spiritual beliefs and practices;<sup>51</sup> speech and expression;<sup>52</sup> association;<sup>53</sup> life, liberty and security;<sup>54</sup> property;<sup>55</sup> family togetherness;<sup>56</sup> a right not to be discriminated against by their governments;<sup>57</sup> the privileges and immunities of citizenship;<sup>58</sup> language;<sup>59</sup> education;<sup>60</sup> labour fairness;<sup>61</sup> administrative law (notice, fairness, hearing);<sup>62</sup> health care;<sup>63</sup> and gender equality.<sup>64</sup> These apply in accordance with limitations imposed by law and in accordance with international law.<sup>65</sup> Again, while it is important to recognize that these laws were enumerated to apply as against states recognized by the United Nations, there is no good reason for restricting their reach in this respect, particularly if self-determination is the lens through which Indigenous human rights are recognized and affirmed.<sup>66</sup> To repeat, the widespread support among Indigenous peoples in the drafting and ratification of UNDRIP, along with the now-unanimous acceptance of this document at the United Nations, signals expectations that human rights, not only of communities, but also of Indigenous individuals, must be respected. It is arguable that this is the case no matter the source of government authority that impacts upon those individuals.

50 UNDRIP's Preamble welcomes "the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement... in order to bring to an end all forms of discrimination and oppression wherever they occur." As Indigenous nations further organize themselves to bring an end to discrimination within their communities, this presumably fits within the activities encouraged by UNDRIP.

51 UNDRIP, *supra* note 4 ("Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains", art 12(1); "States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned", art 12(2)). See also *ibid*, arts 25, 36.

52 *Ibid*, art 31.

53 *Ibid* ("Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State", art 5).

54 *Ibid* ("Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person", art 7(1)).

55 *Ibid* ("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", art 10). See also *ibid*, arts 26, 28–30.

56 *Ibid* ("Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group", art 7(2)).

57 *Ibid* ("Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity", art 2). See also *ibid*, art 15(2).

58 *Ibid* ("Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right", art 9). See also *ibid*, art 33.

59 *Ibid*, arts 13, 16.

60 *Ibid*, arts 14, 21.

61 *Ibid*, art 17.

62 *Ibid*, arts 17–19, 21–23, 32.

63 *Ibid*, art 24.

64 *Ibid*, art 44.

65 *Ibid*, art 46 (a Canadian Charter, section 1, type of provision).

66 See *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UNESCOR, 45th Sess, UN Doc E/CN.4/Sub.2/1993/29 (1993) paras 189–91. See also Frank Pommersheim, "At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty" (2010) 55 *SDL Rev* 48 at 65–66; Rebecca Tsosie, "Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?" (2011) 15 *Lewis & Clark L Rev* 923.



## Conclusion

The application of UNDRIP by both Canadian and Indigenous governments, through UNDRIP's commitment to self-determination, should help courts discard pre- and post-contact distinctions in Canadian constitutional law. UNDRIP's embrace by the Canadian government fundamentally changes the character of the debate surrounding Indigenous law and governance.<sup>67</sup> *Van der Peet* and *Pamajewon* should be overturned; stare decisis should not be a straitjacket that condemns the law to stasis,<sup>68</sup> particularly when such stasis continues to tear the fabric of constitutional reconciliation as it relates to Indigenous peoples.<sup>69</sup> Furthermore, Indigenous peoples' own law must grapple on its own terms — and in accordance with its own cultural worldview — with UNDRIP's provisions. This will strengthen Indigenous governance and protect Indigenous citizens from their own governments in ways that syncretically draw upon Indigenous peoples' own regulatory and dispute resolution structures.

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<sup>67</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 43 [Carter], citing *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 ("Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'" at para 42).

<sup>68</sup> *Carter*, *supra* note 67 at para 44.

<sup>69</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), online: <[www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec\\_Summary\\_2015\\_05\\_31\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf)>.



# Beyond Van der Peet

## Bringing Together International, Indigenous and Constitutional Law



**Brenda L. Gunn**

Before Europeans arrived in North America, Indigenous peoples had thriving governments and legal systems. After many years of advocacy by a number of groups, the United Nations finally recognized that “Indigenous peoples are equal to all other peoples,” while Indigenous peoples have the right to be respected for their difference as Indigenous peoples.<sup>1</sup> Indigenous peoples “contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind.”<sup>2</sup> Unfortunately, Indigenous peoples have been negatively impacted by colonization,<sup>3</sup> including the imposition of a foreign legal system that was used to undermine Indigenous peoples’ own legal traditions.

Indigenous peoples have long fought against the negative impacts of colonization at both the domestic and international level, seeking to protect their fundamental human rights, according to their own legal traditions. Despite protecting Indigenous peoples’ rights in the Constitution Act, 1982, section 35(1) failed to address the harms of colonialism, including recognizing the role of Indigenous laws when determining Indigenous peoples’ rights.<sup>4</sup> There is much criticism on the scope of section 35(1). This essay contributes to that body of literature by arguing that implementing UNDRIP provides an opportunity to move beyond the limited interpretations of section 35(1) to better recognize Indigenous

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1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007), Preamble [UNDRIP].

2 *Ibid.*

3 *Ibid.*

4 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

peoples' rights according to their own legal traditions. In this way, the essay argues that bringing together international human rights law, constitutional law and Indigenous law strengthens the protection of Indigenous peoples' rights. This process of using UNDRIP to make room for Indigenous peoples' laws within the broader Canadian legal landscape is critical for moving away from the colonial relationship toward a nation-to-nation relationship. In particular, it is important that section 35(1) be interpreted in line with UNDRIP, because UNDRIP grounds Indigenous peoples' rights in their own legal traditions.

## Failings of Section 35

When the process to patriate the Canadian Constitution began, Indigenous peoples believed that the recognition and affirmation of Aboriginal and treaty rights would reset the relationship between Indigenous peoples and the Crown — moving beyond the colonial imposition of a new legal order back to a nation-to-nation relationship in which there is space for both Indigenous and Canadian laws to operate.<sup>5</sup> This section briefly discusses how the Supreme Court of Canada's (SCC's) interpretation of section 35(1) has failed to provide adequate scope to Indigenous peoples' rights, especially by failing to understand Indigenous peoples' rights according to their own legal traditions.

When the first case to consider the scope of section 35(1) came before the courts, it was an opportunity for the courts to define Aboriginal rights according to Indigenous peoples' own legal traditions and to provide protection against unchecked government power.<sup>6</sup> The SCC recognized that section 35(1) “represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights.... It also affords aboriginal peoples constitutional protection against provincial legislative power.”<sup>7</sup> This led Chief Justice Brian Dickson to conclude that section 35(1) requires the federal power under section 91(24) of the Constitution Act, 1867<sup>8</sup> to be reconciled with the federal fiduciary duty,<sup>9</sup> which should have restrained the government's power to limit Indigenous peoples' constitutionally recognized rights. However, for the court, it simply meant that the government would need to justify interferences with Aboriginal rights.<sup>10</sup> With this starting point, section 35(1) has not changed the colonial relationship between Indigenous people and the Crown — Canadian law still overruns Indigenous peoples' rights.

Judicial interpretations of section 35(1) have continued to limit the ability of section 35(1) to make space for Indigenous peoples' rights as understood in their own legal traditions. In *Van der Peet*, Chief Justice Antonio Lamer reiterated the *Sparrow* interpretive principles, including taking a purposive approach, upholding the fiduciary relationship, providing a generous and liberal interpretation, and resolving ambiguities in favour of Aboriginal claimants.<sup>11</sup> Yet, Chief Justice Lamer failed to use the principles to guide his analysis. Now, section 35(1) only protects an activity if it is an “element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”<sup>12</sup> Chief Justice Lamer's approach emphasizes the Aboriginal in Aboriginal peoples' rights, based on stereotypical ideas of Indigeneity.<sup>13</sup> This approach undermines the recognition of Indigenous peoples as peoples who are equal to other peoples of the world. It further legitimizes the power of Canadian law over Indigenous laws.

5 James (Sa'ke'j) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights* (Saskatoon, SK: Native Law Centre, 2006) at 34.

6 *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

7 *Ibid.*

8 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

9 *Sparrow*, *supra* note 6.

10 *Ibid.*

11 *R v Van der Peet*, [1996] 2 SCR 507 at paras 22–25 [*Van der Peet*].

12 *Ibid* at para 46.

13 John Borrows, “The Trickster: Integral to a Distinctive Culture” (2005) 8:2 *Const Forum* 27 at 28–29.

In setting out the scope of section 35(1) rights, Chief Justice Lamer highlighted a new purpose of section 35(1): “what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.... [T]he aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>14</sup>

According to Chief Justice Lamer, section 35(1) does not ensure space for Indigenous peoples’ laws when defining Aboriginal rights. The purpose is to reconcile the Crown’s assertion of sovereignty (and the right to impose a new legal order) with pre-existence of Aboriginal societies.<sup>15</sup> Chief Justice Lamer cites the US case *Johnson v M’Intosh*<sup>16</sup> to support his understanding of the purpose of section 35 rights: “aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations.”<sup>17</sup> Chief Justice Lamer omits to mention that Chief Justice Marshall justified his decision on the basis that Indian tribes “were fierce savages whose occupation was war.”<sup>18</sup> Reliance on the Marshall trilogy principles without acknowledging the basis of those principles allows Chief Justice Lamer to “adopt language and propose concepts that appear enlightened on their face but that actually are limited to formalizing the process of colonization.”<sup>19</sup> As long as Chief Justice Lamer’s approach to defining Aboriginal rights prevails, section 35(1) will fail to address the negative impacts of colonization on Indigenous peoples, including the imposition of a new legal system.

In *Van der Peet*, Chief Justice Lamer noted that the test for Aboriginal rights, which required protected activities to be traced back to the point of colonial contact, would not work for Metis people, one of the three constitutionally protected Aboriginal peoples.<sup>20</sup> This recognition that the test could not universally apply to all Aboriginal people, despite one common constitutional provision protecting rights of all Aboriginal people, is yet another indication of the flawed nature of Chief Justice Lamer’s approach. When it came time to consider the scope of Metis peoples’ rights, the court in *R v Powley* created a legal definition of Metis and modified the *Van der Peet* test to accommodate the post-contact ethnogenesis of the Metis peoples.<sup>21</sup>

*R v Powley* is yet another example in which the court placed itself in the position of defining Aboriginal people (Metis people specifically this time) and perpetuating the colonial relationship between Indigenous peoples and the state. Metis peoples’ rights are also entrenched in backward-looking ideas of indigeneity, with Metis people having to trace their rights and identity back to a period post-contact but pre-Canadian control.<sup>22</sup> This again undermines the recognition of Metis people’s right to self-define according to their own legal traditions and prioritizes the Canadian legal system. While there has been limited recognition of Indigenous legal traditions within section 35(1) jurisprudence, the court has failed to fully accept these legal traditions as the foundations for Indigenous peoples’ rights protected under section 35(1).

14 *Van der Peet*, *supra* note 11 at para 31.

15 *Ibid* at para 57.

16 *Johnson v M’Intosh*, 21 US (8 Wheat) 543 (1823) [*Johnson*].

17 *Van der Peet*, *supra* note 11 at para 36.

18 *Johnson*, *supra* note 16.

19 D’arcy Vermette, “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Aboriginal People” (2011) 29:1 Windsor YB Access Just 54 at 56.

20 *Van der Peet*, *supra* note 11 at paras 66–67.

21 *R v Powley*, 2003 SCC 43 at para 36, [2003] 2 SCR 207.

22 *Ibid* at para 37.

Recently, Canada has expressed its full commitment to UNDRIP: “We intend nothing less than to adopt and implement the Declaration in accordance with the Canadian Constitution.... By adopting and implementing the Declaration, we are breathing life into section 35 and recognizing it as a full box of rights for Indigenous peoples. Canada believes that our constitutional obligations serve to fulfill all the principles of the Declaration, including ‘free, prior and informed consent.’”<sup>23</sup>

To fully implement UNDRIP, the test to prove Aboriginal rights and the ability to justify infringements of those rights must be reconsidered. Implementing UNDRIP provides a framework for addressing the disconnect between Canadian law and Indigenous law, moving away from the current colonial relationship toward a nation-to-nation relationship, because UNDRIP recognizes that Indigenous peoples’ rights are based in Indigenous peoples’ own legal traditions.

## UNDRIP

Canada’s commitment to implement UNDRIP presents another moment to reconsider the relationship between the Crown and Indigenous peoples, including how Indigenous peoples’ rights are defined and protected. At the international level, UNDRIP is necessary in part due to the failure of the general, existing human rights regimes to afford appropriate protection for Indigenous peoples’ rights. As will be discussed in this section, domestically, UNDRIP is necessary to move beyond the interpretations of section 35 that perpetuate definitions of Indigenous peoples’ rights based on a colonial understanding of those rights because UNDRIP grounds Indigenous peoples’ rights in Indigenous legal traditions.

Some may attempt to limit the impact of UNDRIP by emphasizing the non-binding nature of declarations. While a declaration does not create directly enforceable, binding legal obligations on a state in and of itself, “soft law cannot be simply dismissed as non-law.”<sup>24</sup> According to the United Nations, “a ‘declaration’ is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.”<sup>25</sup> There is a strong expectation and obligation for states to implement the rights set out in UNDRIP, which is, in part, demonstrated by the near consensus on the instrument.<sup>26</sup> Further, states and the United Nations recommitted to implementing UNDRIP at the World Conference on Indigenous Peoples in 2014, including through reaffirming their commitment “to 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.”<sup>27</sup> Much of the debate around the technical status of the international instrument has been a political manoeuvre to undermine its domestic application; hopefully, we can move beyond these debates, now that Canada has expressed its unconditional support, and begin the process of implementing UNDRIP in Canada.

The UNDRIP preamble tells a powerful story of the potential of UNDRIP to address the disconnect between Canadian law and Indigenous peoples’ law on defining Indigenous peoples’ rights. UNDRIP

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23 Minister of Indigenous and Northern Affairs Carolyn Bennett, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <[www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/](http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/)>.

24 Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58 ICLQ 957 at 959.

25 UN Economic and Social Council, *Commission on Human Rights: Report to the Economic and Social Council on the eighteenth session of the Commission, held at United Nations Headquarters from 19 March to 14 April 1962 inclusive*, UNESCOR, 34th Sess, UN Doc E/CN.4/832 (26 April 1962) at para 105.

26 Siegfried Wiessner claims we have now “arrived at a global consensus on UNDRIP.” Siegfried Wiessner, “Re-Enchanting the World: Indigenous Peoples’ Rights as Essential Parts of a Holistic Human Rights Regime” (2010) 15:1 UCLA J Intl L & Foreign Aff 239 at 253.

27 UN General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, GA Res 69/2, UNGAOR, 69th Sess, UN Doc A/RES/69/2 (2014) at para 3 [Outcome document].

recognizes the essential humanity of Indigenous peoples: “Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.”<sup>28</sup> UNDRIP proclaims that Indigenous peoples can no longer be denied fundamental human rights based on imperialist/racist ideas that Indigenous peoples are “fierce savages whose occupation was war”<sup>29</sup> and resultant doctrines such as discovery and *terra nullius*.<sup>30</sup> The United Nations also recognized that Indigenous peoples have a right to be recognized as Indigenous and that special protections may be necessary to ensure their inherent rights are realized.<sup>31</sup> UNDRIP recognizes that colonization occurred and had a negative impact on Indigenous peoples, in particular the dispossession from their lands, territories and resources.<sup>32</sup> It further recognizes that colonization has led to the ongoing denial of basic human rights.

The path forward requires resetting the relationship between Indigenous peoples and Canada through recognizing and protecting Indigenous peoples’ rights, according to their own legal traditions. The United Nations is “convinced that the recognition of the rights of indigenous peoples in this declaration will enhance harmonious and cooperative relations between the state and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.”<sup>33</sup> A fundamental principle of UNDRIP is the need to move from a colonial relationship in which Canada has control over all aspects of Indigenous peoples’ lives toward self-determination of Indigenous peoples.<sup>34</sup> This is an important point because many people in Canada believe that recognizing special rights for Indigenous peoples will tear Canada apart. UNDRIP explains that the denial of Indigenous peoples’ rights, and the assertion of colonial law and doctrines, is a cause of the current divisions between Indigenous peoples and the rest of Canadians.<sup>35</sup>

Finally, the United Nations “solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect.”<sup>36</sup> This is an important reminder that achieving the ends of UNDRIP requires Indigenous peoples and Canada to work together. The Canadian federal and provincial governments cannot unilaterally implement UNDRIP. In fact, unilateral action would perpetuate the problems within the current system. Rather, implementation of UNDRIP requires Indigenous peoples and Canadian governments to work together “in a spirit of partnership and mutual respect.”<sup>37</sup>

A critical distinction between rights protected under section 35(1) rights and UNDRIP is that the rights recognized in UNDRIP are defined according to Indigenous peoples’ own laws, as a fundamental aspect of self-determination of peoples. This is the major difference from the section 35(1) articulation of Indigenous rights that legitimates defining these rights through Canadian common law, as described above. Many of the rights articulated in UNDRIP refer to Indigenous laws and institutions, including

28 UNDRIP, *supra* note 1, Preamble [emphasis in original].

29 Johnson, *supra* note 16.

30 UNDRIP, *supra* note 1, Preamble.

31 *Ibid*, arts 1, 2.

32 *Ibid*, Preamble.

33 *Ibid*, Preamble [emphasis in original].

34 *Ibid*, art 3.

35 *Ibid*, Preamble.

36 *Ibid*, Preamble [emphasis in original].

37 *Ibid*.

identification of and redress for violations of cultural rights,<sup>38</sup> land rights,<sup>39</sup> membership<sup>40</sup> and the many references to consultation and participation in decision making. Remedies for past violations are to be identified in relation to Indigenous peoples' laws<sup>41</sup> and consultation should be carried out in accordance with Indigenous peoples' own laws.

Indigenous legal institutions are also protected under UNDRIP,<sup>42</sup> including as appropriate venues for the expression or exercise of rights. Article 5 explicitly recognizes that "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." The flip side of the recognized role of Indigenous legal institutions is the need for Canadian legal institutions to exercise restraint when dealing with Indigenous peoples' rights. This is one of the greatest failures of the SCC when addressing rights under section 35(1). Rather than using Canadian law to define Indigenous rights, Canadian law should simply refer to Indigenous laws and institutions to articulate and protect the rights as indicated in UNDRIP.

Implementation is key to giving effect to UNDRIP and moving past the current colonial relationship. To implement UNDRIP, Canadian constitutional law must shift in its approach to defining Indigenous peoples' rights toward ensuring that the rights are defined according to Indigenous peoples' legal traditions. Ensuring that the rights protected under section 35(1) align with UNDRIP will mean that Indigenous peoples' rights will continue to be recognized in the highest law of the land.

States have reiterated their support for implementing UNDRIP or to "achieve the ends of the Declaration"<sup>43</sup> in the outcome document of the World Conference on Indigenous Peoples in September 2015. While Canada could be viewed as having broken international consensus when it registered its concerns with the outcome document at the World Conference, Canada has now expressed its unqualified support for UNDRIP. The question remains: how will Canada work toward implementing UNDRIP in Canada?

## Moving Forward

Moving forward, beyond a colonial relationship toward a nation-to-nation relationship, requires working together to achieve the ends of UNDRIP. One of the best ways to achieve this in Canada is to reinterpret the scope of section 35(1)'s protection of Aboriginal and treaty rights to align with the

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38 *Ibid*, art 11 states:

11(1) Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

11(2) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

39 *Ibid*, art 26(3) states: "States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." *Ibid*, art 27 states: "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."

40 *Ibid*, art 33(1) states: "Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live." *Ibid*, art 33(2) states: "Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures."

41 *Ibid*, art 40 states: "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights."

42 *Ibid*, Preamble.

43 *Outcome document*, *supra* note 27 at para 7.



standards set out in UNDRIP. This will require moving past the limited interpretation set out by the SCC in *Van der Peet* and ensuring the rights are defined according to Indigenous peoples' own legal traditions, as provided in UNDRIP.

This idea of revisiting an issue already decided is one that the SCC has recently confronted in the areas of assisted suicide and prostitution. When the SCC was faced with the constitutionality of the Criminal Code's prostitution provisions, the SCC held that an issue can be revisited when "new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."<sup>44</sup> In *Carter*, the court recognized that it had already upheld a complete prohibition against physician-assisted suicide in *Rodriguez*.<sup>45</sup> After reviewing ongoing debate domestically and internationally, as well as several attempts to introduce legislation, the court concluded that these ongoing debates meant the issue was a live issue and ripe for reconsideration.<sup>46</sup> Based on these criteria, UNDRIP presents such a fundamental shift in the paradigm for recognizing Indigenous peoples' rights that it warrants moving past the *Van der Peet* approach and finding a new, more appropriate way to articulate the scope of section 35(1).

Moving past the "central and integral to the distinctive culture" test does not require setting aside all existing jurisprudence. Greater reliance on the approaches of Justices Claire L'Heureux-Dubé and Beverley McLachlin (now Chief Justice) in *Van der Peet* would help shift the law toward recognizing Indigenous peoples' rights as rights of peoples grounded in Indigenous peoples' laws. In *Van der Peet*, Justice L'Heureux-Dubé was critical of Chief Justice Lamer's approach because "an approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away."<sup>47</sup> Justice L'Heureux-Dubé's approach focused on the significance of the activity to Aboriginal people, and not merely on the activity itself.<sup>48</sup> She focused on preserving Aboriginal peoples and proposed protecting "all practices, traditions and customs which are connected enough to the self-identity and self-preservation of organized aboriginal societies."<sup>49</sup> She would have extended protection to practices, traditions and customs that "maintain a continuing relevance to the aboriginal societies as these societies exist in the contemporary world."<sup>50</sup> Justice McLachlin's approach based the rights on the prior legal regime that gave rise to these rights.<sup>51</sup> Between these two approaches is the recognition of the need to protect the "peoples" in Indigenous peoples, based on their own legal traditions.

The SCC has recognized the ongoing role of Indigenous legal traditions in Canada. In *Mitchell*, Chief Justice McLachlin noted "the doctrine of continuity, which governed the absorption of aboriginal laws and customs into the new legal regime upon the assertion of Crown sovereignty over the region."<sup>52</sup> It is important to note that it is inappropriate for the Canadian common law to take over Indigenous law. Rather, Indigenous peoples have a right to continue their own legal traditions as a basis for their rights,

<sup>44</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 44, [2013] 3 SCR 1101.

<sup>45</sup> *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, cited in *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [Carter].

<sup>46</sup> *Carter*, *supra* note 45 at paras 6–10.

<sup>47</sup> *Van der Peet*, *supra* note 11 at para 154.

<sup>48</sup> *Ibid* at para 157.

<sup>49</sup> *Ibid* at para 162.

<sup>50</sup> *Ibid* at para 173.

<sup>51</sup> *Ibid* at para 230.

<sup>52</sup> *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 62, [2001] 1 SCR 911.

as set out in UNDRIP. According to UNDRIP, Canadian law should simply be acknowledging or ensuring space for those legal traditions.

A starting point for the conversation on how to begin making space for Indigenous legal traditions is to accept that these conversations cannot occur on the global level, but need to happen at the national and local levels. Different Indigenous peoples may have different aspirations for the extent of the operation of their legal traditions within Canada. Different Indigenous peoples will have different understandings of their rights and responsibilities, as Indigenous legal systems vary across Canada. But, throughout central Canada, making space for Indigenous legal traditions includes a need to begin to uphold the original spirit and intent of Treaties 1 to 11. While the possibilities are endless, what follows are a couple of ideas to begin the conversations.

International human rights standards, such as UNDRIP, provide guidance on how to begin the process of making space for Indigenous legal traditions. For example, a foundational aspect of UNDRIP is the right of Indigenous peoples to participate in decision making when their rights are impacted, according to their own traditional decision-making processes. If Canada were to begin to embrace this right of participation, then many more decisions (including resource development decisions) would take into consideration Indigenous laws on land and resource use.

According to UNDRIP, Indigenous peoples have the right to determine their own membership. The Canadian governments and courts must stop interfering with such internal membership decisions of Indigenous peoples, with the proviso that these internal decisions uphold fundamental human rights norms. Governments and Indigenous peoples can conclude agreements to recognize Indigenous peoples' right to control the legal systems within their own territories. This could include agreements that move beyond administering Canadian criminal law to agreements recognizing the right of Indigenous peoples to use their own criminal law within their territory.

Canadian judges need to recognize the limitations of their legal education and their ability to interpret Indigenous legal traditions. There should be continuing judicial training opportunities for learning more about Indigenous legal traditions in communities, on the land from Indigenous elders. Another suggestion is to treat Indigenous law as foreign law in Canadian courts, which removes the need for Canadian judges to interpret Indigenous law.<sup>53</sup> The Federal Court Indigenous Bar Association ~ Aboriginal Law Bar Liaison Committee developed "Practice Guidelines for Aboriginal Law Proceedings," which includes discussions on oral history and the role of elders in Aboriginal law proceedings, as well as on other practical issues in actions, judicial reviews and dispute resolution options.<sup>54</sup> Lawyers who work with Indigenous peoples (either through section 35(1) claims or in other areas) must have an understanding of Indigenous legal traditions. Governments should also learn about Indigenous legal traditions by going to ceremonies and sitting with Indigenous elders. To help this process of learning and using Indigenous law, Val Napoleon and Hadley Friedland have developed an approach for applying common law legal analysis and synthesis to Indigenous stories, narratives and oral histories.<sup>55</sup>

The inclusion of Indigenous legal traditions in Canada must allow for these systems to evolve and not be frozen in time. John Borrows maintains that "traditions can be positive forces in our communities if they exist as living, contemporary systems that are revised as we learn more about how we should live

53 Karen Drake, "Decolonizing the Courtroom: A Trial Lawyer's Guide to Treating Indigenous Law as Law" (presented at Indigenous Bar Association, Academics Forum, Vancouver, 16 October 2016) [unpublished, draft on file with author].

54 Federal Court Indigenous Bar Association ~ Aboriginal Law Bar Liaison Committee, "Practice Guidelines for Aboriginal Law Proceedings: April 2016", online: <[http://cas-cdc-ww02.cas-satj.gc.ca/ftc-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20\(En\).pdf](http://cas-cdc-ww02.cas-satj.gc.ca/ftc-cf/pdf/Aboriginal%20Law%20Practice%20Guidelines%20April-2016%20(En).pdf)>.

55 Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions Through Stories" (2016) 61:4 McGill LJ 725 at 725.

with one another.”<sup>56</sup> In revitalizing Indigenous legal traditions, we must be careful to not romanticize Indigenous traditional legal systems by overstating traditional ideas of equality, as well as to be cautious when presented with fundamentalists’ views of Indigenous laws that purport to identify pure or true traditions.<sup>57</sup> Providing space for Indigenous legal traditions to evolve recognizes that “the teachings may be unchanging, but their application and sometimes even the interpretation changed over time.”<sup>58</sup> Finally, where Indigenous legal traditions did not historically meet contemporary international human rights standards, the traditions must continue to evolve.

International human rights norms should continue to guide the development of both Canadian and Indigenous legal traditions. At the general and national level, the protection of Indigenous peoples’ rights under section 35(1) should align with the broad range of international human rights, beyond just UNDRIP, for the scope of these rights to be fully appreciated. This includes the International Convention on the Elimination of All Forms of Racial Discrimination;<sup>59</sup> the International Covenant on Civil and Political Rights;<sup>60</sup> the International Covenant on Economic, Social and Cultural Rights;<sup>61</sup> the Convention on the Elimination of All Forms of Discrimination Against Women;<sup>62</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>63</sup> the Convention on the Rights of the Child;<sup>64</sup> and the Convention on the Rights of Persons with Disabilities.<sup>65</sup> At the local and practical implementation level, these general international standards must be implemented in accordance with Indigenous peoples’ own legal traditions. Bringing constitutional law and the protections of section 35(1) together with international human rights law and Indigenous laws can reset the current relationship between Indigenous peoples and the Crown, moving it toward a nation-to-nation relationship.

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<sup>56</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto, ON: University of Toronto Press, 2010) at 8.

<sup>57</sup> Emily Snyder, “Indigenous Feminist Legal Theory” (2014) 26 CJWL 365 at 398.

<sup>58</sup> Tracey Lindberg, “Critical Indigenous Legal Theory Part 1: The Dialogue Within,” (2015) 27 CJWL 224 at 232.

<sup>59</sup> 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, ratified by Canada 14 October 1970).

<sup>60</sup> 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976).

<sup>61</sup> 16 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force 3 January 1976).

<sup>62</sup> 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>63</sup> 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, ratified by Canada 24 June 1987).

<sup>64</sup> 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990).

<sup>65</sup> 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008, ratified by Canada 11 March 2010).



# “We have never been domestic”

## State Legitimacy and the Indigenous Question



Joshua Nichols

The Canadian government is currently examining what it means to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>1</sup> The most likely approach is to adapt UNDRIP to the existing juridical framework for Aboriginal rights and title under section 25 of the Charter,<sup>2</sup> section 35 of the Constitution Act, 1982<sup>3</sup> and section 91(24) of the Constitution Act, 1867.<sup>4</sup> While this could well seem to be the best approach to take when adopting an international declaration into constitutional law, it is not advisable in this area. The standards of UNDRIP should instead be used as a means to expose the problems with the current framework and to change the law by removing the doctrine of discovery from Canadian law. In order to see why the existing framework for Aboriginal rights and title is so problematic, we need to consider the history of the struggle for Indigenous self-determination in Canada over the last 240 years. This offers us a different perspective on the nature of the constitutional relationship between the Crown and Aboriginal peoples. A more historically informed and circumspect approach to the question of implementation offers the Canadian government the rare opportunity

1 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007), online: <[www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)>.

2 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

4 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix 11, No 5.

to be a true world leader in the area of Indigenous rights. By using UNDRIP to revitalize the current body of law and remove the existing barriers to self-determination, it is possible to foster a real nation-to-nation relation and restart the currently stalled process of reconciliation.

The question of implementation may be unprecedented in Canadian law, and as such it extends before us as part of the vast and unexplored territory of reconciliation. It is tempting to cast our gaze to the horizon and try to anticipate the path ahead. Justice Ian Binnie's words from *Beckman v Little Salmon/Carmacks First Nation* provide us with some guidance on how the courts are currently finding their way: "the future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards."<sup>5</sup>

This approach captures what has become of reconciliation in the courts: they have, in effect, crafted it into a blank map of the future. The government has taken it as their framework and now seems poised to continue the 150-year-old push into a future that could somehow escape the realities of its past. But attempting to survey the future is a risky venture; more often than not, it is the province of prophets and fortune tellers. If the way forward has little to offer us, how are we to get our bearings? How can we bring reconciliation back from this peculiar holiday?

My response is that we begin by refusing the temptation to look toward blank maps of the future, with their endless promises of a reconciliation *to come* — whose reality in the present is always confined to being simply a reconciliation *to the status quo*. In order to achieve authentic reconciliation, we need to ask what reconciliation means by looking behind us: we need a reconciliation with recollection. This means that the question of implementation cannot be limited to the abstract and formal application of a domestic constitutional "framework" to an international declaration. This exercise simply uses one framework to determine the measure of the other, which is as pointless as holding something against its own shape and seeing that it fits.<sup>6</sup> If reconciliation is going to come back from holiday, the question of implementation has to begin from the context of settler colonialism. This means that it must begin by acknowledging that the relationship between the struggle for Aboriginal self-government and international law is by no means a new one. Nor is implementation merely a domestic issue. It is, as Sa'ke'j Henderson rightly states, "part of the unfinished business of decolonization."<sup>7</sup>

In order to address the question of implementation, I will provide a sketch of the various points of convergence and overlap that connect the struggle for Aboriginal self-government in Canada and the international project of decolonization beginning in the 1920s. This is a rough and very limited sketch of a vast territory.<sup>8</sup> Its purpose is to show that the struggle for Aboriginal self-government has never been simply a domestic matter. This shows that the stakes of the Indigenous question are not limited to Canadian reconciliation; rather, it extends to the very future of popular sovereignty as the legitimating principle for political organization. In order to see these stakes, I argue that we must reject the simplistic vision of historicism that serves to ground the myth of the unitary state and its unified and singular people. This means coming to grips with the fact that the struggle for Aboriginal rights and title *was never merely a domestic matter*. The prospect of the implementation of UNDRIP is thus not akin to the sudden arrival of a stranger; rather, it is part of the 240-year-old tradition of Aboriginal constitutionalism and diplomacy.

5 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103.

6 Ludwig Wittgenstein, *Philosophical Investigations*, 3rd ed (Oxford, UK: Blackwell, 2001) at s 216.

7 James Sa'ke'j Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon, SK: Purich Publishing, 2008) at 34.

8 A more adequate approach to it would be to adopt a comparative and international focus. This would begin by exploring the question of Indigenous self-determination in multiple settler colonial contexts and how these sets of laws, policies, practices and institutions (this family of Crown machines) related both to one another and to the development of international legal institutions in the twentieth century. It is, in my opinion, not simply chance that the mandate system of the League of Nations so strongly resembles the Crown machinery that we find preceding it in dominions such as Canada. Given the focus of my current investigation, this broader project can only be seen as a possible line of future inquiry.

## Inter and Intra-national Struggles of Decolonization

There is a pattern of criss-crossing and overlapping lines that connects the struggle for Aboriginal self-government in Canada with the international process of decolonization. The Six Nations presenting their case at the League of Nations in the 1920s (a tactic that was also used by the Maori during the same period) and the *Lovelace* case in the 1970s clearly show that international law has always been part of the conversation in Canada.<sup>9</sup> It has been a part of each major shift in Canadian Indian policy. This should be no surprise. After all, the international legal institutions of the twentieth century were designed to restructure the colonial system of the preceding century.<sup>10</sup> From their inception, these institutions became avenues for all colonized peoples (those subjected to the external as well as the internal forms of colonization) to contest the legitimacy of the system created by the colonizing powers. This meant that the language and practices of colonial legitimation were being simultaneously contested and re-asserted at both the intra- and international stage. The arguments that Indigenous peoples in Canada have been continually asserting over the last 240 years (i.e., what James Tully refers to as the “prior and coexisting sovereignty argument” and many others — following Russel Lawrence Barsh and Henderson — have called “treaty federalism”) were applied to the emerging field of international legal discourse.<sup>11</sup> They applied and adapted the historical and contextual resources of the “prior and coexisting sovereignty argument” to the concept of self-determination on the international stage. This means that the self-determination argument was never a separate and discrete line, but rather a related and parallel path.

This can be easily seen as soon as we begin to consider the course of the intra-national struggle in Canada in relation to the development of international law. The second wave of international Indigenous diplomacy (following the failure of the League of Nations) begins with the rise of international human rights in the 1960s.<sup>12</sup> In the mid-1960s, the Declaration on the Elimination of All Forms of Racial Discrimination<sup>13</sup> and, a few years later, the International Convention on the Elimination of All Forms of Racial Discrimination, provided a definition of “racial discrimination” that served to delegitimize the maintenance of separate rights for different racial groups.<sup>14</sup> While it did not mention Indigenous peoples, it was clear that it could be used to terminate their treaty rights and this is precisely what the White Paper set out to do in 1969.<sup>15</sup> This (unintentional) shift against the rights of Indigenous peoples was counterbalanced by the Human Rights Covenants in 1966 (the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights), as the first article of both asserts that “All peoples have the right of self-determination.”<sup>16</sup> This brought a new wave of international diplomatic efforts on the part of Indigenous peoples. It was through their

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9 Henderson, *supra* note 7 at 24.

10 See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: Cambridge University Press, 2005) and Marti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, UK: Cambridge University Press, 2001).

11 James Tully, *Public Philosophy in a New Key*, vol 1 (Cambridge, UK: Cambridge University Press, 2008) at 278 [Tully, *Public Philosophy*]; Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, CA: University of California Press, 1980).

12 Henderson, *Indigenous Diplomacy*, *supra* note 7 at 24.

13 *Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res 1904 (XVIII), UNGAOR, 18<sup>th</sup> Sess, UN Doc A/RES/18/1904 (20 November 1963).

14 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), online: <[www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx)>.

15 Ministry of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy (The White Paper)*, Queen’s Printer Catalogue No R32-2469 (Ottawa: Ministry of Indian Affairs and Northern Development, 1969).

16 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force 3 January 1976), online: <[www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx)>; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), online: <[www.ohchr.org/en/professionalinterest/pages/ccpr.aspx](http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx)>.

concerted efforts that in 1972 — a year before the court released its decision in *Calder* — the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights appointed a special rapporteur to study “the problem of discrimination against Indigenous populations.”<sup>17</sup> In 1975 the International Court of Justice (ICJ) released its advisory opinion in the *Western Sahara* case.<sup>18</sup> Tully provides a useful summary of the opinion:

...the ICJ rejected the doctrine of discovery and asserted that the only way a foreign sovereign could acquire a right to enter into territory that is not *terra nullius* is with the consent of the inhabitants by means of a public agreement. The Court further advised that the structure and form of government and whether a people are said to be at a lower level of civilization are not valid criteria for determining if the inhabitants have rights, such as the right of self-determination. The relevant consideration is if they have social and political organization.<sup>19</sup>

This served as yet another blow to the nineteenth-century doctrines that had legitimated the European colonial projects. Its ramifications were not (and could not be) limited to those who experienced an external form of colonization. It added to the building international momentum on the question of Indigenous self-determination. In 1977, at the International NGO Conference on Discrimination Against Indigenous Populations in the Americas in Geneva, Indigenous leaders moved toward developing human rights standards appropriate for this concern. The result of this diplomatic effort was the Declaration of Principles for the Defense of Indigenous Nations and Peoples of the Western Hemisphere.<sup>20</sup> This was later followed in 1982 by the formation of a Working Group on Indigenous Populations. The group was established within the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights. This was the beginning of the long and arduous process that resulted in UNDRIP in 2007.<sup>21</sup> While this constitutes a major advance in the Indigenous struggle for self-determination, it is also not without its limitations. As Tully notes, “under the 2007 Declaration, the transcendent priority of existing exclusive state jurisdiction and territorial integrity is reproduced rather than questioned by the way the distinction between internal and external self-determination can be interpreted.”<sup>22</sup> The main issue to be decided concerns the conflict between territorial integrity (article 46) and self-determination (articles 3 and 4).<sup>23</sup> This conflict is not a new one. It has shaped the course from the intra- to the international legal stage.

The rejection of the Indigenous question at the League of Nations by the settler states and their colonial powers (via the concept of territorial integrity) was extended into the United Nations.<sup>24</sup> This extension can be seen in the General Assembly’s Declaration on the Granting of Independence to Colonial Countries and Peoples, which legitimated the dismantling of the external colonial projects while

17 Sub-commission on Prevention of Discrimination and Protection of Minorities, José R Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, E/CN.4/Sub.2/1986/7/Add.4 (1987).

18 *Western Sahara*, Advisory Opinion [1975] ICJ Rep 12.

19 Tully, *Public Philosophy*, *supra* note 11 at 281.

20 *Declaration of Principles for the Defense of Indigenous Nations and Peoples of the Western Hemisphere*, UN Doc E/CN.4/Sub.2/476/Add.5, Annex 4 (1981).

21 UNDRIP, *supra* note 1.

22 Tully, *Public Philosophy*, *supra* note 11 at 285.

23 UNDRIP, *supra* note 1. This conflict also necessarily concerns the phrase “free, prior and informed consent,” as the concept of “consent” presumes self-governance and jurisdiction over territory (articles 10, 11, 19, 28 and 29).

24 I am referring to the Six Nations status case that Chief Deskaheh (also known as Hi-wyi-iss and Levi General) brought to the attention of the League of Nations in 1923. See Deskaheh, “The Redman’s Appeal for Justice,” cited in *Strange Visitors: Documents in Indigenous-Settler Relations in Canada from 1876*, Kevin D Smith, ed (Toronto, ON: University of Toronto Press, 2014) at 143–48. While he was unable to get a formal hearing of the case (due in large part to British sabre rattling), his efforts generated significant international attention and prompted the Dominion of Canada to publish a formal response in the official journal of the League of Nations in 1924. See “Appeal of the ‘Six Nations’ to the League” (1924), *League of Nations Official Journal* vol 6 at 829.



excluding the internal ones.<sup>25</sup> The so-called “saltwater thesis” denied Indigenous peoples the right to self-determination. The basis of its denial was, once again, territorial integrity. It was attractive to the newly independent states that had inherited the deep social and cultural fractures left by the colonial powers and were concerned by the prospect of intra-national division.

The basic structure of the territorial integrity argument was by no means new to Aboriginal peoples. It exists within the 1888 decision of *St. Catherine’s Milling*, which positions them (without their consent) as already a part of a state.<sup>26</sup> It magically converts their claims to their lands and the pre-existing nation-to-nation treaties as being little more than gifts from the imperial Crown that become the burdens of the Dominion — burdens that, as we well know, can be unilaterally abandoned, or, to use the legal term “extinguished.” This magical argument hides its presumptions by presenting itself as a simple application of the rules of formal legal interpretation. This enables Lord Watson to read section 91(24) as a complete and final grant of unilateral power over Indians and their lands.<sup>27</sup> What it ignores (and must always refuse) is any and all references to the context for this constitutional provision. In order to continue to serve as a foundation, it requires that either the British Crown be able to give what it did not have or that it be able to interpret (unilaterally) all pre-existing agreements in its favour. Once its foundations are laid bare, all that remains of it is that “might makes right.” This absence of a foundation is propped up by the pernicious and absurd legal fiction known as the doctrine of discovery (a fiction based on what I have called “Bluebeard logic”<sup>28</sup>) and theatrical displays of violence (such as the use of police force to suppress the Six Nations in the 1920s, and Canada’s use of the police and military power to respond to the resistance of the Mohawk of Kanesatake in the Oka Crisis in 1990).<sup>29</sup>

The fixed nature of this response can be seen in the similarity between the arguments used by Canada against the Six Nations in the 1920s and those used against the Mi’kmaw Nation in the 1980s. In 1980 the United Nations Human Rights Committee accepted a complaint from the Mi’kmaw Nation that alleged violations of their right of self-determination. Just one month after Canada received notice of the complaint from the Secretary-General, the Sûreté du Québec (provincial police) conducted a raid on the Mi’kmaw Reserve at Listuguj. Canada followed this action with a formal response to the Mi’kmaq. Their position was simple: self-determination “cannot affect the national unity and territorial integrity of Canada”; and the treaties “are merely considered to be nothing more than contracts between a sovereign and a group of its subjects.”<sup>30</sup> Both the pattern of response and its conceptual basis are the same.

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25 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514, UNGAOR, 15th Sess, Supp No 16, UN Doc A/4684 (14 December 1960), online: <[www.un.org/en/decolonization/declarations.shtml](http://www.un.org/en/decolonization/declarations.shtml)>. See also Tully, *Public Philosophy*, *supra* note 11 at 283.

26 *St Catherine’s Milling and Lumber Co v R*, [1888] UKPC 70, 14 App Cas 46 [*St Catherine’s Milling* cited to App Cas].

27 *Ibid* at 59.

28 Joshua Nichols, *Reconciliation and the Foundation of Aboriginal Law in Canada* (DCL, University of Victoria, 2017) at 18: “There is a kind of logic that is reminiscent of the folktale *Bluebeard* at play here: a castle is opened up for us as the reader and we are welcome to explore each and every room with the exception of one. This excluded room is an open secret. We are simply told not to use our key to go inside. Once we violate this prohibition and enter the room we see its simple truth: it conceals violence without measure or proportion. We also see that the violence and death that it hides (which is in a certain way, flat, or banal, as there is no real magic to be seen here) is, at least to my mind, the actual foundation of the castle and the explanation of the bizarre color that marks the owner of the castle. The name of the door within the castle is, for the purposes of my analogy, sovereignty. This *Bluebeard logic* can be found in any number of political thinkers who propose to offer a system of thought that explains away the foundations of law by marking off a ‘state of nature’ (or other open secret) in which the rules are paradoxically presented as both entirely a part of and entirely separate from the rest of the system.”

29 For more on the Oka Crisis and its context, see Gerald R Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Oxford, UK: Oxford University Press, 1995) at 93–114.

30 “Response of the Government of Canada respecting Communication submitted by Mr. Alexander Denny on behalf of the people of the Mi’kmaq tribal society on September 30, 1980 [date of initial letter]” (21 July 1981), at 2 and 4, online: <[www.usask.ca/nativelaw/unhrfn/mikmaqfiles/No4.pdf](http://www.usask.ca/nativelaw/unhrfn/mikmaqfiles/No4.pdf)>. See also Henderson, *supra* note 7 at 38–39.

The conceptual basis of this position appeared again in 1993 at the World Conference on Human Rights in Vienna, during the drafting of the Vienna Declaration and Programme of Action.<sup>31</sup> Canada, along with Indonesia and India, took the position that Indigenous peoples should be described as a “people” and not “peoples.” The basis of this absurd position is that the use of the singular term “people” would serve as a kind of formalistic bar to the application of human rights doctrines so that these states could continue treating Indigenous peoples as a minority.<sup>32</sup> Quite simply, Canada has continually maintained that Aboriginal peoples can only ever be a minority or a secessionist movement. The process of reconciliation has been constructed on this very basis; it is a reconciliation to the Crown’s unilateral power over Aboriginal peoples and their lands via the “broad view” of section 91(24) of the Constitution Act, 1867. Aboriginal peoples have continually responded to this argument by reminding the Crown of their treaties and the nation-to-nation relationship that the Royal Proclamation of 1763 recognized.<sup>33</sup>

This context helps to frame exactly what is at stake in implementation. The stakes are, quite simply, the future of popular sovereignty as the legitimating principle for political organization. This could well strike some readers as little more than hyperbole, but I would ask those readers to pause and consider the situation carefully. The conflict between the concepts of territorial integrity and self-determination is a foundational one. The question of Indigenous self-determination exposes this clearly. If the Westphalian model of the state is to be retained, then we must refuse to recognize Indigenous peoples as peoples. They must be nothing more than a minority within currently existing states.<sup>34</sup> The cost of this position is high; it must withstand the historical reality that Aboriginal peoples did not consent to this relationship. This means it must either simply draw a line that forbids inquiry into the historical warrant of sovereignty or judicially reinterpret each and every piece of historical evidence. Both of these options rely on unilateral power over Aboriginal peoples and neither of them are convincing. They are attempts to finesse rather than face the challenge of reconciliation. Tully draws out the consequences of this strategy: “*Unilateral* defence of the status quo, unilateral constitutional change and unilateral secession are all unjust in the sense that they violate with respect to other members the very principle that is invoked to justify the act. Moreover, such unilateral acts are unstable, for the disregarded members are seldom silenced for long. All the force of existing society or of the secessionist state cannot stabilize effectively the unjust situation or gain the recognition they need from others, as we have seen in many tragic cases.”<sup>35</sup>

The implications are unavoidable; either find a way to finesse legitimation (and paint continued resistance as secessionist) or forgo legitimation altogether. In any case, what is clear at this point is that the Westphalian model of the state is caught in this dilemma. Simply put, the picture of the ship of state is no longer a sustainable one. Clifford Geertz captures the situation:

The diffusionist notion that the modern world was made in northern and western Europe and then seeped out like an oil slick to cover the rest of the world has obscured the fact...that rather than converging toward a single pattern those entities called countries were ordering themselves in novel ways, ways that put European conceptions, not all that secure in any case, of what a country is, and what its basis is, under increasing pressure. The genuinely radical implications

31 UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

32 Henderson, *supra* note 7 at 53, 122.

33 *Royal Proclamation, 1763* (3 Geo III), reprinted in RSC 1985, Appendix II, No 1.

34 Will Kymlicka’s work on the meaning of the term “minority” is especially helpful on this point as he provides a clear distinction between an “ethnic minority” and a “national minority.” As he so clearly puts it, “the basic claim underlying self-government rights is not simply that some groups are disadvantaged within the political community (representation rights), or that the political community is culturally diverse (polyethnic rights). Instead, the claim is that there is more than one political community, and that the authority of the larger state cannot be assumed to take precedence over the authority of the constituent national communities. If democracy is the rule of ‘the people’, national minorities claim that there is more than one people, each with a right to rule themselves.” See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, UK: Oxford University Press, 1995) at 182.

35 Tully, *Public Philosophy*, *supra* note 11 at 201 [emphasis in original].

of the decolonization process are only just now coming to be recognized. For better or for worse, the dynamics of Western nation building are not being replicated. Something else is going on.<sup>36</sup>

It is precisely the “implications of the decolonization process” that are at stake in the question of implementation. If the Canadian government continues forward with the status quo and uses its framework to read down the right of self-determination to fit the municipal model of *St. Catherine’s Milling*, then reconciliation will continue its current holiday.<sup>37</sup> As Tully reminds us, “If the Constitution does not rest on the consent of the people or their representatives, or if there is not a procedure by which it can be so amended, then they are neither self-governing nor self-determining but are governed and determined by a structure of laws that is imposed on them. They are unfree. This is the principle of popular sovereignty by which modern peoples and governments are said to be free and legitimate.”<sup>38</sup>

The consequence is that Aboriginal peoples will effectively be left in a constitutional prison fashioned by the court and when they inquire why, the response will be that it is how power is reconciled with duty. This is not the only available course of action. It is also possible to use implementation to work through and remove the barricades of the past from the current framework. It is possible for Canada to lead the way toward a post-Westphalian model of the state that takes the open-ended plurality of contests over recognition as its starting point. This would replace the unitary model of the ship of state and its endless historical progress toward reconciliation — which has never been anything more than a theological mechanism of deferral — with the diverse and unmoving black canoe.<sup>39</sup> In other words, it is possible to use this moment as an opportunity to find a reconciliation with Aboriginal peoples and thereby shape future processes of internal self-determination.

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36 Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton, NJ: Princeton University Press, 2000) at 230–231.

37 *St Catherine’s Milling*, *supra* note 26.

38 Tully, *Public Philosophy*, *supra* note 11 at 286.

39 This is a reference to Bill Reid’s iconic sculpture *The Spirit of Haida Gwaii* and, more particularly, to James Tully’s reading of it. As Tully puts it, “the answer given by the black canoe is that, although the passengers vie and negotiate for recognition and power, they always do so in accord with the three conventions [viz. mutual recognition, consent and continuity]...we must listen to the description of each member of the crew, and indeed enter into conversation ourselves, in order to find the redescrptions acceptable to all which mediate the differences we wish each other to recognize.” See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: University Press, 1995) at 111, 212.





# Indigenous Legal Orders, Canadian Law and UNDRIP



Gordon Christie

“Indigenous law” refers not only to systems of rules or precepts but also to the authority of Indigenous communities and nations to craft their own understandings of law and the particular form and content their legal orders may take on. For the purpose of this essay, I will focus attention on the presence of Indigenous legal and political authority over Indigenous lands and waters. Indigenous law refers to the authority of particular Indigenous communities, tied to particular lands and waters, to make decisions binding all in regard to how these lands and waters are approached. This authority extends to how people living on the land properly think of their relationships to these lands — for example, in base-level terms of rights, powers and exploitation or in terms of responsibilities and stewardship.

The question, then, is how Canadian authorities might respond to the challenges of implementing provisions of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>1</sup> in light of the existence of Indigenous legal and political authority over Indigenous territories. If one were to employ the metaphor of braiding laws together, the image would then be of separate parties — the Crown and numerous distinct Indigenous communities — each enjoying authority over some common territory, each coming to the exercise of braiding with their own strands of law, and together having to work out how state law and Indigenous law could be interwoven, with guidance from international law, to form a single, strong rope.

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1 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007), online: <[www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)>.

If we began this exercise by imagining that the Canadian state and its courts engage in braiding laws the way we might imagine a single person braids a rope out of materials on hand, we would then have to begin with the notion the state has control over Indigenous law.<sup>2</sup> To think of the state as having control over Indigenous law is, however, to think of Indigenous law as being bits and pieces, constituting no more than articulated rules and principles. This effectively removes Indigenous law from the landscape. There can only be such a thing as Indigenous law if there are Indigenous legal and political authorities, those entities that determine the nature and functioning of legal orders under contemplation. To cut away the possibility these legal and political authorities exist and exercise their authority through their laws and policies is to move directly into a world where the colonial project has been completed.

The challenge as posed is significantly more pronounced than some make it out to be. While Canadian authorities might believe the task ahead is simply to work out on their own how to implement UNDRIP (perhaps with “input” from the voices of Indigenous leaders), the real task as described (if UNDRIP and Indigenous legal orders are taken seriously) is to recognize and accept strong legal pluralism and to work from that initial point.

Recommendations made in this essay incorporate principles and provisions contained in UNDRIP, as that instrument speaks clearly to the idea that Indigenous peoples possess the legal and political authority that accounts for this fact of strong legal pluralism.<sup>3</sup> Thus, while the thought is of a braiding exercise carried out by the Crown and Indigenous nations, as they go about discussing as partners how they might work together to implement UNDRIP, UNDRIP itself enters the discussion as support for the notion that this exercise must be carried out in this fashion.<sup>4</sup> One could say, then, that the reason I approach the question of braiding laws as I do is that I accept the general spirit and intent of UNDRIP. To the extent the Crown is serious in its pronouncements on implementing UNDRIP, it too would see the wisdom in approaching the task in this truly collaborative fashion.

And so we begin where we must, with multiple parties wielding authority over the same territory. How might the braiding of law unfold in this situation? Recognition and acceptance of strong forms of legal pluralism require that matters unfold through dialogue, as each source of legal and political authority must be *persuaded* to act, since *ex hypothesi* no one source of authority enjoys binding authority over

2 That the Crown has control over international law must also be imagined, but only in the sense that the Crown is entirely at its leisure to decide what aspects of international law it might bring into the domestic scene, which reflects how the state and its courts overwhelmingly think of international law.

3 UNDRIP, *supra* note 1, arts 18, 20(1), 34, *inter alia*, speak to this authority:

article 18: *Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making 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; and*

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 [emphasis added].*

4 The Preamble, for example, recognizes “the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,” while articles 18 and 19 hold that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions” and that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” *Ibid*, Preamble, arts 18, 19.

all others.<sup>5</sup> Much, then, would depend on how conversations between the Crown and Indigenous communities unfold. Nevertheless, there are historical, social and political factors that determine certain conditions and that speak to matters the Crown must attend to in order that meaningful dialogue can emerge. These factors indicate where energies of the state should be immediately directed (as we build toward a world in which meaningful dialogue can take place).

One central matter demanding attention from the state is the fact (and ongoing legacy) of colonialism.<sup>6</sup> One cannot reasonably expect dialogue to spring forth between the Crown and Indigenous communities around how UNDRIP should be meaningfully implemented without attention first being focused on the long and difficult shadow cast by a century and a half of settler colonialism. Indigenous legal and political authority has been under relentless assault since the middle of the nineteenth century, and troubling indications are that the Crown persists in thinking it can move forward today while the effects of this assault remain unresolved. Indeed, arguably the assault itself continues, as the Crown aggressively acts as though it is the sole sovereign authority over Canadian territory, all of which is also Indigenous territory.

Those few places where Indigenous legal and political authority are meaningfully exercised in the context of a relationship with the Crown must be carefully unpacked, as the more meaningful and substantial one finds the exercise of Indigenous authority, the more one simultaneously finds this is the result of relentless resistance by an Indigenous nation. Scratch the surface and one will inevitably find this resistance had to be fuelled and sustained by resources, energies and fortuitous surrounding circumstances, all in the service of a decades-long, continuous, back-breaking struggle to stand up to the force of Crown pressure and intimidation.

The Truth and Reconciliation Commission of Canada noted the background tension responsible for this seemingly endless struggle in the executive summary of its final report: “What is clear to this Commission is that Aboriginal peoples and the Crown have very different and conflicting views on what reconciliation is and how it is best achieved. The Government of Canada appears to believe that reconciliation entails Aboriginal peoples’ acceptance of the reality and validity of Crown sovereignty and parliamentary supremacy, in order to allow the government to get on with business. Aboriginal

5 This stands in contrast to most instances of “co-management” and land use planning exercises one has found emerging over the last few decades. In most cases, the Crown dictated terms of the ensuing “dialogue” concerning co-management, allowing discussion only about certain carefully defined topics. There are notable exceptions, such as the *Kunst’aa guu – Kunst’aayah Reconciliation Protocol*, an agreement reached in 2009 between the Haida Nation and the province of British Columbia. The Preamble is key in framing the agreement, as it sets out parallel understandings of the nature of the situation vis-à-vis jurisdiction and ownership of Haida Gwaii. The Haida assert that “Haida Gwaii is Haida lands, including the waters and resources, subject to the rights, sovereignty, ownership, jurisdiction and collective Title of the Haida Nation who will manage Haida Gwaii in accordance with its laws, policies, customs and traditions,” while the province asserts that “Haida Gwaii is Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.” The two parties essentially agree to disagree over this fundamental matter, so they can progress to attempting to reach agreements around land use planning and the like. This is not a process we see unfolding in most other Crown-Indigenous contexts. See “*Kunst’aa guu – Kunst’aayah Reconciliation Protocol*” (2009), online: Council of the Haida Nation <[www.haidanation.ca/Pages/Agreements/pdfs/Kunstaac%20guu\\_Kunstaayah\\_Agreement.pdf](http://www.haidanation.ca/Pages/Agreements/pdfs/Kunstaac%20guu_Kunstaayah_Agreement.pdf)>.

6 Much of UNDRIP is built in light of the history of colonialism and the effects of this history on the abilities of Indigenous peoples to manage their own lands and waters. For example, articles 25 and 26 speak to the rights Indigenous communities have in relation to traditional territories and difficulties they face in fulfilling responsibilities to lands and waters, while articles 20(2) and 28 contemplate “just and fair redress” for historical deprivations.

UNDRIP, *supra* note 1:

article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard;

article 26: (1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired;

article 20(2): Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress; and

article 28(1): Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.



people, on the other hand, see reconciliation as an opportunity to affirm their own sovereignty and return to the ‘partnership’ ambitions they held after Confederation.”<sup>7</sup>

Twenty years earlier, the same background tension was noted by the commissioners of the Royal Commission on Aboriginal Peoples: “But governments have so far refused to recognize the continuity of Aboriginal nations and the need to permit their decolonization at last. By their actions, if not their words, governments continue to block Aboriginal nations from assuming the broad powers of governance that would permit them to fashion their own institutions and work out their own solutions to social, economic and political problems. It is this refusal that effectively blocks the way forward.”<sup>8</sup>

There are at least three activities the Crown can engage in over the next few years (and decades), each of which would undo some of the harms inflicted on Indigenous communities and nations, in particular in relation to the communities’ and nations’ abilities to meet responsibilities to lands and waters to which they have been connected for many generations.

## Internal Crown Activities

One focus for immediate attention is dealing with matters internal to the Crown. At least two matters require attention, one directed toward ensuring the Crown can meaningfully and productively work with Indigenous peoples concerning land and water issues and the other directed toward effecting the massive shift in direction envisioned under strong legal pluralism.

For Indigenous communities to engage with the authority of the Crown over their traditional territories, the communities will, for the most part, need to dialogue with both the federal government and whichever provincial or territorial regime makes most decisions relating to their lands and waters. In both *Tsilhqot’in Nation*<sup>9</sup> and *Grassy Narrows*,<sup>10</sup> the Supreme Court of Canada noted a recent shift to a stronger focus on “cooperative federalism,” in particular in relation to Crown-Indigenous relations. Historically, federal-provincial cooperation regarding Indigenous issues was absent or fleeting, and usually only arose when the aim was to further negatively affect independent Indigenous legal and political authority. A tremendous amount of effort needs to go into determining how federalism can respond to the need to work within a world structured by strong legal pluralism. The onus is on the Crown to begin immediately to carry the language of cooperative federalism into new territory, where both levels of Crown authority work together with the ultimate objective of enabling cooperative relations with Indigenous authorities.

The second internal movement has to be toward adjusting the culture that infuses life within federal and provincial governments. The focus must be on coming to terms with the fact of strong legal pluralism and on effecting concomitant shifts away from current efforts to either ignore (or deny) Indigenous legal and political authority, or to attempt to tame this authority by pulling it into the orbit of state power. Adjusting culture requires several interlocking movements, as this culture affects all levels of government. Change should be initiated through top-down movement, with the highest levels of government — the prime minister or premier, Cabinet, ministers, deputy ministers and the like — leading the way, directed perhaps by either legislation or proclamations (although executive action seems sufficient for this particular movement, on both federal and provincial/territorial levels).

7 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 241, online: <[www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec\\_Summary\\_2015\\_05\\_31\\_web\\_o.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf)>.

8 Canada, Indigenous and Northern Affairs Canada, *Highlights from the Report of the Royal Commission on Aboriginal Peoples* (1996) [Royal Commission], online: <[www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637](http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637)>.

9 *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44.

10 *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] 2 SCR 447.

In concert with direction from the highest levels, education and training efforts should unfold at all levels of government. The history of colonialism — and, in the context of this discussion, specifically the history of Crown efforts to suppress and erase independent Indigenous legal and political authority in relation to lands and waters — should be made visible to all government actors, alongside discussions of theories of legitimate exercise of power in a liberal democracy. This would serve to highlight the fundamental problem facing the Crown as it attempts to exercise its authority over the geography of Canada and to make clear to all government actors that strong legal pluralism is not something to be worked toward but rather something that has always existed across this one expanse of lands and waters.

## External Crown Activities

The second set of actions lies in interaction with Indigenous communities and nations. Tremendous care needs to be taken in this regard, in full light of the fact the Crown has been the protagonist in the Crown-Indigenous relationship. Enormous problems — some seemingly intractable — plague Indigenous communities and nations as they attempt to maintain, rebuild and exercise their legal and political authority. The primary reason behind all their struggles is the history and legacy of colonial activity by the Crown.

The first move on the part of the Crown is not difficult to imagine, although it may be challenging to implement fully. The Crown must cease its aggressive activities, pulling back from the varied techniques it has employed over the years to subvert and destroy Indigenous legal and political authority. In recent decades, these techniques have become covert, as the era of open and overt colonial activity is now long past. The act of selectively choosing representatives from fractured Indigenous communities (those individuals who agree with government positions) to speak with, to fund and to elevate to positions of power must cease. All other related activities meant to further fracture communities, and to widen divisions that already exist, must likewise cease.

A challenge for the Crown, beyond these obvious moves, is in the business of repairing damage caused. The Crown cannot simply act to repair fractures or bring people together. That is essentially the business of Indigenous peoples. In many cases, however, Indigenous communities or nations cannot make significant headway without the cessation of destructive activities by the Crown. Besides renouncing and ceasing destructive activities, the Crown can also do two things. First, it can listen to Indigenous communities, stepping in when assistance is requested (and when it seems appropriate, which would likely be difficult to measure in cases where communities have been riven by generations of assault by the Crown). Second, the Crown can help provide conditions favourable to internal healing within Indigenous communities. Resources can be provided, some capacity building could take place (carefully arranged and managed), and advisers willing to collaborate with Indigenous communities could travel the country, providing outside guidance. It cannot be stressed enough how delicate all these matters would be, given the history of outside interference that indelibly marks the history of Crown-Indigenous relations.

## Education

Finally, much can be done by the state and its institutions to educate the larger Canadian population.<sup>11</sup> This includes, essentially, work within the educational structures of the country (requiring in many

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<sup>11</sup> This was called for in *Royal Commission*, *supra* note 8 (“We were told many times during our mandate that most Canadians know little of Aboriginal life and less of Aboriginal history. Information in school curriculums is limited. Media coverage is often unsatisfactory. Few governments, agencies and organizations promote awareness of Aboriginal issues among members, employees and colleagues.... Part of the answer is information. We recommend a number of steps to increase and improve the quality of information about Aboriginal people and their concerns.... We urge Canadians to become involved in a broad and creative campaign of public education.”)

instances, again, strengthening cooperative federalism). It also entails use of other varied tools available to the Crown — the funding of public forms of media to promote programming that speaks to the history of colonialism and its effects on Indigenous legal and political authority, the funding of research endeavours aimed at further enriching our collective understanding of the history of Crown-Indigenous relations and so forth.

While educational endeavours aimed at telling the truth about Canada's origins and troubling history would go a long way toward enriching the environment in which strong legal pluralism can flourish, focus can also be on telling the truth about the challenges facing the country, both Indigenous and non-Indigenous populations. The most pressing challenges are global in nature, but, as with all global matters, how regional decision-making bodies act is fundamentally important. The Crown should be turning its attention to the vast ecological problems we seem determined to bequeath to our children and grandchildren. Working in an environment accepting of strong legal pluralism can move us all toward possible solutions to these problems. As we make difficult multi-party decisions over shared lands and waters, stewardship responsibilities can move into the centre of discussions, displacing the frantic rush to resource exploitation and capitalist accumulation that is the sole source of these threats to the entire planetary ecology.

It should be appreciated this entails not just matters such as the appearance within existing environmental assessment processes of Indigenous knowledge or perspectives. For the necessary forms of braiding to occur, entire legal regimes need to be reworked from the ground up; they need to be infused with principles and values that move us all in a direction away from the neo-liberal policies and models that have come to animate so much of what passes for environmental law and natural resource management.

This essay is written in full awareness of the unlikely nature of the premise that the Crown might think seriously about engaging in braiding laws in line with principles informing UNDRIP and in light of the fact of strong legal pluralism. Nevertheless, the fact remains that only if the Crown were to make the changes recommended could we imagine a world unfolding in which Indigenous law and Canadian law are interwoven in light of principles and provisions contained in UNDRIP. Moving forward with the assumption that the Crown controls Indigenous law violates fundamental facts at play in the world around us and would signal further attempts on the part of the state to complete the project of colonialism.

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# Options for Implementing UNDRIP without Creating Another Empty Box



Jeffery G. Hewitt

From 2007 until its defeat in 2015, the Conservative Government of Canada of Stephen Harper steadfastly refused to adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>1</sup> ultimately viewing it as aspirational. Conversely, in 2016, the Liberal government of Justin Trudeau stated an intention to adopt and implement UNDRIP in accordance with the Canadian Constitution.<sup>2</sup> Is this a sea change in the relationship between Canada and Indigenous peoples or simply a dressing up of Conservative aspirations in a Liberal constitutional robe?

## Canada's International Conduct Regarding Indigenous Peoples

UNDRIP is an international declaration and therefore non-binding on Canadian courts. Canada has a long history of failing to implement non-binding matters from the United Nations in relation to Indigenous peoples. Consider that, in 2004, Special Rapporteur on the Rights of Indigenous Peoples Rodolfo Stavenhagen visited Canada and reported “unacceptable gaps between [Indigenous] Canadians and the rest of the population in education attainment, employment and access to basic social services.”<sup>3</sup> Although a number of recommendations were included in Stavenhagen’s report, none were

1 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

2 Minister of Indigenous and Northern Affairs Carolyn Bennett, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <[www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/](http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/)>.

3 Paul Joffe, “UN Declaration on the Rights of Indigenous Peoples Not Merely ‘Aspirational’” (22 June 2013), online: <<http://rights.info.yorku.ca/files/2013/06/UN-Decl-Not-merely-aspirational-June-22-13.pdf>>.

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implemented, as evidenced in a 2013 follow-up report. In 2013, Special Rapporteur on the Rights of Indigenous Peoples James Anaya declared that Canada faces a crisis when it comes to Indigenous peoples.<sup>4</sup> Anaya repeated the serious concerns set out by Stavenhagen a decade earlier. Anaya also noted that the violations committed against Indigenous peoples ranged from disrespect for treaty and land rights and unaddressed violence against Indigenous women and girls to gaps regarding access to health care, housing, education, safe drinking water and the welfare and protection of Indigenous children.<sup>5</sup> In his 2013 report, Anaya expressed particular concern about the lack of sufficient and proper consultations by Canada with Indigenous peoples to obtain their free, prior and informed consent — particularly in relation to resource extraction — as required under UNDRIP.<sup>6</sup>

Following the Liberal government's election in November 2015, Prime Minister Justin Trudeau sent a mandate letter to the Minister of Indigenous and Northern Affairs<sup>7</sup> setting out 13 priorities for the minister. Among the priorities were the following: implementation of UNDRIP; a review of the laws and policies regarding the Crown's consultation and accommodation obligation that includes Indigenous peoples in the review process; and the amendment of environmental assessment legislation to enhance the inclusion of Indigenous peoples in the process as well as in the review and monitoring of major resource development in Canada.

However, in November 2016, the prime minister announced approval of pipelines to transport fossil fuels from Canada's western provinces to various parts of the continent<sup>8</sup> without having completed a review of law and policies related to consultation with Indigenous peoples and without any enhancements to environmental assessment legislation that would require consultation with Indigenous peoples. This conduct validates the concerns expressed by Anaya in 2013 relating to a lack of consultation and consent. In sum, Canada's continued behaviour of ignoring international concerns relating to Indigenous peoples persists in spite of changes in government. Canada's intention to implement UNDRIP through section 35 of the Constitution Act, 1982<sup>9</sup> may allow for the infringement of article 10 (which prohibits the relocation of Indigenous peoples without their free, prior and informed consent), in spite of international calls for meaningful change.

## Infringement of UNDRIP through Section 35 of the Constitution Act, 1982

Section 35 forms part of Canada's Constitution, which includes the Charter of Rights and Freedoms.<sup>10</sup> Section 1 of the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In the 1986 *R v Oakes*<sup>11</sup> (*Oakes*) decision (a case challenging certain assumptions within the Narcotic Control Act<sup>12</sup> that created a reverse onus on the accused to prove their innocence), the Supreme Court of Canada (SCC) rejected the burden of a reverse onus as unconstitutional and an unreasonable limit of law in a free

4 James Anaya, "Statement Upon Conclusion of the Visit to Canada" (15 October 2013), online: <<http://unsr.jamesanaya.org/statements/statement-upon-conclusion-of-the-visit-to-canada>>.

5 *Ibid.*

6 *Ibid.*

7 Justin Trudeau, Prime Minister of Canada, "Minister of Indigenous and Northern Affairs Mandate Letter", online: <<http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>>.

8 Amy Minsky, "Fact Check: Did Justin Trudeau Break Promises Approving Pipelines?", *Global News* (30 November 2016), online: <<http://globalnews.ca/news/3097871/fact-check-justin-trudeau-break-promise-approving-pipelines/>>.

9 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

10 *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

11 [1986] 1 SCR 103.

12 *Narcotic Control Act*, RSC 1970, c N1.

and democratic society. *Oakes* established the test for addressing whether the government could justify Charter violations and thereby limit the rights and freedoms of Canadians.

Four years later, interpreting the meaning of section 35 of the Constitution Act, 1982 for the first time, the SCC rendered its judgment in *R v Sparrow*<sup>13</sup> (*Sparrow*) (a challenge of fishing licence regulations that restricted Aboriginal fishing rights to “food purposes” only). In *Sparrow*, the court created a reverse onus burden on the Aboriginal claimants and established a legal test for infringing Aboriginal and treaty rights. In other words, the court in *Sparrow* applied a reverse onus test that it had rejected under the Charter in *Oakes*. This balancing of rights test, which was developed for and affirmed in the language of section 1 of the Charter, does not apply to section 35 of the Constitution Act, 1982 and should not have been incorporated therein. The result is that, while a reverse onus offends the principles of a free and democratic society under section 1 of the Charter, such principles are cast aside when Aboriginal claimants are entangled with Canadian law. *Sparrow* created powerful, severe and still-standing limitations on Aboriginal and treaty rights in favour of the settler-colonial narrative that assumes Aboriginal peoples were conquered and thereby subject to Crown sovereignty.<sup>14</sup> Such subjugation of Indigenous peoples allows section 35 to be used as a constitutional vehicle for infringement and to justify Crown intentions to extinguish Aboriginal and treaty rights.

But consider the wording of section 35(1), which states “existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” There is no “reasonable limits” wording in section 35 as is plainly set out in section 1 of the Charter. The SCC’s broad and liberal interpretation of section 1 in *Oakes* is in favour of protecting individual rights and places the burden on the Crown to justify its actions. On the other hand, the affirmative language of section 35 resulted in a restrictive and narrow constitutional interpretation, which placed the weight of proving an Aboriginal or treaty right on the Aboriginal claimant while protecting the Crown’s asserted control over Indigenous peoples. Given this unsatisfactory judicial treatment of section 35, is it reasonable to expect the courts to do better in interpreting UNDRIP?

*Oakes* and *Sparrow* are similar in their investigation into the infringement of a Charter right and an Aboriginal or treaty right, respectively. Both tests require the Crown to have a pressing and substantial objective to limit a right, but, according to *Sparrow*, the Crown might be liberated from having to further justify its actions if it can demonstrate the Aboriginal right was previously extinguished. Both require a rational connection, minimal impairment and proportionality.

In many ways, the *Sparrow* test defines section 35 and, more broadly, the means by which Canada will engage in a relationship with Indigenous peoples — exclusively on Canada’s terms, favouring itself. It is among the means by which Canada continues to use Canadian law as lubricant for the machinery that sustains a settler-colonial narrative and upholds the country’s long-standing legal mythology of sovereignty over lands, resources and Indigenous peoples. Therefore, implementing UNDRIP through section 35 allows Canada new ways to limit the rights of Indigenous peoples. It is not a “full box of rights”<sup>15</sup> for Indigenous peoples, as Canada’s Minister of Indigenous and Northern Affairs has boldly declared, but may rather be viewed as a full access pass for Canada to the lands and resources of Indigenous peoples.

13 [1990] 1 SCR 1075.

14 John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill LJ 629.

15 Bennett, *supra* note 2.



Using the *Sparrow* test, Canada is liberated from meaningfully adopting UNDRIP by continuing onward with its well-entrenched legal position that section 35 is an empty box.<sup>16</sup> Infringement and extinguishment of rights are inconsistent with the articles of UNDRIP. Section 35 potentially allows the Crown to hollow out the rights of Indigenous peoples found within UNDRIP — such as self-determination; entitlement to free, prior and informed consent; and control of lands and resources.<sup>17</sup> Thus, there is cause for concern regarding whether Canada's current position contributes to nation-to-nation relations or merely maintains the status quo and whether such a position further restricts an already strained national reconciliation discussion. But there are means of implementing UNDRIP other than through section 35 that might meaningfully contribute to Canada's reconciliation discussion and advance the nation-to-nation relationship.

## Accessing UNDRIP to Engage with Indigenous Legal Orders

Canada has options for implementation, including adopting UNDRIP wholesale by means of enabling legislation. If so adopted, the content of UNDRIP may be further developed and implemented without the restrictions built into section 35. This would allow the principles of each article to be meaningfully fulfilled through engagement on a level field between Indigenous peoples and Canada.

In a number of articles — although perhaps most directly in article 5 — UNDRIP makes room for Indigenous laws. UNDRIP asserts the necessity of creating institutions that support the social, political and legal infrastructure of Indigenous peoples. In addition, the Truth and Reconciliation Commission of Canada has called for the inclusion of Indigenous laws and the building of Indigenous legal institutions.<sup>18</sup> Therefore, rather than engaging with the potential limitations of section 35, Canada might opt to fund new institutions based on Indigenous legal orders<sup>19</sup> and ensure such institutions are mandated to interpret UNDRIP outside the confines of section 35.

The Trudeau government's drawing in of UNDRIP through section 35 is markedly different from the Harper government's resistance. But resistance comes in many forms. Sometimes what may appear to be change is merely resistance seen from a new perspective. Without careful consideration by the government, the implementation of UNDRIP through section 35 would mean that UNDRIP would ultimately become another empty box that refuses to include Indigenous legal orders.

## Recommendations

Concerns that implementing UNDRIP through section 35 of the Constitution Act, 1982 will ultimately limit the potential impact of UNDRIP are reasonable. Consider that Canada has a history of ignoring international concerns relating to Indigenous peoples and that Canadian courts have developed jurisprudence in relation to section 35 that allows for the infringement of treaty and Aboriginal rights. Is the infringement of the rights set out in UNDRIP far behind? In *Sparrow*, in 1990, the court reversed the onus of proving a section 35 right, putting it on the Aboriginal claimant, although the same court had rejected the reverse onus in the Charter decision four years earlier in *Oakes*. While section 35 is not part of the Charter, it also does not have any of the limiting language found in section 1 of the Charter. Rather, section 35 recognizes and affirms Aboriginal and treaty rights. Filtering UNDRIP through section 35 will mean that the onus will be on Aboriginal claimants to prove the meaning of each article

16 For more, see John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37 and Douglas Sanders, "The Supreme Court of Canada and the 'Legal and Political Struggle' Over Indigenous Rights", (1990) 22:3 Can Ethnic Stud 122.

17 UNDRIP, *supra* note 1, arts 3, 10, 26.

18 Truth and Reconciliation Commission of Canada, "Calls to Action" (Winnipeg, MB: Truth and Reconciliation Commission of Canada, 2015) at Recommendation 50, online: <[www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls\\_to\\_Action\\_English2.pdf](http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf)>.

19 For more on Indigenous legal orders, see Val Napoleon, "Thinking about Indigenous Legal Orders" in René Provost and Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism* (Dordrecht, Netherlands: Springer, 2013) 229.

contained therein while allowing the Crown to infringe on such rights. Vigilance — not celebration — is required if Canada is insistent on using section 35 to implement UNDRIP. Implementing UNDRIP through section 35 is not inevitable. Canada has options, such as the following:

- Canada should reconsider its position on implementing UNDRIP through section 35, which, in light of the jurisprudence, is limiting and favours maintenance of the settler-colonial status quo.
- Canada should implement legislation mirroring each article of UNDRIP in order to fully implement UNDRIP into Canadian law, which will further the reconciliation dialogue between Canada and Indigenous peoples as one that takes place on a nation-to-nation basis. Moreover, Canadian legislation adopting UNDRIP would be binding on Canadian courts without necessarily forcing the courts to interpret such legislation through the limits of section 35.
- The creation of separate legislation adopting UNDRIP would further advance the legal framework for recognition of Indigenous laws through UNDRIP's articles and the Truth and Reconciliation Commission of Canada's Calls to Action for the building of Indigenous legal institutions.

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# Braiding the Incommensurable

## Indigenous Legal Traditions and the Duty to Consult



**Sarah Morales**

On May 10, 2016, the federal Minister of Indigenous and Northern Affairs, Carolyn Bennett, announced Canada's latest position on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>1</sup> She confirmed that Canada is now a full supporter of UNDRIP, without qualification, and that Canada intends to adopt and implement UNDRIP in accordance with the Canadian Constitution. At the United Nations Permanent Forum on Indigenous Issues, she recognized that "Canada has a long history of multilateralism and respect for the values of internationalism and pluralism."<sup>2</sup> The minister also stated, "through Section 35 of its Constitution, Canada has a robust framework for the protection of indigenous rights.... Canada believes that our constitutional obligations serve to fulfill all of the principles of the declaration, including 'free, prior and informed consent.' We see modern treaties and self-government agreements as the ultimate expression of free,

<sup>1</sup> GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

<sup>2</sup> Minister of Indigenous and Northern Affairs Carolyn Bennett, "Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples" (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <[www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/](http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/)>.

prior and informed consent among partners.”<sup>3</sup> Arguably, some Indigenous peoples may question that understanding of free, prior and informed consent [FPIC].<sup>4</sup>

Over the last decade, the federal government has repeatedly approved large-scale resource development projects — such as the Trans Mountain Expansion Project (often referred to as the Kinder Morgan Pipeline), the Northern Gateway Pipeline and the Site C dam in British Columbia — over the objections of Indigenous communities, many that are currently engaged in modern treaty and self-government negotiations or have already entered into treaty relationships with the Canadian state.<sup>5</sup> Approval of these projects is not sitting well with Indigenous peoples, who argue that their existing Aboriginal rights and title, which are supposed to be protected by section 35 of the Constitution Act, 1982<sup>6</sup> are being infringed by these development projects. As stated by Chief Ian Campbell of the Squamish Nation, “Ottawa and Victoria need to hear loud and clear that they can’t just run roughshod over aboriginal rights and title. That era has come and gone.”<sup>7</sup> Drawing on the Supreme Court of Canada’s (SCC’s) judgment in *Haida Nation v British Columbia (Minister of Forests)*,<sup>8</sup> Chief Campbell and other Indigenous leaders are voicing their frustrated concerns that, with the recognition by Canada’s highest court, “[t]he Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof.”<sup>9</sup>

Indigenous peoples still do not feel that they are being consulted adequately during these types of decision-making processes. Indigenous peoples do not feel that their own laws or decision-making processes are being taken into consideration, or relied upon, throughout these engagement processes. Chief Maureen Thomas of the Tsleil-Waututh Nation stated the following about the Trans Mountain Expansion Project consultation process: “The federal government’s consultation process was disappointingly flawed. The economic information they relied on was outdated. The oil spill risks and health impacts were significantly understated. We have done our own independent assessment and made a decision based on Tsleil-Waututh law. We do not consent to the Kinder Morgan pipeline project in our territory. We are asking the Court to overturn the federal cabinet’s decision to approve this project.”<sup>10</sup>

The SCC has stated that “the doctrine of aboriginal rights exists, and is recognized and affirmed by section 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”<sup>11</sup> However, despite this recognition, there is a failure to recognize that

3 *Ibid.*

4 See Christopher Alcantara, “To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada” (2007) 38:2 *Publius: J Federalism* 343; Richard Day & Tonio Sadik, “The BC Land Question, Liberal Multiculturalism and the Spectre of Aboriginal Nationhood” (Summer 2002) 134 *BC Studs* 5; Sarah Morales, “(Re)Defining ‘Good Faith’ through *Snuw’uyulh*” in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto, ON: University of Toronto Press, 2017).

5 For example, many Coast Salish First Nations, including the Squamish Nation and the Tsleil-Waututh First Nation, are actively involved in opposing the Trans Mountain Expansion Project. The Treaty 8 Tribal Association, in particular Prophet River and West Moberly First Nations, are currently defending their treaty rights, in opposition to the Site C dam, in courts across Canada.

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

7 “Advisory: New Legal Challenges Against the Kinder Morgan Pipeline from First Nations” *Tsleil-Waututh Nation Sacred Trust Initiative* (17 January 2017), online: <<http://blog.twnsacredtrust.ca/blog/update-new-legal-challenges-against-the-kinder-morgan-pipeline-from-first-nations>> [TWN, “Advisory”].

8 [2004] 3 SCR 511 at para 27 [*Haida*].

9 *Ibid.*

10 TWN, “Advisory”, *supra* note 7.

11 *R v Van der Peet*, [1996] 2 SCR 507 at para 30 [*Van der Peet*].

Indigenous legal traditions<sup>12</sup> are the sources of these rights<sup>13</sup> and, as a result, Indigenous peoples' own laws and legal processes have not played a prominent role in defining and interpreting the rights contained in section 35(1), such as the duty to consult. This error has had a negative effect on the process of reconciliation,<sup>14</sup> which the court has stated to be one of the overarching purposes of constitutional recognition of Aboriginal rights and title.

This essay will discuss how the framework of FPIC, as recognized in UNDRIP, could be used to braid together the duty to consult and Indigenous legal traditions in a manner that comes closer to achieving the overarching constitutional goal of reconciliation. The essay will first examine the duty to consult and accommodate, as recognized under section 35, and discuss why it has been unable to achieve reconciliation between Indigenous peoples and the Canadian state. Second, the doctrine of FPIC, as articulated in UNDRIP, will be examined as a useful interpretive framework for the duty to consult. Finally, the essay will assess the importance of Indigenous legal traditions to the development of the duty to consult and consider whether UNDRIP could be used to make constitutional space for these legal traditions within section 35.

## An Impediment to Reconciliation: Issues with the Implementation of the Duty to Consult

In 2004 and 2005, the SCC released a series of cases<sup>15</sup> that marked a shift from a focus by the court on static constitutional rights (whether or not a particular interest and/or activity could be recognized as an existing Aboriginal right within section 35(1)) to a dynamic proceduralism, a new approach that allows for the opportunity to recognize asserted Aboriginal rights and interests and protect them from unilateral Crown action, even before they have been proven to exist in court.<sup>16</sup> Although the duty to consult had been recognized in earlier jurisprudence,<sup>17</sup> the court had previously limited its discussion to requirements regarding the infringement of established Aboriginal rights.<sup>18</sup> It was not until the court's decision in *Haida* that the duty's foundational principles were explained and a framework for consultation was outlined.<sup>19</sup>

In *Haida*, the SCC explained that the duty to consult and accommodate arises when there are established or asserted section 35 rights that the Crown is or should be aware of and those rights will likely be affected by the Crown's proposed decision or action.<sup>20</sup> However, the level of consultation required depends on the strength of the asserted claim to rights or land title and on the extent to which the

12 "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 ways law is or should be made, applied, studied, perfected, and taught." See JH Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed (Stanford, CA: Stanford University Press, 1996) at 11. This term is used in this essay to refer to not only Indigenous laws, but also Indigenous legal systems, methodologies and beliefs about the role of law in Indigenous societies.

13 Ghislain Otis, "Constitutional Recognition of Aboriginal and Treaty Rights: A New Framework for Managing Legal Pluralism in Canada?" (2014) 46:3 J Leg Pluralism & Unofficial L 320 at 322.

14 *Van der Peet*, *supra* note 11 at 548, 551.

15 *Haida*, *supra* note 8; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*].

16 Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 36 UBC L Rev 397 at 398.

17 See e.g. *R v Sparrow*, [1990] 1 SCR 1075 at 1119, 70 DLR (4th) 385 [*Sparrow* cited to SCR]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168, 153 DLR (4th) 193 [*Delgamuukw* cited to SCR].

18 *Sparrow*, *supra* note 17 at 1111.

19 See *Haida*, *supra* note 8.

20 *Ibid* at para 35.

proposed decision or activity will potentially harm those existing or asserted rights.<sup>21</sup> The duty exists on a spectrum, ranging from obligations of notice and disclosure in instances of minor breaches to “deep consultation, aimed at finding a satisfactory interim solution” in instances of significant breaches.<sup>22</sup> However, the court articulated that regardless of the level of consultation owed, in all circumstances, consultation must be meaningful and performed in good faith, with the intention of substantially addressing the concerns of the affected Indigenous group.<sup>23</sup> “However, there is no duty to agree; rather, the commitment is to a *meaningful* process of consultation.”<sup>24</sup> The duty to consult also applies in the context of treaty rights; however, the content and scope of the consultation may be on the lower end of the spectrum, as a treaty itself is the product of negotiation.<sup>25</sup>

Arguably, the framework described above does not offer much certainty to the process of consultation; in *Haida*, Chief Justice Beverley McLachlin provided some statements about the nature of meaningful negotiation and consultation. First, she stated that meaningful consultation prohibits the Crown from engaging in “sharp dealings” and requires the Crown to act “in good faith.”<sup>26</sup> In the most basic sense, this means that the Crown must act fairly in its negotiations with Indigenous peoples and ensure, to the greatest extent possible, that negotiations are the product of a balanced and equitable conversation.<sup>27</sup> This process is guided by the doctrine of the honour of the Crown, the underlying source of the duty to consult,<sup>28</sup> which requires that the Crown must act in an honourable manner in all its dealings with Aboriginal people.

Second, meaningful consultation requires that negotiations be initiated at an early stage in the process, that is, at the strategic planning level, because decisions at this level have the potential to have significant impacts on Aboriginal rights and interests.<sup>29</sup> In *Haida*, the court determined that the duty to consult was owed when considering the transfer of tree farm licences that would have permitted the cutting of old-growth forests within the traditional territory of the Haida Nation. In other duty to consult cases, strategic, higher-level decisions triggering the duty have included the approval of a multi-year forest management plan for a large geographic area<sup>30</sup> and the establishment of a review process for a major gas pipeline.<sup>31</sup>

Finally, *Haida* provided that “meaningful consultation” may require the Crown to “make changes to its proposed action based on information obtained through consultations.”<sup>32</sup> Courts have elaborated on this requirement, suggesting that meaningful consultation requires the Crown to take the interests and concerns voiced by the affected Indigenous group seriously, to ensure they are considered and, wherever possible, to ensure they are integrated into the proposed plan of action.<sup>33</sup>

21 *Ibid* at para 39.

22 *Ibid* at paras 43–44.

23 *Ibid* at para 42.

24 *Ibid* [emphasis added].

25 *Mikisew Cree*, *supra* note 15 at paras 63–64.

26 *Haida*, *supra* note 8 at paras 41–42.

27 *Ritchie*, *supra* note 16 at 399.

28 *Haida*, *supra* note 8 at para 16.

29 *Ibid* at para 76.

30 *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 CNLR 110.

31 *Dene Tha' First Nation v Canada (Minister of Environment)*, 2008 FCA 20, 35 CELR (3d) 1.

32 *Haida*, *supra* note 8 at para 46.

33 *Halfway River First Nation v British Columbia (Minister of Forests)* (1999), 178 DLR (4th) 666, 64 BCLR (3d) 206 (CA), *aff'g* (1997), 39 BCLR (3d) 227 (SC).



Despite these guidelines and guarantees, many Indigenous peoples continue to voice their frustrations with consultation processes in Canada, especially those involving the extractive industry (as illustrated by the comments of the chiefs in the introductory section of this essay). Although the court in *Haida* explicitly stated that the objective of the duty to consult is “reconciliation...of Crown-Aboriginal relations,”<sup>34</sup> arguably the development of this doctrine has not yet led to this result. This essay contends that this failure is a result of the power imbalance inherent within this framework and the failure of these consultative processes to adequately consider and rely upon Indigenous legal traditions.

The power imbalance inherent in the duty to consult framework is apparent when one considers the words of the court in *Haida* regarding the power to issue a veto. The duty to consult does not provide Indigenous peoples with the opportunity to say no to a Crown initiative that has the potential to adversely affect their rights and interests. As the SCC stated, “the duty to consult does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.... Aboriginal ‘consent’...is appropriate only in cases of established rights, and then by no means in every case.”<sup>35</sup> *Mikisew Cree*, a case dealing with treaty rights, alludes to the notion that there may be a case for a veto in circumstances in which an Indigenous community could be left with “no meaningful right to hunt”;<sup>36</sup> however, the court is clear that, other than in this limited circumstance, the duty does not provide Indigenous peoples with the ability to stop or prevent outright a particular Crown initiative from occurring.<sup>37</sup> This results in a negotiation process whereby one party, the Crown, has the ability to outwardly reject Indigenous initiatives, but Indigenous peoples do not have the ability to stop the Crown’s initiatives.

Although a notion of consent that does not include a veto is damaging enough to a relationship of reconciliation in and of itself, this damage is compounded further by the court’s acknowledgement that the duty to consult does not include a duty to reach an agreement: “[T]here is no duty to agree; rather, the commitment is to a meaningful process of consultation.”<sup>38</sup> This means that the Crown could proceed, even in the absence of an agreement, if it so chose. As discussed in the final section of this essay, this notion that a good faith negotiation process is not dependent on reaching an agreement runs counter to several Indigenous legal principles.

Finally, the court has not precluded any hard bargaining on the part of the Crown: “Sharp dealing is not permitted.... Mere hard bargaining, however, will not offend an Aboriginal people’s right to be consulted.”<sup>39</sup> Combined with the factors mentioned above, and the vast disparity in resources that exist between the Crown and Indigenous nations, the right to hard bargaining creates a significant power imbalance that has the potential to seriously undermine the goal of reconciliation.

Reconciliation is also undermined by the failure to include Indigenous understandings, principles and laws around decision making in the consultation framework. Rather than making space for Indigenous concepts of engagement, negotiation and decision making, the court has dictated obligations, based on its own legal framework, to the Indigenous participants in these processes. The court has stated that “Aboriginal claimants...must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where,

34 *Haida*, *supra* note 8 at para 14.

35 *Ibid* at para 48.

36 *Mikisew Cree*, *supra* note 15 at para 48.

37 *Haida*, *supra* note 8 at para 48.

38 *Ibid* at para 42.

39 *Ibid*.

despite meaningful consultation, agreement is not reached.”<sup>40</sup> This obligation not only suggests that the court has an expectation that Indigenous peoples will cooperate and agree, but also suggests that positions put forward by Indigenous peoples, based on their own legal traditions, will be considered unlawful if they hinder the government from making decisions. According to this understanding, it is not difficult to see why the duty to consult has not led to greater reconciliation in Canada. The next section of this essay will examine whether the UNDRIP principles of FPIC can help to rectify this situation.

## How Can the UNDRIP Principles of FPIC Meaningfully Inform the Duty to Consult?

As stated previously, the Government of Canada has recently expressed its commitment to implementing UNDRIP as part of its overall process of achieving a nation-to-nation relationship with its Indigenous peoples. This is significant, given that Canada was one of only four countries to vote against the adoption of UNDRIP on September 13, 2007. Even when the government reversed its position and endorsed UNDRIP in November 2010, it did so with qualifications, emphasizing that UNDRIP “does not reflect customary international law nor change Canadian laws” and further emphasizing Canada’s objection to most of the major rights outlined in UNDRIP, including the right to FPIC when used as a veto.<sup>41</sup> Although Minister Bennett qualified her announcement by stating that section 35 provides a “robust”<sup>42</sup> framework for implementing UNDRIP, including FPIC, it is important to consider if and how the principles of FPIC can be implemented through section 35 of the Constitution.

### FPIC as Derived from the Right to Self-determination

One of the major ongoing concerns for Indigenous peoples in Canada is that the government continues to make decisions that affect their lives with little or no input from them. The right to participate “in decision-making on the full spectrum of matters that affect their lives forms the fundamental basis for the enjoyment of the full range of human rights” for Indigenous peoples.<sup>43</sup> The right to participate in decision making is viewed as deriving from the right to self-determination, which is considered the founding principle of Indigenous peoples’ rights and the central guiding principle of UNDRIP.<sup>44</sup> Accordingly, many provisions in UNDRIP relate to Indigenous peoples’ right to participate in decision making, highlighting the importance of this principle. These provisions include articles 3–5, 10–12, 14, 15, 17–19, 22, 23, 26–28, 30–32, 36, 38, 40 and 41.<sup>45</sup>

The right to self-determination is clearly articulated in article 1 of the International Covenant on Civil and Political Rights<sup>46</sup> and of the International Covenant on Economic, Social and Cultural Rights, which both state: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>47</sup> UNDRIP closely mirrors this established language: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social

<sup>40</sup> *Ibid.*

<sup>41</sup> Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (30 July 2012), online: <[www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142](http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142)>.

<sup>42</sup> Online Editor, *supra* note 2.

<sup>43</sup> UN Human Rights Council, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making*, UNGAOR, 15th Sess, UN Doc A/HRC/15/35 (23 August 2010) at para 2.

<sup>44</sup> Bartolome Clavero, “The Indigenous Rights of Participation and International Development Policies” (2005) 22 *Ariz J Intl & Comp L* 41 at 42.

<sup>45</sup> UNDRIP, *supra* note 1.

<sup>46</sup> 19 December 1966, 999 UNTS 171, art 1 (entered into force 23 March 1976).

<sup>47</sup> 16 December 1966, 993 UNTS 3, 6 ILM 360, art 1 (entered into force 3 January 1976).

and cultural development.”<sup>48</sup> Accordingly, it is well established in international law that Indigenous peoples, as peoples, have the right to self-determination.<sup>49</sup> It could also be argued that in order to be meaningful, self-determination must include economic self-determination, which ultimately involves control over traditional lands, territories and resources.<sup>50</sup> Thus, it could be argued that Indigenous peoples have the right to be informed and to engage with, and grant or withhold consent, to certain development projects within their lands that impact their resources and ways of life.<sup>51</sup>

This understanding, that the right to FPIC flows from the recognition of a right to self-determination, could greatly influence the interpretation of the duty to consult in Canadian law.<sup>52</sup> As previously stated, although reconciliation is an overarching purpose of the duty to consult, arguably the doctrine has not developed in a manner that recognizes the right to self-determination.<sup>53</sup> Instead, it assumes Crown sovereignty and attempts to reconcile Indigenous interests to the development interests of the Canadian state. This is made evident by the court’s statements on consent, which clarify that consent does not include a right to say no, and its statement that Indigenous peoples “must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.”<sup>54</sup> Arguably, the recognition of a right to consultation, interpreted as deriving from an overarching right to self-determination, could greatly advance the project of reconciliation in Canada.

### When Is FPIC Owed to Indigenous Peoples?

UNDRIP also offers guidance in terms of when an Indigenous community has the right of consultation. As stated previously, in Canada, the SCC has determined that the duty to consult and accommodate arises when there are established or asserted section 35 rights that the Crown is aware of, or should be aware of, and those rights will likely be affected by the Crown’s proposed decision or action.<sup>55</sup> The right to FPIC is articulated in many provisions of UNDRIP and arises prior to the approval of any project affecting Indigenous peoples’ lands or territories or other resources;<sup>56</sup> prior to the taking of any lands, territories and resources that Indigenous peoples have traditionally owned or otherwise

48 UNDRIP, *supra* note 1, art 3.

49 This is significant because UNDRIP may be understood to embody or reflect customary international law. See S James Anaya, *International Human Rights and Indigenous Peoples* (New York, NY: Aspen Publishers, 2009). Accordingly, it may be applied by Canadian courts without any need for an express legislative act, unless there is a clear conflict with statute law or common law, which, arguably, is not the case here. See Maxwell Cohen & Ann F Boyefsky, “The Canadian Charter of Rights and Freedoms and International Law” (1983) 61 Can Bar Rev 265 at 275.

50 UN Economic and Social Council, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, Erica-Irene A Daes*, UNESCO, 56th Sess, UN Doc E/CN.4/Sub.2/2004/30 (13 July 2004) at 17.

51 *Ibid* at 10.

52 It is well established in Canadian case law that “[t]he general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation.” *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, 51 Alta LR (2d) 97. See William A Schabas & Stephane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter* (Toronto, ON: Thomson Carswell, 2007) at 84–102. A similar argument could be made that these international obligations should be considered relevant and persuasive in section 35 constitutional interpretation.

53 See *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 126, where the court stated: “The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination – a people’s pursuit of its political, economic, social and cultural development within the framework of the existing state” [emphasis in original]. This suggests that although the court has previously recognized economic self-determination as forming part of the right to self-determination in Canadian law, it has not been recognized in its duty to consult jurisprudence.

54 *Haida*, *supra* note 8 at para 42.

55 *Ibid* at para 35.

56 UNDRIP, *supra* note 1, art 32(2).

occupied or used;<sup>57</sup> prior to the storage or disposal of hazardous materials in Indigenous peoples' lands or territories;<sup>58</sup> and prior to the taking of any cultural, intellectual, religious and spiritual property.<sup>59</sup>

Although at first glance it might seem that the standards within UNDRIP are captured by the court in *Haida*, these standards need to be considered in conjunction with the right to property in international human rights law. The United Nations Permanent Forum on Indigenous Issues has observed that “[l]and is the foundation of the lives and cultures of indigenous peoples all over the world. Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples' particular distinct culture is threatened.”<sup>60</sup> It is a right that is essential for the maintenance of other human rights, including, for example, the right to self-determination or the right to culture. Although some might question the utility of relying on the international right to property in a Canadian legal context, given that a general right to property is not protected in Canada's Constitution<sup>61</sup> or the Charter,<sup>62</sup> Aboriginal title has been recognized and affirmed under section 35(1) of the Constitution Act, 1982<sup>63</sup> by the SCC in *Tsilhqot'in Nation v British Columbia*.<sup>64</sup> Therefore, Indigenous nations, such as the Tsilhqot'in Nation, with recognized Aboriginal title possess constitutionally protected rights to certain lands.<sup>65</sup> These are wide-ranging rights, “including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”<sup>66</sup> International human rights law is of use in further defining and clarifying these rights, and the corresponding remedies<sup>67</sup> that exist to enforce these rights.

The Inter-American Human Rights System has developed an advanced and substantive body of jurisprudence on the rights of Indigenous peoples, drawing on UNDRIP. In particular, this system has recognized the collective rights of Indigenous peoples to land, to the natural resources traditionally used and found within Indigenous territories and, ultimately, to FPIC with regard to any large-scale development projects that impact their survival as Indigenous peoples. This body of jurisprudence has been developed around the rights to property and culture, as outlined by the American Declaration on the Rights and Duties of Man<sup>68</sup> (American Declaration) and the American Convention on Human Rights<sup>69</sup> (American Convention). It should be noted that although the American Declaration is not a legally binding document, it is interpreted by both the Inter-American Commission on Human Rights and the courts as a source of international legal obligations for member states of the Organization of

<sup>57</sup> *Ibid*, art 28.

<sup>58</sup> *Ibid*, art 29(2).

<sup>59</sup> *Ibid*, art 11(2).

<sup>60</sup> UN Economic and Social Council, *Permanent Forum on Indigenous Issues, Report on the Sixth Session (14-15 May 2007)*, UNESCO, Supp No 23, UN Doc E/2007/43, E/C.19/2007/12 at para 4.

<sup>61</sup> John Borrows, “Aboriginal Title and Private Property” (2015) 71 SCLR Osgoode's Annual Constitutional Cases Conference 91 at 93 [Borrows, “Aboriginal Title”]. See also Richard Bauman, “Property Rights in the Canadian Constitutional Context” (1992) 8 SAJHR 344.

<sup>62</sup> *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act (UK), 1982, c 11.*

<sup>63</sup> *Constitution Act, 1982, supra note 6.*

<sup>64</sup> [2014] 2 SCR 257, [2014] SCJ No 44 (QL) [*Tsilhqot'in Nation*].

<sup>65</sup> Borrows, “Aboriginal Title”, *supra* note 61.

<sup>66</sup> *Tsilhqot'in Nation, supra note 64* at para 73, cited in Borrows, “Aboriginal Title”, *supra* note 61.

<sup>67</sup> *Tsilhqot'in Nation, supra note 64* at paras 89, 90. These remedies include “injunctive relief, damages, or an order that consultation or accommodation be carried out” (at para 89).

<sup>68</sup> OAS, Inter-American Commission on Human Rights, *American Declaration on the Rights and Duties of Man*, OR OEA/Ser.L/V/1.4 Rev 9 (31 January 2003), 43 AJIL Supp 133 (1949).

<sup>69</sup> OAS, Inter-American Specialized Conference on Human Rights, *American Convention on Human Rights*, OAS TS No 36, 1144 UNTS 123 (1969).

American States, such as Canada. The American Convention, on the other hand, is a legally binding treaty; however, Canada is not a party to this treaty.

The case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua* was the first internationally binding ruling that recognized that the right to property, in international human rights law, includes the communal property of Indigenous peoples.<sup>70</sup> The court ordered Nicaragua to adopt the necessary domestic legal measures to “create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary laws, values and mores.”<sup>71</sup> The court also stated that until the delimitation and titling of the Awas Tingni community’s land was complete, Nicaragua must prevent agents of the state or third parties from acting in a way that affects the Awas Tingni community members’ use, value or enjoyment of the property where they live and carry out their activities.<sup>72</sup> Accordingly, this seminal ruling affirmed the right of Indigenous peoples to their lands and resources without state interference and also asserted a positive obligation on the state to prevent interference with that right by third parties.<sup>73</sup> This goes beyond the SCC’s requirements in *Haida* because it requires the state to recognize Indigenous customary rights according to the legal traditions of Indigenous peoples themselves and places a positive obligation on states to protect those rights prior to state recognition.

The case of *Saramaka People v Suriname*<sup>74</sup> also goes beyond the SCC’s requirements in *Haida*. This case dealt specifically with the right of Indigenous peoples to FPIC and revolved around the fact that Suriname granted resource concessions to private companies within the territories of the Saramaka people without their consultation or consent. Drawing on articles 10 (relocation) and 29 (disposal of hazardous materials) of UNDRIP, the Inter-American Court held that measures that have a potentially substantial impact on the basic physical and/or cultural well-being of an Indigenous community should not proceed without the community’s consent.<sup>75</sup> According to this interpretation, the right to FPIC would arise whenever an activity has the potential to significantly impact the physical and cultural well-being of an Indigenous community; this goes well beyond the rights requirement in *Haida*.

### The Content of FPIC

While an in-depth analysis of the history and content of the principles of FPIC is beyond the scope of this essay, a short overview of its content is provided for the purposes of comparison with the duty to consult. It is important to acknowledge that there is not one specific formula for carrying out consultations with Indigenous peoples that applies to all countries and in all circumstances.<sup>76</sup>

According to former UN Special Rapporteur James Anaya, the duty to consult directly with Indigenous peoples, through “special, differentiated procedures,” applies only when a state decision has the potential to affect Indigenous peoples in ways not felt by other members of society.<sup>77</sup> This does not mean that the duty to consult and the principles of FPIC are limited in application to circumstances in which a proposed measure will or might affect an already recognized right or legal entitlement. Rather,

70 [2001], Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 79 at paras 140–155 [*Awas Tingni v Nicaragua*].

71 *Ibid* at para 148.

72 *Ibid* at para 164.

73 S James Anaya, *Indigenous Peoples’ Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources* (2005) 22 *Ariz J Intl & Comp L* 7 at 16.

74 [2007], Preliminary Objections, Merits, Reparations & Costs, Inter-Am Ct HR (Ser C) No 174 [*Saramaka*].

75 *Ibid*.

76 James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, HRC Res 6/12, UNHRC, 12th Sess, UN Doc A/HRC/12/34 (2009) para 37 [Anaya, “Promotion and Protection”].

77 *Ibid* at para 43.

FPIC is required whenever state action pertains to lands that Indigenous people occupy or otherwise use, whether or not they hold title to those lands.<sup>78</sup> This is due to the recognition that, commensurate with the right to self-determination and democratic principles, the duty arises whenever Indigenous peoples' particular interests are at stake, even when those interests do not correspond to a recognized right to land or other legal entitlement.<sup>79</sup>

The character of the consultation procedure and its object are also determined by the nature of the right(s) or interest(s) at stake for the Indigenous peoples concerned and the anticipated impact of the proposed measure.<sup>80</sup> UNDRIP establishes that, in general, consultations with Indigenous peoples must be carried out in "good faith...in order to obtain their free, prior and informed consent."<sup>81</sup> James Anaya has noted the importance of adhering to these good faith consultation processes in order to create a climate of confidence with Indigenous peoples, which favours productive dialogue.<sup>82</sup> The first step is often to ensure that the consultation procedure itself is a product of consensus.<sup>83</sup> Further, states must ensure that Indigenous peoples have the financial, technical and other assistance they need, in order to address the imbalance of power. These provisions must be afforded freely, absent any type of coercion or attempt to use such assistance to leverage or influence positions in the consultations.<sup>84</sup>

FPIC also depends on a consultation procedure in which Indigenous peoples' own institutions of representation and decision making are fully respected.<sup>85</sup> James Anaya has stated that Indigenous peoples may need to develop or revise their own institutions, through their own decision-making procedures, in order to set up representative structures to facilitate the consultation process.<sup>86</sup> In noting that the failure of Indigenous groups to clarify their representative organization structures may confuse and slow down the process, he observed that it may be useful to bear in mind that UNDRIP states that the functioning of Indigenous institutions should be in accordance with the international human rights standards.<sup>87</sup>

In order for the Indigenous peoples concerned to make free and informed decisions about a potential project, it is necessary that they be provided with full and objective information about all aspects of the project that will affect them, including the impact of the project on their individual lives and the environment.<sup>88</sup> It is essential for the state to carry out environmental and social impact studies and present these studies to the Indigenous people concerned at the early stages of consultation, allowing them time to "understand the results of the impact studies and to present their observations and receive information addressing any concerns."<sup>89</sup> These impact assessments should be objective and the state should ensure the objectivity of impact assessments, either by subjecting them to independent review or by requiring that the assessments be performed free from the control of the promoters of the

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78 *Ibid* at para 44.

79 *Ibid*.

80 *Ibid* at para 46.

81 UNDRIP, *supra* note 1, art 19.

82 Anaya, "Promotion and Protection", *supra* note 76 at para 50. He noted that the creation of a climate of confidence is particularly important in relation to Indigenous peoples, given their lack of trust in state institutions, marginalization and histories of colonization.

83 *Ibid* at para 51.

84 *Ibid*.

85 UNDRIP, *supra* note 1, art 19.

86 Anaya, "Promotion and Protection", *supra* note 76 at para 52.

87 *Ibid*.

88 *Ibid* at para 53.

89 *Ibid*.

extractive projects.<sup>90</sup> Additionally, a consensus-driven, good faith consultation process, in the context of extractive industry projects, should not only address measures to mitigate or compensate for adverse impacts of the project, but also explore and arrive at means of equitable benefit sharing in the spirit of “true partnership.”<sup>91</sup>

In respect of timing, consultations and agreement with Indigenous peoples should happen “before the State authorizes or a company undertakes, or commits to undertake, any activity related to the project within an indigenous territory, including within areas of both exclusive and non-exclusive indigenous use.”<sup>92</sup> As a result, consultation and consent may be required at various stages of a project, from exploration to production to project closure.<sup>93</sup>

Related to the statements above regarding timing, FPIC requires effective grievance mechanisms, spanning the entire project life cycle, including any post-project impacts, to be guaranteed. In situations in which a private company is the operator of the project, company grievance procedures should be established that complement the remedies provided by the state.<sup>94</sup> “The grievance procedures should be devised and implemented with *full respect for indigenous peoples’ own justice and dispute resolution systems*.”<sup>95</sup> FPIC not only works to establish the processes of consultation and negotiations that have to be followed, but also imposes a requirement that the outcome of these processes be recognized and upheld.<sup>96</sup>

As is evident from the descriptions above, FPIC builds safeguards into the consultative process and recognizes Indigenous authority throughout the decision-making process. This is a marked departure from the Canadian approach, which focuses its discussion on assessing the strength of the right involved and the level of infringement, rather than on the content of the right itself. This ambiguity, arguably, is one of the reasons why consultation cases continue to flood Canadian courts. If Canada is serious about its commitment to implement UNDRIP, these principles of FPIC should be used to interpret the duty to consult and breathe new life into these decision-making processes.

### Veto or Consent?

Because the requirement to obtain consent implies respecting the right to say no, one of the contentious issues raised by Canada regarding UNDRIP revolved around the notion of a veto. Canada objected to the inclusion of FPIC in UNDRIP and argued that it “could be interpreted as a veto over development and other decisions made in the broader public interest.”<sup>97</sup>

Although the requirement to obtain Indigenous peoples’ consent in relation to development projects in their territories is protected within the normative framework of Indigenous peoples’ rights, at present

90 James Anaya, *Extractive Industries and Indigenous Peoples*, HRC Res 6/12 and 15/14, UNHRC, 24th Sess, UN Doc A/HRC/24/41 (2013) para 65 [Anaya, *Extractive Industries*].

91 Anaya, “Promotion and Protection”, *supra* note 76 at para 37.

92 Anaya, *Extractive Industries*, *supra* note 90 at para 67.

93 *Ibid.*

94 *Ibid* at para 78.

95 *Ibid* [emphasis added].

96 Jérémie 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, UK: Hart Publishing, 2011). See also *Awas Tingni v Nicaragua*, *supra* note 70; *Saramaka*, *supra* note 74; *Dann v US* (2002), Inter-Am Comm HR, No 11.140, Report No 75/02, OEA/Ser.L/V/II.117/doc 5; *Maya Indigenous Communities of the Toledo Dist v Belize* (2004), Inter-Am Comm HR, No 12.053, Report No. 40/04, OEA/Ser.L/V/II.122/doc 5/rev 1; *Kichwa People of Sarayaka and its members v Ecuador* (2010), Inter-Am Comm HR, No 12.465, Application to the Inter-Am Ct HR.

97 Gloria Galloway, “Canada drops opposition to UN indigenous rights declaration” *The Globe & Mail* (9 May 2016), online: <[www.theglobeandmail.com/news/politics/canada-drops-objector-status-on-un-indigenous-rights-declaration/article29946223/](http://www.theglobeandmail.com/news/politics/canada-drops-objector-status-on-un-indigenous-rights-declaration/article29946223/)>.

there is some divergence of opinion within the human rights regime as to when this requirement arises.<sup>98</sup> While some would argue that Indigenous peoples have the right to say no for any project or activity affecting their lands, territories, resources or well-being, others would argue that the right to veto only arises 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.<sup>99</sup> The first approach recognizes that consent is an integral part of the right to self-determination, whereas the second approach seems to suggest that the extent of the requirement to obtain consent is a function of the degree of impact of the proposed activity. As explained in the previous section of this essay, in all cases in which an Indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should be an objective of the consultations. As stated, this requirement does not provide Indigenous peoples with a veto power; however, it does establish the need to frame the consultations in a manner that works to make every effort to build consensus on the part of all those concerned.<sup>100</sup>

As explained by Anaya, a project or decision that has 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."<sup>101</sup> In some circumstances, this presumption may harden into a prohibition of the measure or project in the absence of Indigenous consent.<sup>102</sup> Articles 10 and 29(2) of UNDRIP recognize two situations in which the state is under an obligation to obtain the consent of the Indigenous peoples concerned, beyond the obligation to have consent as the objective of consultations. These situations include cases in which the project will result in the relocation of a group from its traditional lands and cases involving the storage or disposal of toxic waste within Indigenous territories.<sup>103</sup>

Whether or not Indigenous consent is a strict requirement, as previously stated, UNDRIP and other sources require that states engage in good faith negotiations in an effort to reach agreement or consent.<sup>104</sup> However, when a state determines that it is not necessary to obtain Indigenous consent and chooses to proceed with a project in the absence of consent, it remains "bound to respect and protect the rights of indigenous peoples and must ensure that other applicable safeguards are implemented, in particular steps to minimize or offset the limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing."<sup>105</sup> The adequacy of these measures and the consultations about them will be factors in determining proportionality in regard to any limitations on rights.<sup>106</sup> Any decision by the state to proceed with or permit a measure or project without the consent of Indigenous peoples should be subject to review by an impartial judicial authority.<sup>107</sup> Any judicial review should ensure compliance with the applicable Indigenous human rights international standards and provide for an independent assessment of whether or not the state has met its burden of justifying any limitation on rights.<sup>108</sup>

<sup>98</sup> Gilbert & Doyle, *supra* note 96 at 316-317.

<sup>99</sup> *Ibid* at 317.

<sup>100</sup> Anaya, "Promotion and Protection", *supra* note 76 at para 48.

<sup>101</sup> *Ibid* at para 47.

<sup>102</sup> *Ibid*.

<sup>103</sup> UNDRIP, *supra* note 1, arts 10, 29(2).

<sup>104</sup> *Ibid*, arts 19, 32(2).

<sup>105</sup> Anaya, *Extractive Industries*, *supra* note 90 at para 38.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* at para 39.

<sup>108</sup> *Ibid*.



In determining how UNDRIP, and international human rights law, should be used to frame the notion of consent in Canadian law, it is also important to look to domestic legal precedent. The SCC in *Delgamuukw* clarified that where Aboriginal people hold title to land, the government's duty to consult is "in most cases...significantly deeper than mere consultation" and can require the "full consent of an aboriginal nation."<sup>109</sup> This understanding was recently affirmed in the 2014 *Tsilhqot'in Nation*<sup>110</sup> decision of the SCC, which recognized the right to veto on Aboriginal title lands. Taken together with international human rights law, these cases support the argument that a proper understanding of FPIC, within Canada's constitutional framework, includes the right to say no, at least in some circumstances.

## The Importance of Indigenous Legal Traditions in Implementing the Duty to Consult

As recognized in UNDRIP, FPIC is essential for the operationalization of the right to self-determination. Accordingly, if the purpose of FPIC is to give effect to the right to self-determination, then the right itself must be interpreted in a manner that makes space for Indigenous laws and practices regarding decision-making practices and dispute resolution. To do otherwise would run the risk of recognizing a procedural right that actually diminishes the substantive right to self-determination — similar to some of the criticisms surrounding the current section 35 jurisprudence on the duty to consult and accommodate.

The Liberal government of Canada has publicly stated that it is committed to resetting its relationship with Canada's Indigenous peoples. However, in order to give effect to this nation-to-nation relationship, Canada must recognize Indigenous nations as peoples who bring well-established legal traditions to the relationship. These laws and legal orders are capable of influencing not only Indigenous peoples' own internal decision-making practices, but also the external practices of the Canadian state.

Articles 18 and 19 of UNDRIP explicitly state that Indigenous peoples have the right to participate in decision-making processes according to their own legal traditions. Accordingly, if Canada is to implement UNDRIP in any meaningful way, it must make space for Indigenous laws and practices to be utilized within the creation of the process itself. This necessarily will require different processes for different Indigenous peoples; however, the result will be one more likely to achieve true reconciliation.

Indigenous peoples have developed systems to maintain and regulate their relations since time immemorial. Living in independent communities and nations across the land, they developed norms and practices to govern their societal relations, manage territories, regulate trade, resolve disputes and govern the relationships between different nations.<sup>111</sup> Over time, the diverse norms and practices progressed into highly developed legal traditions that guided these peoples for centuries in the governance of community, the environment and relationships between people. Passed down through generations in stories, songs, ceremonies and practices, there are many Indigenous societies in Canada today that still rely on these legal traditions to guide their affairs.<sup>112</sup> However, currently these traditions have an indeterminate status before certain Canadian institutions. Our country's history of denial has resulted in a failure to recognize that Indigenous peoples have systems of law that governed, and still govern, our lives today.<sup>113</sup>

<sup>109</sup> *Delgamuukw*, *supra* note 17 at para 168.

<sup>110</sup> *Tsilhqot'in Nation*, *supra* note 64.

<sup>111</sup> Law Commission of Canada, "Justice Within: Indigenous Legal Traditions" (Ottawa, ON: Law Commission of Canada, 2006) at 1.

<sup>112</sup> *Ibid.*

<sup>113</sup> See John Borrows, *Canada's Indigenous Constitution* (Toronto, ON: University of Toronto Press, 2012).

Working with my Coast Salish community, the Hul'qumi'num Mustimuhw<sup>114</sup> (Hul'qumi'num People), I have to understand some of our decision-making processes that may prove useful in determining what FPIC means according to our laws. While a full discussion is beyond the scope of this commentary, it is useful to consider a few examples relating to the principle of consent.

In my research on dispute resolution in the Coast Salish world, the importance of reaching consensus has been stressed to me many times by elders.<sup>115</sup> “The leaders got together from the different communities and whatever time it took, one day, two days, three days, of deliberations and then they would decide. They decided, well, you can go...and my community will go...and someone else will sometimes volunteer, I will go... But the leaders deliberated and then the communities were brought together and this is what I'm talking about — reconciliation.”<sup>116</sup>

Former Stz'uminus elder Willie Seymour described one of the first times he witnessed such an event:

Another one I remember clearly, I was just a little guy and there was a problem in the community that needed to be dealt with right away.

All the big houses were on the waterfront in Kulleet Bay, and there was a point, a rock that went out...my grandfather went down there.

I remember one summer day and somebody was there talking to him and it wasn't long and he grabbed his drum. He had a big drum — hand drum.

We walked down to the big house, he unlocked the doors, opened up the doors, and someone saw him walking, I can't remember who it was, they went in and started the fire right away. And he beat on his drum. Beating on his drum for maybe five minutes so the whole community can hear it. And then five minutes later, he beat on his drum again and that was his notice for the people to come; that there was business to be taken care of. And if it was an urgent matter, then there was a third time.

The people rushed down, “We need to talk about whatever the concern was.” And every family brought something. The women, they would go in the kitchen...the women would start cooking and the men would be down the other end discussing what had to be taken care of.

When the table was ready, they continued their discussion as they ate. And when the women were finished cleaning up, they came in and joined and they were invited to continue the discussion. It was open and sometimes they involved women if it was a husband and wife conflict or whatever.

And they didn't leave until they came to a satisfied resolution. Sometimes they were there until real late at night. Really late at night they would stop and eat again.

If there was somebody missing, they would send one of the young men. There was trails between the villages...so they would send a runner from Kulleet Bay to Shellbeach, from Kulleet Bay to Nelson Point — to call all the individuals that were knowledgeable on the issues they were discussing, or so that they could contribute to some solution.

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114 Hul'qumi'num Mustimuhw refers to the five Coast Salish communities that comprise the Hul'qumi'num Treaty Group. They include Cowichan Tribes, Halalt First Nation, Penelakut Tribes, Lake Cowichan First Nation and Lyackson First Nation.

115 Sarah Morales, *Snw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria, 2014) [unpublished] at 304 [Morales, “Snw'uyulh”].

116 Interview of Willie Seymour (23 June 2010) in Morales, “Snw'uyulh”, *supra* note 115.

They asked everyone; they asked every individual, “*nil ow’ sthuthi’ ni’ ‘utun shqualuwun.*” “Is it okay with you, okay with you personally? Is our decision effective? Is our decision acceptable?” They go around asking each individual and then they say, “*tun’ ni’ ‘utunu ‘il kwet ch*” – from this day on we put this to rest. Then they will appoint a couple of elders to go deal with the involved.<sup>117</sup>

Although it was acknowledged that this type of consensus-building process may, at times, be difficult and lengthy, the process was valued for its ability to foster harmony and relations within and between communities.<sup>118</sup> The process of dialoguing with individuals and taking the time to hear and understand their positions works not only to foster a shared understanding of the issues (which can, in turn, aid in a more timely resolution) but also to develop a mutual respect and relationship between the parties involved.

However, while developing consensus is definitely the high-water mark in dispute resolution practices, it is also acknowledged that reaching consensus is simply not possible in all cases.<sup>119</sup> Reaching consensus is contingent upon the parties to the dispute and the issue at hand; therefore, many dispute resolution practices in the Coast Salish world allow for an ultimate decision maker when appropriate; this may be an elder, a respected leader within the community or chief and council.<sup>120</sup>

This understanding of the principle of consensus can work to inform the understanding of FPIC. It demonstrates that this right entails more than just a veto, but rather encompasses Indigenous perspectives around legitimacy, fairness and respect. These are the types of considerations that must be taken into account in working toward implementing UNDRIP in an effective manner.

## Conclusion

UNDRIP provides a normative framework for engagement between Canada and its Indigenous peoples. If implemented in good faith, with the aim of realizing its overarching purpose of Indigenous self-determination, it will provide an opportunity to address historical power imbalances, which have led to illegal land takings and resource exploitation. In doing so, UNDRIP has the potential to strengthen the relationship between Canada and its Indigenous peoples as they work toward the national goal of reconciliation.

However, this project of implementation will involve a careful braiding together of Canadian law, international law and Indigenous legal traditions. Although all three of these systems of law contain principles and processes relating to decision making, at times they may be incommensurable. In such circumstances, it will be important to return to the overarching purpose of this right — Indigenous self-determination — to determine the best path forward. UNDRIP provides a useful framework for overcoming these obstacles and strengthening the ties between the Indigenous and Canadian strands of sovereignty.

## Author's Note

I raise my hands to my teachers, my elders, and thank them for their gift of time and their willingness to share their knowledge and wisdom with me.

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<sup>117</sup> *Ibid.*

<sup>118</sup> Morales, “*Snuw’uyulh*”, *supra* note 115 at 270.

<sup>119</sup> *Ibid* at 304.

<sup>120</sup> *Ibid.*

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# UNDRIP As a Catalyst for Aboriginal and Treaty Rights Implementation and Reconciliation



**Cheryl Knockwood**

For many decades, Indigenous nations from all over Mother Earth drafted and advocated for the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>1</sup> Many years were spent crafting the wording of each of the 46 articles of UNDRIP before it was finally adopted at the United Nations General Assembly on September 13, 2007.<sup>2</sup>

Indigenous nations held high hopes that, with the adoption of UNDRIP, many of their rights would be recognized, including, for example, Indigenous rights to self-determination (articles 3 and 4), to own and control their lands and resources within their traditional territories (article 26) and to establish and control culture and education (article 14) within their home states. Furthermore, Indigenous nations hoped that their home states would consult and cooperate in good faith with Indigenous nations to obtain their free, prior and informed consent (article 32) for any projects that concern their lands and resources within their traditional territories.

It has been nearly 10 years since UNDRIP was adopted by the United Nations in 2007. Canada only endorsed UNDRIP in 2010 and adopted it in 2016. Minister of Indigenous

1 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

2 Lillian Aponte Miranda, "Indigenous Peoples as International Lawmakers" (2010) 32 U Pa J Intl L 210.

and Northern Affairs Carolyn Bennett stated that implementing UNDRIP is about righting historical wrongs and that what is needed is fundamental and foundational change.<sup>3</sup>

In July 2016, Canadian Justice Minister Jody Wilson-Raybould called the full adoption of UNDRIP into Canadian law “unworkable” in a statement to the Assembly of First Nations. Minister Wilson-Raybould stated that hard work was required by Indigenous nations to implement UNDRIP in First Nation communities. She also stated that the Canadian government needs Indigenous nations to step forward with ideas for legislation and policy that will eventually wipe out laws such as the Indian Act.<sup>4</sup>

For Indigenous nations, the adoption of UNDRIP means the full implementation of self-determination and of Aboriginal and treaty rights. Indigenous nations, such as the Mi’kmaq, have been doing the hard work to ensure rights recognition and implementation since before Confederation. For the Mi’kmaq, treaty negotiations began in the 1700s,<sup>5</sup> and the Mi’kmaq have been advocating for, negotiating and litigating their rights ever since. The Mi’kmaq are ready to continue doing the hard work to ensure UNDRIP is recognized and implemented in Canada.

In the 150 years since Canada’s Confederation, the Mi’kmaq Nation has gone from being an independent, self-sufficient and self-governing nation to one subjected to dispossessing laws and policies aimed at eliminating and assimilating the Mi’kmaq. This forced the Mi’kmaq Nation to depend upon Canada to recognize its legal and ethical obligations. Sadly, Canada has often failed in meeting its obligations to the Mi’kmaq; Mi’kmaq Aboriginal and treaty rights have not been fully implemented and Mi’kmaq’ lands rights have been ignored.

However, UNDRIP provides a beacon of hope for the Mi’kmaq Nation. It is hopeful that with Canada’s implementation of UNDRIP, Canada’s relationship with the Mi’kmaq and other Indigenous nations can truly move toward reconciliation. The work does not need to be difficult if Canada fulfills its legal and ethical obligations to the Mi’kmaq.

I will share examples of the hard work that has been done since Confederation by the Mi’kmaq Nation on rights recognition and UNDRIP implementation. Then I will focus on what two Mi’kmaq communities — Membertou and Elsipogtog — have been doing in the last few years to implement UNDRIP.

It is hoped that UNDRIP will be a catalyst for change in which the Canadian government will act upon, recognize and implement Mi’kmaq Aboriginal and treaty rights. UNDRIP has acted as a catalyst for some Mi’kmaq communities that have advocated for their consent to be sought in megaprojects impacting their lands and in the development of their laws.

## The Hope: Mi’kmaq Communities

Mi’kma’ki, the traditional territory of the Mi’kmaq Nation, encompasses what is now known as Nova Scotia, Prince Edward Island, Newfoundland, the Gaspé regions of Quebec, the Eastern side of New Brunswick and parts of Maine. The Mi’kmaq title to its traditional territory has never been ceded in any treaty or by any other act or legal instrument.

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3 Minister of Indigenous and Northern Affairs Carolyn Bennett, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: Northern Public Affairs <[www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/](http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/)>.

4 APTN National News, “Justice Minister Jody Wilson-Raybould says adopting UNDRIP into Canadian law ‘unworkable’” *APTN National News* (12 July 2016), online: <<http://aptnnews.ca/2016/07/12/justice-minister-jody-wilson-raybould-says-adopting-undrip-into-canadian-law-unworkable/>>.

5 Pre-Confederation treaties signed between the Mi’kmaq and the British Crown began in 1725.



The treaties that were signed between the Mi'kmaq and the British Crown from 1725 to 1779 were about establishing a relationship based on mutual peace and friendship, not about ceding any Mi'kmaw territory. The Mi'kmaq have never ceded their Aboriginal title nor has Canada ever extinguished Mi'kmaw title over its territory.

For centuries, the Mi'kmaq have been seeking implementation of their treaty rights. Letters were sent to the British Crown reminding it of its treaty promises. In 1841, a letter written by Mi'kmaw Chief Pemmeenauweet to Queen Victoria sadly illustrates the dire circumstances the Mi'kmaq were in during the treaty denial era: “No Hunting Grounds — No Beaver — No Otter — no nothing. Indians poor — poor for ever. No Store — no Chest — no Clothes. All these Woods once ours. Our Fathers possessed them all. Now we cannot cut a Tree to warm our Wigwam in Winter unless the White Man please. The Micmacs now receive no presents, but one small Blanket for a whole family.”<sup>6</sup>

Mi'kmaw individuals have been going to the courts to get legal recognition of their Aboriginal and treaty rights with mixed results. Gabriel Sylliboy lost in 1929,<sup>7</sup> as did Martin Francis in 1969.<sup>8</sup> Despite losing in the lower courts, James Matthew Simon in 1985<sup>9</sup> and Donald Marshall Jr. in 1999<sup>10</sup> finally won their treaty right cases at the Supreme Court of Canada (SCC).

In 1926, the Mi'kmaw Grand Chief Gabriel Sylliboy<sup>11</sup> was convicted of having pelts (muskrat and fox) in his possession, contrary to the Nova Scotia Lands and Forests Act, 1926. Grand Chief Sylliboy's defence was that he had the right to hunt and fish at all times because of his Treaty of 1752 right. The court held that Grand Chief Sylliboy was not a beneficiary to the 1752 treaty because he was from Cape Breton. The court then went on to characterize Mi'kmaq as savages: “[T]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized.”<sup>12</sup>

On September 22, 1966, Martin Francis was salmon fishing with a net on the Richibucto River. He was charged with fishing without a licence in violation of the New Brunswick fishery regulations. Francis' defence was that he had a treaty right to fish, and he cited three Mi'kmaw treaties, dated December 15, 1725, November 22, 1752, and September 22, 1779.

The court convicted Francis, taking a very restrictive view as to which “bands” of the Mi'kmaw Nation the treaties of 1725 and 1752 applied, and held that Francis had not proven he was a member of those bands.<sup>13</sup> While the court had held that Francis was a member of the Treaty of 1779, it interpreted the Treaty of 1779 as not conferring any hunting and fishing rights.<sup>14</sup>

6 “Letter of Mi'kmaq' Chief Pemmeenauweet to Queen Victoria, 1841”, online: *JohnWood1946* <<https://johnwood1946.wordpress.com/2011/07/08/letter-of-mi%e2%80%99kmaq%e2%80%99-chief-pemmeenauweet-to-queen-victoria-1841/>>.

7 *R v Sylliboy*, [1929] 1 DLR 307, 1928 CanLII 352 (NSSC) [*Sylliboy* cited to DLR].

8 *R v Francis* (1969), 10 DLR (3d) 189, 1969 CanLII 848 (NBCA) [*Francis* cited to DLR].

9 *Simon v R*, [1985] 2 SCR 387 [*Simon*].

10 *R v Marshall*, [1999] 3 SCR 456 [*Marshall*].

11 Grand Chief Gabriel Sylliboy's name was spelled Syliboy in this case.

12 *Syliboy*, *supra* note 7 at 313.

13 The term “bands” is a creation of the *Indian Act*, 1876. The Mi'kmaq did not live in *Indian Act*-created “band” entities prior to contact nor during the treaty-making period.

14 *Francis*, *supra* note 8 at 194.

Regardless of these huge losses and expenses<sup>15</sup> within the Canadian judicial system, the Mi'kmaw Nation never gave up hope that its treaties were valid and that these treaties would be recognized and implemented by Canada. The Mi'kmaw Nation was finally vindicated when, in 1985, for the first time in Canada, the SCC ruled in *Simon*<sup>16</sup> that the Mi'kmaw Treaty of 1752 was valid.

In 1999, the SCC, in the *Marshall*<sup>17</sup> decision, ruled in favour of Mi'kmaw, Maliseet and Passamaquoddy treaty rights. The court recognized those three nations' treaty rights to gain a moderate livelihood from fishing. Sadly, there is not one Mi'kmaw community fishing under a treaty-based commercial fishery. Instead, many are fishing commercially under the interim agreements negotiated by the Department of Fisheries and Oceans soon after the *Marshall* decision was won.<sup>18</sup> Canada has given Indigenous and Northern Affairs the mandate to negotiate a treaty-based fishery with the Mi'kmaq, but there has been no success to date.<sup>19</sup>

Currently, the treaty and aboriginal rights recognition process, primarily in the courts, is expensive and time consuming.<sup>20</sup> When the Mi'kmaw Nation wins at the SCC level, there are no guarantees there will be implementation, as we learned with the Mi'kmaq in the *Marshall* decision. However, the Mi'kmaq are hopeful that, with Canada's commitment to the implementation of UNDRIP, Canada will spend less time and money litigating with the Mi'kmaw Nation and more time on recognizing and implementing treaty and aboriginal rights.

In the next few paragraphs, I will share stories from Mi'kmaw communities that are implementing UNDRIP. First, I will share Elsipogtog's struggle to seek free, prior and informed consent. Then, I will share how Membertou made a decision to include UNDRIP within the development of its laws.

## Elsipogtog, Fracking and No Free, Prior and Informed Consent

In 2013, the Mi'kmaw community of Elsipogtog challenged the province of New Brunswick on a shale gas exploration project slated to occur within its traditional territory area. The community was concerned about the impacts that project might have on the current and future use of land.

Mi'kmaw groups in Elsipogtog First Nation, New Brunswick,<sup>21</sup> united and stood up against Southwestern Energy (SWN), an oil and natural gas company based in Houston, Texas. The New Brunswick government, under Progressive Conservative party leadership, had allowed SWN to conduct shale gas exploration within the traditional territory of the Sikniktuk district of the Mi'kmaw Nation. The permission to conduct this exploration was granted by the provincial government without adequate and/or meaningful consultation with the Mi'kmaw groups most impacted by the exploration.

Concerned about the effects of exploration, the Mi'kmaw leaders and members from the community of Elsipogtog First Nation were strongly opposed to fracking and did not want any shale gas exploration

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15 Yamri Taddese, "Feds pouring big money into aboriginal litigation", *The Law Times* (11 March 2013), online: <[www.lawtimesnews.com/20131113587/headline-news/feds-pouring-big-money-into-aboriginal-litigation](http://www.lawtimesnews.com/20131113587/headline-news/feds-pouring-big-money-into-aboriginal-litigation)>. This article focuses on the expenses of Aboriginal Affairs and Northern Development Canada.

16 *Simon*, *supra* note 9.

17 *Marshall*, *supra* note 10.

18 Parliament of Canada, "The Marshall Decision and the Atlantic Fishery" (20 September 2001), online: <[www.loppar.gc.ca/content/loppar/ResearchPublications/tips/tip63-e.htm](http://www.loppar.gc.ca/content/loppar/ResearchPublications/tips/tip63-e.htm)>.

19 Atlantic Policy Congress of First Nations Chiefs, "Marshall 10 Years Later: Atlantic and Gaspé First Nations Participation in Fisheries" (September 2009), online: <[www.apcnc.ca/images/uploads/Post\\_Marshall\\_report\\_10\\_years.pdf](http://www.apcnc.ca/images/uploads/Post_Marshall_report_10_years.pdf)>.

20 Kent McNeil, "Stop wasting money fighting aboriginals", *The National Post* (21 October 2015), online: <<http://news.nationalpost.com/full-comment/kent-mcneil-stop-wasting-money-fighting-aboriginals>>.

21 The First Nation community with the largest population in New Brunswick, located in Kent County.

to occur within their traditional territory.<sup>22</sup> Many in the community felt their free, prior and informed consent was never sought and, therefore, never given. As stewards of their traditional territory, the Mi'kmaq from the Sikniktuk district stood on their lands and refused access to SWN employees. Chief Aaron Sock of Elsipogtog issued an eviction notice to SWN.<sup>23</sup> As a result, many Mi'kmaq people who joined Elsipogtog in its opposition to SWN's plans launched a protest in an attempt to stop the company.

On October 3, 2013, the Court of Queen's Bench in New Brunswick granted SWN an injunction to end the protests.<sup>24</sup> However, the Mi'kmaq stewards were undeterred, and on October 17, 2013, the RCMP moved in to enforce the injunction.<sup>25</sup> Elders, women and children were pepper-sprayed and more than 40 Mi'kmaq stewards were arrested. The excessive force used against the Mi'kmaq was captured on video and shared internationally through online social media channels.

On December 6, 2013, SWN announced it was halting exploration for a year.<sup>26</sup> On December 18, 2014, newly elected Premier Brian Gallant of New Brunswick announced a moratorium on fracking exploration until numerous conditions were met. The first condition called for a process to consult with Indigenous peoples.<sup>27</sup> On May 27, 2016, the province announced it would ban fracking indefinitely.<sup>28</sup>

Despite enormous effort to push them out of the way so that the government could allow companies to develop Mi'kmaq land and resources, the Mi'kmaq people from Elsipogtog never bowed to this pressure. Rather, they stood united with neighbouring communities from Richibucto and Rexton to protect the land for use by current and future generations.

## Membertou and Self-determination

Membertou<sup>29</sup> is a Mi'kmaq community that has incorporated UNDRIP provisions in relation to lands, territories and resources into one of its laws. On April 30, 2016, Membertou enacted its Membertou Family Homes Law.<sup>30</sup> The Membertou Governance Committee, which drafted the law, ensured that UNDRIP was referred to and given significance in its law. For instance, in three sections of the preamble, the law states:

B. Membertou has an unextinguished right to self-determination, as affirmed by the United Nations Declaration on the Rights of Indigenous People, which includes a right to govern itself, its members and its lands;

22 Vidya Kauri, "Elsipogtog man determined to stop fracking", *National Observer* (3 March 2015), online: <[www.nationalobserver.com/2015/02/13/news/elsipogtog-man-determined-stop-fracking](http://www.nationalobserver.com/2015/02/13/news/elsipogtog-man-determined-stop-fracking)>.

23 CBC News, "First Nations chief issues eviction notice to SWN Resources", *CBC News* (1 October 2013), online: <[www.cbc.ca/news/canada/new-brunswick/first-nations-chief-issues-eviction-notice-to-swn-resources-1.1874870](http://www.cbc.ca/news/canada/new-brunswick/first-nations-chief-issues-eviction-notice-to-swn-resources-1.1874870)>.

24 CBC News, "Court orders end to shale gas barricades on Route 134", *CBC News* (3 October 2013), online: <[www.cbc.ca/news/canada/new-brunswick/court-orders-end-to-shale-gas-barricades-on-route-134-1.1894789](http://www.cbc.ca/news/canada/new-brunswick/court-orders-end-to-shale-gas-barricades-on-route-134-1.1894789)>.

25 Melanie Patten, "Elsipogtog First Nation Sees Violence As RCMP Moves To End Protest", *Huff Post Politics Canada* (17 October 2013), online: <[www.huffingtonpost.ca/2013/10/17/elsipogtog-photos-rcmp-protest-violence\\_n\\_4114506.html](http://www.huffingtonpost.ca/2013/10/17/elsipogtog-photos-rcmp-protest-violence_n_4114506.html)>.

26 APTN National News, "SWN ending exploration work in NB, will be back in 2015: Elsipogtog War Chief Levi", *APTN National News* (6 December 2013), online: <<http://aptnnews.ca/2013/12/06/swn-ending-exploration-work-nb-back-2015-war-chief-levi/>>.

27 CBC News, "Shale gas moratorium details unveiled by Brian Gallant: Five conditions will need to be met before government lifts moratorium on all forms of fracking", *CBC News* (18 December 2014), online: <[www.cbc.ca/news/canada/new-brunswick/shale-gas-moratorium-details-unveiled-by-brian-gallant-1.2877440](http://www.cbc.ca/news/canada/new-brunswick/shale-gas-moratorium-details-unveiled-by-brian-gallant-1.2877440)>.

28 Shawn McCarthy, "New Brunswick extends fracking ban indefinitely", *The Globe and Mail* (27 May 2016), online: <[www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/new-brunswick-extends-fracking-ban-indefinitely/article30191515/](http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/new-brunswick-extends-fracking-ban-indefinitely/article30191515/)>.

29 A Mi'kmaq community located on Cape Breton Island in Nova Scotia.

30 *Membertou Family Homes Law 2016*, *First Nations Gazette*, online: <[http://sp.fng.ca/fngweb/26\\_MPR\\_law\\_2016.pdf](http://sp.fng.ca/fngweb/26_MPR_law_2016.pdf)>.

C. Membertou has an unextinguished and inherent right of self-governance which emanates from its people, culture, language, land and aboriginal and treaty rights, which are recognized by section 35 of the Constitution Act, 1982;

D. Membertou, as an aspect of its unextinguished right to self-determination and its unextinguished and inherent right of self-governance, has jurisdiction to create rules for the resolution of issues regarding family homes and real property located on Membertou lands upon the breakdown of a marriage or common-law relationship.<sup>31</sup>

Membertou is also developing a land code. The land code will recognize Membertou's jurisdiction over its lands, water and resources. The land code will adopt the language of self-determination used in UNDRIP, similar to the language used in the Membertou Family Homes Law. The land code will go to a community ratification vote in the near future. Like Elsipogtog, Membertou is doing the hard work required to implement UNDRIP.

## Conclusion

The Mi'kmaw Nation has been advocating for treaty and aboriginal rights recognition for nearly 300 years. The Mi'kmaq are aware of the work required from them to ensure Canada fulfills its legal obligations. UNDRIP would not exist if it were not for the hard work of Indigenous nations from all over the world. UNDRIP is a symbol of what can be accomplished when Indigenous peoples and nation-states work together internationally within the United Nations to ensure our rights are respected and our voices are heard. UNDRIP is another tool that the Mi'kmaq have available to ensure recognition of their constitutional and international Indigenous rights.

The adoption of UNDRIP by Canada is of great importance to the Mi'kmaw Nation. At the heart of UNDRIP is an international recognition of the rights of Indigenous nations to self-determination and all that follows from that.

While the Mi'kmaw Nation has taken important steps, much hard work is required from the government of Canada to implement UNDRIP within Canada. What is needed to implement UNDRIP in Canada is for Canada to stop litigating against Mi'kmaw individuals when they are exercising their aboriginal and treaty rights. Canada needs to recognize and give full meaning to all the existing treaties signed with the Mi'kmaq and other Indigenous nations within Canada. Canada needs to ensure that laws, policies and funding are in place to ensure Indigenous nations are included in discussions of all potential projects that may happen within their traditional territories.

It is hoped that, with implementation, there may be fewer time-consuming, expensive legal battles for aboriginal and treaty rights recognition. It is hoped that, with the adoption of UNDRIP, Canadian provinces will involve Indigenous nations that are impacted by any potential development within their traditional territory in the entire review and decision-making process. It is hoped that Canada will soon respect Mi'kmaw nationhood, the inherent right of Mi'kmaw self-determination, the right to aboriginal title and the right to manage land and resources. Ultimately, if these hopes are realized, how can that not lead to reconciliation?

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31 *Ibid*, Preamble B, C, D.

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For 13 years, Cheryl worked as a senior policy analyst with the Atlantic Policy Congress of First Nations Chiefs, where she gave strategic advice in areas such as fisheries, environment, treaty education and economic development to the Mi'kmaw, Maliseet and Passamaquoddy chiefs and communities. Cheryl was called to the Nova Scotia Barristers' Society Bar in 2009, becoming the first Mi'kmaq-speaking female lawyer in Nova Scotia. In 2015, Cheryl was appointed to the Nova Scotia Human Rights Commission and still serves as a commissioner. Since 2010, Cheryl has been the governance coordinator for Membertou, Nova Scotia, where she engages the community in the development of laws in relation to lands and citizenship. She occasionally teaches courses at Cape Breton University on Aboriginal and treaty rights, governance and Indigenous economic development.



# Our Languages Are Sacred

## Indigenous Language Rights in Canada



**Lorena Sekwan Fontaine**

Indigenous languages are the oldest languages of Canada. They contain a rich and diverse history that is intimately connected to the land, plants and living creatures. A significant part of the history of the country is embedded in Indigenous linguistic concepts that evolved as the peoples' relationship to the land developed. There are Indigenous laws and international laws that recognize the significance of these languages, in addition to Indigenous peoples' linguistic rights in areas such as education, government services and the translation of laws. Canada has not implemented Indigenous linguistic rights under domestic law.

In December 2016, Prime Minister Justin Trudeau announced that the federal government would introduce an Indigenous Languages Act to support the revitalization of Indigenous languages. The challenge for Canada is how it will incorporate international law and Indigenous law into the legislation. There are also a number of other factors that will have to be considered as the legislation is contemplated, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>1</sup>

UNDRIP recognizes linguistic rights in a number of areas, such as the right to transmit languages to the next generation (article 13), the right to establish educational

<sup>1</sup> GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

institutions that provide education in their own languages (article 14) and the right to be heard and understood in their own languages in a number of private and public settings. International human rights scholars have also recognized Indigenous language rights as a right of self-determination and cultural integrity.<sup>2</sup>

Recently, the Truth and Reconciliation Commission (TRC) of Canada called on governments to use UNDRIP as the framework for reconciliation (TRC Calls to Action 43 and 44).<sup>3</sup> The TRC also called on the federal government to acknowledge that Aboriginal rights under section 35(1) of Canada's Constitution Act, 1982<sup>4</sup> include Indigenous language rights (TRC Calls to Action 13).

In addition to their current backing of the TRC, Indigenous leaders have been attempting to advance Indigenous language rights in a number of contexts, but particularly in education, since the 1970s.<sup>5</sup> In light of discussions regarding Indigenous language rights, the objective of this essay is to provide a survey of Indigenous customary law regarding Indigenous languages and international human rights, and examples of how other countries have implemented Indigenous language rights. This essay also includes recommendations for promoting and advancing Indigenous language rights in proposed federal legislation.

## Indigenous Customary Law

The basis for Indigenous language rights is derived from Indigenous customary law, where language is recognized as a sacred, inalienable right. For the Algonquian people, for example, according to the creation story, language is one of the sacred gifts given to people by the Creator. More specifically, language is a gift given in the spirit realm, during a sacred period described as the time before the beginning of time.

The creation story indicates that before we travel from the spirit world to the physical world, the Creator speaks to us, prepares us for life in the physical world and gives us direction. These instructions, it is explained, are given in our ancestral languages.<sup>6</sup> This demonstrates that language is not only sacred but also a crucial part of our connection with the spiritual realm. Language is

- 2 James Anaya, *Indigenous Peoples in International Law* (New York, NY: Oxford University Press, 2004); Tove Skutnabb-Kangas, *Linguistic Genocide in Education – or Worldwide Diversity and Human Rights?* (Mahwah, NJ: Lawrence Erlbaum, 2000); Robert Dunbar & Tove Skutnabb-Kangas, "Forms of Education of Indigenous Children as Crimes Against Humanity?" (2008) Expert paper written for the United Nations Permanent Forum on Indigenous Issues [Dunbar & Skutnabb-Kangas, "Forms of Education"]; Tove Skutnabb-Kangas & Robert Dunbar, "Indigenous Children's Education as Linguistic Genocide and a Crime Against Humanity? A Global View" (2010) 1 *Gáldu Čála – J Indigenous Peoples Rts* [Skutnabb-Kangas & Dunbar, "Indigenous Children's Education"].
- 3 One of the TRC's conclusions is that "[i]f the preservation of Aboriginal languages does not become a priority both for governmental and for Aboriginal communities, then what the residential schools failed to accomplish will come about through a process of systematic neglect." TRC, *Canada's Residential Schools: The Legacy: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 5 (Montreal, QC, & Kingston, ON: McGill-Queen's University Press, 2015) at 6.
- 4 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1).
- 5 Indigenous leaders have been advocating for the education of Indigenous languages since the 1970s in the following reports: Manitoba Indian Brotherhood/Assembly of Manitoba Chiefs, *Wahbung: Our Tomorrows* (Manitoba: Manitoba Indian Brotherhood, 1971); National Indian Brotherhood/Assembly of First Nations, "Indian Control of Indian Education" (1972) Policy Paper Presented to the Minister of Indian Affairs and Northern Development by the National Indian Brotherhood/Assembly of First Nations; Assembly of First Nations, *Tradition and Education: Towards a Vision of Our Future, A Declaration on First Nations Jurisdiction* (Ottawa, ON: Assembly of First Nations, 1988); Assembly of First Nations, *Towards Linguistic Justice for First Nations* (Ottawa, ON: Assembly of First Nations, 1991); Assembly of First Nations, *Towards Rebirth of First Nations Language* (Ottawa, ON: Assembly of First Nations, First Nations Languages and Literacy Secretariat, 1992); Assembly of First Nations, *The National Strategy and Draft of First Nations Languages and Foundation Act* (Ottawa, ON: Assembly of First Nations, 2000); Assembly of First Nations, *Submission of the Assembly of First Nations to the UN Committee on the Rights of the Child* (Ottawa, ON: Assembly of First Nations, 2012).
- 6 Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is that Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary, AB: University of Calgary Press, 2000) at 30.



therefore more than just words and expression; it is recognized as a gift and responsibility received from the Creator, intended to teach principles of life and existence.<sup>7</sup>

Indigenous languages are also shaped by a number of aspects, such as geography and experience, that develop into cultural practices, needs and communicative systems that change over time.<sup>8</sup> This is demonstrated, for instance, in the multiple and different Indigenous languages spoken in specific areas in North America, among relations and communities, and in dialects within language families. Language is something crucial to the creation of Indigenous peoples. In addition to the views that characterize language as sacred, there are principles rooted within the language itself.

Cree customary law such as *iyiniw miyikowisowina*,<sup>9</sup> meaning “that which is given to the peoples,” and *iyiniw saweyihtakosiwin* (“the peoples’ sacred gifts”) are derived from the peoples’ unique relationship with the Creator.<sup>10</sup> These Cree principles stem from Indigenous customary law, which recognizes that languages are sacred.<sup>11</sup>

The basis for the constitutional status for Indigenous languages is also attributed to the inter-societal customs that initially governed the relationships between Europeans and Aboriginal peoples.<sup>12</sup> These customs would have been primarily derived from Indigenous customary law. Then, as time went on, communication exchanges flourished in a variety of ways, in areas such as trading practices, political and treaty negotiations, and diplomatic relationships. When gatherings occurred between Europeans and Indigenous peoples, not only was interpretation required, but there were also communication protocols to be observed. Over time, customary linguistic practices between Europeans and Indigenous peoples began to emerge that regulated communication exchanges.<sup>13</sup> These established inter-societal laws that came to regulate language practices in Canada.

Today, language practices translate into the right to maintain and develop languages, which includes the development of educational and cultural institutions that are required to maintain them.<sup>14</sup> It may also be important to self-government rights to pass language laws in addition to developing language education.<sup>15</sup> Language rights also fall under the umbrella of the “right to cultural integrity,” under more current international and domestic norms. For Indigenous peoples, language is an integral feature of their ability to manifest, nurture and transmit culture.<sup>16</sup>

## International Approaches

The international community has posited that past and present educational systems in which Indigenous children are taught in the dominant language — at the expense of their ancestral

7 *Ibid*; Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning: A Foundational Report for a Strategy to Revitalize Indian, Inuit and Métis Languages and Cultures*, (Ottawa, ON: Department of Canadian Heritage, 2005) at 93.

8 Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (Minneapolis, MN: University of Minnesota Press, 2010).

9 These terms are in the Plains Cree dialect.

10 Cardinal & Hildebrandt, *supra* note 6 at 10.

11 Cardinal & Hildebrandt, *supra* note 6.

12 Brian Slattery, “Aboriginal Language Rights” in David Schneiderman, ed, *Language and the State: The Law and Politics of Identity* (Cowansville, QC: Éditions Yvon Blais, 1991) 119 [Slattery, “Aboriginal Language Rights”].

13 *Ibid*.

14 Brian Slattery, “A Taxonomy of Aboriginal Rights” in Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Aboriginal Rights*, (Vancouver: UBC Press, 2007) 111 at 119 [Slattery, “Taxonomy of Aboriginal Rights”].

15 Slattery, “Taxonomy of Aboriginal Rights” *supra* note 14.

16 *Ibid* at 119.

language — constitutes linguicide.<sup>17</sup> Studies have also demonstrated that the most effective methods of creating fluent speakers are immersion programs.<sup>18</sup>

Some Indigenous language education programs have been implemented in Bolivia, New Zealand, Norway, Finland and the United States.<sup>19</sup> Many of these countries also have legislation recognizing Indigenous language rights in a variety of areas.

### Bolivia

The Bolivian Constitution declares 36 Indigenous languages, as well as Spanish, as official languages of the country.<sup>20</sup> The constitution also requires government representatives to use at least two official languages, including Spanish.<sup>21</sup> In 1994, education reform was implemented, resulting in intercultural bilingual education for Indigenous children.<sup>22</sup> Educational reforms include the inclusion of curriculum that has been developed based on the knowledge, values and cultures of Indigenous peoples in Bolivia. Indigenous teaching practices and methodologies are also integrated into teaching Indigenous languages.<sup>23</sup> Over the past few years, the social and political status of Indigenous languages has been strengthened because of the legislative and educational changes that have been introduced.<sup>24</sup>

### New Zealand

The Maori Language Act 1987 declares the Maori language as the official language of New Zealand.<sup>25</sup> The Waitangi Tribunal has deemed the Maori language a national treasure, or *taonga*, that the Crown must protect.<sup>26</sup> The Maori Language Act also established the Te Taura I Te Reo Maori, or the Maori Language Commission “to promote the Maori language, and, in particular, its use as a living language and as an ordinary means of communication.”<sup>27</sup> Because of the commission’s work, many Maori people have been empowered to learn Maori and take pride in their language.

17 Skutnabb-Kangas, *supra* note 2; Dunbar & Skutnabb-Kangas, “Forms of Education”, *supra* note 2; Skutnabb-Kangas & Dunbar, “Indigenous Children’s Education”, *supra* note 2; Andrea Bear Nicholas, “Linguicide: Submersion Education and the Killing of Languages in Canada”, *Briarpatch* (March/April 2011) 4.

18 Marka-Liisa Olthuis, Suvi Kivelä & Tove Skutnabb-Kangas, *Revitalising Indigenous Language: How to Recreate a Lost Generation* (Bristol, UK: Multilingual Matters, 2013); Jim Cummins, “Total Immersion or Bilingual Education? Findings of International Research on Promoting Immigrant Children’s Achievement in the Primary School” in J Ramseger & M Wagener, eds, *Chancengleichheit in der Grundschule: Ursachen und Wege aus der Krise* (Wiesbaden, Germany: CS Verlag für Sozialwissenschaften, 2008) 44; Haley De Korne, “Indigenous Language Education Policy: Supporting Community-Controlled Immersion in Canada and the United States” (2008) 9:2 *Language Pol’y* 115; Jon Reyhner, “Indigenous Language Immersion Schools for Strong Indigenous Identities” (2010) 7:2 *Heritage Language J* 138.

19 Although Indigenous language rights have been recognized as a right to education in a number of countries, the legislation is not perfect. It is not within the scope of this essay to provide a critique of the legislation; however, the challenges that Indigenous peoples face in advancing their languages should be considered as legislation is contemplated in Canada.

20 *Constitucion Política del Estado Plurinacional de Bolivia* (2009), art 5.I.

21 *Ibid*, art 5.II.

22 Bolivia, *Education Reform Law, 1994* (Law 1565); Rosaleen Howard, “Language, Signs, and the Performance of Power: The Discursive Struggle over Decolonization in the Bolivia of Evo Morales” (2010) 37:3 *Latin Am Persp* 176.

23 Sonia Comboni Salinas & José Manuel Juárez Núñez, “Education, Culture and Indigenous Rights: The Case of Educational Reform in Bolivia” (2000) 30:1 *Q Rev Comp Educ* 105 at 110.

24 *Ibid* at 108.

25 *Maori Language Act 1987* (NZ), 1987/176 [Maori Language Act].

26 Article 2 of the *Treaty of Waitangi* (1840) guarantees to Māori hapu (tribes) the control and enjoyment of those resources and *taonga* that it is their wish to retain. The preservation of a resource base, restoration of tribal self-management and the active protection of *taonga*, both material and cultural, are necessary elements of the Crown’s policy of recognizing *rangatiratanga*.

27 *Maori Language Act*, *supra* note 26, s 7(b).

## United States

In 1978, the state legislature of Hawaii recognized Hawaiian as an official language, which generated a language revitalization program. Ten years later, a Hawaiian senator introduced a proposal in Congress, resulting in the adoption of the Native American Languages Act in October 1990.<sup>28</sup> This legislation acknowledges that the United States must act with Native Americans to help preserve Indigenous languages. It also establishes a federal policy to preserve, protect and promote the rights and freedom of Native Americans to use, practise and develop Native American languages and to encourage and support the use of Native American languages as a medium of instruction.<sup>29</sup>

## Norway, Finland and Sweden

In the 1980s, all Scandinavian countries legislated legal guarantees and regulations for the right to use the Sami language. Norway adopted the first Sami language law in 1990.<sup>30</sup> In 1991, Finland established its law on the use of the Sami language before the authorities,<sup>31</sup> while Sweden, in contrast, has adopted some regulations on the use of Sami. All three states have directly elected Sami Parliaments.

## Greenland

The Indigenous people in the Danish territory of Greenland have also made important gains with language rights. In 1979, Home Rule recognized Greenlandic as the main language of the country.<sup>32</sup> Since then, Greenlandic has become the medium of instruction in schools. Most inhabitants of Greenland acknowledge that children of Danish parents living in Greenland should learn Greenlandic.<sup>33</sup>

## Canada

The federal government has made a commitment to deal with Indigenous rights on a nation-to-nation basis in Canada.<sup>34</sup> The Ministry of Indigenous and Northern Affairs as well as the Department of Justice have made commitments to implement UNDRIP according to the principles of free, prior and informed consent.<sup>35</sup> While the federal government is contemplating how it intends to fulfill its international and domestic responsibilities to Indigenous languages, other key players from across the country are contemplating Indigenous language revitalization strategies.

Two recent national events resulted in recommendations for the advancement of Indigenous language rights in Canada. Indigenous and non-Indigenous scholars gathered in Toronto to discuss

28 *Native American Languages Act of 1990*, Pub L No 101-477, 104 Stat 1152.

29 *Ibid.*

30 *Sami Language Act*, 1990, Norway.

31 *Sami Language Act 1991*, (516/1991) Finland (now replaced).

32 *The Greenland Home Rule Act*, No 577 (29 November 1978) s 9(1).

33 Lars S Vikør, *The Nordic Languages: Their Status and Interrelations* (Oslo, Norway: Novus Press, 1993) at 110.

34 Prime Minister Justin Trudeau, "Minister of Indigenous and Northern Affairs Mandate Letter" (2015), online: <<http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>>: "No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, cooperation, and partnership."

35 Online Editor, "Justice Minister Jody Wilson-Raybould's Opening Address at UN Permanent Forum on Indigenous Issues" *Northern Public Affairs* (9 May 2016), online: <[www.northernpublicaffairs.ca/index/justice-minister-jody-wilson-rayboulds-opening-address-at-un-permanent-forum-on-indigenous-issues/](http://www.northernpublicaffairs.ca/index/justice-minister-jody-wilson-rayboulds-opening-address-at-un-permanent-forum-on-indigenous-issues/)>; Online Editor, "Canada and UNDRIP: Indigenous Leaders Respond to the Announcement" *Northern Public Affairs* (11 May 2016), online: <[www.northernpublicaffairs.ca/index/canada-undrip-indigenous-leaders-respond-to-announcement/](http://www.northernpublicaffairs.ca/index/canada-undrip-indigenous-leaders-respond-to-announcement/)>.

the TRC Calls to Action on Indigenous Languages.<sup>36</sup> Subsequently, a national dialogue in Victoria with Indigenous language experts from across the country was held to discuss approaches to language revitalization in Canada.<sup>37</sup> Individuals at both events recommended implementing the TRC Calls to Action as well as UNDRIP.

Adding to these significant contributions, discussions at the community level have signalled that immersion and teacher training programs are essential for language revitalization efforts. Some of the barriers have been attributed to lack of guaranteed funding or institutional support. There are also jurisdictional issues among government departments regarding Indigenous languages and education. Heritage Canada is responsible for funding the Aboriginal Languages Initiative program and Indigenous and Northern Affairs is responsible for funding Indigenous education. The federal government has indicated that both departments will work together in advancing and promoting Indigenous languages.<sup>38</sup>

Canada has some internal legislative and educational models from which to draw. The Charter of Rights and Freedoms recognizes rights for minority languages under section 23.<sup>39</sup> As a result, Canadians have the right to have their children educated in their mother tongue, whether English or French. French language immersion encourages bilingualism for children with no constitutional right to education in French (that is, when their mother tongue is not French), and provides a model to consider for Indigenous language education.

Certain Indigenous languages have also been granted regional quasi-constitutional status in the Northwest Territories, Nunavut, the Yukon and Manitoba.<sup>40</sup> A problem has been that the legislation does not guarantee the resources required for the revitalization and maintenance of Indigenous languages.<sup>41</sup>

36 The event was held at Glendon College, York University, and was sponsored by the School of Public and International Affairs and the Centre for Research in Language and Culture Contact. The report was circulated across Canada. As well, a launch of a declaration on Indigenous languages was held in November 2016: "The Glendon Truth and Reconciliation Declaration on Indigenous Language Policy" (October 2016), online: <[www.glendon.yorku.ca/crlcc/wp-content/uploads/sites/106/Glendon-declaration-Final-Draft-Oct-2016-public.pdf](http://www.glendon.yorku.ca/crlcc/wp-content/uploads/sites/106/Glendon-declaration-Final-Draft-Oct-2016-public.pdf)>.

37 The national dialogue was hosted by the First Peoples' Cultural Council on Indigenous Languages and was held in June 2016. The report focused on four areas: language rights, legislation and policy: community-based revitalization; education; and urban strategies. It was submitted to the Department of Canadian Heritage and to the Assembly of First Nations: "Indigenous Languages Recognition, Preservation and Revitalization" (30 September 2016), online: First Peoples' Cultural Council <[www.fpcc.ca/files/PDF/General/FPCC\\_\\_National\\_Dialogue\\_Session\\_Report\\_Final.pdf](http://www.fpcc.ca/files/PDF/General/FPCC__National_Dialogue_Session_Report_Final.pdf)>.

38 Prime Minister Justin Trudeau, "Minister of Canadian Heritage Mandate Letter" (2015), online: <<http://pm.gc.ca/eng/minister-canadian-heritage-mandate-letter>>: "Work in collaboration with the Minister of Indigenous and Northern Affairs to provide new funding to promote, preserve and enhance Indigenous languages and cultures."

39 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 23: "23(1) Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province."

40 In 1984, the *Northwest Territories Official Languages Act*, RSNWT 1988, c 0-1, s 4 recognized nine Indigenous languages as official languages. In 2008, Nunavut implemented the *Official Languages Act*, SNU 2008, c 10 and the following year the *Inuit Language Protection Act*, SNU 2008, c 17 was introduced. In the Yukon, Indigenous languages have been granted official language status of the territory in the *Languages Act*, RSY 2002, c 133, ss 1(3), 3(1). In Manitoba, the *Aboriginal Languages Recognition Act*, CCSM c A1.5 recognizes the importance of the seven Indigenous languages.

41 Senator Murray Sinclair reported in a discussion regarding a bill on Aboriginal languages that, other than Heritage Canada's Aboriginal Languages Initiative, the only significant programs for language preservation are the Canada Territorial Language Accords, with a \$4.1-million budget, which support territorial government-directed Aboriginal language services, as well as community projects in Nunavut and the Northwest Territories. In Yukon, language revitalization and preservation projects are supported through transfer agreements, with 10 of the 11 self-governing Yukon First Nations becoming eligible. Compare that to the official languages program for English and French in Canada, which in recent years has been allotted funding as follows: in 2012-2013, \$353.3 million; in 2013-2014, \$348.2 million; in 2014-2015, \$348.2 million. In Senator Sinclair's concluding remarks, he indicated that he had some concerns with the bill on Aboriginal languages but would "support [it] going on to committee in order to see if the committee members will support amendments to the bill...that...will make [it] stronger and consistent both with the TRC's calls to action as well as the principles espoused in the United Nations Declaration on the Rights of Indigenous Peoples." "Bill S-212, Aboriginal Languages of Canada Act", 2nd Reading, *Debates of the Senate*, 42nd Parl, 1st Sess, No 73 (17 November 2016) at 1510 (Hon Murray Sinclair).

## Recommendations

Subject to further consultation with Indigenous peoples, it is recommended that the federal government do the following:

- Implement Indigenous language rights in accordance with the principles of Indigenous customary law, UNDRIP and the TRC's Calls to Action regarding Indigenous languages.
- Formally acknowledge that section 35 of the Constitution Act, 1982 recognizes and affirms Indigenous customary law as the right of Indigenous peoples to transmit their languages from generation to generation.
- Give effect to Indigenous customary law and inter-societal constitutional language rights by adopting legislation granting Indigenous parents the right to educate their children in their ancestral languages, through language courses or immersion programs made available in on-reserve and off-reserve schools, at the expense of the federal government.
- Authorize federal funding of such education through Heritage Canada, as is now done for minority language education under section 23 of the Charter.<sup>42</sup>
- Enter into legal and funding arrangements with provincial and territorial governments to ensure that such education is made available to parents whose children are not residing on reserve.
- Create a national institute of Indigenous language education whose mandate should be as follows:
  - to collect and disseminate information about the teaching of Indigenous languages, whether in Canada or elsewhere;
  - to conduct and publish the results of research into the teaching of Indigenous languages;
  - to provide information to Indigenous parents and Indigenous communities about how and where Indigenous languages are currently taught and how to create new facilities or opportunities to learn Indigenous languages or be instructed in Indigenous languages;
  - to assist federal, provincial and territorial governments required to provide education in Indigenous languages; and
  - to train and certify teachers and teachers' aids to provide instruction in Indigenous languages.

## Author's Note

The Recommendations section of this essay was prepared with David G. Leitch.

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<sup>42</sup> Note that Heritage Canada's Aboriginal Languages Initiative does not currently provide funding for the development of regular accredited curriculum. See "eligible expenses" on the website of the Aboriginal Languages Initiative, online: <<http://canada.pch.gc.ca/eng/1476991063660>>.

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Since 2003, Lorena has been an advocate for Aboriginal residential school survivors as well as children of residential school survivors. She has spoken nationally and has authored articles in Australia and Canada on residential school issues. In 2003, she was a task force member and contributor to the Assembly of First Nations' Report on Canada's dispute resolution plan to compensate for abuses in Indian residential schools. Lorena has also acted as a legal consultant to the Toronto law firm Thomson, Rogers for the plaintiffs and their counsel in the Baxter National Residential School Class Action, as well as to Mother of Red Nations Women's Council in Manitoba on cultural harm issues. She has been involved with the Digital Storytelling project on the intergenerational legacy of the residential schools. The Digital Storytelling project has been presented across Canada, the United States and in Iceland.

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## Artist Credits

- Cover**    *Natives Playing on the Land*  
Lawrence Paul Yuxweluptun  
2015, 270 × 180 cm, acrylic on canvas  
The Bailey Collection, courtesy of the artist and Macaulay & Co. Fine Art
- vi**        *Indian World My Home and Native Land*  
Lawrence Paul Yuxweluptun  
2012, 304 × 213 cm, acrylic on canvas  
Courtesy of the artist and Macaulay & Co. Fine Art, photo credit: Barb Choit
- 8-9**        *The One Percent*  
Lawrence Paul Yuxweluptun  
2015, 84" x 60", acrylic on canvas  
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- 18-19**     *The Masterpiece*  
Norval Morrisseau  
1982, 64" x 112", acrylic on canvas  
Courtesy of The Coghlan Art Gallery
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1989, 122 × 102 cm, acrylic on canvas  
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2013, 48" x 68", acrylic on canvas  
Collection of Glenbow; purchased with funds from the Historic Resources Fund, 2014
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Norval Morrisseau  
1990, 48" x 96", acrylic on canvas  
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2016, 48" x 24", acrylic on canvas  
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2013, 72" x 68", acrylic on canvas  
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- 88 *New Beginnings*  
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2015, 48" x 72", acrylic on canvas  
Courtesy of the artist and the Wabano Center for Aboriginal Health

Title Pages

*Sweetgrass*  
Peter Pomart  
2017, photograph  
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## About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

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## À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan qui formule des points de vue objectifs dont la portée est notamment mondiale. Nos recherches, nos avis et l'opinion publique ont des effets réels sur le monde d'aujourd'hui en apportant autant de la clarté qu'une réflexion novatrice dans l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques mondiales, et le droit international, et nous les exécutons avec la collaboration de nombreux partenaires stratégiques et le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

