

## **“We Will Remain Idle No More”: The Shortcomings of Canada’s ‘Duty to Consult’ Indigenous Peoples**

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## Abstract<sup>1</sup>

Bill C-38, *Jobs, Growth and Long-term Prosperity Act*, and Bill C-45, *Jobs and Growth Act*, both passed in 2012, contain numerous amendments that could affect established and potential Aboriginal rights across Canada. This unilateral action by the Government of Canada came as a great surprise to many Aboriginal people, who indicated that they were not consulted in advance of the legislation's introduction.

However, this then begs the question: What is Canada's 'duty to consult'? What is the content of this 'duty'? Does this 'duty' even exist? If it does, is there a discrepancy between the established 'duty to consult' and the legislative amendments included in Bill C-38 and Bill C-45?

The purpose of this article is to attempt to answer all of these questions. To do this, we will begin by examining contemporary Canadian jurisprudence on the issue, including reviewing the relevant case law in order to gain an insight into the procedural substance of the 'duty to consult'. Following this, in an attempt to enrich and deepen the discussion concerning the recent developments in Canada, we will outline the emergence of consultation norms at the international level, and highlight recent jurisprudence that takes into consideration consultation duties at the Inter-American Court of Human Rights. The article will conclude by juxtaposing the emergence of the international and regional norms regarding consultation duties with current events in Canada, in order to confirm the discrepancy between the recent legislative amendments and domestic jurisprudence, international law, international human rights law, and regional human rights law.

Our hope is that this article will not only inform readers of current events in Canada but also enrich the current discourse on the participatory rights of indigenous peoples in the context of land and natural resource development.

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## A. Introduction

### I. *Idle No More*: The Beginning of a Grassroots Movement

The *Idle No More* movement in Canada has humble beginnings<sup>2</sup>: four indigenous<sup>3</sup> and non-indigenous women from the province of Saskatchewan felt it was necessary to act on proposed federal legislation that they saw as negatively impacting First Nations people and their lands, as well as the lands and waters which all Canadians share.

With the passage of Bill C-38, *Jobs, Growth and Long-term Prosperity Act*,<sup>4</sup> and Bill C-45, *Jobs and Growth Act*,<sup>5</sup> imminent, and many people unaware of their consequences, Nina Wilson, Sylvia McAdam, Jessica Gordon, and Sheelah MacLean resorted to holding rallies and teach-ins in an effort to transfer as much information as possible to the maximum number of people in the shortest amount of time. As information sessions concerning the far-reaching and long-term effects of the legislation spread from Saskatchewan to other provinces, First Nations leaders descended upon the Parliament of Canada to express their dismay and discontent.

However, even after receiving an invitation from the New Democratic Party (the official opposition to the governing Conservative Party of Canada (CPC)), the First Nations leaders were refused entry to Parliament. With this refusal of entry to First Nations leaders and the voices of the communities they represent, the Government of Canada made it clear that it considered itself not

<sup>2</sup> J. Gordon, 'History of Idle No More Grassroots Movement' (31 December 2012), available at <http://idlenomore.ca/about-us/item/1-history-of-idle-no-more-grassroots-movement> (last visited 15 June 2013).

<sup>3</sup> For the purpose of this paper the term 'indigenous peoples' will be understood as follows: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Problem of Discrimination Against Indigenous Populations*, Vol. V (1987), UN Doc E/CN. 4/Sub. 2/1986/7/Add. 4, 29, para. 379. Throughout this paper the terms 'Aboriginal', 'First Nations', and 'indigenous' will be used interchangeably.

<sup>4</sup> Bill C-38, *Jobs, Growth and Long-term Prosperity Act* (SC 2012, ch. 19).

<sup>5</sup> Bill C-45, *Jobs and Growth Act* (SC 2012, ch. 31).

obliged to consult with the Aboriginal peoples of Canada over the proposed legislation.

The *Idle No More* movement quickly cemented itself as a national grassroots movement through its first day of action, which took place on 10 December 2012 in over 13 Canadian cities and became the platform through which the voice of the Aboriginal peoples' discontent over being ignored could be heard<sup>6</sup> Since then, *Idle No More* and actions in support of the movement have grown exponentially to include mass demonstrations, hunger strikes, and cross-country walks in which Aboriginal youths have walked from their reserve lands in remote, distant communities all the way to the capital city, Ottawa.

## II. Jobs, Growth and Long-term Prosperity Act: Bill C-38 and Beyond

The purpose of this article is to expand upon the duty of States to consult with indigenous populations prior to action that would, directly or indirectly, impact them or their lands. As previously noted, the *Idle No More* movement began in response to proposed government-sponsored legislation. While it is beyond the scope of this article to provide a detailed analysis of the proposed amendments,<sup>7</sup> it is worthwhile to provide a brief overview of the changes that would have immediate consequences for the Aboriginal population of Canada.

On 29 March 2012, the Government of Canada, led by the CPC, tabled its budget, titled *Economic Action Plan 2012: Jobs, Growth and Long-term Prosperity*. It was followed by the introduction of legislation designed to put into effect its constituent elements. Those bills included C-38 and C-45, which have now received *Royal Assent*.

Bill C-38 completely overhauled existing environmental assessment procedures, replacing them with the *Canadian Environmental Assessment Act, 2012*<sup>8</sup> (CEAA). Environmental impact assessments (EIA) have been recognized by the federal government as a viable way for indigenous peoples to participate

<sup>6</sup> Gordon, *supra* note 2.

<sup>7</sup> The Assembly of First Nations has noted that Bill-C-38 introduces, amends, or repeals nearly 70 laws that can have significant implications for First Nations. See Assembly of First Nations, 'Technical Bulletin – Update on Bill C-38: Jobs, Growth and Long-term Prosperity Act', available at <http://www.afn.ca/index.php/en/news-media/latest-news/Technical-Bulletin-Update-on-Bill-C-38-Jobs-Growth-and-Long-term-Pros> (last visited 15 June 2013).

<sup>8</sup> *Canadian Environmental Assessment Act, 2012* (SC 2012, ch. 19, s. 52).

in the protection of their lands.<sup>9</sup> They have also been referenced in Supreme Court of Canada (SCC) jurisprudence<sup>10</sup> as an example of fulfilling a duty of consultation owed by the government to indigenous peoples.

The CEEA imposes time limits of 12 months on EIAs, with major resource development projects being approved or rejected in no longer than 24 months.<sup>11</sup> Under the previous guidelines, similar-scale resource projects could have taken up to 6 years to receive approval.<sup>12</sup> Minor projects no longer need EIAs, and provincial EIAs can now substitute for federal EIAs or be deemed equivalent.<sup>13</sup> This latter change can be detrimental to First Nations rights as the provincial environment assessment process is often viewed as less stringent than the federal process: examples exist of resource development being stopped at the federal level, even after receiving approval at the provincial level.<sup>14</sup>

Another environmental measure included in the above-mentioned bills was the replacement of the *Navigable Waters Protection Act*<sup>15</sup> (NWPA) with the *Navigation Protection Act*<sup>16</sup> (NPA). When enacted in 1882, the NWPA was principally designed to protect the public right to navigate inland and territorial waters, but proved to have the salutary benefit of protecting Canada's waterways from obstruction and pollution.<sup>17</sup> Additionally, its threshold for application was low, as "no one could block, alter or destroy any water deep enough to float a

<sup>9</sup> Amnesty International Canada, 'Indigenous Peoples in Canada', available at <http://www.amnesty.ca/our-work/issues/indigenous-peoples/indigenous-peoples-in-canada> (last visited 15 June 2013).

<sup>10</sup> See *Haida Nation v. British Columbia (Minister of Forests)*, Supreme Court of Canada, 2004 SCC 73, [2004] 3 SCR 511, 537, para. 53 [Haida Case]. See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, Supreme Court of Canada, 2004 SCC 74, [2004] 3 SCR 550, 554-555, para. 2 [Taku River Case].

<sup>11</sup> M. Paris, 'Budget Shortens Environmental Review Process' (29 March 2012), available at <http://www.cbc.ca/news/politics/story/2012/03/29/federalbudget-flaherty-environment.html> (last visited 15 June 2013).

<sup>12</sup> *Ibid.*

<sup>13</sup> Assembly of First Nations National Chief S. Atleo, 'Presentation to the Sub-Committee on Bill C-38 (Part III) of the House of Commons Standing Committee on Finance' (29 May 2012), available at <http://www.afn.ca/uploads/files/parliamentary/c-38.pdf> (last visited 15 June 2013).

<sup>14</sup> An example of this is the Prosperity Mine Project. See *ibid.*

<sup>15</sup> *Navigable Waters Protection Act* (RSC 1985, ch. N-22).

<sup>16</sup> *Navigation Protection Act* (SC 2012, ch. 31).

<sup>17</sup> EcoJustice, 'Bill C-45 and the *Navigable Waters Protection Act*' (October 2012), available at [http://www.ecojustice.ca/files/nwpa\\_legal\\_backgrounder\\_october-2012/](http://www.ecojustice.ca/files/nwpa_legal_backgrounder_october-2012/) (last visited 15 June 2013).

canoe without federal approval”.<sup>18</sup> With the introduction of the NPA, however, the number of protected water bodies has been greatly reduced, with the NPA covering 3 oceans, 97 lakes, and portions of 62 rivers. By comparison, it is estimated that Canada contains 32,000 major lakes and 2.25 million rivers: meaning the NPA excludes 99.7% of Canada’s lakes and 99.9% of Canada’s rivers from federal oversight and regulation.<sup>19</sup> Accordingly, waterways that were once protected have been opened up for development with major pipeline and power line projects being exempt from having to prove that they would not destroy or damage them.<sup>20</sup>

Another major change comes with an amendment to the *Indian Act*,<sup>21</sup> which, according to government officials, was designed to enhance and to facilitate First Nations’ ability to take advantage of economic opportunities.<sup>22</sup> However, the amendment drastically changes the decision-making process of how First Nations allocate their reserve land, allowing First Nations communities to lease reserve lands based on a majority of votes from those in attendance at a meeting or referendum. Previously, such votes were based on a majority of votes from all eligible voters.<sup>23</sup> Thus, the burden is on First Nation members to make themselves available for the meetings assuming they are duly informed.

Furthermore, the Minister of Aboriginal Affairs is given the authority to call a meeting or referendum for the purpose of land surrender from the band’s territory.<sup>24</sup> The Minister of Aboriginal Affairs is also given the authority to accept or refuse a land designation after receiving a proposal from the band council or the body governing the band.<sup>25</sup> Both of these authorities did not exist previously and now allow ministerial interference in band decisions.

As previously mentioned, Bill C-38 and Bill C-45 contain numerous amendments that could affect established and potential Aboriginal rights across Canada, and the above examples are meant to be illustrative only. Following

<sup>18</sup> M. McDiarmid, ‘Waterways Changes in Budget Bill Seen as Eroding Protections’ (18 October 2012), available at <http://www.cbc.ca/news/politics/story/2012/10/18/pol-navigable-waters-protection-budget-bill.html> (last visited 15 June 2013).

<sup>19</sup> EcoJustice, *supra* note 17.

<sup>20</sup> McDiarmid, *supra* note 18.

<sup>21</sup> *Indian Act* (RSC 1985, ch. I-5).

<sup>22</sup> J. McGregor, ‘22 Changes in Budget Bill Fine Print’ (26 October 2012), available at <http://www.cbc.ca/news/politics/story/2012/10/19/pol-list-2nd-omnibus-bill.html> (last visited 15 June 2013).

<sup>23</sup> *Ibid.*

<sup>24</sup> Atleo, *supra* note 13.

<sup>25</sup> McGregor, *supra* note 22.

the trajectory of the *Idle No More* movement, what one observes is that this unilateral action by the Government of Canada came as a great surprise to many Aboriginal people, who indicated that they were not consulted in advance of the legislation's introduction. As the Assembly of First Nations made clear throughout their submission to the Sub-Committee reviewing Bill C-38,<sup>26</sup> the adoption of these bills runs counter to Canada's duty to consult, a concept which has emerged both at the domestic and international level.<sup>27</sup> This same view has been brought forward by a collaboration of indigenous groups in a *Joint Submission to the United Nations Human Rights Council in Regard to the Universal Periodic Review Concerning Canada*.<sup>28</sup>

However, this then begs the question: What is Canada's 'duty to consult'? What is the content of this 'duty'? Does this 'duty' even exist? If it does, is there a discrepancy between the established 'duty to consult' and the legislative amendments included in Bill C-38 and Bill C-45? The purpose of this article is to attempt to answer all of these questions. To do this, we will begin by examining contemporary Canadian jurisprudence on the issue, including reviewing the relevant case law in order to gain an insight into the procedural substance of the 'duty to consult'. Following this, in an attempt to enrich and deepen the discussion concerning the recent developments in Canada, we will outline the emergence of consultation norms at the international level, and highlight recent jurisprudence that takes into consideration consultation duties at the Inter-American Court of Human Rights (IACtHR). The article will conclude by juxtaposing the emergence of the international and regional norms regarding consultation duties with current events in Canada, in order to confirm the discrepancy between the recent legislative amendments and domestic jurisprudence, international law, international human rights law, and regional human rights law.

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<sup>26</sup> Atleo, *supra* note 13.

<sup>27</sup> See S. Matiation & J. Boudreau, 'Making a Difference: The Canadian Duty to Consult and Emerging International Norms Respecting Consultation with Indigenous Peoples', in O. E. Fitzgerald (ed.), *The Globalized Rule of Law: Relationships Between International and Domestic Law* (2006), 397.

<sup>28</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, 'Joint Submission to the United Nations Human Rights Council in Regard to the Universal Periodic Review Concerning Canada (Second Cycle)' (October 2012), available at [http://www.ubcic.bc.ca/files/PDF/UPR\\_Canada\\_JointSubmission.pdf](http://www.ubcic.bc.ca/files/PDF/UPR_Canada_JointSubmission.pdf) (last visited 15 June 2013).

## B. Developing Jurisprudence on the ‘Duty to Consult’ by the Supreme Court of Canada

### I. Setting the Stage

Before delving into Canadian jurisprudence, it would be useful to begin with a definition of a variety of the terms used throughout judgments of the SCC, as they might be new to several readers.

‘Aboriginal title’ refers to the inherent Aboriginal right to a land or a territory, meaning that this right stems from Aboriginal peoples’ longstanding use, and prior occupancy, of the land or territory in question. The Canadian legal system recognizes Aboriginal title as a right *sui generis*, or “as a unique collective right to the use of, and jurisdiction over, a group’s ancestral territories”.<sup>29</sup>

‘Treaty rights’ refer to Aboriginal rights that are set out in a treaty. Starting in 1701, the Crown<sup>30</sup> entered into treaties in an effort to encourage peaceful relations with the First Nations.<sup>31</sup> Some treaties were designed to provide a strategic alliance and others involved the ceding or surrendering of rights to land in exchange for treaty rights. While all treaties are different, some treaty rights have included reserve lands, annual payments, clothing, ammunition, farming equipment and some rights to hunt and fish.<sup>32</sup> *Treaty 8*, for example, promises several types of rights, such as the right to fish, hunt, and trap.<sup>33</sup>

Finally, regarding the usage of the term ‘Aboriginal rights,’ it is important to note that it is not possible to provide an exhaustive list of all of the rights

<sup>29</sup> Indigenous Foundations (University of British Columbia), ‘Aboriginal Title’, available at <http://indigenousfoundations.arts.ubc.ca/home/land-rights/aboriginal-title.html> (last visited 15 June 2013).

<sup>30</sup> The Crown in this instance refers to the British Crown, as Canada was not yet established. However, throughout this paper, any reference to the Crown refers to Government of Canada, as the Crown is the legal embodiment of all levels of governance. In the courts, the Crown acts as the prosecuting part, and is represented by *R*, as in *R v. XX* (*R* stands for *Rex* or *Regina* depending on the sex of the monarch).

<sup>31</sup> For further information concerning the historic treaties between the Crown and the First Nations see the Aboriginal Affairs and Northern Development Canada website: <http://www.aandc-aadnc.gc.ca> (last visited 15 June 2013).

<sup>32</sup> Aboriginal Affairs and Northern Development Canada, ‘Treaty Rights’, available at <http://www.aadnc-aandc.gc.ca/eng/1100100028602/1100100028603> (last visited 15 June 2013).

<sup>33</sup> ‘Treaty No. 8’ (21 June 1899), available at <http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853#chp4> (last visited 15 June 2013).



contained within this term. One of the major reasons for this is that Aboriginal peoples and the Government of Canada may have different perspectives as to what constitutes an Aboriginal right: certain rights that Aboriginal peoples recognize and practice for themselves might not be considered as a right by the Canadian government.<sup>34</sup> Moreover, since Canada has a federal system of parliamentary government, the federal, provincial, and territorial governments have, separately, attempted to define, legislate, or expand upon Aboriginal rights, such as the hunting and fishing rights, contained within treaties.<sup>35</sup>

In an effort to address the gap in understanding what constitutes Aboriginal 'rights', the crafters of the *Constitution Act*, 1982 included Section 35 (1), which reads: "[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed".<sup>36</sup> Prior to this, Aboriginal rights were not constitutionally recognized and could be unilaterally extinguished or limited by the Government of Canada.<sup>37</sup> In fact, until *Calder*,<sup>38</sup> Aboriginal land rights were guided by a decision from 1888, *St. Catherine's Milling & Lumber v. The Queen*,<sup>39</sup> which held that Aboriginal land interests were "merely interests created through grant by the Crown".<sup>40</sup> After the *Calder* decision in 1973, Aboriginal land interests were seen as pre-existing interests, meaning that they were rooted in historical land occupancy by Aboriginal peoples, pre-dating the arrival of the Crown.<sup>41</sup>

However, it is important to note that the *Calder* decision did not usher in a new era of Aboriginal and government relations. Strangely enough, firmly entrenched in the *Calder* decision, and later the *Guerin*<sup>42</sup> decision, Aboriginal land interests existed only as burdens that underlie Crown title and that on surrender

<sup>34</sup> Indigenous Foundations, *supra* note 29.

<sup>35</sup> K. McNeil, 'The Constitutional Rights of the Aboriginal Peoples of Canada', 4 *Supreme Court Law Review* (1982), 255, 257.

<sup>36</sup> *Constitution Act*, 1982, Art. 35 (1) (Schedule B to the *Canada Act*, 1982 (UK), 1982, ch. 11).

<sup>37</sup> Matiation & Boudreau, *supra* note 27, 429.

<sup>38</sup> *Calder et al. v. Attorney-General of British Columbia*, Supreme Court of Canada, [1973] SCR 313 [Calder Case].

<sup>39</sup> *St. Catherine's Milling and Lumber Co. v. R.*, Supreme Court of Canada, [1887] 13 SCR 577.

<sup>40</sup> G. Christie, 'Developing Case Law: The Future of Consultation and Accommodation', 39 *U.B.C. Law Review* (2006) 1, 139, 142.

<sup>41</sup> *Calder Case*, *supra* note 38, 328. See Christie, *supra* note 40, 142.

<sup>42</sup> *Guerin v. The Queen*, Supreme Court of Canada, [1984] 2 SCR 335.

to the Crown, Aboriginal land interests disappear, as the underlying Crown title is 'perfected'.<sup>43</sup>

*Calder* and *Guerin* were progressive in that they recognized the special status of Aboriginal peoples being afforded unique rights, resulting from their original occupation of Canada.<sup>44</sup> However, the legal protections afforded Aboriginal land, and Aboriginal rights more generally, were limited and tenuous. Obtaining constitutional protection for Aboriginal rights brought about fundamental changes to the legal landscape, as the court system in Canada was then tasked with addressing the uncertainty regarding the content of Aboriginal rights.<sup>45</sup>

Rights enumerated in constitutions are, on the one hand, protected by the State and meant to temper the power given to the State by its citizens. On the other hand, however, some rights are said not to be absolute: they can be infringed upon, but only if the State satisfies a strict justification framework. In the case of Aboriginal peoples, the function of constitutionally recognized Aboriginal rights in Section 35 (1) of the *Canadian Constitution* is to temper the power of unquestioned sovereignty by the Crown; but no legal test exists for the State to articulate a justifiable infringement upon protected Aboriginal rights.<sup>46</sup> The *Sparrow*<sup>47</sup> case was the first opportunity for the SCC to examine Section 35 (1) of the *Constitution Act*, interpret its applicability, and in the case of an infringement upon a constitutional right, elaborate upon a justification framework. It is within this context that the duty to consult emerged.

## II. *Sparrow* and the Development of Canada's Duty to Consult

In *Sparrow*, the SCC was asked to determine the constitutionality of federal fishing regulations that impose a permit requirement, and prohibit certain methods of fishing. For the Musqueam First Nation, living in the province of British Columbia, fishing for salmon in the Canoe Passage was not only required for subsistence but also played a central role in their cultural identity.<sup>48</sup> The Musqueam First Nation held that the recently enacted natural

<sup>43</sup> Christie, *supra* note 40, 142.

<sup>44</sup> McNeil, *supra* note 35, 255.

<sup>45</sup> Matiation & Bourdreau, *supra* note 27, 429.

<sup>46</sup> Christie, *supra* note 40, 145-146.

<sup>47</sup> *R v. Sparrow*, Supreme Court of Canada, [1990] 1 SCR 1075 [Sparrow Case].

<sup>48</sup> S. Lawrence & P. Macklem, 'From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult', 79 *Canadian Bar Review* (2000), 255, 255.

resource conservation measures interfered with their right to fish, which, in turn, negatively impacted their community in a variety of ways.<sup>49</sup>

In this landmark decision, the SCC ruled in favor of the Musqueam First Nation, explaining primarily that Aboriginal rights affirmed and recognized by Section 35 (1) include practices that are integral to an Aboriginal community's distinctive culture, and, in the case of the Musqueam First Nation, this meant their right to fish for salmon around the Fraser River estuary.<sup>50</sup> The judgment explained further that if any policies or legislation are implemented by the government that restrict, or infringe upon, the exercise of recognized and affirmed Aboriginal rights, then the Crown bears the burden of meeting strict justificatory requirements: one such requirement is that the Crown has the duty to provide adequate consultation with the affected Aboriginal group.<sup>51</sup>

Following the *Sparrow* case, the SCC also attached justificatory requirements to the violation of Aboriginal treaty rights, in the case *R v. Badger*,<sup>52</sup> and to the infringement upon Aboriginal title, in *Delgamuukw v. British Columbia*.<sup>53</sup>

*Badger* dealt with *Treaty 8*, a historical treaty providing for the right to hunt, and the implementation of legislation in Alberta which prohibited hunting out-of-season or without a license. The SCC decision held that, similar to Aboriginal rights, treaty rights are not absolute and can be abridged by the Crown.<sup>54</sup> However, any infringements must satisfy the justification framework elaborated in *Sparrow*, consultation being one of the factors to be considered.<sup>55</sup>

*Delgamuukw* concerned an Aboriginal title claim made by the hereditary chiefs of the Gitksan and Wet'suwet'en nations, to a territory located in the interior of British Columbia. In this case the SCC affirmed that in the context of Aboriginal title, the Crown always has a duty to consult, and that "consultation is required in order for the Government of Canada to justify infringements of Aboriginal title."<sup>56</sup> As written by Lamer C.J. for the majority:

<sup>49</sup> *Ibid.*, 255-256.

<sup>50</sup> *Sparrow Case*, *supra* note 47, 1099.

<sup>51</sup> *Ibid.*, 1111-1119. See also Lawrence & Macklem, *supra* note 48, 255 and Matiation & Boudreau, *supra* note 27, 430.

<sup>52</sup> *R v. Badger*, Supreme Court of Canada, [1996] 1 SCR 771 [Badger Case].

<sup>53</sup> *Delgamuukw v. British Columbia*, Supreme Court of Canada, [1997] 3 SCR 1010 [Delgamuukw Case].

<sup>54</sup> *Badger Case*, *supra* note 52, 793-814. See also Lawrence & Macklem, *supra* note 48, 257.

<sup>55</sup> *Badger Case*, *supra* note 52, 793-814. See also Matiation & Boudreau, *supra* note 27, 431.

<sup>56</sup> Matiation & Boudreau, *supra* note 27, 432.

“[...] There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified [...]. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”<sup>57</sup>

The above-mentioned cases were positive developments in that they introduced the duty to consult within the justification framework. However, the dilemma arising from these cases is that they only discussed consultation in the context of ‘proven’ or ‘established’ rights under Section 35 (1) of the Constitution.<sup>58</sup> Aboriginal groups were concerned that the legal obligation to consult only arose after the existence of a right was determined and a *prima facie* case was made regarding its infringement.<sup>59</sup> The Crown was not legally required to consult prior to engaging in measures that could have a negative impact upon potential rights, forcing Aboriginal groups to protect their interests in anticipation of Crown activity that could infringe upon claimed, but unproven, rights.<sup>60</sup> This gap in Canadian jurisprudence was addressed in two decisions: *Haida Nation v. British Columbia (Minister of Forests)*<sup>61</sup> and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*.<sup>62</sup>

In the *Haida* case, the Haida Nation challenged the renewal of a tree farm license by the provincial government of British Columbia, and also challenged the transfer of said tree farm license to a private company (*Weyerhausen Co.*

<sup>57</sup> *Delgamuukw Case*, *supra* note 53, 1112-1113, para 168.

<sup>58</sup> *Matiation & Bourdreau*, *supra* note 27, 433.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Haida Case*, *supra* note 10.

<sup>62</sup> *Taku River Case*, *supra* note 10.

*Ltd.*) on land that was subject to their Aboriginal title claim. In *Taku River*, an Aboriginal community challenged a proposed mining road, resulting from the reopening of a mine by *Redfern Resources Ltd.*, that would pass through contested territory. The SCC was unanimous in rejecting the view that the government did not have a legally enforceable duty to consult prior to establishing Aboriginal rights under Section 35 of the Constitution.<sup>63</sup> Furthermore, the Crown had a legal duty to consult when it had knowledge of the potential existence of an Aboriginal right or title and when considering activities that infringed upon these potential rights or title.<sup>64</sup> As McLachlin C.J. wrote for the majority:

“[...] The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in the processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.<sup>65</sup> [...] Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.”<sup>66</sup>

Where treaty rights are at issue, the SCC expanded upon the duty to consult framework established in *Badger*, in the *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.<sup>67</sup> In *Mikisew*, the issue was approval of road construction through Wood Buffalo National Park. The Minister of Canadian Heritage believed that the Crown was permitted to do this, and to do it without consultation, based on an interpretation of *Treaty 8*, which states:

<sup>63</sup> *Matiation & Boudreau*, *supra* note 27, 434.

<sup>64</sup> *Haida Case*, *supra* note 10, 529, para. 35. *Taku River Case*, *supra* note 10, 562, para. 21. See also L. Sossin, 'The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights', 23 *Canadian Journal of Administrative Law and Practice* (2009), 93, 100.

<sup>65</sup> *Haida Case*, *supra* note 10, 525, para. 25.

<sup>66</sup> *Ibid.*, 534-535, para. 47.

<sup>67</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, Supreme Court of Canada, 2005 SCC 69, [2005] 3 SCR 388 [Mikisew Case].

“And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”<sup>68</sup>

The Mikisew Cree, on the other hand, claimed that the construction and operation of the road would have a negative impact on their hunting and trapping rights. The SCC decided in favor of the Mikisew Cree, confirming that the duty to consult extended itself to Treaty situations, stating that the Minister had not adequately consulted with the Mikisew Cree.<sup>69</sup>

Since *Sparrow*, the SCC has made it clear that there is a duty to consult and that this duty arises “when the Crown has knowledge, real or constructive, of the potential existence of the right or title and contemplates conduct that might adversely affect”.<sup>70</sup> The content and scope of the duty to consult varies, but encapsulates a wide spectrum of duties governed by context.<sup>71</sup> In all cases, the Crown must act in good faith and undertake meaningful consultation.<sup>72</sup>

In relation to the omnibus budget bills discussed above, the SCC delayed “the question of whether government conduct includes legislative action”.<sup>73</sup> One can only assume that one will obtain clarification on this point shortly as the Misikew Cree First Nation and the Frog Lake First Nation have filed documents with the Federal Court claiming the effects of Bill C-38 and Bill C-45 violate the Crown’s treaty obligations to protect traditional Aboriginal territory.<sup>74</sup>

<sup>68</sup> ‘Treaty No. 8’, *supra* note 33.

<sup>69</sup> G. McDade, & M. Giltrow, ‘Federal Court Judicial Review and Aboriginal Consultation Cases’ (June 2007), available at [http://www.cle.bc.ca/PracticePoints/AB\\_OR/Fed%20Ct%20Judicial%20Review%20and%20Aboriginal%20Consultation.pdf](http://www.cle.bc.ca/PracticePoints/AB_OR/Fed%20Ct%20Judicial%20Review%20and%20Aboriginal%20Consultation.pdf) (last visited 15 June 2013), 5.

<sup>70</sup> *Haida Case*, *supra* note 10, 529, para. 35; *Taku River Case*, *supra* note 10, 564-565, para. 25.

<sup>71</sup> *Mikisew Case*, *supra* note 67, 419-421, paras 62-63.

<sup>72</sup> *Matiation & Boudreau*, *supra* note 27, 436.

<sup>73</sup> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, Supreme Court of Canada, 2010 SCC 43, [2010] 2 SCR 650, 673, para. 44.

<sup>74</sup> G. Galloway, ‘First Nations Take Treaty Rights Conflict to Courts’ (07 January 2013), available at <http://www.theglobeandmail.com/news/politics/alberta-first-nations-launch-court-battle-over-omnibus-bills/article7013228/> (last visited 15 June 2013).

However, in reviewing the jurisprudence that developed the concept of 'duty to consult', one can posit that a constitutional challenge of Bill C-38 and Bill C-45

is analogous to the challenges brought forth in *Sparrow*, *Delgamuukw*, *Haida*, *Taiku River*, and *Mikisew*.<sup>75</sup>

Canada is not alone in addressing the topic of consultation with indigenous communities but its influence has been extended to decisions internationally.<sup>76</sup> Conversely, developments at the international level, through the treaty bodies and relevant commentaries, and developments in regional human rights systems, can be drawn upon for Canada's own domestic law and policy making.<sup>77</sup> In understanding the dynamic relationship between indigenous rights in Canada and internationally, the following two sections are dedicated to exploring how the United Nations (UN), the International Labour Organization (ILO) and the Inter-American System are approaching the duty to consult.

### C. The Emerging International Norm of 'Duty to Consult'

The cause of indigenous peoples has come under the scrutiny of the international community during the last decades.<sup>78</sup> It was for long an issue that only sporadically attracted attention within the community of States, mainly in the context of the fight against discrimination, and the endeavor to assimilate 'tribal' and 'subordinated' communities to the modernized majority.<sup>79</sup> Today, the

<sup>75</sup> Similar comparisons have also been made by Professor Kent McNeil of Osgoode Hall Law School (Toronto, Canada), available at <http://canadianlegalease.com/2013/01/17/idle-no-more/> (last visited 15 June 2013.)

<sup>76</sup> For example, Supreme Court of Canada decisions respecting indigenous rights have been referenced in *Mabo v. Queensland (No. 2)*, High Court of Australia, [1992] 175 CLR 1 and *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor*, Madras High Court, [1997] 1 MLJ 418. See Matiation & Boudreau, *supra* note 27, note 161.

<sup>77</sup> Matiation & Boudreau, *supra* note 27, 447.

<sup>78</sup> J. Burger & P. Hunt, 'Towards the International Protection of Indigenous Peoples' Rights,' 12 *Netherlands Quarterly of Human Rights* (1994) 4, 405, 406. The famous lectures of Professor Francisco de Vitória (1482-1546) of the University of Salamanca and the works of the other famous sixteenth century Spanish scholar Bartolome de las Casas prove that this is not totally true. See, for example, G. C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas,' 13 *Australian Yearbook of International Law* (1992), 1.

<sup>79</sup> The International Labour Organization (ILO) showed interest in the situation of indigenous peoples already in the early 1920s. It then undertook a number of studies and

adoption of specific instruments addressing the rights of indigenous peoples, and the reinterpretation of older, more general human rights instruments through the lenses of indigenous peoples' demands, have led to the development of an increasingly sophisticated body of international law addressing the plight of indigenous peoples in a more comprehensive manner. Indigenous peoples have recently been recognized as holders of a whole range of collective rights, from cultural and identity rights to self-government and self-determination. The right of indigenous peoples to exist as distinct communities has been confirmed and, as such, they ought to participate in the decision-making process of both state and society. More importantly, they have the right to be involved in matters that concern them. S. James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples, considers this a novel contribution to notions such as self-government. For him

“[i]n the particular context of indigenous peoples, notions of democracy (including decentralized government) and of cultural integrity join to create a sui generis self-government norm. The norm included two distinct but interrelated strains. One upholds spheres of governmental or administrative autonomy for indigenous communities; the other seeks to ensure the effective participation of those communities in all decisions affecting them that are left to the larger institutions of decision making.”<sup>80</sup>

Under these participatory rights a new standard for effective and meaningful indigenous participation in decision-making has emerged, known as the right to free, prior, and informed consent (FPIC)<sup>81</sup> deriving from a revisited and broader right to self-determination and self-government.<sup>82</sup>

in 1926 established the Committee of Experts on Native Labour to agree on standards for the protection of indigenous workers.

<sup>80</sup> S. J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (2004), 151 [Anaya, Indigenous People in International Law].

<sup>81</sup> M. Trask, 'Indigenous Peoples Participation in Decision-Making – A Paper Prepared for the UN Expert Mechanism on the Rights of Indigenous Peoples' (January 2010), available at [www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/MililaniTrask.doc](http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/MililaniTrask.doc) (last visited 15 June 2013), 1.

<sup>82</sup> T. Ward, 'The Right to Free Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law', 10 *Northwestern Journal of International Human Rights* (2011) 2, 54, 55.



Basic human rights instruments such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) had already recognized in their common Article 1 that "all peoples have a right to self-determination".<sup>83</sup> To possess a right to self-determination has always been one of the main demands of indigenous peoples and although they have now been recognized as possessing that right, it remains controversial as to whether they can benefit from the same right to self-determination as other peoples.<sup>84</sup> The bulk of UN practice on self-determination has mainly focused on the political dimension of this right and in particular granted colonial peoples and peoples living under foreign and military occupation a right to freely decide upon their future international status, often implemented as a right to become independent.<sup>85</sup>

Indigenous peoples are, however, generally not claiming independent statehood when invoking self-determination but the possibility to keep and develop their distinctness. For indigenous peoples, self-determination does not only refer to political rights but also to economic, social, and cultural rights. Even though the basic human rights instruments referring to self-determination also include the right to freely pursue one's own economic development and 'economic self-determination' constituting the natural counterpart of the political aspect of self-determination, it has never received the same attention in the UN and other circles.<sup>86</sup> It is "as if self-determination has been shorn of all its

<sup>83</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 1, 999 UNTS 171, 173; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 5.

<sup>84</sup> P. J. Magnarella, 'The Evolving Right of Self-Determination of Indigenous Peoples', 14 *St. Thomas Law Review* (2001) 2, 425; A. Huff, 'Indigenous Land Rights and the New Self-Determination', 16 *Colorado Journal of International Environmental Law and Policy* (2005) 2, 295; M. A. Murphy, 'Representing Indigenous Self-Determination', 58 *University of Toronto Law Journal* (2008) 2, 185; S. Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', 41 *Vanderbilt Journal of Transnational Law* (2008) 4, 1141.

<sup>85</sup> From the practice of the HRC, one can conclude that self-determination is not only a right limited to peoples living under foreign domination but equally a right belonging to all peoples to participate in their governance through democratic processes (Human Rights Committee, *General Comment 12*, UN Doc HRI/GEN/1/Rev. 9 (Vol. I), 27 May 2008, 183 and the various state reports and comments to the State reports by the Committee). This has been confirmed by the Committee supervising the implementation of the *Convention on the Elimination of All Forms of Racial Discrimination* (Committee on the Elimination of Racial Discrimination, *General Recommendation XXI*, HRI/GEN/1/Rev. 9 (Vol. II), 27 May 2008, 282.

<sup>86</sup> A. Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human

economic elements and [has] become solely concerned with borders, territory, and nationalism".<sup>87</sup> Economic self-determination has mainly been approached from a State-centric perspective considering the State as the right holder rather than the people.<sup>88</sup> The indigenous claims to self-determination and its deriving right to effective and meaningful participation are closely linked to the economic aspect of self-determination because without control of their traditional lands and natural resources, efforts to preserve indigenous distinctness are often meaningless.<sup>89</sup>

In order to support and protect these essential rights, consultation rights have evolved from a mere reference to a right to be consulted in the first instruments on indigenous peoples to a full-fledged right to 'free, prior, and informed consent' standing on its own, in the more recent instruments. What this right to free, prior and informed consent really means remains a debatable issue, but what is certain is that indigenous peoples have more and more rights on matters that concern them.

## I. International Labour Organization

The first instrument to have addressed the question of indigenous rights in a comprehensive manner is the 1957 *ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO Convention No. 107).<sup>90</sup> Its objective was to address, as a binding legal instrument, the marginalization and discrimination of indigenous and tribal populations by recognizing a number of rights and freedoms.<sup>91</sup> Having placed the question of indigenous and tribal populations on

Rights Realization in Resources-Rich Countries', 39 *New York University Journal of International Law and Politics* (2006) 2, 417.

<sup>87</sup> J. Oloka-Onyango, 'Heretical Reflexion on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium', 15 *American University International Law Review* (1999) 1, 151.

<sup>88</sup> See generally Farmer, *supra* note 86 and S. Smis, D. Cambou & G. Ngende, 'The Questions of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources', 35 *Loyola of Los Angeles International and Comparative Law Review* (2013) (forthcoming).

<sup>89</sup> *Ibid.*

<sup>90</sup> ILO, *Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 [ILO Convention No. 107]. The convention is no longer open for ratification but remains in force for 18 States.

<sup>91</sup> Examples are the prohibition from compulsory service, the right not to be discriminated,

the international agenda, *ILO Convention No. 107* was, however, criticized for its 'assimilationist' and paternalistic approach.<sup>92</sup> Its underlying assumption was that traditional customs and culture were considered an impediment to social and economic development of the communities concerned as well as the States in which they were living.<sup>93</sup>

In its paternalistic view, *ILO Convention No. 107* devoted only one provision to indigenous peoples' participatory rights. Article 12 protected indigenous and tribal populations against removal from their lands without their free consent. However, for reasons of national security, national economic development, or indigenous health, broad exceptions were provided allowing States parties to significantly curtail the right to land and the linked right to free consent.

The critique on the State-centric leaning of *ILO Convention No. 107* resulted in the drafting of a more up-to-date legal instrument: *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169),<sup>94</sup> which revised and improved the previous convention.<sup>95</sup>

the right to life, education, social security, land, health and participation.

<sup>92</sup> The preamble and several provisions of the *ILO Convention No. 107* confirm this statement. The indigenous and tribal populations are referred to as "less advanced" and governments are requested to integrate them progressively into the life of their state society hoping that they would disappear as separate groups once they have integrated into the national society. See L. Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989', 15 *Oklahoma City University Law Review* (1990) 3, 677, 696-710 and Anaya, *Indigenous Peoples in International Law*, *supra* note 80, 44-45.

<sup>93</sup> In 1986 an ILO meeting of experts concluded that the language of *ILO Convention No. 107* was 'outdated' and 'destructive in the modern world' and unanimously recommended to revise the Convention. ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Conference (75th Session), Report VI (1) (1988), 18. See R. L. Barsh, 'Revision of ILO Convention No. 107', 81 *American Journal of International Law* (1987) 3, 756.

<sup>94</sup> ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169]. See A. Yupsanis, 'ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview', 79 *Nordic Journal of International Law* (2010) 3, 433; Swepston, *supra* note 92; ILO, 'Indigenous & Tribal People's Rights in Practice - A Guide to ILO Convention No. 169' (10 May 2009), available at [http://www.ilo.org/indigenous/Resources/Guidelinesandmanuals/WCMS\\_106474/lang-en/in dex.htm](http://www.ilo.org/indigenous/Resources/Guidelinesandmanuals/WCMS_106474/lang-en/in dex.htm) (last visited 15 June 2013).

<sup>95</sup> The Convention has been ratified by 22 States. See ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)', available at [http://www.ilo.org/dyn/normlex/en/?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314) (last

Responding to the critique, it recognized a right of indigenous and tribal peoples to live and develop as distinct communities.<sup>96</sup> A more elaborated catalogue of rights was the result. The provisions on land rights of the previous convention which were highly criticized,<sup>97</sup> now better protect indigenous peoples *inter alia* via procedural mechanisms.

Moreover, participation rights received additional attention and were elevated to being a key principle applying to the whole Convention. Article 6 requires that States consult indigenous peoples in good faith regarding legislative or administrative measures that directly affect them, and that these consultations should be done through appropriate procedures and through their representative institutions. This does not, however, mean that the consultations must result in agreements with indigenous peoples.<sup>98</sup> Article 7 recognizes their right to decide their own priorities and to participate in the formulation, implementation, and evaluation of national and regional development plans which may affect them directly.

*ILO Convention No. 169* also explicitly refers to a right of prior consultation when it comes to exploration and exploitation of resources (Art. 15 (2)), a right for free informed consent prior to any relocation (Art. 16 (2)), and the requirement to be consulted prior to transfers of land rights outside of their communities (Art. 17 (2)). Through participation rights, indigenous peoples have thus received additional means to exercise control over their own economic, social, and cultural development. For the Committee of Experts, which issues annual reports containing observations on the implementation of ILO Conventions, consultation has to grow into an instrument of genuine dialogue and social cohesion resulting in the prevention and resolution of conflict.<sup>99</sup>

In supervising the implementation of the Convention, ILO bodies are increasingly confronted with violations of the consultation rights of indigenous

visited 15 June 2013).

<sup>96</sup> See S. Venne, 'The New Language of Assimilation: A Brief Analysis of ILO Convention 169', 2 *Without Prejudice* (1990) 2, 53.

<sup>97</sup> See A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007), 80. Prof. Xanthaki asserts that the outdated land rights provisions of *ILO Convention No. 107* were one of the main reasons why the Convention had to be revised.

<sup>98</sup> See Statement of the International Labour Office, in ILO, *Provisional Record No. 25*, International Labour Conference (76th Session) (1989), 25/01, 25/12, para. 74.

<sup>99</sup> Committee of Experts on the Application of Conventions and Recommendations [CEACR], *General Observation on Convention No. 169*, International Labour Conference (79th Session) (2008).

peoples, and have in their responses, sought to give content to the right.

In 2001, a complaint was brought to the ILO, alleging that Mexico had violated Article 6 of the *ILO Convention No. 169* in the legislative procedure leading to the approval of the *Decree on Constitutional Reform in the Areas of Indigenous Rights and Culture* without taking into account the consultation process laid down in the Convention. The Governing Body noted that "if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention".<sup>100</sup> However, as the Committee confirmed, "consultation does not necessarily imply that an agreement will be reached in the way the indigenous peoples prefer".<sup>101</sup>

In 2005, a report submitted to the Committee of Experts on the Application of Conventions and Recommendations by a Guatemalan indigenous organization, referred to "symbolic" participation because "there is no specific institutional machinery for consultation", such that "31 concessions were granted for the exploitation of mineral resources and 135 for exploration, with no prior consultation with the indigenous peoples as to the viability of such activities or their environmental impact".<sup>102</sup> The Committee of Experts emphasized that

"the provisions on consultation, particularly Article 6, are the core provisions of the Convention and the basis for applying all the others. Consultation is the instrument that the Convention prescribes as an institutional basis for dialogue, with a view to ensuring inclusive development processes and preventing and settling disputes. The aim of consultation as prescribed by the Convention is to reconcile often conflicting interests by means of suitable procedures."<sup>103</sup>

Similarly, in 1997, the Committee of Experts observed that, in making decisions involving legislative measures that may impact land ownership of indigenous peoples, the Peruvian government should have had consultations

<sup>100</sup> Governing Body, *Representation Alleging Non-Observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, GB.289/17/3 (2004).

<sup>101</sup> *Ibid.*

<sup>102</sup> CEACR, '*Individual Observation Concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169)*' (2005), available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:0::NO:13100:P13100\\_COMMENT\\_ID:2261253](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:0::NO:13100:P13100_COMMENT_ID:2261253) (last visited 15 June 2013), para. 4.

<sup>103</sup> *Ibid.*, para. 6.

with them.<sup>104</sup> In 1998, the Committee of Experts came to similar conclusions *vis-à-vis* Bolivia, when they requested the government to conduct consultations and impact studies with indigenous communities prior to granting logging concessions.<sup>105</sup>

Canada has not ratified *ILO Convention No. 169*, and is therefore not bound by, or subject to, its compliance mechanisms. However, *ILO Convention No. 169* has informed domestic<sup>106</sup> and international approaches to indigenous rights,<sup>107</sup> and has also been referred to in reports prepared by UN treaty bodies<sup>108</sup> and the Inter-American Commission on Human Rights (Inter-American Commission),<sup>109</sup> suggesting that *ILO Convention No. 169* is an expression of customary international law.

## II. United Nations: Treaty Bodies

Although the ICCPR does not refer explicitly to indigenous peoples' rights, the question has been addressed by the Human Rights Committee (HRC) in the context of its interpretation of Article 27, which recognizes the rights of ethnic, religious, or linguistic minorities "to enjoy their own culture, to profess and practice their own religion, or to use their own language".<sup>110</sup> In *General Comment No. 23*, the HRC observed that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples".<sup>111</sup> Furthermore, the HRC stated that "the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them".<sup>112</sup>

In examining complaints by indigenous individuals claiming a violation of Article 27, the HRC has determined that not every impact on land-based

<sup>104</sup> Matiation & Boudreau, *supra* note 27, 406.

<sup>105</sup> *Ibid.*, 406-407.

<sup>106</sup> See *Indigenous Peoples Rights Act*, 29 October 1997, Republic Act 8371 (Philippines).

<sup>107</sup> *United Nations Declaration on the Rights of Indigenous Peoples* provisions deal with all areas covered by *ILO Convention No. 169*.

<sup>108</sup> See CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Finland*, UN Doc CERD/C/63/CO/5, 10 December 2003, 2-3, para. 12.

<sup>109</sup> Matiation & Boudreau, *supra* note 27, 408.

<sup>110</sup> *International Covenant on Civil and Political Rights*, Art. 27, *supra* note 83, 179.

<sup>111</sup> Human Rights Committee, *General Comment No. 23*, UN Doc CCPR/C/21/Rev.1/Add.5, 26 April 1994, 1, 4, para. 7.

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

activities will constitute a violation, but a critical issue is that the State must show that it engaged in effective consultations and that measures were taken to involve indigenous peoples in decisions impacting the right to enjoy one's culture.<sup>113</sup> Moreover, when commenting on State reports, the HRC has consistently urged States to respect their duty to consult with indigenous peoples prior to any resource development projects within their traditional lands or territories.<sup>114</sup>

Similar to the HRC, the supervisory body of the ICESCR has understood that in order to fulfill the right to enjoy and maintain one's culture, indigenous peoples must participate in any decisions that would affect their collective right to lands and resources.<sup>115</sup> Moreover, the goal of States should be to acquire consent prior to using lands, territories, and resources traditionally used and enjoyed by indigenous communities.<sup>116</sup> As stated in the *General Comment No. 21*, which provides an authoritative interpretation of Article 15 of ICESCR:

“Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the

<sup>113</sup> See Human Rights Committee, *Länsman et al. v. Finland*, Communication No. 511/1992, UN Doc CCPR/C/52/D/511/1992, 26 October 1994; Human Rights Committee, *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, Communication No. 779/1997, UN Doc CCPR/C/73/D/779/1997, 4 November 1997; and Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993, 27 October 2000.

<sup>114</sup> Ward, *supra* note 82, 56. See also Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Chile*, UN Doc CCPR/C/CHL/CO/5, 18 May 2007, 5-6, para. 19; Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Panama*, UN Doc CCPR/C/PAN/CO/3, 17 April 2008, 5, para 21; Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Nicaragua*, UN Doc CCPR/C/NIC/CO/3, 12 December 2008, 5-6, para. 21.

<sup>115</sup> Ward, *supra* note 82, 56-57; Matiation & Boudreau, *supra* note 27, 416-418.

<sup>116</sup> See Committee on Economic, Social and Cultural Rights [CESCR], *Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc E/C.12/1/Add.74, 6 December 2001, 3 & 5, paras 12 & 33 and CESCR, *Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, UN Doc E/C.12/1/Add.100, 7 June 2004, 3 & 5, paras 12 & 35.

loss of their natural resources and, ultimately, their cultural identity. [...] States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.”<sup>117</sup>

Giving guidelines on how to apply the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>118</sup> when it comes to indigenous peoples, the Committee on the Elimination of Racial Discrimination (CERD) called for consultation but also referred to the more stringent notion of ‘informed consent.’<sup>119</sup> In General Recommendation XXIII, CERD calls upon all States to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent”.<sup>120</sup> CERD then refers to informed consent again in the context of the rights of indigenous peoples to own, develop, control, and use their communal lands, territories, and resources.<sup>121</sup> In effect, CERD has used the given framework of protecting indigenous peoples from discrimination, and of upholding equality, in order to advocate for indigenous peoples’ right to participate and to be consulted.<sup>122</sup>

### III. United Nations Declaration on the Rights of Indigenous Peoples

To date, the most significant contribution to indigenous rights has been the drafting of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).<sup>123</sup> Adopted by the UN General Assembly on 13 September 2007 by a vote of 143 in favor, 11 abstentions and four against (Australia, Canada, New Zealand, and the United States of America), it has been welcomed as a major

<sup>117</sup> CESCR, *General Comment 21*, UN Doc E/C.12/GC/21, 21 December 2009, 9, para 36.

<sup>118</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195.

<sup>119</sup> CERD, *General Recommendation XXIII*, UN Doc HRI/GEN/1/Rev.9, 285, 286, para. 4 (d).

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

<sup>121</sup> *Ibid.*, 286, para. 5.

<sup>122</sup> Ward, *supra* note 82, 57.

<sup>123</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1.



step forward in the protection of indigenous peoples' rights and a significant contribution in the broader area of the protection of human rights. The Declaration is imbued with a self-determination logic, and refers several times, explicitly and implicitly, to the right and its many ramifications at the political, economic, social, and cultural level. In the belief that indigenous peoples should freely pursue their right to political, economic, and social development, the UNDRIP articulates clear consultation and participation rights and further establishes the purpose of FPIC:

“Article 5

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.

[...]

Article 10

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

[...]

Article 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 19

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

[...]

## Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

[...]

## Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

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

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”<sup>124</sup>

The UNDRIP establishes indigenous peoples right to FPIC. In several provisions, the document calls explicitly for the exercise of the right by indigenous communities, especially in matters affecting their lands and natural resources. However, many controversies subsist on the legal status of the norm.<sup>125</sup> For some FPIC is seen as a right for indigenous peoples to veto any project that may interfere with their livelihood, whereas for the others, FPIC is mainly a way of guaranteeing indigenous participation in decision-making processes that concern them.<sup>126</sup> From the view of the Expert mechanism

<sup>124</sup> *Ibid.*, Arts 5, 10, 18, 19, 23 & 32, 4, 5, 6, 7, 9.

<sup>125</sup> L. Heinamaki, ‘Indigenous Peoples in International law’, in H. Leena *et al.*, *Addressing the Climate Vulnerability of Marginalized Groups Through Finnish Foreign Policy* (forthcoming 2013).

<sup>126</sup> Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UN Doc A/HRC/12/34, 15 July 2009, 17, para. 48; M. Davis, ‘Indigenous Struggles in Standard-Setting: The

“[t]he duty to obtain the free, prior and informed consent of indigenous peoples presupposes a mechanism and process whereby indigenous peoples make their own independent and collective decisions on matters that affect them. The process is to be undertaken in good faith to ensure mutual respect. The State's duty to obtain free, prior and informed consent affirms the prerogative of indigenous peoples to withhold consent and to establish terms and conditions for their consent.”<sup>127</sup>

In practice, doubts remain on the meaning of the right, and especially on what consent implies. While actual consent is required in case of relocation (Art. 10) as well as storage and disposal of hazardous materials on their lands (Art. 29), only consultation and cooperation to obtain indigenous FPIC is called for in case of approval of projects affecting them (Art. 32). Both the HRC and the IACtHR emphasize that consultation is however not sufficient in cases of large scale development projects, instead FPIC, is required.<sup>128</sup> In addition, the IACtHR stipulates that the State may be required to obtain full consent if a large-scale project affects the survival of a community. Thus, although the interpretation of the right to FPIC is not strictly determined yet, the development of the norm at the international and regional level already demonstrates its powerful effect on the protection of indigenous peoples' interests.

The UNDRIP was adopted as a resolution of the UN General Assembly and is legally speaking, therefore, a non-binding instrument, or, a recommendation. There are, however, convincing arguments that can be advanced to attribute a binding status to its content. First, because there is a growing acceptance that the Declaration (if not all provisions, at least some of them) can be considered as an expression of customary international law<sup>129</sup> and second because it has been considered “an authoritative statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles”.<sup>130</sup> A significant

United Nations Declaration on the Rights of Indigenous Peoples', 9 *Melbourne Journal of International Law* (2008) 2, 439, 464-465.

<sup>127</sup> Human Rights Council (Expert Mechanism on the Rights of Indigenous Peoples), *Final Study on Indigenous Peoples and the Right to Participate in Decision-Making*, A/HRC/EMRIP/2011/2, 26 May 2011, 20-21, para. 24.

<sup>128</sup> See Human Rights Committee, *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, UN Doc CCPR/C/95/D/1457/2006, 24 April 2009 and *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172 [Saramaka Case].

<sup>129</sup> Wiessner, *supra* note 84, 1176.

<sup>130</sup> Anaya, *Indigenous Peoples in International Law*, *supra* note 80, 65.

majority of States voted for the Declaration<sup>131</sup> and even those which voted against it have recently endorsed the Declaration.<sup>132</sup> Moreover, regional organizations such as the *Organization of American States* (OAS) and the *African Union* have become involved in the domain of indigenous peoples' rights. Many States have also recently adopted legislation recognizing rights for indigenous peoples at the national level, and have made statements attributing a legal value to the Declaration. This has prompted the International Law Association to conclude that it can now be considered as a reflection of customary international law.<sup>133</sup>

#### IV. Inter-American Human Rights System

The Inter-American Human Rights System has contributed greatly to the development of indigenous peoples' rights. Its jurisprudence also has major implications for the strengthening of the right to consultation within the Inter-American System and even beyond.<sup>134</sup> In 1985, the Inter-American Commission had already issued its first resolution on the protection of indigenous rights to collective property. Due to the failure of the Brazilian government to adopt necessary measures to protect the well-being of the Yanomami community against the effect of industrial activities carried on in their territories, the Inter-American Commission decided that the government had violated the right to life and several other provisions recognized in the *American Declaration of the Rights and Duties of Man* (American Declaration).<sup>135</sup> As a result, the Commission recommended that the government of Brazil set and demarcate the boundaries of the Yanomami territory. This case marked the beginning of the normative

<sup>131</sup> The Resolution was adopted by a majority of 143 against 4 and with 11 abstentions.

<sup>132</sup> Australia, Canada and New Zealand have since reconsidered their position and have officially endorsed the UN Declaration. US President Obama has also declared that the US supports the Declaration.

<sup>133</sup> International Law Association, *Conclusion and Recommendations of the Committee on the Rights of Indigenous Peoples*, Resolution No. 5/2012 (adopted during 75th Conference on International Law, 26-30 August 2012) [ILA, Conclusion and Recommendations of the Committee on the Rights of Indigenous Peoples].

<sup>134</sup> S. J. Anaya & R. A. Williams, Jr., 'The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System', 14 *Harvard Human Rights Journal* (2001), 33; E. Tramontana, 'The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources', 17 *International Journal on Minority and Group Rights* (2010) 2, 241.

<sup>135</sup> *Yanomami Community v. Brazil*, IACHR Case 7615, 5 March 1985, Report No. 12/85.

involvement of the Inter-American system in the field of indigenous peoples' rights protection.<sup>136</sup>

For the first time in 2001, the IACtHR recognized the communal property rights of indigenous peoples in the landmark case *Awas Tingi Case v. Nicaragua*.<sup>137</sup> This judgment set a precedent for the protection of indigenous peoples' distinctive relationships with their land and natural resources. Adopting an evolutionary interpretation of the right to property as defined in Article 21 of the *American Convention on Human Rights*, in its meaning autonomous of domestic law, the Court examined relevant international law instruments so as to recognize indigenous rights to communal property.<sup>138</sup> In its decision, the Court acknowledged that indigenous rights to property derived from their traditional use and occupancy patterns and did not depend on State recognition.<sup>139</sup> Because the judgment established the existence of indigenous peoples' rights to communal property and described circumstances in which they may be violated, it significantly contributed to improving the Inter-American System and the international regime of human rights dealing with indigenous issues.<sup>140</sup> In particular, the Court held that the failure to demarcate indigenous lands, and the granting of a concession for logging within the lands traditionally belonging to the community, represented a violation of indigenous rights to property.

One year later, a similar approach was adopted by the Inter-American Commission in the case *Mary and Carrie Dann*.<sup>141</sup> On the basis of the *American Declaration*, the Commission found a violation of the rights to equality and property of the Western Shoshone people whose title to their ancestral lands had been ignored by the US government to pursue agricultural developments.<sup>142</sup> In its decision, the Commission further stipulated the rights of indigenous peoples not to be deprived of their interest in the occupation and use of their traditional lands and natural resources except with fully informed consent.<sup>143</sup> Although

<sup>136</sup> Tramontana, *supra* note 134, 249.

<sup>137</sup> *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79.

<sup>138</sup> *Ibid.*, 74, para. 148.

<sup>139</sup> *Ibid.*, 71, 74 & 75, paras 140, 148-153.

<sup>140</sup> L. J. Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons From the Case of Awas Tingni v. Nicaragua', *24 Arizona Journal of International & Comparative Law* (2007) 3, 609, 617.

<sup>141</sup> *Mary and Carrie Dann v. United States*, IACHR Case 11.140, 27 December 2002, Report No. 75/02 [Dann Case].

<sup>142</sup> *Ibid.*, para. 144.

<sup>143</sup> *Ibid.*, para. 131.

the Commission did not specify what it meant by fully informed consent, it nevertheless asserted the specific relevance of indigenous peoples' consent to land use, occupation and expropriation.

The question of indigenous right to consultation and consent surfaced again in the landmark case *Saramaka v. Suriname*<sup>144</sup> where the IACtHR held for the first time that "indigenous communities have the right to own the natural resources they have traditionally used within their territory".<sup>145</sup> The decision was also significant because it clarified whether and to what extent the State may interfere with indigenous property rights in the exploration and extraction of natural resources located on their territory. According to the judgment, the right to property is not an absolute right.<sup>146</sup> In this respect, the Court carefully described the circumstances in which the right to property may legitimately be limited.<sup>147</sup> Beyond conventional factors, the Court was specifically required to take into consideration whether any restriction "amounts to a denial of traditions and customs in a way that endangers the very survival".<sup>148</sup> In this regard, the Court established three safeguards to identify whether any restriction would threaten survival of the indigenous communities. First, the State must ensure the right of indigenous communities to effective participation in conformity with their customs and traditions in the context of proposed development plans. Then, it must guarantee that the indigenous community shares in the benefits of the development plan. Finally, an environmental assessment must be performed.<sup>149</sup> Only when those factors are respected can the State legitimately curtail indigenous peoples' rights to property.

The *Saramaka* case is noteworthy because it helped to qualify the meaning of participatory rights while defining the right to consultation and, where applicable, the duty to obtain consent.<sup>150</sup> According to the decision, to be adequate, consultation with the indigenous community must be actively conducted with due regard to its traditional methods of decision-making. In addition, the consultation should occur at the beginning of the development project, in good

<sup>144</sup> *Saramaka Case*, *supra* note 128.

<sup>145</sup> *Ibid.*, 36, para. 121.

<sup>146</sup> *Ibid.*, 37-38, para. 127.

<sup>147</sup> The right to property can be limited where the restrictions are: a) previously established by law; b) necessary; c) proportional; and d) with the aim of achieving a legitimate objective in a democratic society. *Ibid.*

<sup>148</sup> *Ibid.*, 38, para. 128.

<sup>149</sup> *Ibid.*, 38, para. 129.

<sup>150</sup> *Ibid.*, 40, para. 133.

faith and performed with the objective of reaching an agreement.<sup>151</sup> With respect to the right to consent, the Court further stipulated that “when dealing with any major development [...] that may have a profound impact on the property rights of the members of the Samaraka people”.<sup>152</sup> The State is additionally required to obtain “the free, prior, and informed consent of the Samarakas in accordance with their traditions and customs”.<sup>153</sup> Although this safeguard goes beyond the requirement defined in the *ILO Convention* which refers only to an obligation to consult,<sup>154</sup> it does not coincide with the protection afforded by the UNDRIP which requires FPIC in any development project affecting the lands and natural resources of indigenous communities.<sup>155</sup> Nonetheless, the jurisprudence of the Court in *Saramaka* constitutes a significant step forward in the development of indigenous peoples' right to lands and natural resources.

The jurisprudence developed in the *Saramaka* case has recently been upheld and strengthened by the IACtHR in the case of *Sarayaku v. Ecuador*.<sup>156</sup> In particular, the application of the effective participatory rights standards helped the Court to decide whether the authorization given by the State of Ecuador to explore and exploit oil resources on the territory of the Sarayaku community without consultation would violate their rights. The Court noted that Ecuador is party to *ILO Convention No. 169* and should in this respect be held responsible at least from the day the convention had been ratified.<sup>157</sup> The Court additionally emphasized that the right to consultation constitutes a general principle of international law.<sup>158</sup> This statement has broad implications. It suggests that the State may be held liable for violation of the right to consult independent of its obligations under the ILO Convention.<sup>159</sup> Seen from this angle, *Sarayaku v. Ecuador* reinforces the right to consultation as a rule of customary international law.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*, 41, 137.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Convention No. 169*, *supra* note 94. See also Tramontana, *supra* note 134, 259.

<sup>155</sup> J. M. Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples', 27 *Wisconsin International Law Journal* (2009) 1, 51, 66.

<sup>156</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245 [Sarayaku Case].

<sup>157</sup> *Ibid.*, 20, para. 70.

<sup>158</sup> *Ibid.*, 44-45, para. 164.

<sup>159</sup> L. Brunner & K. Quintana, *The Duty to Consult in the Inter-American System: Legal Standards After Sarayaku*, 16 *ASIL Insights No. 35* (2012), 4.

In order to verify whether the right to consultation was adequately ensured, the Court reiterated the jurisprudence established in *Saramaka* while slightly adjusting it.<sup>160</sup> Notably, it specified that the duty to consult is a State responsibility that cannot be delegated to a third party and also redefined the purpose of the EIA. Whereas in *Saramaka*, EIA was considered as a distinctive safeguard to verify whether the community survival had been endangered, in *Sarayaku*, the Court emphasized the importance of EIA for applying the right to consultation. In other words, EIA constituted a distinctive element, not only to check whether the community survival was at stake, but also to verify whether the right to consultation had been violated.<sup>161</sup> In brief, *Sarayaku v. Ecuador* confirms the standards established in *Saramaka* and provides a better understanding of the content and scope of the right to prior, free and informed consultation. However, in its judgment, the Court did not address the issue of the right to consent. From the decision's conclusions, it can nevertheless be implied that without proper consultation there is no possibility to secure the right to consent.

#### D. Conclusions

This comparative analysis clarifies the enormous gap between the norms being developed at the international level, and certain State practice especially in the case of Canada.<sup>162</sup> In the decisions delivered by the SCC, the 'duty to consult' with Aboriginal peoples appears to flow from the honor of the Crown in an attempt to accommodate and reconcile past injustices.<sup>163</sup> However, while these developments are a welcome attempt to refine State practice in terms of the Crown's relationship with the Aboriginal communities, they should not be seen as a replacement for Canada's human rights obligations regarding consultation with indigenous peoples.<sup>164</sup>

<sup>160</sup> The following order was presented by the Court: a) the prior nature of the consultation; b) good faith and attempts at reaching an agreement; c) appropriate and accessible consultation; d) environmental impact assessment; and e) informed consultation. *Sarayaku Case*, *supra* note 156, 50, para. 178.

<sup>161</sup> Brunner & Quintana, *supra* note 159, 4.

<sup>162</sup> Ward, *supra* note 82, 83.

<sup>163</sup> N. Bankes, 'International Human Rights Law and Natural Resources Projects Within Traditional Territories of Indigenous Peoples', 47 *Alberta Law Review* (2010) 2, 457, 459.

<sup>164</sup> Ward, *supra* note 82, 71.



Canada is a signatory to various international human rights treaties, including the ICCPR,<sup>165</sup> the ICESCR<sup>166</sup> and the *International Convention on the Elimination of Forms of Racial Discrimination*.<sup>167</sup> Accession and ratification to the above-mentioned human rights treaties create minimum legal obligations for Canada. In the case of consultation duties, if the authoritative interpretations of the UN treaties are considered, Canada is required to consult with Aboriginal peoples in good faith, or run the risk of violating international law.

Moreover, Canada is a member of the OAS and signed the *OAS Charter* in 1989. Although Canada is not a signatory to the *American Convention on Human Rights*, and has not accepted the jurisdiction of the IACtHR, the Court and the Commission on Human Rights do consider the *American Declaration* as an expression of the human rights provisions in the OAS Charter, and thus binding on all OAS Member States.<sup>168</sup> Furthermore, the Inter-American Commission has held that there are minimum standards that States Parties to the *American Declaration* have to respect in order to fully comply with the provisions in the Declaration, notably the right to property.<sup>169</sup>

The question now becomes whether the development of a 'duty to consult' in Canadian jurisprudence is equivalent to, or meets the standard of, the developing norms in international human rights jurisprudence.<sup>170</sup> We contend that this is not the case.

The Inter-American System has taken huge steps forward in attempting to qualify the meaning of participatory rights, to define consultation duties and, where applicable, to obtain consent. In the *Saramaka* case, safeguards were developed to ensure indigenous survival. In order to shrink the gap between developing international human rights norms and State practice, Canada needs to implement legislation that reflects the above-mentioned developments.<sup>171</sup>

Moreover, arguably of equal or more importance, Canada needs to recognize that the practice of consultation with Aboriginal peoples is an expression of the Aboriginal's right to self-determination.<sup>172</sup> As mentioned above, the more effective and meaningful right to FPIC is emerging from the broader

<sup>165</sup> Canada acceded to the ICCPR on 19 May 1976.

<sup>166</sup> Canada acceded to the ICESCR on 19 May 1976.

<sup>167</sup> Canada ratified ICERD on 14 October 1970.

<sup>168</sup> Bankes, *supra* note 163, 479. See also Ward, *supra* note 82, 71.

<sup>169</sup> *Mary and Carrie Dann v. United States*, *supra* note 141, para. 140. See also Ward, *supra* note 82, 71.

<sup>170</sup> Ward, *supra* note 82, 71.

<sup>171</sup> *Ibid.*, 83.

<sup>172</sup> *Ibid.*, 58.

right to self-determination and self-government. The UNDRIP provides a clear outline of the purpose and content of FPIC, reflecting the wishes of indigenous peoples and the developments in international human rights jurisprudence. Although UNDRIP is a non-binding instrument, it is a reflection of customary international law.<sup>173</sup> By continuing to observe that the principles enshrined in UNDRIP are evidenced in State practice, and reaffirmed in human rights jurisprudence, the UNDRIP is slowly being cemented in international law.<sup>174</sup> In the future, the UNDRIP, and included in this is FPIC, can provide a best practices guide for State practice and can even challenge State practice that does not fulfill its international legal obligations.<sup>175</sup>

Finally, many developments concerning indigenous participatory rights and consultation duties have stemmed from battles over land and resources. Although this article has concerned itself with the implementation of legislation, what is important to observe is the cumulative impact of Bill C-38 and Bill C-45, which can have drastic and long-lasting impacts on Aboriginal land, culture and way of life. This, in itself, makes it analogous to an encroachment on Aboriginal land and resources and Aboriginal peoples affected deserved to be consulted.

Moreover, the objections many Aboriginal peoples have concerning Bill C-38 and Bill C-45, expressed by the *Idle No More* movement, have a sound basis in Canadian constitutional law.<sup>176</sup> As outlined above, the amendments included in Bill C-38 and Bill C-45 could have very significant impacts on Aboriginal and treaty rights across Canada. In *Sparrow*, the SCC made it clear that infringements of Aboriginal rights is permissible but can only be justified by a strict test. Also, the *Sparrow* case made it clear that the Crown has the duty to consult with Aboriginal peoples whose rights are being infringed upon. In *Haida*, the SCC went a step further and decided that the same principles apply to not yet established Aboriginal rights. Following this, the *Mikisew* case demonstrated that the Crown has a duty to consult even when they have the authority to undertake an action that could affect the rights of Aboriginal peoples.

Unfortunately, despite evidence that the duty to consult exists, the SCC has remained very cautious in not providing a detailed outline pertaining to the scope of consultation duties, instead suggesting that this be decided on a

<sup>173</sup> ILA, *Conclusion and Recommendations of the Committee on the Rights of Indigenous Peoples*, *supra* note 133.

<sup>174</sup> Ward, *supra* note 82, 84.

<sup>175</sup> *Ibid.*

<sup>176</sup> See McNeil, *supra* note 75.

case-by-case basis.<sup>177</sup> By leaving the content of the Crown's duty to consult open one can find it difficult to elaborate on what the Crown could have done prior to introducing Bill C-38 and Bill C-45 in order to satisfy their obligations to consult with Aboriginal peoples. However, in this instance, it is instructive to look to the jurisprudence developed in *Haida* where the SCC determined that insight into meaningful consultation can be garnered from the New Zealand Ministry of Justice's *Guide for Consultation With Maori*. In this guide, meaningful consultation includes "seeking Maori opinion on [policy] proposals", "being prepared to alter the original proposal", and "providing feedback both during the consultation process and after the decision process".<sup>178</sup>

There is no evidence to suggest that anything of this nature took place, resulting in a possible violation of Canada's constitutional obligations to Aboriginal peoples. However, in an effort to accommodate Aboriginal peoples, to reconcile past injustices, and to respect the honour of the Crown, the Canadian government should have at least consulted with the Aboriginal peoples prior to rushing through Bill C-38 and Bill C-45. Maybe this is why the Aboriginal peoples of Canada stood up and refused to be *Idle No More*.

<sup>177</sup> See *Sparrow Case*, *supra* note 47. See also *Delgamuukw Case*, *supra* note 53.

<sup>178</sup> *Haida Case*, *supra* note 10, 534, para. 46.