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The Duty to Consult in Canada Post-*Haida Nation*

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Abstract
This article is intended as a companion piece to Øyvind Ravna's contribution to this anniversary volume. It maps the development of the duty to consult in Canadian law since the seminal decision of the Supreme Court of Canada in *Haida Nation v British Columbia* in 2004. The article begins by briefly examining the first references to the duty to consult in 1990 before turning in Part 2 to the transformation of the duty in *Haida Nation* and a doctrinal analysis of the various elements of the duty. Part 3 examines the international standard of free, prior and informed consent (FPIC) as developed in the UN Declaration on the Rights of Indigenous Peoples as well as the implications of legislation that aims to give effect to the Declaration in federal or provincial law. The conclusion to the paper offers some comparative comments on Norway and Canada regarding the development of the duty to consult. These comments emphasise that whereas consultation and FPIC obligations in Norway are firmly rooted in international law, and, in particular, in the International Labour Organization's Convention on Indigenous and Tribal Peoples (ILO C-169), this is not the case in Canada. In Canada, the duty to consult and accommodate finds its origins in domestic law and the entrenchment of aboriginal rights in the Constitution in 1982. However, more recent discussions over the implementation of the UN Declaration in federal and provincial law have inevitably broadened the discourse to include international law and the FPIC standard.

Keywords: *Canada; Indigenous peoples; duty to consult; free, prior and informed consent*

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This article is intended as a companion piece to Øyvind Ravna's contribution to this anniversary volume.[1] It maps the development of the duty to consult in Canadian law since the seminal decision of the Supreme Court of Canada in *Haida Nation v*

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British Columbia in 2004.[2] As such, it reaches back beyond the inaugural volume of this *Review*.

When the Supreme Court of Canada rendered its decision in *Haida Nation* there was little if any discussion of free, prior and informed consent (FPIC) as an alternative or parallel formulation to the duty to consult. Indeed, the FPIC formulation does not make an appearance in Canadian case law until 2014.[3] Nevertheless, with the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP or UN Declaration) in 2007,[4] there has been increased reference to this standard in the discourse surrounding the rights of Indigenous peoples, not only internationally but also in Canada. And while Canada was slow to endorse the UN Declaration, more recent efforts at both the federal and provincial levels to adopt legislation to make the Declaration applicable in Canadian law has brought to the fore the relationship between the international standard of FPIC and the domestic law standard pertaining to the duty to consult and accommodate.

This article begins by briefly examining the first references to the duty to consult in 1990 before turning in Part 2 to the transformation of the duty in *Haida Nation* and a doctrinal analysis of the various elements of the duty. Part 2 concludes with a survey of some critiques of the duty to consult (and accommodate).[5] Part 3 examines the international standard of free, prior and informed consent as developed in the UN Declaration as well as the implications of legislation that gives effect to the Declaration in federal or provincial law. The conclusion to the paper offers some comparative comments on Norway and Canada regarding the development of the duty to consult. These comments emphasise that whereas consultation and FPIC obligations in Norway are firmly rooted in international law, and, in particular, the International Labour Organization's Convention on Indigenous and Tribal Peoples (ILO C-169), this is not the case in Canada. In Canada, the duty to consult and accommodate finds its origins in domestic law and the entrenchment of aboriginal rights in the Constitution in 1982. However, more recent discussions over implementation of the UN Declaration in federal and provincial law have inevitably broadened the discourse to include international law and the FPIC standard.

1 First references to the duty to consult

The Supreme Court of Canada first referenced the duty to consult in *Sparrow* in the context of assessing the extent to which the government might be able to justify the infringement of a constitutionally protected aboriginal right to fish.[6] As part of that analysis (known as the justifiable infringement test), the Court, almost in passing, indicated that it would consider as a relevant factor whether the Crown has consulted the aboriginal group in question with respect to the proposed conservation measures.[7] The duty to consult still plays a role in rights infringement cases[8] but its principal role now in Canadian law is as a means to protect aboriginal and treaty rights (especially those rights claimed rather than proven) *from* infringement where a

government is proposing to make a decision that may affect those rights, rather than consultation as a procedural branch of a justifiable infringement analysis.[9]

The Court first developed the independent standing of the duty to consult and accommodate as a proactive protective mechanism in *Haida Nation* as a means to address the concerns of Indigenous communities with respect to aboriginal rights and title claims that had yet to be formally adjudicated or recognized.[10] Since then, the Court has also confirmed that the duty to consult and accommodate applies to proven rights in the context of both historic treaties[11] and modern land claims agreements.[12]

The Court has also been at pains to locate the duty to consult within the broader umbrellas of the "honour of the Crown" and the project of reconciliation. In *Haida Nation*, for example, the Court observed that "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown."[13] The duty of honourable dealing arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[14] And "(t)he ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty."[15] While the duty to consult and accommodate "flows from the honour of the Crown", it is constitutionalized by section 35 of the *Constitution Act, 1982* which protects not only proven rights but also "the potential rights embedded in as-yet unproven Aboriginal claims …"[16]

2 Elements of the duty to consult and accommodate

This account of the duty to consult and accommodate is organized around the following questions: what is the trigger to the duty; what is the content of the duty; who owes the duty to consult; and, what are the consequences where there is a breach of the duty? The leading case on most of these questions is still *Haida Nation*, a case that dealt with the proposed transfer of a previously granted tree farm licence within the traditional territory of the Haida Nation.[17]

Most of the analysis responding to these questions focuses on the duty to consult. A separate subsection addresses the duty to accommodate more directly. Part 2 concludes with a critique of the duty to consult and accommodate.

2.1 The trigger

In *Haida* the Court suggested that "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it …".[18] The threshold for triggering the duty is therefore low.[19] The test has three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[20] The duty may be triggered by more abstract

decisions (such as the transfer of a resource licence as was the case in *Haida*, or the determination of a total allowable harvest or cut[21]), or by more concrete decisions such as the grant of a cutting or harvesting permit, or a drilling licence with respect to specific lands.[22] The duty may also be triggered by "high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants."[23]

It may not always be easy to say whether particular Crown conduct triggers the duty to consult, especially where there are multiple decisions to be made before physical activities will occur within the traditional territory of an Indigenous community. For example, there is a line of cases to the effect that the grant of a Crown property interest such as an oil and gas lease will not trigger the duty to consult but that a decision to grant a drilling licence to authorize drilling activity on that lease will trigger the duty.[24]

The Court addressed the extent to which legislative decisions (e.g. the introduction and passage of new legislation or new regulations) may trigger the duty to consult in *Mikisew Cree (No 2)* in 2018.[25] While at least some members of the Court confirmed that a decision to promulgate delegated legislation (e.g. new regulations) might trigger the duty to consult,[26] the majority was firmly of the view that the adoption of new legislation that might adversely affect an aboriginal or treaty right or a claim to title would not trigger a duty to consult. The different opinions that constitute the majority gave several reasons for this conclusion. For Justice Karakatsanis the doctrines of the separation of powers and parliamentary sovereignty trumped any such duty. Each branch of government (the courts, the legislative branch and the executive) would be unable to fulfil its function if interfered with by another branch.[27]

> Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced post-enactment. The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes. Directly transposing such *executive* requirements into the *legislative* context would be an inappropriate constraint on legislatures' ability to control their own processes.[28]

Justice Brown for his part was of the view that the development and enactment of new legislation was not, strictly speaking, Crown conduct that could attract the duty within the meaning of *Haida*.[29] This conclusion was based on the assertion that Crown conduct, as used in *Haida,* must be confined to the executive branch and could not extend to the legislative branch or to the courts. Finally, Justice Rowe offered several practical obstacles that would need to be resolved were the duty to apply to the legislative process[30] noting that "(t)he courts are ill-equipped to deal with the procedural complexities of the legislative process."[31]

While the opinions of the various members of the Court reveal a variety of different views with only two justices in favour of applying the duty to consult to the

legislative process,[32] it is also notable that none of the judgments reference Article 19 of the UN Declaration.[33] Article 19 draws no distinction between legislative (parliamentary) measures and delegated legislation (regulations made by the executive drawing upon authority conferred by parliament):

> 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.

Despite the Court's position on the inapplicability of the duty to consult to the parliamentary legislative process, the Court was unanimously of the view that if the resulting legislation infringed an aboriginal or treaty right, such legislation "will be a nullity and will not authorize any regulatory action" unless the Crown could meet the *Sparrow* justifiable infringement test.[34] And as part of that the Court also acknowledged that consultation, or the absence thereof, would be a relevant part of the justifiable infringement analysis.[35]

The duty to consult is triggered by the potential adverse effects that may flow from the decision that is being considered. Consequently, where the possible decision involves an amendment to the operation of an existing facility, the duty only applies to the consequences of the amendment; it does not apply to the existing facility.[36] It is also evident that the third element of the trigger requires that there be "a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right."[37] Hence, in *Carrier Sekani* the Court concluded that the Crown conduct in that case (execution of an energy purchase agreement) of a hydro facility) would not alter the operation of an existing hydro generation facility and therefore there could be no impact on the claims of the Indigenous community.[38]

2.2 The content of the duty

The content of the duty varies with the "strength of the claim and the circumstances"[39] but "(i)n general terms … the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[40] There is therefore a spectrum:

> At one end … lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty … may be to give notice, disclose information, and discuss any issues raised in response to the notice. …[41]

> At the other … lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail

> the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.[42]

In cases engaging treaties and modern land claims agreements rather than an asserted aboriginal title or rights claim, the Crown must recognize that it is dealing with *established* rights, although the scope and content of the duty may be affected by the specificity of the promise.[43]

Given that the depth of the duty to consult varies with the strength of the claim it will ordinarily be necessary at the outset for the Crown to conduct a strength of claim assessment and to communicate the results of that assessment to the Indigenous community.[44] In some cases, however, courts have relaxed that requirement where there is evidence of real engagement.[45]

Consultation is not just another form of project assessment but must engage with the effect of the project on the *rights* of the Indigenous community and must be demonstrably responsive to the concerns of the community.[46] The Crown must inform itself as to the impact of a proposed project on the rights of the community, communicate those findings to the community and deal with the community "in good faith and with the intention of substantially addressing" articulated concerns.[47] Consultation is not just an "opportunity to blow off steam" and "[c]onsultation that excludes from the outset any form of accommodation would be meaningless."[48] Indigenous rights and interests cannot be conflated with the interests and concerns of other stakeholders.[49] If the record shows that the relevant decision maker required no changes to the project configuration, or included no additional terms and conditions on a project approval, it may be difficult to establish that the decision maker truly engaged with the rights and concerns of the community.[50]

Finally, in terms of content, all levels of court have emphasised that the right to be consulted does not afford affected Indigenous communities a veto over proposed new projects.[51] To put it another way, the right to be consulted does not require that government or a project proponent obtain the consent of the community before a project can be allowed to proceed. At least, that is, unless the Indigenous community has title to the project lands required, in which case Indigenous consent will be required.[52] In sum, where a community has yet to prove its claim to the satisfaction of settler society, the duty is a duty to consult; but where the community has established a title the government or developer must obtain the community's consent to proceed.

2.3 Who has the duty to consult and accommodate?

It is the Crown contemplating "the conduct" that might adversely affect the Aboriginal right or title or treaty right that has the responsibility to discharge the duty to consult and accommodate. Within the Canadian federal system that Crown might be the Crown in right of Canada (i.e. the federal government), or the Crown in right of

a Province (i.e. a provincial government),[53] or both with respect to some projects.[54] While this seems fairly straightforward, it must also be recognized that governments organize themselves in different ways in order to make decisions with respect to resource projects. For example, a government (e.g. the government of the Province of Saskatchewan) may direct that the relevant line Department or Minister is the party responsible for licensing new oil and gas wells,[55] whereas another jurisdiction (e.g. the government of the province of Alberta) may give this responsibility to an independent administrative tribunal (the Alberta Energy Regulator (AER)).[56] That tribunal may have final decision-making authority or it may only have the power to make recommendations.[57] The same diversity of approach may be seen for other types of decisions, such as decisions to approve the construction of new pipelines or new dams.

The manner in which a government organizes the discharge of its permitting authority cannot be used to avoid a constitutional duty to consult and accommodate,[58] but the case law suggests that the involvement of independent administrative tribunals complicates the allocation and discharge of the duty. Questions that have arisen in this context include the following: (1) Does the administrative tribunal itself have a duty to consult and accommodate? (2) Can the tribunal's procedures be relied upon by the Crown to discharge the Crown's duty to consult and accommodate? (3) Does the tribunal have the authority (and perhaps the duty) to assess whether the Crown has discharged its obligations with respect to the duty to consult and accommodate before making a decision?

A leading decision on these issues is *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council* (*Carrier Sekani*).[59] The case involved an application to a provincial energy regulator (the British Columbia Utilities Commission (BCUC)) by a provincial Crown corporation, BC Hydro, for approval of an energy purchase agreement (EPA) that it had entered into with Alcan, the operator of a hydro facility within the traditional territory of the Carrier Sekani. The Court noted that the Crown could delegate its duty to consult to an administrative tribunal and could also give that tribunal the power and responsibility to determine if the Crown's consultation obligations have been fulfilled.[60] Whether the government has done so are questions of statutory interpretation and thus the answers are contingent – what did Parliament (or the provincial legislature) intend, either expressly or implicitly?[61] The Court concluded that a tribunal will generally have the power to assess whether or not the Crown has fulfilled its constitutional obligations to consult and accommodate if the tribunal's statute gives it the authority to determine questions of law, unless some other provision removes from it the power to determine questions of constitutional law generally (or more specifically removes its power to resolve questions pertaining to aboriginal consultation).[62] In *Carrier Sekani* the Court concluded that while the Commission had the authority to assess whether there was a duty to consult, and if so whether that duty had been satisfied, it did not itself have the duty to consult,[63] that responsibility remained with the Crown in its executive capacity.

Where a regulator does have consultation responsibilities and where it is the final decision-maker for a project, the Crown may be entitled to wholly rely on the consultation activities carried out by the regulator so long as that regulator has the jurisdiction to consider the full suite of concerns raised by the Indigenous community.[64] Where a regulator is only responsible for making a recommendation to cabinet, cabinet may have additional consultation and accommodation obligations to discharge before it can make a final decision.[65] Furthermore, insofar as cabinet's responsibilities may extend beyond the narrow jurisdiction of a particular regulator, the scope of cabinet's consultation and accommodation responsibilities may be broader than that of the regulator making the recommendation.[66]

Another issue concerns the role of the *proponent* in the discharge of the duty to consult and accommodate. The case law has consistently confirmed that it is the Crown and not the proponent that has the duty to consult and accommodate.[67] At the same time, the case law also confirms that "(t)he Crown may delegate procedural aspects of consultation to industry proponents".[68] In practice both federal and provincial governments delegate many consultation activities to project proponents.

2.4 Judicial supervision of the duty to consult and accommodate: the standard of review

The Courts will always be in a position to supervise the discharge of the duty to consult and accommodate based on the applicable standard of review. Trigger questions, including the depth of consultation required, are questions of law that will generally be evaluated on the basis of correctness, with the qualification that such decisions are in part premised on an assessment of the facts for which some judicial deference may be appropriate.[69] The consultation process itself will be evaluated on the basis of reasonableness. [70] Perfection is not required.[71] Where a decision maker has concluded that it has discharged its obligation, a reviewing court will focus on the reasonableness of that conclusion rather than conducting its own assessment of the merits of the consultation activities.[72]

2.5 What are the remedies for breach?

One remedy for breach is simply a judicial declaration that the Crown has failed to fulfill its obligations.[73] It should follow from this that the Indigenous community should also be entitled to a declaration that any decision made without fulfilling the duty to consult is void.[74] That may not mean the end of the project since, in accordance with general administrative law principles, the relevant decision maker will typically have the opportunity to cure the identified deficiencies.[75] Such was the case, for example, with the Trans Mountain Expansion project (TMX). The Federal Court of Appeal quashed the original Order in Council approving the project in its *Tsleil-Waututh* decision.[76] The federal government then sought to address the deficiencies identified by the Court both through further review by the regulator, the

National Energy Board, and through more direct engagement with First Nations with territories along the route of this linear project. While the second Order in Council approving the project was also subject to an application for judicial review in *Coldwater*, the Federal Court of Appeal in that case considered that the Governor in Council could reasonably conclude "that the consultation efforts made after [*Tsleil-Waututh*] adequately remedied the identified flaws."[77]

In rare cases legislative amendments will be required in order to operationalize the duty to consult and to correct systemic issues in the permitting process.[78]

2.6 The duty to accommodate

The case law to date has tended to focus on the duty to consult rather than the duty to accommodate, and indeed the Supreme Court has emphasised that the duty "guarantees a process and not a particular result."[79] Accommodation is most likely to take the form of changes in the configuration of a project or additional terms and conditions. For example, in *Ktunaxa Nation* the Supreme Court noted that "many accommodations" had been made for Ktunaxa spiritual concerns. These included removing one proposed chair lift in order to protect grizzly bear populations and confining the development to the upper half of the valley as well as "extensive environment reserves and monitoring."[80] Accommodation is unlikely to result in a decision to reject a proposed project since that would be the equivalent of granting injunctive relief even before proof of an asserted claim.[81] In *Ktunaxa Nation* the First Nation took the position that the proposed ski development site was part of a sacred site known to the Ktunaxa as Qat'muk and that the sacred nature of the site entailed that permanent construction should be banned. The court characterized this as a claim for a "specific *accommodation*"[82] further noting that the Crown "did not offer the ultimate accommodation demanded by the Ktunaxa".[83] But this did not mean that the Crown had breached its duty to consult and accommodate even though there had been no reconciliation. Reconciliation may not always be possible, the duty to consult and accommodate does not afford "a right to a particular outcome", but rather that "[t]he process is one of 'give and take'."[84]

Accommodation measures may go beyond the imposition of terms and conditions for a specific project and address the cumulative effects of different projects on Indigenous rights and on the environment. This was the case, for example, with respect to the TMX project. In directing issuance of a project certificate for the second time, Cabinet undertook to implement a number of recommendations designed to address the cumulative impact of increased shipping (project and non-project) within the Salish Sea.[85]

2.7 Critiques of the duty to consult and accommodate

To this point, this paper has largely provided a descriptive and doctrinal account of the duty to consult and accommodate. This concluding subsection canvasses some

of the critiques of the duty. Professors Hamilton and Nichols have offered what is perhaps the most far-reaching critique. They point out that the theoretical underpinnings of the duty to consult and accommodate are founded upon ideas of reconciliation and the honour of the Crown, ideas which in turn are premised on the recognition by the Courts of *de facto* Crown sovereignty.[86] They contend that the judicial acknowledgement of Crown sovereignty (without questioning the legitimacy of that assumption of sovereignty) makes it easy for the Court to conclude that there can be no Indigenous veto. But the implications of this assumption are far reaching because it "forces Aboriginal peoples into a sovereign-to-subjects framework"[87] rather than a nation-to-nation relationship and "maintains a systemic power imbalance"[88] and Crown "unilateralism".[89] Hamilton and Nichols contrast the Court's approach to the relationship between the Crown and Indigenous communities with the Court's approach to the relationship between the federal government and the subjects of the federation as articulated in the *Quebec Secession Reference*,[90] which the authors describe as a jurisdictional or a negotiation model. Were that model applied to the relationship between Indigenous communities and the Crown, it would entail the recognition of indigenous communities as "*peoples* who are in a complicated multinational federal relationship with the Crown"[91] within which the Courts would mediate a *negotiated* relationship between the three orders of government.

Other critiques are more particular. Ariss and colleagues, for example, identify four main concerns.[92] First, they point to the risks associated with the widespread delegation of the Crown's consultation obligations to industry. They observe that this may serve to blur the nation-to-nation relationship, and also note that Indigenous communities may have a broad range of interests and issues that cannot be dealt with by a proponent.[93] A second concern relates to the availability of adequate resources "to ensure that an Aboriginal community can participate meaningfully in consultation."[94] Although funding is typically made available for consultation with respect to major projects, there is always a question as to its adequacy. But there are also concerns that communities may be overwhelmed by the 'demand' for consultation in areas of intense resource exploration, or where there are different resource activities present in the area (e.g. coal mining, oil and gas activities and forestry operations).[95] A third area of concern relates to the scope of accommodation obligations. Should our understanding of accommodation obligations be informed by a weighing of project benefits versus effects on Indigenous interests, or should it be informed by more principled ideas such as the obligation to minimize adverse effects on indigenous interests?[96] A fourth concern deals with the connection between the duty to consult and accommodate and FPIC. I address this in more detail in part 3 of this article. Finally, the authors reference the issue of inequality of bargaining power. While this resembles part of the critique mounted by Hamilton and Nichols, Ariss et al.'s objection is framed in more technical terms than ultimate Crown unilateralism and the absence of a veto. Instead, Ariss et al. choose to emphasise issues such as access to legal and other expert resources and the fact that industry is likely

to be more experienced in negotiations and can learn as a repeat player from past experiences.[97]

2.8 Conclusions

The duty to consult and accommodate has become the principal means in Canadian law for insisting that Indigenous interests are taken into account in government project-related decision-making. To that end the duty serves to protect rights and title claims that have yet to be adjudicated by courts, as well as rights recognized and confirmed by treaties or land claims agreements or by judicial declaration. Good faith implementation of the duty generally requires demonstrable integration of Indigenous interests in government decisions, but it does not afford Indigenous communities a veto over projects proposed within the traditional territories of those communities unless the community has a recognized title to the land concerned.

The next part of the paper turns to consider the international standard of free, prior and informed consent (FPIC), especially as articulated in the UN Declaration.

3 The international standard: Free, Prior and Informed Consent

As noted in the introduction, while the domestic discourse in Canada with respect to resource projects within the traditional territories of Indigenous peoples engages the duty to consult and accommodate as described in Part 2 of this article, the international discourse revolves around the principle or concept of free, prior and informed consent (FPIC).[98] The UN Declaration references some version of the FPIC principle in six different articles.[99] The first section of this part analyses the six references to FPIC in the Declaration before turning to the implications of efforts to implement the Declaration in Canadian law.

3.1 The UNDRIP FPIC Provisions

The first such reference is found in Article 10 and deals with the forcible removal and relocation. The first sentence states that Indigenous peoples shall not be forcibly removed from their lands and territories while the second sentence goes on to provide that:

> 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.

The second reference is in Article 11(2). Article 11 is generally concerned with Indigenous cultural rights. Article 11(2) specifically addresses state obligations to effect redress where cultural property has been taken without the free, prior and informed consent of the peoples concerned. This provision is, in a sense, backward looking; the absence of FPIC historically triggers the present duty to provide some

form of redress such as restitution. The third FPIC reference is found in Article 19 and deals with the adoption of legislative and administrative measures that may affect Indigenous peoples. I have already quoted this article above in the context of *Mikisew Cree* (*No 2*). This is the first FPIC reference in the Declaration to yoke together ideas of consultation and FPIC.

Article 28, the fourth FPIC reference, bears some similarities to Article 11(2). The overall topic of Article 28 is redress for the loss of lands, territories and resource. The trigger for the duty to redress is the historical circumstance that such lands, territories or resources were taken without the free, prior and informed consent of the peoples concerned.

If Articles 11 and 28 adopt a similar FPIC formulation, the same can be said for Articles 10 and 29. Article 29 is generally concerned with the protection of the environment. Within that, Article 29(2) adopts an FPIC provision to address the specific issue of the storage or disposal of hazardous substances. It provides as follows:

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

Finally, there is Article 32(2), which deals with FPIC in the context of resource projects that may affect the lands and territories of Indigenous peoples. This time the FPIC formulation follows that of Article 19 and provides as follows:

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

It is apparent from this overview that the Declaration adopts three different FPIC formulations: first, there is the strong FPIC formulation of Articles 10 and 29 (relocation and chemicals); second, two articles provide that the failure to observe FPIC historically serves as a trigger for redress (Articles 11(2) and 28(1)); and third, there is FPIC as a goal within a consultation framework (Articles 19 and 32(2)) (i.e. consult in order to obtain FPIC).[100]

It is important to observe that all of the rights articulated in the Declaration have to be read in the context of the entire Declaration.[101] Of particular note here is Article 46(2), which suggests that rights may be subject to limitations but only where such limitations "are determined by law and in accordance with international human rights obligations." Furthermore,

> Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

This provision on the limitation of rights protected by the instrument has precursors in other international human rights instruments, although such provisions are usually more limited in their scope.[102] Scheinin and Åhrén offer the opinion, drawing on the interpretive comments on the Human Rights Committee, that it is possible to generalize as to the requirements "for permissible limitations on human rights".[103] In summary, a permissible limitation must: (1) have a proper legal basis, (2) have a legitimate aim, (3) respect the core right subject to limitation, (4) demonstrate necessity, and (5) demonstrate proportionality.[104]

With this overview in mind, the balance of this section focuses on the interpretation of the FPIC formulation in Article 32(2) of the Declaration.[105]

In analyzing this provision, it is important to read the sentence as a whole rather than simply fastening on to the FPIC language in the middle of the clause. Read in its entirety, the paragraph imposes a compound obligation on a state to consult and cooperate in order to obtain FPIC from the indigenous peoples concerned prior to approving a project affecting their lands, territories and resources. The paragraph does not provide (as per the language of Article 29(2) in the context of hazardous materials, or the language of Article 10 on relocation) that a state *shall* ensure that no project that affects an indigenous peoples' lands, territories and resources can be approved without their FPIC. Article 32(2) therefore falls short of stipulating that FPIC is a condition precedent to the approval of any such project, but it does require the state's good faith consultation and cooperative efforts directed at obtaining FPIC.[106] Furthermore, reading Article 32(2) together with other relevant rules of international law suggests that FPIC might be required in some circumstances. In particular, the general comment[107] and decisions of the Human Rights Committee[108] under Article 27 of the International Covenant on Civil and Political Rights[109] suggest that a project, either alone or in conjunction with others (i.e. its cumulative impact), that serves to deny an Indigenous community access to the necessary material elements of its culture *would* require the consent of that community or would otherwise have to be justified on the basis of compelling necessity.[110] The same might also be the case if Indigenous title lands had to be acquired (i.e. expropriation) to allow a project to proceed.[111]

How does this understanding of the Declaration and more general international law compare with the position under domestic law as articulated in Part 2 of this article? Under the current law, a proposed project located on recognized title lands will require Indigenous consent or it will have to meet the justifiable infringement test laid down in *Sparrow*.[112] That test, especially as informed by the subsequent case law,[113] is less stringent than that entailed by Article 46(2) of the Declaration and too heavily weighted in favour of settler society ideas of the public interest.[114]

If the project involves territory for which there is an outstanding but unresolved claim as to title, the applicable law is the duty to consult and accommodate. This has a more variable content than that prescribed by the Declaration and is not directly aimed at securing FPIC.[115]

3.2 Implementation of the Declaration in Canadian Law

Canada voted against the adoption of the Declaration in the General Assembly, later offering its lukewarm endorsement[116] before finally becoming a "full supporter of the Declaration, without qualification."[117] That unqualified political endorsement, however, does not itself serve to make the Declaration part of Canadian law. The Declaration can only have direct effect in Canadian law to the extent that the various provisions represent customary international law or to the extent that the Declaration is implemented by relevant federal and provincial laws.[118] Domestic implementation of the Declaration has a prominent position in the Calls to Action of Canada's Truth and Reconciliation Commission,[119] and some Canadian jurisdictions, most notably at the federal level and in British Columbia, have heeded that call, at least to some degree. While the effort to adopt federal legislation[120] did not make it through the Senate during the last parliament before parliament dissolved for the upcoming election in September 2019,[121] British Columbia adopted the *Declaration on the Rights of Indigenous Peoples Act* in November 2019.[122] That Act falls short of giving the Declaration the force of law in British Columbia, but it does "affirm the application of the Declaration to the laws of British Columbia".[123] This must, at a minimum, mean that the Declaration can be used to influence the interpretation and evolution of domestic law.[124] To the extent that the standard captured by Article 32(2) and general international law (as described in section 3.1 of this article) differs or may differ from the standard captured by domestic law, it becomes important to consider how these two standards will interact now that the Declaration is "of application" to the laws of British Columbia.

This was the subject of some extended discussion in the Committee proceedings in British Columbia leading to the adoption of the legislation. In the course of that discussion, Minister Fraser, the minister responsible for introducing the legislation, made the following points. First, while the government would still have responsibility for final decisions in relation to projects, it would be important to work collaboratively with Indigenous communities to achieve consensus.[125] In that context the Minister noted that:[126]

> … the UN declaration does not contain the word "veto," nor does the legislation contemplate or create a veto. So the bill does not limit the right of government to make decisions in the public interest. But there are many decisions where we need to make those decisions with Indigenous peoples. This legislation gives us the tools, I would suggest, to get an orderly, structured and, especially, a transparent process to do just that.

Second, the Minister suggested that the same standard of seeking to achieve consent (but not necessarily obtaining consent) should apply not only to confirmed title lands but also to lands to which title was asserted. This was consistent, in the Minister's mind, with the direction given by the court in *Tsihqot'in*.[127] Third, the government's approach to implementing Article 32 would be "applied within

the constitutional framework of Canada, including Section 35 of the constitution" and the evolving case law on Section 35.[128]

There are clearly mixed messages here and it will ultimately be up to the courts to resolve how to best read together the text of Article 32(2) and the domestic jurisprudence. In my view, the way forward likely requires re-orienting the duty to consult and accommodate towards the objective of obtaining consent, and it may also require enhanced government involvement and less delegation to industry. In addition, the test for justifying the circumstances in which a project can be allowed to proceed where consent may not be obtained will need some adjustment. In particular, it will need to be more centred on respecting Indigenous interests and values, and less oriented towards privileging settler society's articulation of the public interest.

4 Comparative Conclusions

In the introduction, I noted that this contribution was, at least in part, a companion to Professor Ravna's contribution to this volume.[129] Indeed, we had originally conceived of co-authoring a single article that would cover both jurisdictions. But it soon became apparent that an analytical framework that worked for Norway would not work for Canada. This is largely because the development of the duty to consult and associated ideas of FPIC in Norwegian law has largely, as Ravna's account demonstrates, been driven by international law; particularly by the requirements imposed on Norway by virtue of its adhesion to ILO Convention 169, but also by Article 27 of the International Covenant on Civil and Political Rights and the decisions and commentary of the Human Rights Committee. As my account here shows, this has simply not been the case for Canada. Canada is not a party to ILO Convention 169 and indeed, for reasons I have discussed elsewhere, [130] there is almost no debate about possible Canadian ratification of the Convention.[131] But, more generally, it is evident that international law has had no discernible direct influence on the development of the duty to consult and accommodate.[132] That doctrine of domestic law first emerged as a response to the constitutional protection of Aboriginal treaty rights post-1982.[133] It has subsequently evolved, in part, as a result of a deeper reflection on the relationship between Indigenous peoples and settler society and settler society's claims to sovereignty. It has also evolved as a pragmatic appreciation of the need to afford some protection to claimed rights short of expensive litigation in the courts aimed at enjoining development pending settlement of claims. Neither strand of Canada's duty to consult jurisprudence owes anything to international law. Even in more recent duty to consult and accommodate cases, where one might expect to see some engagement with the international law ideas of FPIC, the judgments have been largely silent on the relevance of FPIC.[134]

Where international law has come to the fore in Canada is in the discourse pertaining to the implementation of UNDRIP in domestic law. These discussions have occurred within the legislative context rather than in the context of litigated cases,

and have gained both profile and impetus following Canada's full endorsement of the Declaration in 2016. This development has provided an important additional source for a normative critique of the domestic standard of the duty to consult and accommodate, particularly within the context of Article 32(2) of the Declaration. To this point, this critique has occurred within academic writings, legislative debate and the media, but, as statutory references to the Declaration grow, along with the adoption of UNDRIP implementing legislation at the federal level and within the different provinces and territories, the debate will inevitably move into the courts.

A second significant difference between the duty to consult as articulated in Canadian law and as articulated in Norwegian law and practice relates to the role of the Sámi parliament and the consultation procedures between State authorities and the Sámi Parliament.[135] Unlike the position taken by the Supreme Court of Canada in *Mikisew Cree (No 2)*,[136] those procedures expressly contemplate that "The substantive scope of consultations may include various issues, such as legislation, regulations, specific or individual administrative decisions, guidelines, measures and decisions (e.g. in governmental reports to the Norwegian Parliament, the Storting)."[137] While the Royal Commission on Aboriginal Peoples and some authors[138] have explored the idea of a House of First Peoples or an Indigenous parliament, those debates have not obtained much traction. Nevertheless, political accords between settler governments and Indigenous communities regarding consultation protocols with respect to new legislation may offer a way to implement Article 19 of the Declaration.[139]

As for the future, increased domestic implementation of the Declaration in different Canadian jurisdictions, can only serve to further internationalise debate in Canada towards the language of FPIC, understanding that the version of that standard as adopted in Articles 19 and 32(2) of the Declaration is a nuanced version of FPIC. It is a standard that requires good faith consultation with a view to achieving FPIC, rather than a version that stipulates that FPIC must be obtained in all circumstances.

NOTES

⋆ Thanks to the Review's two anonymous reviewers for their critical comments on the first submission of this article.

1. Øyvind Ravna, "The Duty to Consult and to Involve the Sámi in Decision-making in Norwegian Law".
2. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.
3. *Snuneymuxw First Nation v. Board of Education – School District #68*, 2014 BCSC 1173.
4. UNGA Res 61/295, 13 September 2007.
5. Parts 1 and 2 draw upon Nigel Bankes, "Clarifying the parameters of the Crown's duty to consult and accommodate in the context of decision-making by energy tribunals", 2017, 36 *Journal of Energy and Natural Resources Law*, 163–180.
6. *R v. Sparrow*, [1990] 1 SCR 1075. Aboriginal and treaty rights were first afforded constitutional protection in Canada in 1982. See *Constitution Act, 1982*, s. 35.
7. *Sparrow* (n 6) at 1119. Other elements of the justifiable infringement test are the requirement that there be a valid legislative objective, the measure must be consistent with the

honour of the Crown and afford an adequate priority to the Indigenous interest, as little infringement as possible and the availability of compensation, ibid at 1113–1119.

8. See, for example, *Mikisew Cree First Nation v. Canada*, 2018 SCC 40 (*Mikisew Cree (No 2)*) per Karakastanis J at para 48, per Abella J at paras 76–77 and per Rowe J at para 155.
9. See *Haida Nation* (n 2) *Prophet River First Nation v. Canada (Attorney General)*, 2017 FCA 15 [33]–[34]; *Ross River Dena Council v Yukon*, 2020 YKCA 10 at para 10. See also *Mikisew Cree (No 2)* (n 8) at para 64 per Justice Abella referencing "the jurisprudential development of the duty to consult from an aspect of the infringement analysis in *Sparrow* to an independent obligation in *Haida Nation*."
10. In this sense the Court recognized that the duty might serve as an alternative to an application to the court for interlocutory injunctive relief: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650 [33].
11. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 388, [2005] 3 SCR 388 (*Mikisew Cree (No 1)*) and *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48.
12. *Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 SCR. 103 and *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557.
13. *Haida Nation* (n 2) at para 16.
14. Ibid at para 32.
15. *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII), [2013] 1 SCR 623 at para 66. And see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 at para 24.
16. *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (CanLII), [2017] 2 SCR 386, at para 79 per McLachlin CJ and Rowe J.
17. *Haida Nation* (n 2).
18. Ibid at para 35. See also *Carrier Sekani* (n 10) at para 31.
19. *Carrier Sekani* (n 10) at para 40, "The threshold, informed by the need to maintain the honour of the Crown, is not high".
20. *Carrier Sekani* (n 10) at para 31.
21. *Gamlaxyeltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440 (total allowable harvest for moose).
22. See *Carrier Sekani* (n 10) at paras 43–44 for further examples.
23. *Carrier Sekani* (n 10) at para 87.
24. *Buffalo River Dene Nation v Saskatchewan (Energy and Resources)*, 2015 SKCA 31 and *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2011 ABCA 29.
25. *Mikisew Cree (No 2)* (n 5). For my comment on the Federal Court of Appeal's decision in that case (and making some comparisons to the situation in Norway) see Nigel Bankes "The Duty to Consult and the Legislative Process: But What About Reconciliation?" (21 December 2016), online: ABlawg, http://ablawg.ca/wp-content/uploads/2016/12/Blog_NB_Courtoreille_MCFN_FCA.pdf
26. Ibid at para 51 per Justice Karakatsanis writing on behalf of Wagner CJ and Gascon J. Justices Abella and Martin considered that the duty applied to all legislation. The remaining members of the bench did not expressly address the issue but their objection to the application of the duty to the legislative process is principally based on the separation of powers and thus the objection should not extend beyond the adoption of legislation by parliament or a provincial legislature.
27. Ibid, Justice Karakatsanis at para 35.
28. Ibid at para 38 (emphasis in original).
29. Ibid at para 127.
30. Ibid at paras 164–165.

31. Ibid at para 164.
32. Justices Abella and Martin.
33. UN Declaration (n 4).
34. Ibid at para 154 per Justice Brown; and see also Justice Karakatsanis at para 48 and Justice Rowe at paras 152 and 156. And for the *Sparrow* test see (n 7).
35. Ibid.
36. *Carrier Sekani* (n 10) at para 45: "Past wrongs, including previous breaches of the duty to consult, do not trigger." Neither is the duty triggered (id at para 52) simply because the new operation "is part of a larger hydro-electric project which continues to impact its rights." See also *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (CanLII), [2017] 1 SCR 1099 (*CTFN*) at para 41.
37. *Carrier Sekani* (n 10) at para 51.
38. Ibid at paras 82–86. See also *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 (no duty to consult prior to ratifying a bilateral investment treaty because no causal relationship between the treaty and its effects upon the First Nation and its asserted rights and interests).
39. *Haida Nation* (n 2) at para 38.
40. Ibid.
41. Ibid at para 43.
42. Ibid at para 44.
43. *Mikisew Cree No 1* (n 11) at para 63; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (CanLII), [2017] 1 SCR 1069 (*Clyde River*).
44. See, for example, *Gitxaala Nation v. Canada*, 2016 FCA 187 (CanLII), [2016] 4 FCR 418 at para 225.
45. *CTFN* (n 36) at para 59. And see also *Clyde River* (n 43) at para 42 and *Ktunaxa Nation* (n 16) at paras 97–104.
46. *Sipekne'katik v Alton Natural Gas Storage*, 2020 NSSC 111.
47. *Grassy Narrows* (n 11) at para 52, *Mikisew Cree (No 1)* (n 11) at par 55, *Delgamuukw* v *British Columbia*), [1997] 3 SCR 1010 [61].
48. *Mikisew Cree (No 1)* (n 11) at para 54.
49. *Sipekne'katik*, (n 46).
50. *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 FCR 3.
51. *CTFN*, (n 36) at para 59 and referencing *Haida Nation* (n 2) at paras 48 and 50. See also *Ktunaxa Nation* (n 16) at paras 80 & 83 confirming that duty to consult and accommodate "does not give Aboriginal groups a veto over developments pending proof of their claims."
52. *Tsilhqot'in Nation v British Columbia*, [2014] SCC 44 at paras 94, 97 and 124–126 and Sharon Mascher, "Today's Word on the Street – 'Consent', Brought to You by the Supreme Court of Canada", 8 July 2014, https://ablawg.ca/wp-content/uploads/2014/07/Blog_SM_Tsilhqotin_July-2014.pdf In such a case a project cannot proceed without the consent of the community unless the Crown is able to establish that the resulting infringement can be justified: see *Ross River Dena Council v. Yukon*, 2020 YKCA 10 at para 8.
53. *Grassy Narrows* (n 11).
54. See for example *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 804. This decision involved the Northern Gateway Project which, were it to have been constructed, would have been a federally regulated pipeline. As such, the federal Crown had consultation and accommodation obligations. But the project also engaged provincial legislative authority with respect to environmental issues leading the Court to conclude that the Crown in right of the province also had consultation obligations. In *Gitxaala* (n 44) the Federal Court of Appeal concluded that the federal Crown had failed to discharge its obligations and quashed the project certificate.

55. The *Oil and Gas Conservation Act*, RSS 1978, c O-2, ss. 8 & 9.
56. See *Responsible Energy Development Act*, SA 2012, c. R-17.3 (REDA) (establishing the Alberta Energy Regulator) and the *Oil and Gas Conservation Act* RSA 2000, c. O-6, s. 18 establishing the authority of the AER with respect to well licences.
57. The AER's authority to issue a well licence is final, ibid. By contrast, approval of a new oil sands development also requires the prior authorization of the Lieutenant Governor in Council (cabinet): *Oil Sands Conservation Act*, RSA 2000, c. O-7, s. 10. However, while that may look more like a recommendation, the Alberta Court of Appeal has recently emphasized that the AER has to make its own decision as to whether or not the project is in the public interest and that the AER's decision on that point is final even though cabinet approval may also be required. See *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at para 66.
58. *Carrier Sekani* (n 10) at paras 62–63.
59. Ibid. Note that both *CTFN* (n 36) and *Clyde River* (n 43) also deal with the duty to consult in the context of energy regulatory tribunal and as such build on the Court's earlier decision in *Carrier Sekani*. For further discussion of these two cases see Bankes (n 5).
60. Ibid at paras 55–57.
61. Ibid [60].
62. For an example of a provision which clearly does this see s. 21 of *REDA* (n 56) which provides that "The Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*." However, the AER may still be obliged to determine other constitutional issues related to the rights of Indigenous peoples: *Fort McKay First Nation* (n 57).
63. *Carrier Sekani* (n 10) at paras 71–72 and 74.
64. *CTFN* (n 36); *Clyde River* (n 43).
65. Gitxaala (n 44), *Tsleil-Waututh* (n 50) and *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, leave to appeal to the Supreme Court of Canada denied 2 July 2020, https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/18411/index.do.
66. Ibid.
67. *Haida Nation* (n 2) at para 53.
68. Ibid.
69. *Haida Nation* (n 2) at para 61.
70. *Haida Nation* (n 2) at paras 61–62; *Carrier Sekani* (n 10) at paras 64–65 and 78–92; *Ktunaxa Nation* (n 16) at para 82]and *Coldwater First Nation* (n 65).
71. *Gitxaala* (n 44) at para 182.
72. *Ktunaxa Nation* (n 16) at para 77; *Coldwater First Nation* (n 65) applying the leading decision of the Supreme Court of Canada on standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.
73. The Supreme Court of Canada had little to say about the remedy in *Haida Nation* (n 2). Instead it largely (with one significant modification) endorsed the decision of British Columbia Court of Appeal 2002 BCCA 147 at para 60 which had granted a declaration "that the Crown Provincial and Weyerhaeuser have now, and had in 1999 and 2000, and earlier, a legally enforceable duty to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown and Weyerhaeuser to manage T.F.L. 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand." The Supreme Court varied this relief by striking out the reference to Weyerhauser consistent with its conclusion that third parties did not owe a duty to consult. A declaration may not issue where the Court considers that the

Crown is adequately acknowledging and discharging its obligations: *Ross River Dena Council v. Yukon*, 2015 YKSC 45.

74. See, for example, *Mikisew Cree (No 2)* (n 11) at para 69, *Gitxaala* (n 44) at para 333 and *Tsleil Waututh* (n 50) at para 768.
75. *Mikisew Cree (No 2)* (n 11) at para 69.
76. *Tsleil Waututh* (n 50).
77. *Coldwater First Nation* (n 65) at para 16.
78. *Ross River Dena Council v. Yukon*, 2012 YKCA 14 (a case dealing with a free entry mining statute). See Nigel Bankes and Cheryl Sharvit, *Aboriginal Title and Free Entry Mining Regimes in Northern Canada*, Canadian Arctic Resources Committee, Northern Minerals Program, Working Paper No 2 (1988).
79. *Ktunaxa Nation* (n 16) at para 79. Actually the Court (per CJ McLachlin and Rowe J) attributed this quality to s 35 of the *Constitution Act* rather than the duty to consult and accommodate. See also at para 114.
80. Ibid at para 112.
81. *Ktunaxa Nation* (n 16) at para 86.
82. Ibid at para 94 emphasis in original.
83. Ibid at para 114.
84. Ibid.
85. See Order P.C. 2019–820 (18 June 2019) (online: http://www.gazette.gc.ca/rp-pr/p1/2019/2019-06-22/pdf/g1- 15325.pdf#page=251).
86. Robert Hamilton and Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019), 64 Alberta Law Review 729.
87. Ibid at 738.
88. Ibid at 743.
89. Ibid at 737.
90. *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 88 "The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire."
91. Hamilton and Nichols (n 86) 751.
92. Rachel Ariss, Clara MacCallm Fraser and Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?", 2017, 13 McGill J Sust Dev L 1.
93. Ibid at 17 and for a practical example see the facts of *Fort Mackay First Nation* (n 57). Ariss et al also reference 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, 46 UBC L Rev 397.
94. Ariss et al (n 92) 19.
95. See for example the facts of *West Moberly First Nations v. British Columbia*, 2011 BCCA 247.
96. Ariss et al (n 92) 20 and referencing Veronica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation", 2006, 17 J Envl L & Prac 27.
97. Ariss et al (n 92) at 23.
98. For more general discussion of the status of FPIC in international law see Sasha Boutilier, "Free, Prior, and Informed Consent and Reconciliation in Canada", 2017, 7 Western J of Leg Studies 1.
99. UNDRIP (n 4), Articles 10, 11(2), 19, 28, 29 and 32(2). For commentary see Mauro Barelli, "Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2) and 32(2)" in Jessie Hohmann and Marc Weller, The UN Declaration on the Rights of Indigenous Peoples:

A Commentary", Oxford, OUP (2018). As the title to the chapter suggests, Barelli's account covers only four of the six FPIC references.

100. If follows from this that I could not, for example, accept Boutilier's view (n 98) at 6 to the effect that "FPIC presents a single universal 'standard'". See also Barelli (n 99 at 249) who prefers to see a sliding scale for FPIC rather than "two different models of FPIC … within the normative framework of the Declaration."
101. Article 31, Vienna Convention on the Law of Treaties, 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.
102. See for example ICCPR, Article 4 dealing with derogations in time of emergency but also indicating (Article 4(2)) that an emergency does not justify derogation from certain norms such as the right to life (Article 6) and the right to be free of torture and slavery (Articles 7 and 8). Other provisions such as Article 12 (freedom of movement) and Article 19 (freedom of expression) contain their own internal derogation clauses.
103. Martin Scheinin and Mattias Åhrén, "Relationship to Human Rights and Related International Instruments" in Hohman and Weller (eds) 63–86, 80. These authors rely in particular on ICCPR General Comment No. 27: Article 12 (Freedom of Movement) Adopted at the Sixty-seventh session of the Human Rights Committee, on 2 November 1999 CCPR/C/21/Rev.1/Add.9.
104. Scheinin and Åhrén ibid at 82–82 and ICCPR General Comment No. 27 (ibid) at paras 11–15.
105. The next few paragraphs draw on Nigel Bankes, "Implementing UNDRIP: An analysis of British Columbia's Declaration on the Rights of Indigenous Peoples Act" forthcoming in a special issue of the UBC Law Review devoted to a consideration of British Columbia's UNDRIP implementing legislation.
106. The duty of good faith is a foundational principle of general international law and specifically of the law of treaties (although here it is important to acknowledge that the Declaration is not a treaty). On the law of treaties see VCLT (n 101) Articles 26 and 31(1).
107. UN Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, General Comment No. 23, 8 April 1994.
108. See, in particular, *Poma Poma v Peru*, CCPR/C/95/D/1457/2006 24 April 2009. For commentary to this effect see Leena Heinämäki, "The Rapidly Evolving International Status of Indigenous Peoples: the Example of the Sami People in Finland" in Christina Allard and Susann Funderud Skogvang (eds), *Indigenous Rights In Scandinavia: autonomous Sami Law*, (Ashgate, 2015). See also the discussion of *Poma Poma* in Ravna (n 1) in this volume.
109. Adopted 16 December 1966; in force 23 March 1976, 999 UNTS 171.
110. UN Declaration, Article 46(2). This seems consistent with Barelli's account (n 99) at 253–254 of FPIC as a sliding scale which, in a case where a project (at 269) will have a significant negative impact on the lands, cultures and lives of Indigenous peoples, will require consent. See also Heinämäki (n 108).
111. The argument here would be that Indigenous title rights are entitled to the same level of respect under international human rights law as settler land titles. See Nigel Bankes, "The protection of the rights of indigenous peoples to territory through the property rights provisions of international regional human rights instruments" 2011, 3 Yearbook of Polar Law 57 surveying, *inter alia*, the jurisprudence of the Inter American Court (IACtHR) and the Inter American Commission on Human rights with respect to the protection of Indigenous property rights under the human rights instruments of the Organization of American States. See, most recently, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina*, IACtHR, February 6, 2020, at para 174 emphasizing that while the right to property under Article 21 may be limited "for reasons of public utility or social

interest" the same rules for triggering those limitations should apply to activities on indigenous territory as apply to other state granted titles to property. See also Alejandro Fuentes, "Judicial Interpretation and Indigenous Peoples' Rights to Lands, Participation and Consultation. The Inter-American Court of Human Rights approach", 2016, 23 International Journal on Minority and Group Rights 39.

112. See *Tsilhqot'in* (n 52) at paras 90, 92 and 120–127.
113. I refer here in particular to both *R v Gladstone*, [1996] 2 SCR 723 at para 73 and *Delgamuukw* (n 47) at para 165 giving a very broad and expansive reading of a valid legislative objective. See also *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (CanLII), [2014] 2 SCR 447 concluding that the government should be able to take advantage of the justifiable infringement test even where its resource development practices have rendered a treaty right to hunt meaningless. In my view this is inconsistent with Canada's obligations under article 27 of the ICCPR, see Nigel Bankes, "*Grassy Narrows*, Division of Powers and international Law" ABlawg, August 6, 2014, https://ablawg.ca/wp-content/uploads/2014/08/Blog_NB_Keewatin_Aug2014.pdf
114. I think that much of the critique developed by Hamilton and Nichols (n 86) with respect to the duty to consult and accommodate is equally applicable to the justifiable infringement test.
115. *Tsilhquot'in* (n 52) at paras 89 and 91.
116. Canada's Statement of Support on the Declaration, November 12, 2010 https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142
117. Speaking Notes for The Honourable Carolyn Bennett Minister of Indigenous and Northern Affairs Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples United Nations Permanent Forum on Indigenous Issues, 10 May 2016, New York City, at 6, https://www.metisnation.ca/wp-content/uploads/2016/05/Speech-Minister-Bennett-UNPFII-NEW-YORK-MAY-10-FINAL.pdf
118. For an example of a recent decision embracing customary international law as part of the law of Canada see *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 and in the context of UNDRIP see *TA v Alberta (Children's Services)*, 2020 ABQB 97, and for further discussion, Gib van Ert, "The Impression of Harmony: Bill C-262 and the implementation of the UNDRIP in Canadian law", 2018 CanLIIDocs 252.
119. Truth and Reconciliation Commission of Canada, *Calls to Action*, 2015. http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf. See, in particular, Calls, 27, 28, 42–45, 48, 50, 75, 67, 69, 70, 86 and 92.
120. See Nigel Bankes, "Implementing UNDRIP: some reflections on Bill C-262" (November 27, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/11/Blog_NB_Bill_C-262_Legislative_Implementation_of_UNDRIP_November2018.pdf
121. See Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples, as passed by the House of Commons, May 30, 2018. The current Trudeau minority government has however committed to introduce a new bill as a government measure Prime Minister Trudeau to Lametti, 13 December 2019 available https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-justice-and-attorney-general-canada-mandate-letter
122. SBC 2019, c 44. Other legislation adopted by the province has also referenced the Declaration including the *Environmental Assessment Act*, SBC 2018, c 51. And notwithstanding the failure to adopt Bill C-262 an increasing number of federal statutes now refer to the Declaration principally in the preamble to the statute but also in some cases in the operative text. See for example, *Indigenous Languages Act*, SC 2019, c 23, *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 and the *Canadian Energy Regulator*

Act, SC 2019, c 28. For a discussion of these two types of UNDRIP implementation legislation see Sam Adkins et al, "UNDRIP as a Framework for Reconciliation in Canada: challenges and Opportunities for Major Energy and Natural Resource Projects" forthcoming, Alberta Law Review (2020).

123. Ibid, s 2(a). The Act, much like the earlier federal Bill C-262, is largely concerned with the adoption of action plans to ensure that the laws of British Columbia are consistent with the Declaration. Evidently this calls for a program of work that will take years. For further details see Bankes (n 105).
124. For a more extended discussion see Bankes (n 105).
125. BC Hansard, 25 November, at 17.20.
126. Ibid.
127. Ibid at 17.40.
128. Ibid at 17.50.
129. My comments here are informed both by Ravna's article (n 1) and Ravna's additional comments on a draft of this section.
130. See my discussion in Nigel Bankes', "Land claim agreements in Arctic Canada in light of international human rights norms", 2009, 1 Yearbook of Polar Law 175. While some of the concerns are based on Canada's federal structure there has also been little Indigenous support for ratification on the basis that Indigenous people were not directly involved in the negotiation of the instrument.
131. The situation in Canada is therefore quite different from that in Finland and Sweden where there are long-standing and ongoing debates about ratification.
132. For example, so far as I am aware, Article 27 of the ICCPR and the HRC's commentary and decisions has never been referenced in any Canadian case dealing with the duty to consult and accommodate. This is the case notwithstanding the fact that that the HRC's decision on Communication No. 167/1984 (Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada), views adopted on 26 March 1990 (the Lubicon case) was the first decision in which the HRC articulated its view that the right to culture "manifests itself in many forms, including a particular way of life associated with the use of land resources" (see General Comment No. 23: The rights of minorities (Art. 27): 08/04/94. CCPR/C/21/Rev.1/Add.5, General Comment No. 23 at para 7. The decision of the Supreme Court of Canada in *Ktunaxa Nation* (n 16) is particularly notable in this context. While the decision refers to the ICCPR at paras 64–66 in the context of interpreting the scope of freedom of religion as recognized in Canada's Charter of Rights and Freedoms (s 2(a)) there is no parallel discussion of Article 27 of the ICCPR in the Court's discussion of the duty to consult and accommodate or indeed any reference to the Declaration.
133. By contrast, the reference to Sámi rights in Article 108 of the Norwegian Constitution has not been a significant source of normative inspiration with respect to consultation\consent. Article 108 provides that: "The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life." The Constitution of the Kingdom of Norway, unofficial English translation: https://lovdata.no/dokument/NLE/lov/1814-05-17#KAPITTEL_5
134. For example, as pointed out above, there is no reference to, or discussion of, Article 19 of the Declaration in *Mikisew Cree (No 2)* (n 25); see also (n 132) re *Ktunaxa Nation* (n 16). The decision in *Coldwater* (n 65) contains a reference to FPIC but no reference to Article 32(2) of the Declaration. Instead the Court noted at para 194 that even if Canada was seeking to obtain FPIC "Canada was under no obligation to obtain consent prior to approving the Project. That would, again, amount to giving Indigenous groups a veto."

135. Agreement between Erna Solberg Minister of Local Government and Regional Development and Sven-Roald Nystø, President of the Sami Parliament, Oslo, 11 May 2005. An unofficial English version of the Agreement is available here https://www.regjeringen.no/en/topics/indigenous-peoples-and-minorities/Sami-people/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA/id450743/. The text is also reproduced in in my comment (n 25) on the Federal Court of Appeal's decision in *Mikisew No 2*.
136. *Mikisew Cree (No 2)* (n 25).
137. Consultation Agreement (n 135), Article 2, paragraph 2.
138. See, for example, Boutilier (n 98).
139. One important challenge however would be to identify appropriate and legitimate Indigenous counterparties to any such protocols given the diversity of Indigenous communities in Canada.