WEST COAST Environmental Law

DECOLONIZING WATER

Between Law and Action:
Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with reference to Fresh Water Resources

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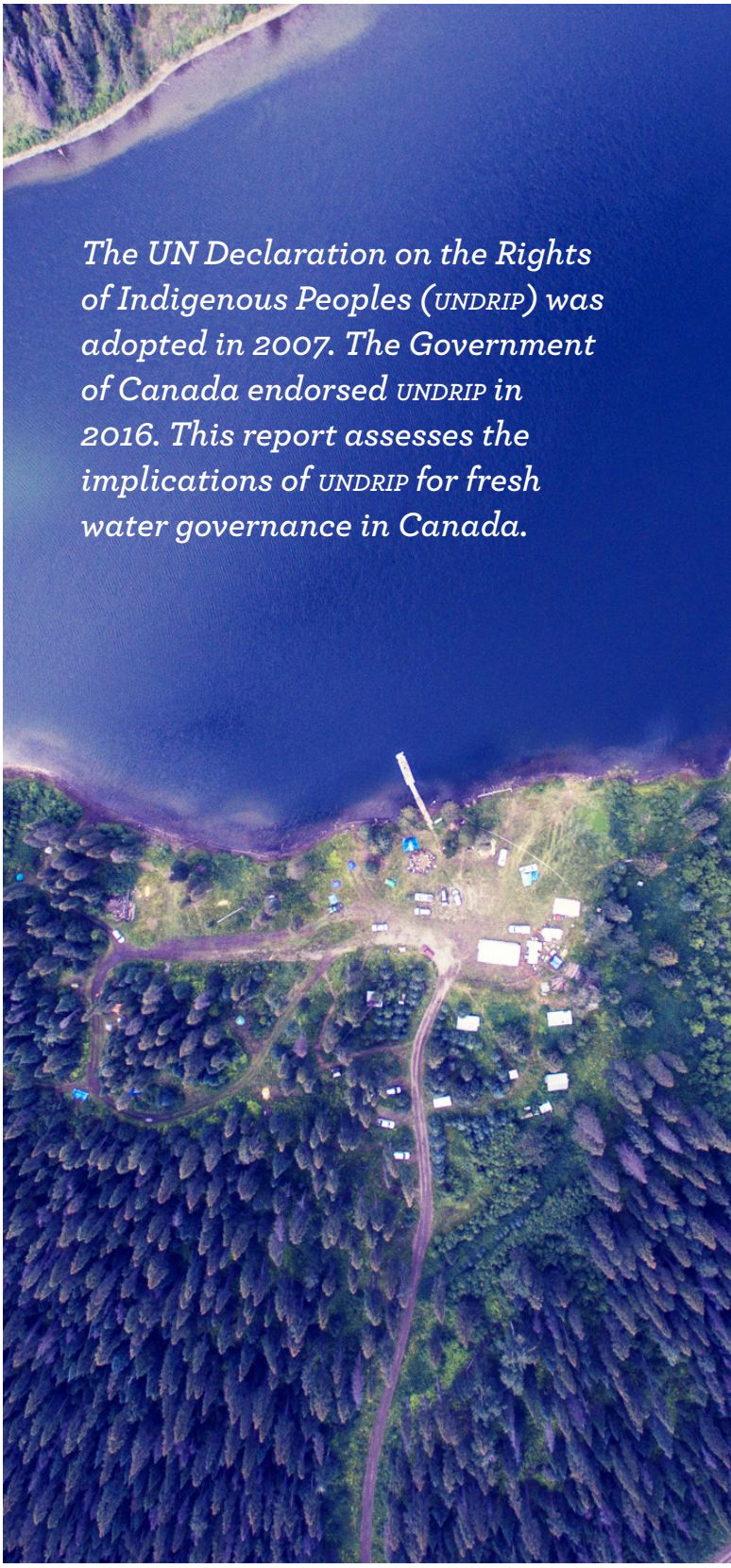
Key Messages

1. UNDRIP has both legal implications and normative power. It has existing normative weight and can be mobilized to set a minimum standard for Indigenous rights. UNDRIP can also be incorporated into domestic legal frameworks in Canada and applied by the courts.

2. Water is only specifically mentioned in UNDRIP twice, but references to Indigenous "lands, territories and resources" throughout the UNDRIP are interpreted to include water.

3. UNDRIP articulates powerful substantive and procedural norms with respect to the rights of Indigenous peoples that go beyond existing Canadian court decisions and state policy interpreting section 35(1) of the Canadian Constitution.

4. One of the major barriers to implementation of UNDRIP has been concern over the extent to which Free Prior and Informed Consent may be interpreted as a potential "veto" to resource development. Watershed co-governance may address this issue.



Executive Summary

At the 15th Session of the United Nations Permanent Forum on Indigenous Issues held in New York City in May 2016, Indigenous and Northern Affairs Minister, Carolyn Bennett, officially endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[1]. More recently, the federal government released its *Principles respecting the Government of Canada's relationship with Indigenous Peoples*, marking a move to align federal policy with the provisions of UNDRIP. These announcements express the political will to begin implementation of UNDRIP, in light of which many questions have been raised. As expressed in the title of this report, "Between Law and Action: Assessing the state of knowledge on the United Nations Declaration on the Rights of Indigenous Peoples with reference to fresh water resources", the **goal of this report is to support debate on the implementation of UNDRIP with respect to fresh water issues**, through providing a synthesis of existing research knowledge and identifying knowledge gaps. Our report accepts the premise that implementing UNDRIP provides an opportunity to explore and reconceptualize the relationship between international law, Canadian constitutional law and Indigenous legal orders.[2]

This is particularly relevant to water issues, which are the focus of this report. Much of the literature has focused on ongoing drinking water challenges in Indigenous communities. Water insecurity—with associated effects on health and wellbeing—affects hundreds of Indigenous communities across Canada. There is also growing recognition of the need to comprehensively examine Indigenous relationships to water at a broader scale, and to address Indigenous water governance. Simultaneously, UNDRIP implies substantial changes in water-related decision-making, particularly, but not limited to, natural resource development. This report contributes to this debate through exploring the implications of UNDRIP for fresh water governance in Canada.

CONTEXT

HISTORY OF UNDRIP

The United Nations General Assembly adopted the **United Nations Declaration on the Rights of Indigenous Peoples** (UNDRIP) on September 13th, 2007, after more than 30 years of drafting and negotiating by Indigenous peoples around the globe[3]. According to the United Nations, the Declaration is the "most comprehensive international instrument on the rights of Indigenous peoples". UNDRIP sets out minimum standards for the "survival, dignity and well-being" of Indigenous peoples by applying existing human rights standards to their specific situation.[4]

At the UN Assembly vote on UNDRIP, 144 states voted in favour, 11 abstained, and 4 (including Canada), voted against. The Canadian government stated concerns about the incompatibility of certain aspects of UNDRIP with Canada's legal and constitutional frameworks. In 2010, the federal government of Canada officially endorsed UNDRIP, but emphasized its "aspirational" nature.[5] In May 2016, the Federal Government removed its objections and upgraded its level of commitment. Speaking at the UN Permanent Forum on Indigenous Issues, the then federal minister of Indigenous and Northern Affairs, the Honorable Carolyn Bennett, stated, "we are now a full supporter of the declaration, without qualification. We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution."[6] UNDRIP is not a legally binding instrument under international law, but it is now established Canadian government policy and, if implemented through relevant legislative frameworks, will carry the weight of domestic law.

FREE, PRIOR AND INFORMED CONSENT

The debate over UNDRIP in Canada has focused on the topic of Free and Prior and Informed Consent (FPIC) and particularly its implications for resource development. FPIC and related concepts appear in several UNDRIP articles[7], which include:

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 and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Article 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.

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

Article 32:3. 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.

FPIC is not the only significant element of UNDRIP that has broader implications for Canadian law and policy. However, it does raise significant issues for all orders of government in Canada and hence is the focus of the rest of this report. It is important to remember that all articles in the Declaration are intended to be read in conjunction with one another, as well as in relation to other international agreements to which Canada is a signatory (e.g., the Universal Declaration of Human Rights[8] and the American Declaration on the Rights of Indigenous Peoples[9]).

UNDRIP AND WATER

While water is only specifically mentioned twice in the text of the UNDRIP there are a number of key articles that can be used as both normative and legal leverage points in the protection of Indigenous ownership and control over water. These include:

- Protection of Indigenous relationships to their land and territories;
- Rights to use, own, develop and control lands and resources, including the right to determine development and the right to redress if development hinders these rights;
- Establishing free, prior and informed consent as the consultation standard in the case of resource development;
- Protection against forcible removal from their lands and territories.

Taken together, the key articles from UNDRIP articulate the rights Indigenous peoples have related to consultation both prior to actions being taken, as well as part of a redress strategy to address historic and ongoing injustices within states.

IMPLICATIONS

The implications from our report are organized around four themes:

1. Implementation of UNDRIP in Canada.
2. Relationship between UNDRIP and Indigenous Law.
3. Implications for the Duty to Consult.
4. UNDRIP Implementation and co-governance.

APPROACH

We conducted a review of the academic peer-reviewed literature as well as reports and other documents produced by stakeholders, including government and industry. This was supplemented by interviews with 4 academic experts.

RESULTS

RESULT 1: WATER INSECURITY IS HIGH AND GROWING FOR INDIGENOUS PEOPLES IN CANADA

Sustainable water governance[10] is a particularly critical issue for Indigenous communities currently grappling with access to safe water. Historical inequalities have often constrained Indigenous communities' access to secure water in Canada.

RESULT 2: CANADA'S APPROACH TO WATER RIGHTS CONFLICTS WITH INDIGENOUS WATER RIGHTS AS SET OUT IN UNDRIP

In Canadian law, jurisdiction over water is divided between the federal and provincial governments. Scholars have argued that water security, which depends upon the interrelationship between human and environmental health, is necessary for the fulfilment of other Constitutional and Treaty rights. This logic would also extend to recognition of Indigenous Rights as described in UNDRIP. Aboriginal title confers on the group that holds the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one caveat: that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. This includes "the right to pro-actively use and manage the land."[11]

RESULT 3: UNDRIP ACCELERATES THE RESURGENCE OF INDIGENOUS WATER RIGHTS AND LAW

Articles 18 and 27's affirmation of the need for recognition of and respect for Indigenous legal orders and water governance in Canada holds promise as a focal point for the revitalization of Indigenous law.

RESULT 4: THERE IS A LACK OF CONSENSUS ON HOW TO INTERPRET FREE, PRIOR AND INFORMED CONSENT

Academic scholarship and public commentary is clearly divided over the content and meaning of UNDRIP and more specifically, FPIC, as it is enshrined in Canadian Law. As John Borrows suggests "rights identified by

UNDRIP should be available within self-governing Indigenous nations across Canada. Once adopted, they can be interpreted in accordance with the Indigenous peoples' own legal traditions, in Indigenous adjudicative forums."[12]

On the few occasions that FPIC has been substantively interpreted by international legal bodies, these interpretations have illustrated the ongoing tension between a "strong" interpretation of FPIC, in which the outcome of consultation determines the outcome of the project, and the "procedural" view that states must seek consent but not necessarily obtain it.

RESULT 5: FPIC AND CONSENT MUST BE AN ONGOING RELATIONSHIP

An opportunity exists for the federal government to align efforts to seek consent through FPIC in ways that encourage respectful ongoing co-operation. In this way, consent is obtained not through singular, point-in-time agreement, but rather is reaffirmed continually through ongoing collaboration.

RESULT 6: THERE ARE DEBATES OVER THE LEGAL AND NORMATIVE IMPLICATIONS

UNDRIP has been deployed as "a persuasive moral and political tool" to change the position of states who originally opposed UNDRIP. Canada was especially vulnerable given that their identity is "co-constitutive of human rights."[13] Thus, Canada (among others) moved from rejection to what Sheryl Lightfoot calls "selective endorsement'[14], which involves the writing down of the normative implications of UNDRIP.

In terms of diplomacy, Lightfoot writes that "Indigenous global diplomacies have shown that transnational relations can successfully conform to Indigenous ontologies of mutual respect, consensus decision-making, non-hierarchical relations, sustainability, and ongoing negotiations."[15]

RESULT 7: UNDRIP INTERSECTS WITH THE CALLS TO ACTION OF THE TRC

The Truth and Reconciliation Commission of Canada's (TRC) final report positions UNDRIP as the roadmap for reconciliation, calling it "the framework for reconciliation at all levels and across all sectors of Canadian society."[16] UNDRIP is mentioned 23 times in the TRC's report, *Calls to Action*, calling for, *inter alia*, its full implementation by all levels of Canadian government (Article 43); a national action plan, strategies, and "other concrete measures" to achieve the goals of UNDRIP (Article 44); integration of the UNDRIP into curricula for lawyers (Articles 27 and 28) and medical professionals (Article 24); and for Canada's "recognition and implementation" of Indigenous legal systems (Articles 42 and 50).[17]

STATE OF KNOWLEDGE AND FURTHER RESEARCH

Our report identified six areas for further research:

1. Interaction of specific UNDRIP articles with existing and evolving Canadian laws and policies and the interpretation of Canadian constitutional rights.
2. The potential role of UNDRIP in facilitating reconciliation of Crown and Indigenous jurisdiction within the Canadian polity today.
3. Interpretation of UNDRIP from the point of view of particular Indigenous legal orders.
4. Proactive planning.
5. Water co-governance as an increasingly widespread trend and changes in the practice of co-governance under UNDRIP.
6. Interpretations of UNDRIP's provisions in the context of diverse Indigenous legal orders and legal traditions across Canada.

ADDITIONAL RESOURCES AND KNOWLEDGE MOBILIZATION

West Coast Environmental Law, our community partner, has produced a second report which provides a more comprehensive assessment of UNDRIP and water issues. To create this second report, West Coast Environmental Law drew on its extensive experience working with Indigenous communities on environmental governance issues in general, and water governance issues in particular, including ongoing collaboration with Canadian university researchers on documenting Indigenous water law and legal traditions.

In addition to these two reports, our team will produce two podcasts and three policy-oriented briefing notes. All of these resources can be found on the websites of the four organizations that will disseminate this research:

West Coast Environmental Law
www.wcel.org

Program on Water Governance
www.watergovernance.ca

Decolonizing Water Project
www.decolonizingwater.ca

Keepers of the Water
www.keepersofthewater.ca

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Context

At the 15th Session of the United Nations Permanent Forum on Indigenous Issues held in New York City in May 2016, Indigenous and Northern Affairs Minister, Carolyn Bennett, officially endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), without qualification.[18] More recently, the federal government released its *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples,*[19] marking a move to align federal policy with the provisions of UNDRIP. These announcements express the political will to begin implementation of UNDRIP and correspondingly raises many legal and policy questions about how the Canadian government intends to proceed with this important and complex task. The process of implementing the *Declaration* provides an opportunity to explore and reconceive the relationship between International law, Canadian constitutional law and Indigenous legal orders. Using the example of water law and governance, this report will contribute to this undertaking by synthesizing the existing knowledge on UNDRIP implementation and proposing areas for further research.

The final report of the *Truth and Reconciliation Commission* concludes that UNDRIP is "the appropriate framework for reconciliation in twenty-first-century Canada. Studying the *Declaration* with a view to identifying its impacts on current government laws, policy, and behaviour would enable Canada to develop a holistic vision of reconciliation that embraces all aspects of the relationship between Aboriginal and non-Aboriginal people in Canada, and to set the standard for international achievement in its circle of hesitating nations."[20]

HISTORY OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The current form of UNDRIP is the direct result of decades, perhaps even centuries of global Indigenous activism in both domestic and international arenas.

According to Sheryl Lightfoot, the original intention of UNDRIP focused on four main goals[21]:

1. "[Provide] a set of guidelines and a framework for state implementation of Indigenous rights";
2. "[Provide] a persuasive moral and political tool to push state actors toward new visions and new global imaginings that can accommodate Indigenous ways of being, and thinking beyond the existing international law and the constraints of state sovereignty"
3. "Represent a broad global consensus of both Indigenous and state actors"; and
4. "Represent a compromise," like all multilateral international agreements"

The fight for international recognition of Indigenous rights on the International stage was instigated in the 1970s when Indigenous peoples around the globe found that the domestic sphere of politics was insufficient and ineffectual in responding to increasing calls for Indigenous rights, recognition and legal change.[22]

Canada, and three other states (Australia, New Zealand and the United States) initially rejected the *Declaration*, citing incompatibility with the Canadian constitution and concern over the *Declaration*'s language (especially as it regards self-determination, land and resource rights). However, Indigenous leaders and allies have deployed UNDRIP as "a persuasive moral and political tool"[23] to challenge state positions in the four years following ratification in 2007. "Canada was particularly receptive to this moral persuasion given that the *Canadian Charter of Human Rights and Freedoms* is embedded in the Constitution, grounding the Canadian nation-state's identity as 'co-constitutive of human rights'."[24] Thus, Canada moved from rejection to what Lightfoot calls "selective endorsement."[25]

Canada issued a statement of support for UNDRIP in 2010 but clarified that the document was "aspirational and not legally binding."[26]

TIMELINE

1960
The Declaration on the Granting of Independence to Colonial Countries and Peoples was implemented by almost all colonized countries, but was not extended to include "domestic overseas colonies."[27]

1977
The International Indian Treaty Council (IITC) deployed its status to be included in the first NGO Conference on Discrimination in Geneva, September 20-23, 1977. Here Indigenous peoples drafted a "Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere" or the 1977 Declaration of Principles.

1982
The UN created the Working Group on Indigenous Populations. The Working Group contained a new innovative model with flexible rules of procedure to encourage and enable broader participation. It received and analyzed both written and oral submissions from Indigenous peoples and organizations, governments, agencies, and UN bodies.[28]

1985
The Working Group on Indigenous Peoples began drafting "the official standards on the rights of Indigenous peoples."[29]

1989
The International Labour Organization (ILO) Convention 169 acknowledged Indigenous peoples as distinct polities entitled to negotiate with states in good faith, and sometimes veto state plans. Nation-states were seen as having limited power over Indigenous peoples as "distinct territorial and political entities."[30] The Convention came into force in 1991.

1993
The Draft Declaration on the Rights of Indigenous Peoples submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

1996
The Government of Canada formally declared its legal and moral commitment to the "non-discriminatory application of the rights of self-determination to Indigenous and non-Indigenous peoples" before the Commission on Human Rights.[31]

2006
The Human Rights Council passed the Draft Declaration on the Rights of Indigenous Peoples – 30 for, 2 against, 12 abstentions – and forwarded it to the United Nations General Assembly (UNGA) for adoption.[32]

2010
Canada endorsed UNDRIP.[33]

2016
Canada announced that it would formally remove its "permanent objector" status and announced plans to adopt the document.[34] Minister of Justice, Wilson-Raybould, states: "simplistic approaches, such as adopting the UNDRIP as being Canadian law are unworkable."[35]

2017, April 24
Canada's Minister of Indigenous and Northern Affairs, Carolyn Bennett, reconfirmed at the opening ceremony of the United Nations Permanent Forum on Indigenous Issues that Canada plans to fully adopt and implement UNDRIP.[36]

2017, July 14
Canada's Minister of Justice, Jody Wilson-Raybould, released a set of Principles Respecting the Government of Canada's Relationship with Indigenous Peoples. The Principles are rooted in section 35 of the Constitution and the UNDRIP and are informed by TRC's Calls to Action.[37]

PRINCIPLES OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

According to former United Nations special rapporteur on the rights of Indigenous peoples, James Anaya, the *Declaration* represents the basic principles and standards that should guide states in their dealings with Indigenous peoples.[38] Similarly, the Canadian government defines it as a document that describes both individual and collective rights of Indigenous peoples around the world, which offers guidance on cooperative relationships with Indigenous peoples to states, the United Nations, and other international organizations based on the principles of equality, partnership, good faith and mutual respect.[39]

The *Declaration* is "grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity."[40] In this way, UNDRIP codifies the minimum content of Indigenous peoples' inherent human rights at a global level by providing "a contextualized elaboration of general human rights principles and rights as they relate to the specific, historical, cultural and social circumstances of indigenous peoples."[41]

UNDRIP AND WATER

While water is only specifically mentioned twice in the text of the UNDRIP, there are a number of key articles that can be used as both normative and legal leverage points in the protection of Indigenous ownership and control over water. These include:

- Protection of Indigenous relationships to their land and territories.
- Rights to use, own, develop and control lands and resources, including the right to determine development and the right to redress if development hinders these rights.
- Clear language on the duty to consult get free, prior and informed consent in the case of resource development.
- Protection against forcible removal from their lands and territories.

Taken together, the key articles from the UNDRIP clearly establish that Indigenous peoples have rights related to consultation both prior to actions being taken on their lands and territories, as well as part of a redress strategy to address historic and ongoing injustices within states.

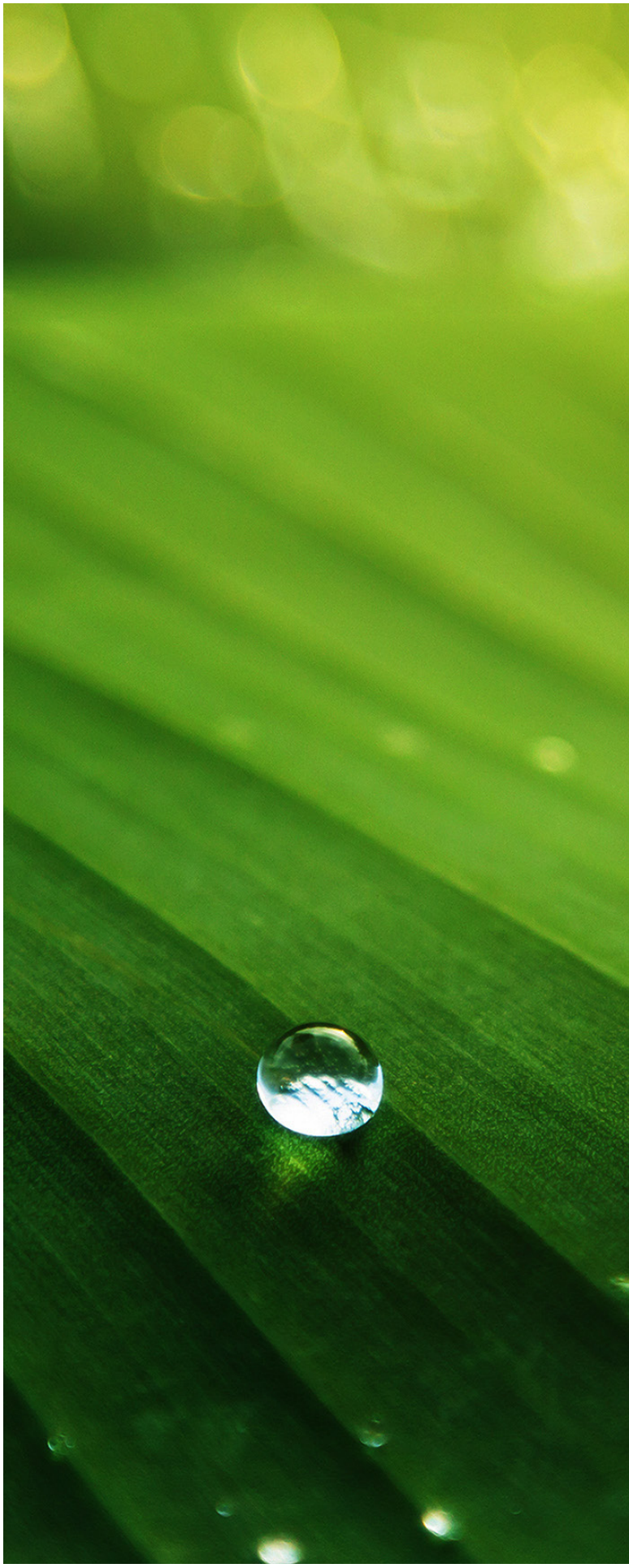


TABLE 1

UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: ARTICLES RELEVANT TO WATER

Article 3	Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
Article 4	Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
Article 25	Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard;
Article 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 20.2	Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress; and
Article 26	1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired;
Article 27	States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
Article 28	1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
Article 29	1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
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.
Article 8.2 b	2. States shall provide effective mechanisms for prevention of, and redress for: (*b*) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

Implications

The implications of UNDRIP are wide-ranging for Canada but for the purposes of clarity we have framed the implications in three key sections: 1) Implementation of UNDRIP in Canada; 2) Relationship between UNDRIP and Indigenous Law; and 3) Implications for Duty to Consult.

This section provides as brief overview of these over-arching implications from a general perspective. The results section focuses on the issues of water rights and water governance.

1) IMPLEMENTATION OF UNDRIP IN CANADA

Canada's commitment to implement UNDRIP presents an opportunity to reconsider the relationship between the Crown and Indigenous peoples, including how Indigenous peoples' rights are defined and protected. While a declaration does not create directly enforceable, binding legal obligations on a state in and of itself, according to the United Nations, "a 'declaration' is a solemn instrument relating to matters of major and lasting importance where maximum compliance is expected."[42] Indigenous legal scholar, John Borrows, notes:

> *"Although international norms are not binding without legislative implementation, such norms should be relevant sources for interpreting rights domestically. While UNDRIP is technically not binding on Parliament because of its status as a declaration, it should nevertheless inform the executive's (the Crown's) interpretation and implementation of the Constitution."*[43]

UNDRIP has yet to be specifically addressed by the Supreme Court of Canada; however, it has affirmed the applicability of international law in Canada generally.[44] The legislature is presumed to act in compliance with Canada's international obligations, unless there is a clear contrary legislative intent.[45] Courts sometimes concede that UNDRIP is an international instrument that can be used to interpret domestic law.[46] Therefore, a court may find such an international instrument a persuasive authority articulating Canada's obligations.

least, vulnerable to arguments that it has breached its obligations under UNDRIP.

2) INDIGENOUS LAW AND UNDRIP

Several articles of UNDRIP directly reference recognition of and respect for Indigenous legal orders and decision-making processes. if implemented in Canada, this would broaden Indigenous governance powers and require Canadian law to give effect to Indigenous law and institutions.[47] For example, article 18 states that:

"Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions".[48]

Article 27 further states that "states shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure system, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."[49]

It quickly becomes apparent that articles 18 and 27, and articles pertaining to self-determination, align with Recommendation 45 (iv) of the TRC's *Calls to Action*, which calls on governments to "[r]econcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving treaties, land claims, and other constructive agreements."[50]

With respect to FPIC and the development of natural resources on Indigenous lands, the necessary implication of these articles is that government and industry would need to engage with Indigenous institutions to obtain consent for projects. The federal government appears to be moving in this direction with its Principles Respecting the Government of Canada's Relationship with Indigenous Peoples. Principle 4 maintains that "recognition of the inherent jurisdiction and legal orders of Indigenous nations is therefore the starting point of discussions aimed at interactions between the federal, provincial, territorial, and Indigenous jurisdictions and laws."

Given the diversity of Indigenous legal orders, it would be inappropriate to create a single, standardized approach to interpreting and applying FPIC. Individual Indigenous Nations must help to interpret and apply FPIC according to their own distinctive legal orders in conversation with Canadian government and industry.

INDIGENOUS LAW AND THE UNDRIP

Romeo Saganash, NDP MP for Abitibi—Baie James—Nunavik—Eeyou:

"Under Cree law, we have a trapline system in Northern Quebec where there's about 310 traplines and there's one boss per trap line. He's the tallyman. He determines who comes in his territory to get what, for how long and so on and so forth. So that permission requested to the tallyman, or the chief hunter, is already incorporated in Cree law. So I think the parallel with free, prior and informed consent is already pretty easy to make ....

...You cannot consider a new forestry regime in the territory without considering those different family hunting territories that exist. The tallyman has a central role in that new regime. He has to sign at the bottom of the forestry plan for the following year in order for the forestry company to go ahead. So it's already there. The word is not there, but the process leads to that final consent where the tallyman signs the cutting plans for next year for this company, for that company and so on and so forth. It's already there in practice for Northern Quebec."

3) THE DUTY TO CONSULT AND FREE, PRIOR AND INFORMED CONSENT (FPIC)

The Supreme Court of Canada has confirmed that the Crown may not make unilateral decisions about the use and management of natural resources, even if Aboriginal title and/or Aboriginal rights have not been formally recognized by the Canadian courts or addressed in a treaty. This is known as the duty to consult.[53] However, according to Canadian law, in many situations it remains unclear the extent to which consultation must occur and what actions are considered valid consultation. Further, under section 35 jurisprudence, there are several justifiable grounds for infringing Aboriginal rights. However, this is an evolving area of law.[54]

The principle of FPIC first emerged as an international norm with the International Labour Organization's *Indigenous and Tribal Peoples Convention, 1989 (No. 169)* (ILO 169),[55] which Canada did not ratify, and was later enshrined in UNDRIP, which was adopted by the United Nations General Assembly in September 2007. There are several references to FPIC in UNDRIP, notably in articles 10, 11, 28 and 29.

While FPIC is increasingly recognized as an international norm, some states advocate a narrow interpretation of articles 19 and 32 as merely a procedural obligation to consult to seek but not necessarily obtain consent. Many Indigenous leaders, scholars and nongovernmental organizations are challenging this minimalist interpretation of FPIC. In their view, Indigenous peoples should hold the ultimate decision-making authority within their jurisdictions.

Approach

Jurisprudence is dynamic and quickly evolving. Community initiatives to revitalize and apply Indigenous law on the ground are also occurring with greater frequency and success. As a result, scholarship on the subject faces the challenge of keeping pace with new developments in the legal, political and community spheres. Through surveying the academic literature and policy documents of government and industry, examining the state of Indigenous legal orders as they exist today and drawing on case studies of Indigenous law in action, we have attempted to canvass a broad range of sources to present the most up-to-date picture possible. Ongoing developments mean that academic analysis will always be somewhat retroactive. Research synthesis is nonetheless an effective tool for finding out where we are, where we are going, and how to get there. Specifically, we surveyed and synthesized research comprised of:

- Published research findings and academic commentary on an extensive body of literature;
- Analysis of primary sources, including legislation, Canadian case law and international treaties;
- "Grey literature", including policy documents and reports of government, industry and the not-for-profit sector; and
- Indigenous legal orders and case studies of their application.

Our methodology included locating published literature through database searches, reviewing recent publications and searching through promising citations. Grey literature included relevant legal analysis from practicing lawyers. Specifically, this spanned a variety of sources including syntheses prepared by consulting firms on industry perspectives (such as the UN Business Reference Guide to the UNDRIP), in-person meetings with individuals involved in the negotiation of UNDRIP, various media sources, related UN documents on international law and other international legal instruments comprising the international legal framework that UNDRIP is a part of.

Results

RESULT 1: WATER INSECURITY IS HIGH AND GROWING FOR INDIGENOUS PEOPLES IN CANADA

Sustainable water governance[56] is a particularly critical issue for Indigenous communities currently grappling with access to safe water, and with associated health and livelihood issues in the context of climate change and resource extraction in northern Canada.[57] Indigenous communities face ongoing challenges with respect to safe drinking water. A recent *Globe and Mail* study found that high-risk water systems pose a threat to the health of one-third of First Nations people living on reserves.[58] However, water is absent from the Supreme Court of Canada's definition of Aboriginal title.[59] In Canada, Indigenous water rights and laws, as well as their participation in water governance, have, with few exceptions, been treated implicitly within land-focused legal claims and negotiation processes.[60] As a result, historical inequalities have often constrained Indigenous communities' access to secure water in Canada.[61]

There is a broad consensus in the literature and amongst policy makers that the current legal regime in Canada provides insufficient safeguards for ensuring water security for Indigenous peoples. As a result, conflict is growing. To cite just a few examples, in the 12 months preceding the publication of this report, Assembly of First Nations National Chief, Perry Bellegarde, toured the proposed Site C Dam site in British Columbia at the invitation of West Moberly and other local First Nations communities.[62] In Labrador, protesters have physically blocked the construction of the Muskrat Falls hydroelectric project and entered the construction site, prompting the provincial government to remove hundreds of workers and hold emergency talks (#MakeMuskratRight).[63] In Northern BC, several Indigenous protest camps (including Lelu Island) have been created to protest against water-related risks stemming from oil and gas pipelines and facilities, with conflict set to intensify given the federal government's recent approval of the Pacific Northwest LNG project, and upcoming decision on Kinder Morgan. In Alberta, conflict over water allocations to First Nations reserves is intensifying.[64] Fifty Indigenous groups across North America have signed an unprecedented pan-continental Treaty Alliance against tar sands expansions. In the meantime, some Indigenous communities have taken the initiative of developing their own policies for resource governance.[65] A related trend, in line with broader trends of community participation in decision making at the watershed scale, has been the increased involvement of Indigenous peoples in collaborative water governance; this can be most notably seen via the Northwest Territories Water Stewardship Strategy. This parallels calls by industry for new approaches to resource management (e.g., the recent appeal by TransCanada's CEO for conflict resolution with Indigenous communities over pipelines[66]). These initiatives are characterized by a shared recognition that current approaches to consultation and environmental assessment are unsatisfactory and are likely to undergo significant transformation given the federal government's ongoing commitment to overhauling the federal environmental assessment processes and implementing UNDRIP, while enshrining the importance of reconciliation with Indigenous peoples as a top priority in federal ministerial mandates.

RESULT 2: CANADA'S APPROACH TO WATER RIGHTS CONFLICTS WITH INDIGENOUS WATER RIGHTS AS SET OUT IN UNDRIP

In Canadian law, the Constitution Act, 1867 divides jurisdiction over water between the federal and provincial governments.[67] While the provinces have exclusive law-making authority over "non-renewable natural resources," including water as well as property and civil rights, local works and undertakings, and 'matters of a merely local or private nature' (among others), the federal government has jurisdiction over areas that affect water, including sea coast and inland fisheries, navigation and shipping, international or interprovincial 'works and undertakings' (which the courts have interpreted to cover pipelines), federal works and undertakings, canals, harbours, rivers and lake improvements, and Indians and land reserved for Indians.[68] As Linda Nowlan describes, "The Constitution also gives shared responsibilities to both the federal and provincial governments over certain subjects such as interprovincial water issues, agriculture and health. There is no central federal water law, despite the existence of a seemingly comprehensive *Canada Water Act*."[69] The *Canada Water Act* helps to guide co-operation between provinces and the federal government in regards to water management.[70] Other significant pieces of legislation include the *Fisheries Act*[71], the *Navigable Waters Protection Act*[72] and the *Canadian Environmental Protection Act.*[73] Environmental assessment laws at both the federal and provincial level also play a role in ensuring that water quality and quantity are not subject to significant adverse impacts that cannot be mitigated.

As inherited from the British common law, surface water was subject to the law of riparian rights, the legal rights of land owners bordering on a river or other body of surface water to access for domestic use, while ground water was governed under a separate doctrine known as absolute capture, which was essentially an unregulated state where the ownership of groundwater crystallized upon its withdrawal from an aquifer. With the introduction of BC's *Water Sustainability Act* in 2016, all provinces now regulate ground water, which supplies 1/3 of Canada's drinking water.[74]

Aboriginal water rights exist alongside these systems. In the *R v. Van der Peet* case, the Supreme Court held that land rights under the treaties includes the right to water:

"Thus the treaties recognized that by their own laws and customs, the Aboriginal people had lived off the land and its waters. They sought to preserve this right in so far as possible as well as to supplement it to make up for the territories ceded to settlement. These arrangements bear testimony to the acceptance by the colonizers of the principle that the Aboriginal peoples who occupied what is now Canada were regarded as possessing the Aboriginal right to live off their lands and the resources found in their forests and streams to the extent they had traditionally done so."[75]

Despite the SCC's pronouncements with respect to water and treaty rights, water is rarely mentioned or referenced in the text of historic treaties themselves.

FIRST IN TIME, BUT NOT FIRST IN RIGHT

The First in Time, First in Right (FITFIR) water rights regimes in British Columbia and other provinces were established at the time of colonial settlement in a manner prejudicial to the rights of Indigenous communities. FITFIR regimes allocate water on the basis of a rank order of license holders. A priority number, determined by the date and time the license application was approved, is recorded on the license and indicates seniority in times of shortage. When there is not enough water for all the licensees, the oldest licensees get their water before the newer ones. Although First Nations are undeniably "First in Time," they were prevented from applying for water licenses at the time the regulatory regime was created.[76] For example, the Lower Similkameen Indian Band (LSIB) holds the 61st out of 105 licenses on the Similkameen River.[77] In 1969, the LSIB applied for the right to use 2,000 gallons of water a day from Nahumcheen Brook but the application was refused on the basis that there was insufficient water to grant this allocation.78 However, seventeen years later, the Province of British Columbia issued a license to a private landowner for a much larger amount of water.[79] Similar issues affect First Nations across the province. This situation was left unchanged during the Government of British Columbia's recent Water Act Modernization process despite repeated calls from First Nations to overhaul FITFIR. Similar issues affect Indigenous peoples across the country.

Scholars have argued that water security, which depends upon the interrelationship between human and environmental health, is necessary for the fulfilment of other Constitutional and Treaty rights, and that Indigenous water rights are inherently necessary to fulfill the purpose for which reserves were created (including hunting and fishing rights).[80] This logic would also extend to recognition of Indigenous rights as described in UNDRIP. Insofar as water and land are integrally interconnected, Aboriginal title gives Indigenous peoples the right to lands submerged by waters, and entitles them to make use of waters.[81] More generally, Indigenous peoples claim that they have inherent water rights that stem from their relationships with their traditional territories.[82]

Recent Canadian jurisprudence provides support for the above arguments (e.g. the BC Supreme Court's Halalt decision).[83] Moreover, the full implications of the Supreme Court of Canada's 2014 *Tsilhqot'in* decision have yet to be fully explored.[84]

In *Tsilhqot'in Nation v British Columbia*, the Supreme Court of Canada recognized the Tsilhqot'in Nation's Aboriginal title using a territorial approach affirming that:

"Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations."[85] This includes "the right to pro-actively use and manage the land."[86]

RESULT 3: UNDRIP ACCELERATES THE RESURGENCE OF INDIGENOUS WATER RIGHTS AND LAW

Articles 18 and 27's affirmation of the need for recognition of and respect for Indigenous legal orders and water governance in Canada holds promise as a focal point for the revitalization of Indigenous law.

Some scholars argue that the colonial Aboriginal law regime should be complemented or supplanted by Indigenous laws that stem from historic cultural, spiritual and material relationships, values and water use practices of Indigenous people.[87]

A key issue is the articulation between Indigenous and Western **worldviews of water**. Asserting a dichotomy between Indigenous and Western approaches runs the risk of essentialization and threatens to obscure diversity within these traditions. With these caveats in mind, scholars have observed that whereas Western views often frame water as a resource available for human exploitation[88], Indigenous views may frame water as an animate (living) entity which is imbued with socio-cultural and spiritual meaning, inter-related with all aspects of the environment, the subject of values, use practices and rituals transmitted over generations, and thus constitutive of Indigenous law, knowledge and identity.[89] In other words, our worldviews of water influence our approaches to governance.[90]

INCLUSION IN LAND USE PLANS

Increasingly, Indigenous nations are acting on the basis of their own inherent jurisdiction and laws to safeguard their territories as articulated by UNDRIP. The Gitanyow Lax'Yip Land Use Plan is an example of this. The Gitanyow, whose lax'yip (territories) are located in the middle-Nass and upper Skeena Watersheds of British Columbia, developed their land use plan on the basis of the Gitanyow legal principle to "hold, protect and pass on the land in a sustainable manner from generation to generation."[91] These responsibilities extend to water as well. Permission must be sought before territory or resources are used and a share of what is harvested must be paid back as a condition of the consent granted. From the perspective of the Gitanyow, the land use plan applies to all activities within their territory, including water. The Gitanyow Hereditary Chiefs commenced litigation against the federal Crown when a transmission line was proposed through the Hanna Tintina watershed and were able to successfully negotiate a change in route.

Indigenous law has governed the territory now known as Canada for millennia and Indigenous legal traditions contain a wealth of accumulated knowledge about effective strategies for environmental governance, including water stewardship and management. These laws originate from the political, economic, spiritual and social values expressed through the teachings of respected elders in communities. Legal principles regarding water are found within these teachings and they are passed onto future generations through stories, ceremonies and traditions. At the risk of oversimplification, while Western law frames water as a resource available for human exploitation, Indigenous laws frame water as an animate (living) entity that, like other elements of nature, is a rights-bearing entity imbued with socio-cultural and spiritual meaning and interrelated with all aspects of the environment.[92]

An important point to note here is that Indigenous law pre-exists the creation of the Constitution; therefore, its authority is not derived from Constitutional recognition but rather exists independently on its own. Section 35 recognizes and affirms Indigenous peoples' pre-existing "Aboriginal and treaty rights"[93] – this includes Indigenous peoples' governance and management authority in their territories. Constitutional recognition of Indigenous governance may be linked with Aboriginal title or governance rights may be independently recognized.

As a result, strategies for practical implementation of UNDRIP are currently unclear, and are likely to be highly variable given Canada's decentralized, multi-scalar, multi-jurisdictional water governance approach (Bakker and Cook 2011; Norman 2009, 2012, 2013, 2014; Wolf 2000).[94] When adopting UNDRIP, it must stem from and be responsive to the specificity of Indigenous laws, within Canada and across the globe.

Meanwhile, some Indigenous communities have taken the initiative of developing policies for resource governance in their traditional territories.[95]

In many instances, these policies embody principles that flow from Indigenous law (e.g., role as owners and stewards of the land; environmental regulations consistent with traditional laws). As a result, calls for new approaches to co-governance have been on the rise (e.g., the statement by TransCanada's CEO calling for conflict resolution with Indigenous communities over controversial pipelines).[96] A related trend has been increased interest in—but also debate over—the involvement of Indigenous peoples in collaborative water governance in line with broader trends of community participation in decision-making processes often rescaled to watersheds.[97]

The Crown could make arguments before the courts to directly insert UNDRIP into submissions related to Aboriginal and Treaty rights. It could also incorporate UNDRIP more generally into its approach to governance, notably "when developing, enacting and implementing statutes and policies to ensure that UNDRIP is the standard that animates its actions in the House of Commons."[98]

RESULT 4: THERE IS A LACK OF CONSENSUS ON HOW TO INTERPRET FREE, PRIOR AND INFORMED CONSENT

Academic scholarship and public commentary is clearly divided over the content and meaning of UNDRIP and more specifically FPIC as it is enshrined in Canadian Law. However, a couple key debates and recommendations can be synthesized from the literature.

ACADEMIC COMMENTARY ON UNDRIP IMPLEMENTATION

Several leading legal scholars suggest that the path forward requires resetting the relationship between Indigenous peoples and Canada through recognizing and protecting Indigenous peoples' rights according to their own legal traditions. Implementation of UNDRIP requires Indigenous peoples and Canadian governments to work together in a spirit of partnership and mutual respect.[99]

John Borrows has suggested that UNDRIP could provide an alternative legal framework put forward in *R v. Van der Peet*[100], one which does not depend on "constitutional distinctions based on pre- and post-contact or assertions of sovereignty" and is "not contingent on a non-Indigenous event"[101] but rather takes the stories of Indigenous peoples as central.

As Borrows suggests, rights identified by UNDRIP should be available within self-governing Indigenous nations across Canada.[102] Once adopted, they can be interpreted in accordance with the Indigenous peoples' own legal traditions and in Indigenous adjudicative forums.

FPIC INTERPRETATION IN INTERNATIONAL LAW

On the few occasions that FPIC has been substantively interpreted by international legal bodies, these interpretations have illustrated the ongoing tension between a "strong" interpretation of FPIC in which the outcome of consultation determines the outcome of the project, and the "procedural" view that states must seek consent but not necessarily obtain it. Industry writings supportive of FPIC also demonstrate this uncertainty.[103]

UNDRIP INTERNATIONALLY

The Declaration is being used to interpret domestic law.[104] In 2007, in a major land rights case that included the issue of Indigenous "consent," the Chief Justice of the Supreme Court of Belize relied in part on Article 26 of UNDRIP and ruled in favour of the Maya people.105 Subsequently, the Court of Appeal affirmed Mayan land and resource rights in Southern Belize based on their longstanding use and occupancy.106 The Court of Appeal emphasized that the Chief Justice was "entirely correct" to take into account Belize's international law and treaty obligations, as well as general principles of international law in the the Declaration.[107] In 2009, the African Commission on Human and Peoples' Rights relied extensively on the Declaration108 and other international law to address the land rights of the Endorois people stating that, "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[109]

IS FPIC A VETO?

Regarding the question of whether FPIC translates into a veto right, Romeo Saganash, Nunavik-Eayou, NDP MP for Abitibi notes that, "people choose to polarize the issue…They consider consent as a veto, which is not the case. **I participated throughout the process at the UN when we negotiated and drafted the UN Declaration, and no one ever talked about a veto.** You have to read the UN Declaration as an entire document, not just those provisions that talk about free, prior and informed consent. You don't read provisions in isolation. That's how the law works. That's how our legal system works. So you have to read the entire document, and parts of the document talks about the rights of others. So when you consider the right to free, prior and informed consent, you also have to consider the rights of others that are at stake. And especially the human rights of others. I think that's how we should approach this."[110]

Similarly, Dalee Sambo Dorough, one of the drafters of UNDRIP on behalf of the Inuit Circumpolar Council, notes that FPIC does not amount to a veto and stresses the difference between the "procedural and substantive aspects of free, prior and informed consent" and the idea of a veto. While a veto is often part of a "legislative or constitutional authority and vested in a political leader," FPIC "entails dialogue, negotiation… in good faith….with the objective of achieving consent, which the peoples concerned may give or withhold."[111]

In *The Principles Document,* the federal government articulates its view in Principle 6, that "the Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior and informed consent when Canada proposes to take actions which impact them and their rights , including their lands, territories and resources".[112] The federal government is now guided by the principle that it must move beyond the legal duty to consult and towards the free, prior and informed consent of Indigenous peoples.

ON THE QUESTION OF VETO

"The obsession with the veto really misses the forest for the trees," said Brenda Gunn, a fellow with the Centre for International Governance Innovation and a leading Canadian legal expert who has worked to interpret the UN declaration for government, business and Indigenous peoples.

"The government should never be approaching Indigenous peoples with a yes or no question. It's actually about building new relationships: having Indigenous peoples involved at the very beginning in any project or process where their rights might be affected and sitting there as true partners in helping guide the decision-making process where their views and concerns are heard, taken into account and addressed."[113]

RESULT 5: FPIC AND CONSENT MUST BE AN ONGOING RELATIONSHIP

A considerable amount of literature has been published on the interpretation of historic and numbered treaties as ongoing relationships of consultation, rather than single finite documents of land cession and sale.[114]Similarly, echoed in UNDRIP, the literature and the federal government's *Principles Respecting Document* is that Indigenous peoples must be treated as partners in Confederation.[115] An opportunity exists for the federal government to align efforts to seek consent through FPIC in ways that encourage respectful ongoing co-operation. In this way, consent is obtained not through singular point-in-time agreement but rather is reaffirmed continually through ongoing collaboration.

CONSENT IN INDIGENOUS LAW

There are real-world examples of ongoing consent relationships between industry and Indigenous communities. Consider this example from Anishinaabe law and the Saugeen Ojibway Nation as explained by Olthuis Kleer Townshend (OKT) law partner Lorraine Land:

"Within the traditional territory of the SON—about 15 km from the Saugeen First Nation's reserve—is one of Canada's largest nuclear plants: the Bruce Nuclear Generating Facility at Kincardine. Ontario Power Generation is currently proposing to build a new facility to store nuclear waste in a deep geological repository at the Bruce Nuclear site along the shoreline of Lake Huron. The SON and their ancestors have lived in this area for thousands of years, and have an Aboriginal title claim to the beds of Lake Huron where the facility is located.

The SON has been participating in the joint panel hearings on this proposal and digging deep into its implications for their communities. For the SON, this means engaging the community on challenging questions. For example, what does it mean to live with the risk of radiation poisoning for your doodem (clan) beings a million years from now? In the event of significant environmental contamination, what would it mean to be forced from the land and water your people have lived in relationship with for thousands of years?

...The SON engaged in rigorous efforts to ensure meaningful engagement in the nuclear decision-making process. In 2015 they were able to obtain a commitment from the proponent that OPG would not proceed with the deep geological repository project under Lake Huron unless the SON consents.

Consent doesn't just mean approval or no approval, however, in SON's view. The SON clearly see 'consent' as a complex process of building a relationship, exchanging information, conducting analysis, dealing with 'the legacy' of the already existing issues related to nuclear waste storage, and fully integrating their community in the process of discussion, analysis and decision-making."[116]

RESULT 6: THERE ARE DEBATES OVER THE LEGAL AND NORMATIVE IMPLICATIONS

LOCATING SELF-DETERMINATION: INTERNATIONAL DECLARATION OR DOMESTIC LAW?

The SCC concluded in the *Reference re Secession of Quebec* that the right to self-determination "is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law."[117] According to the International Covenant on Civil and Political Rights (ICCPR), the right to self-determination includes a people's right to "freely dispose of their natural wealth and resources," not to be deprived of their own means of subsistence" and to "freely pursue their economic, social and cultural development."[118] UNDRIP references international law on rights to self-determination and affirms that Indigenous peoples enjoy the same rights, including the right to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions."[119]

One of the drafters of UNDRIP, on behalf of the Inuit Circumpolar Council notes, "it is important to establish that the source of the right to free, prior and informed consent is the right to self-determination. Free, prior and informed consent is derived from this pre-existing right."[120] Audra Simpson argues this right manifests through "nested sovereignty", where Indigenous political orders prevail through acts of resistance, revealing that the project of Canada is not as settled as traditional thinkers in the field of foreign policy would have us believe.[121] Self-determination has been described as a "foundational right" without which Indigenous peoples' "human rights, both collective and individual cannot be fully enjoyed."[122]

UNDRIP has been deployed as "a persuasive moral and political tool" to change the position of states who originally opposed the Declaration. Canada was especially vulnerable given that their identity is "co-constitutive of human rights."[123] Thus, Canada (among others) moved from rejection to what Lightfoot calls "selective endorsement', which involves the writing down of the normative implications of the UNDRIP.

For Lightfoot, global Indigenous rights and politics represents a transformational norm vector, "a subtle revolution in global politics."[124]

Furthermore, there have been significant innovations through UNDRIP, not only in the relationships between Indigenous peoples and the state, but also between Indigenous nations globally. In terms of diplomacy, Lightfoot writes that "Indigenous global diplomacies have shown that transnational relations can successful conform to Indigenous ontologies of mutual respect, consensus decision-making, non-hierarchical relations, sustainability, and ongoing negotiations."[125]

RESULT 7: UNDRIP INTERSECTS WITH THE CALLS TO ACTION OF THE TRC

The Truth and Reconciliation Commission of Canada's (TRC) final report positions UNDRIP as the roadmap for reconciliation, calling it "the framework for reconciliation at all levels and across all sectors of Canadian society."[126] UNDRIP is mentioned 23 times in the TRC's report *Calls to Action*, calling for, *inter alia*, its full implementation by all levels of Canadian government (Article 43); a national action plan, strategies, and "other concrete measures" to achieve the goals of UNDRIP (Article 44); integration of the UNDRIP into curricula for lawyers (Articles 27 and 28) and medical professionals (Article 24); and for Canada's "recognition and implementation" of Indigenous legal systems (Articles 42 and 50).[127]

State of Knowledge

Some literature comments extensively on the applicability of UNDRIP as a framework for redefining Canada's obligations to Indigenous peoples.[128] More specifically, analyses center on whether UNDRIP represents a more just set of principles than currently in place in Canada, both in theory and in practice.

Some literature also covers the enforceability of UNDRIP domestically. UNDRIP is not legally binding but there are indications that its provisions are considered persuasive by Canadian courts. Thus, much of the scholarship focuses on arguments in favour of incorporating elements of UNDRIP into domestic laws, policies and decision-making processes. Other studies emphasize the history and development of the *Declaration*, highlighting the ways in which its development was an Indigenous-driven and grassroots process of advocacy and collaboration, and others still cover the internationalization of Indigenous rights movements.

In terms of the ways in which the Canadian state's recognition of Indigenous peoples' rights discords with the principles of UNDRIP, four common areas of inquiry emerge in the literature: (1) the land claims process; (2) the acknowledgement and implementation of treaties; (3) Aboriginal rights under section 35(1) of the *Constitution Act, 1982* and its interpretation in the corresponding jurisprudence; and, prominently within the latter, (4) the Duty to Consult and its implications for development projects.

POSITION STATEMENTS FROM SELECTED INDUSTRY REPORTS:

FORTIS BC

Emphasizes acknowledging, respecting, and understanding Indigenous difference and educating their workforce about Indigenous peoples' issues, interests, and goals; ongoing and clear communication with First Nation communities in their operations; as well as hiring First Nation employees.[129]

BC HYDRO

Stresses clear, accessible information on its projects as early as possible in order for discussions that both inform about interests of First Nations and provide advice on how to reduce or avoid harm to the environment, cultural heritage, and social needs; when refurbishing or building new operations/assets BCHydro will seek opportunities for mutually beneficial opportunities; recognizes (potentially) fundamental differences in world views; seek solutions to provide clean and reliable energy to First Nation communities; deliver employment and training programs to First Nation communities; and be open and transparent if obstacle is presented towards mutual benefits.[130]

SUNCOR

Desires to work in collaboration with Aboriginal peoples to ensure a thriving energy industry that also allows Aboriginal communities to be vibrant, diversified, and sustainable, and express a commitment to work with Aboriginal peoples and communities to build and maintain "effective, long-term and mutually beneficial relationships" based on "transparency, mutual respect, and trust." In contrast to Fortis and BCHydro, Suncor declares its recognition of the inherent and constitutionally protected Aboriginal rights. While similarly to Fortis and BCHydro, Suncor seeks to understand and respect their history, customs, beliefs and traditions and aims to integrate principles of recognition into their approach and operations. Suncor also expresses support for direct and open communication in relation to "events, issues and ideas," "timely, interactive, and culturally appropriate consultation", and where appropriate provide opportunities for Aboriginal peoples to increase their understanding of the energy business. The Suncor aims to offer the benefits of participation in the economic opportunities and succeses, via full-time employment and contracts, and investments in Aboriginal communities to support their cultures and priorities. Suncor also recognizes Indigenous relationships to land its own obligations to the land to conduct business in an environmentally responsible way. The president and CEO is accountable to the Board of Directors for Suncor's policy implementation. Policies will be reviewed every three years and will provide regular objective reporting on progress. All employees and contractors are responsible to apply the policy and managers are responsible for promoting the beliefs and principles underlying the policies in joint ventures not operated by Suncor.[131]

Further Research

There are several gaps in the literature that, if addressed, might give us a clearer picture of how we might proceed.

INTERACTION OF SPECIFIC UNDRIP ARTICLES WITH EXISTING CANADIAN LAWS AND POLICIES

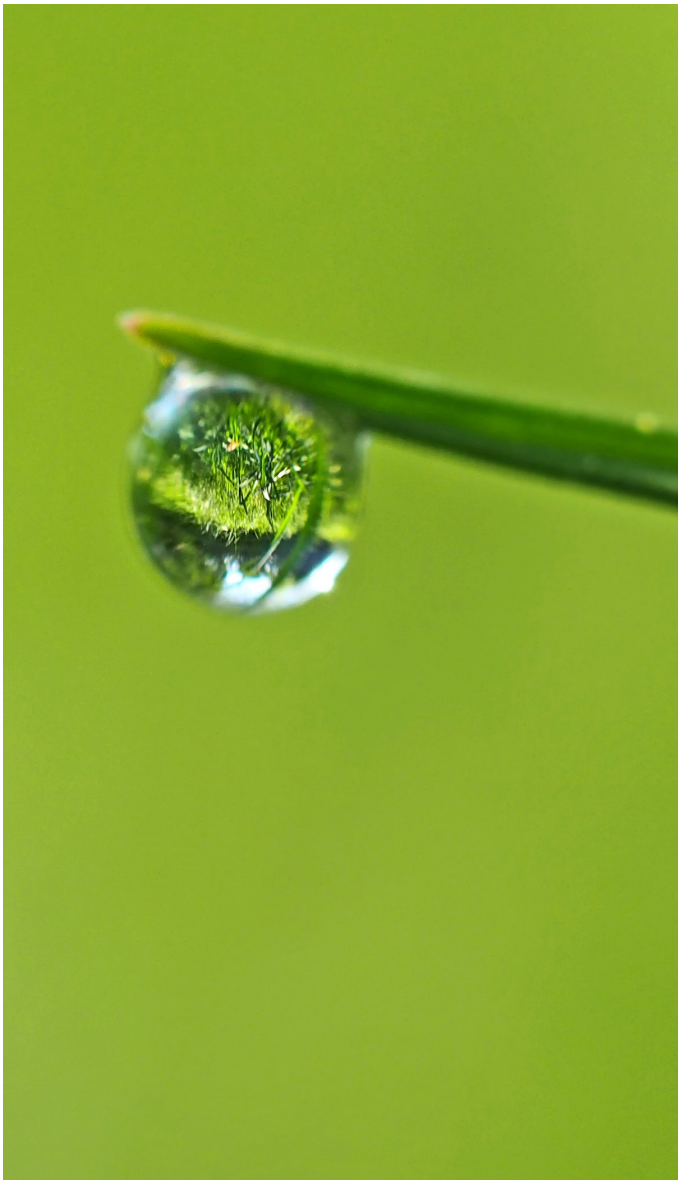
Further analysis is required of the interaction of UNDRIP articles with Canadian law, and in particular the Canadian Charter of Rights and Freedoms. For example, Article 39 (Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration) requires an assessment of government programs and spending.

FPIC AS A VETO?

With so much emphasis placed on FPIC as an ideal model for consultation between government, industry and Indigenous peoples, many concerns remain around the question of whether FPIC equals a *carte blanche* veto for Indigenous peoples on development projects. Several articles have attempted to address this question but further research is required to analyze how FPIC might figure into consultation processes on a case-by-case basis.[132] What are the best practices? What are the procedures when disputes arise? How can industry concerns about risk mitigation be addressed? How can FPIC be incorporated into the project approval process and Environmental Assessment processes, particularly in light of the work of the Expert Panel established in 2016 by the Minister of Environment and Climate Change to review federal environmental assessment processes. It is also important to note that FPIC does not represent the full scope of UNDRIP. In other words, it is not sufficient for Canadian governments to address FPIC and claim to have satisfied their commitment to UNDRIP.

WATERSHED CO-GOVERNANCE

Watershed co-governance has been extensively studied in the literature and is a growing trend internationally. Further research on the uptake of watershed governance by Indigenous communities is required. This research should address substantive water management issues, water governance frameworks, key issues of capacity-building, decentralization and delegation of authority, as well as an enabling legal framework (e.g., new planning and governance mechanisms, and legal tools for protecting environmental flows and integrating land and water decision-making under BC's recent *Water Sustainability Act*).



Additional Resources & Knowledge Mobilization

As this is an evolving field of study, we are committed to sharing the key research and policy gaps widely, while practical recommendations are communicated directly to policy makers. Both the creation and dissemination of this report has been aimed towards multiple end users. We are committed to innovative knowledge mobilization that offers a means through which community members will have access to the research. We also continue our commitment to mentoring young students and media makers, who have been involved in the production of many of the outputs listed below.

To accompany this report, our community partner, West Coast Environmental Law, is producing a comprehensive assessment of UNDRIP and water issues. To create this report West Coast Environmental Law will draw on its extensive experience working with Indigenous communities on environmental governance issues in general, and water governance issues in particular, including ongoing collaboration with Canadian university researchers on documenting Indigenous water law and legal traditions. These reports can be found one the following websites:

West Coast Environmental Law
www.wcel.org

Program on Water Governance
www.watergovernance.ca

Decolonizing Water Project
www.decolonizingwater.ca

Keepers of the Water
www.keepersofthewater.ca

Audience	
End Users in Government and Administration	Briefing Notes: • Briefing Note #1: *Current State of Water Governance in Canada* • Briefing Note #2: *Key Debates around UNDRIP and Free, Prior and Informed Consent* Position Papers: • Position Paper #1: *West Coast Environmental Law- Implications and Potentials for Adopting the UNDRIP in Canada* • Position Paper #2: *West Coast Environmental Law- Changes in Duty to Consult*
Information Professionals, Researchers and University Professionals	Presentations • Invited Plenary Panel, the Royal Geography Association (RGS) (Fall 2017) • UNDRIP and FPIC: Implications in Canadian Law, Presentation at Anishinaabe Law Camp, Cape Croker, (September 3, 2017) Publications • Briefing Note #3: *Implementation implications for FPIC* • Book Review: Sheryl Lightfoot's *"A Subtle Revolution"*
All Users	• www.decolonizingwater.ca • Annotated Bibliography • Podcasts to be hosted on Decolonizing Water Website • Podcast 1: *Background on UNDRIP* • Podcast 2: *Free, Prior and Informed Consent*

Conclusion

The United Nations and member states recommitted to implementing UNDRIP at the World Conference on Indigenous Peoples in 2014, reiterating the language of Free Prior and Informed Consent and committing "to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[133]

In Canada, there remains questions around the implementation of UNDRIP from all stakeholders. UNDRIP recognizes that Indigenous peoples' rights are rooted in Indigenous peoples' own legal traditions but this remains in tension with the current Canadian legal regime which continues to define Aboriginal rights within and according to European understandings of law. These ways of understanding law create a key tension in the implementation strategy for UNDRIP.

Does implementation require nesting Indigenous Rights within the Canadian Constitution or does it demand something more? Can UNDRIP be used as a critical leverage point to mobilize Indigenous rights outside of the status quo?

End Notes

[1]Tim Fontaine, "Canada officially adopts UN declaration on rights of Indigenous Peoples," *CBC News*, May 10, 2016, http://www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272.

[2]This approach is suggested by the authors of the special edition of the Centre for International Governance Innovation's *Special Report on UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*. Centre for International Governance and Innovation (May 2017). The initial idea for this emerged from a conversation between legal scholars John Borrows, Brenda Gunn and Joshua Nichols.

[3]John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges," in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws – Special Report*, ed. Jennifer Goyder (Centre for International Governance Innovation), 25, https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf.

[4] United Nations Division for Social Policy and Development Indigenous Peoples, "United Nations Declaration on the Rights of Indigenous Peoples", https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

[5] Government of Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," https://www.aadncaandc.gc.ca/eng/1309374239861/1309374546142.

[6] Fontaine, "Canada officially adopts UN declaration on rights of Indigenous Peoples."

[7] United Nations (UN), "*United Nations Declaration on the Rights of Indigenous Peoples,*" March 2008, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[8] United Nations General Assembly (UNGA), Resolution 217 A (III), "Universal Declaration of Human Rights," December 10, 1948, http://www.un-documents.net/a3r217a.htm.

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[77] Simms, 49.

[78] *Ibid.*

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48638/1/StewardshipOP35w.pdf; This is at odds with some positions taken by the Canadian government; for example, Bill S-8 (2013 *Safe Drinking Water for First Nations Act*) has been criticized for a clause that permits Aboriginal and Treaty rights to be overridden to ensure drinking water safety (See Tonina Simeone and Shauna Troniak, "Bill S-8: The *Safe Drinking Water for First Nations Act*, March 15, 2012, http://www.afn.ca/uploads/files/parliamentary/s-8legislativesummary.pdf; The Assembly of First Nations, "Assembly of First Annual Report 2011-2012," https://www.afn.ca/uploads/files/2012afnannualreport.pdf.). It is also relevant to note that international jurisprudence often links Indigenous water rights to land rights (See Rutgerd Boelens, "Cultural Politics and the Hydrosocial Cycle: Water, Power and Identity in the Andean Highlands," *Geoforum* 57 (2014), http://dx.doi.org/10.1016/j.geoforum.2013.02.00; Rutgerd Boelens and Bernita Doornbos, "The Battlefield of Water Rights: Rule Making Amidst Conflicting Normative Frameworks in Ecuadorian Highlands," *Human Organization* 60, 4 (2001), doi: 10.17730/humo.60.4.d3v194qmcael7ett; Rutgerd Boelens et al., "Hydrosocial Territories: A Political Ecology Perspective," *Water International* 41, 1 (2006), doi: 10.1080/02508060.2016.1134898; Dean H. Getches, "Indigenous Peoples' Rights to Water Under International Norms," *16 Colo. J. Int'l. Envtl. L. & Pol'y 259* (2005), http://scholar.law.colorado.edu/articles/430; Edmund J. Goodman, "Indian Tribal Sovereignty and Water Resources: Watersheds, Ecosystems and Tribal Co-Management," *Journal of Land, Resources and Environmental Law* 20 (2000); Phare, *Denying the Source*; Thomas Perreault, "State Restructuring and Scale Politics of Rural Water Governance in Bolivia," *Environment and Planning A* 37, 2 (2005), doi: 10.1068/a36188; Thomas Perreault, "Custom and Contradiction: Rural Water Governance and the Politics of Usos Y Costumbres in Bolivia's Irrigators' Movement," *Annals of the Association of American Geographers* 98, 4 (2008), doi: 10.1080/00045600802013502; Dik Roth, Rutgerd Boelens, and Margreet Zwarteveen, *Liquid Relations: Contested Water Rights and Legal Complexity* (New Jersey: Rutgers University Press, 2005); John E. Thorson, Sarah Britton, and Bonnie G. Colby, *Tribal Water Rights: Essays in Contemporary Law, Policy, and Economics* (Tucson: University of Arizona Press, 2006); United Nations (UN), "*United Nations Declaration on the Rights of Indigenous Peoples*, Article 32.

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CASE LAW AND LEGISLATION

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Appendix 1: Annotated Bibliography

THEMES:

CONSULTATION/CONSENT

1. Peach, Ian. "Who Speaks for Whom? Implementing the Crown's Duty to Consult in the case of divided Aboriginal political structures". *Canadian Public Administration*, 59, 1 (2016): 95-112.

   Abstract: The Supreme Court of Canada has determined that the Crown has a duty to consult Aboriginal peoples on government decisions that may adversely affect their rights, but the Court did not define who the Crown should consult on behalf of Aboriginal people when two or more groups claim the right to speak for them. For government officials attempting to fulfil the Crown's duty, this can create challenges. This article reviews the jurisprudence and scholarly commentary to provide some guidance to government officials on how to effectively implement the Crown's duty to consult as a practical matter of public administration.

2. Dokis, Carly A. *Where the Rivers Meet: Pipelines, Participatory Resource Management, and Aboriginal-State Relations in the Northwest Territories*. UBC Press: Vancouver, 2015.

   Summary: Oil and gas companies now recognize that industrial projects in the Canadian North can only succeed if Aboriginal communities are involved in the assessment of project impacts. Are Aboriginal concerns appropriately addressed through current consultation and participatory processes? Or is the very act of participation used as a means to legitimize project approvals?

   Where the Rivers Meet is an ethnographic account of Sahtu Dene involvement in the environmental assessment of the Mackenzie Gas Project, a massive pipeline that, if completed, would transport gas from the western subarctic to Alberta, and would have unprecedented effects on Aboriginal communities in the North.

   Carly A. Dokis reveals that while there has been some progress in establishing avenues for Dene participation in decision making, the structure of participatory and consultation processes fails to meet expectations of local people by requiring them to participate in ways that are incommensurable with their experiential knowledge and understandings of the environment. Ultimately, Dokis finds that despite Aboriginal involvement, the evaluation of such projects remains rooted in non-local beliefs about the nature of the environment, the commodification of land, and the inevitability of a hydrocarbon-based economy.

3. Newman, Dwight. *Revisiting the Duty to Consult Aboriginal Peoples*. Purich Publishing: Saskatoon, 2014.

   Summary: Since the release of The Duty to Consult in 2009, there have been many important developments on the duty, including three major Supreme Court of Canada decisions. Both the Supreme Court and lower courts have grappled with many questions they had not previously answered, and these very attempts have raised yet new questions. Governments, Aboriginal communities, and industry stakeholders have engaged with the duty to consult in new and probably unexpected ways, developing policy statements or practices that build upon the duty to consult, but often use it only as a starting point for different discussions. At the same time, evolving international legal norms have come to engage with the duty to consult in new ways that may have further impact in the future.

   Professor Newman clarifies the duty to consult as a constitutional duty, offers some approaches to understanding the developing case law at a deeper and more principled level, and suggests possible future directions for the duty to consult in Canadian Aboriginal law. The duty to consult has a fundamental importance for all Canadians, yet misunderstandings of the doctrine remain widespread. This book will help address many of those misunderstandings.

4. Gardner, Holly L., Denis Kirchoff, and Leonard J Tsuji. "The Streamlining of the Kabinakagami River Hydroelectric Project Environmental Assessment: What is the 'Duty to Consult' with Other Impacted Aboriginal Communities When

the Co-Proponent of the Project is an Aboriginal Community?" *International Indigenous Policy Journal*, 6, 3 (2015).

Abstract: There is existing tension within many Aboriginal communities between economic development and preservation of traditional lands for the continued practice of traditional activities. The "duty to consult" doctrine has has become an important mechanism by which these concerns were identified and addressed (when possible) prior to development. This is a legal requirement that is rooted in the Constitution Act (1982) and subsequent legal case law that has further defined and outlined requirements under this obligation. This article describes the process that was carried out to advance the proposed Kabinakagami River Hydro Project Class Environmental Assessment in Northern Ontario, Canada with an emphasis on the approach to Aboriginal consultation. This project is unique because the co-proponent of the project is an Aboriginal community, with several neighbouring Aboriginal communities potentially affected by the project. This project raises questions about the approach to carrying out the duty to consult in an effective way. An evaluative framework was developed to examine timeline, information, means, and flexibility and transparency of the process to highlight shortcomings in the process and make recommendations for improvement.

5. Natcher, David. "Land use research and the duty to consult: a misrepresentation of the aboriginal landscape." *Land Use Policy*, 18, 2 (2001): 113-122.

   Abstract: This paper addresses the means by which the government of Canada is fulfilling its fiduciary obligation to consult with Aboriginal communities whose traditionally used lands are subject to industrial development. Specifically, the use of Aboriginal land use studies, as a means of consultation, is called into question on the basis of methodological limitations and cultural misrepresentation. In closing, it is suggested that until the Canadian government is prepared to take a proactive stance in mitigating land use conflicts through an effective and equitable consultative framework one should expect an escalation of litigation and continued Aboriginal discord.

6. Graben, Sari and Abbey Sinclair. "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board." *University of Toronto Law Journal*, 65, 4 (2015): 382-433.

   Abstract: In this article, the authors present evidence that the NEB does *not* evaluate whether the duty to consult has been met by applicants or the Crown for the purposes of regulatory approval. While the NEB makes findings about the sufficiency of applicant engagement and its impact on Aboriginal rights, they are not premised on any known legal standards. The authors argue that an approval rate of almost 100 per cent[7] and the reasons provided by the NEB for avoiding a *Haida* analysis raise questions about whether tribunal practice can be reconciled with tribunal authority as conceived by the Supreme Court. If the NEB does not evaluate the effect of consultation on rights, then it effectively does what the Crown may not: it plays a role in authorizing conduct that infringes rights. This article clarifies why this occurs and calls for legal change that compels transparency in the production and use of tribunal findings.

7. Promislow, Janna. "Irreconcilable? The duty to consult and administrative decision makers". *Constitutional Forum*, 22, 1 (2013): 63-79.

8. Mullan, David. "The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?" *Canadian Journal of Administrative Law and Practice*, 24, 3 (2011):

   Abstract: In Rio Tinto Alcon Inc. v. Carrier Sekani Tribal Council and Beckman v. Little Salmon/ Carmacks First Nation, the Supreme Court of Canada revisited the issue of Crown consultation with and accommodation of Aboriginal peoples. While these two judgments did not resolve all of the outstanding issues, they have clarified some important aspects of this evolving area of the law. Five contributions in particular stand out. First, the duty to consult and, where appropriate, accommodate may apply to the Crown's taking up of rights conferred by modern, apparently comprehensive land claims agreements, notwithstanding the absence of specific provision in such a treaty for consultation. Second, even where there are unresolved claims, the duty does not apply as a way of rectifying past failures to subsequent downstream decision-making at least where that decision-making has no additional impact on Aboriginal peoples' interests. Third, the duty to consult does not rest with independent tribunals and regulatory agencies except where there has been a specific legislative conferral of that responsibility. However, these tribunals and agencies may have a duty to assess the adequacy of consultation otherwise conducted

by the Crown in relation to matters coming before them. Fourth, while the source of the duty is different, the content of the duty to consult is often informed by the requirements of common law procedural fairness. Fifth, a decision-maker may fulfill the duty to consult even when under the impression that the duty does not attach to the particular decision. It all depends on the level of procedural protection afforded in the decision-making process. In this article, the author explores these matters in greater detail as well as the still troubling question of the standard of review that the courts apply in assessing the adequacy of consultation and accommodation. He also identifies some of the other unresolved issues in this increasingly important area of constitutional and administrative law.

9. Newman, Dwight. "Emerging Challenges on Consultation with Indigenous Communities in the Canadian Provincial North." *Northern Review*, 39 (2015): 22-30.

   Abstract: This paper examines particular emerging challenges on the workings of Canada's duty to consult doctrine in the Canadian Provincial North, focusing specifically on Northern Saskatchewan as an example. The duty is situated within a particular set of northern governance issues that are themselves closely interlinked with a set of Indigenous rights issues. The paper ultimately identifies various challenges as accentuated within the context of the Provincial North. These include certain technical questions about turning duty to consult principles into practical policy; larger problems arising from legal uncertainties; and general challenges to do with the way consultation regimes have developed in Canada's legal system differently than in other national systems. The paper is part of a special collection of brief discussion papers presented at the 2014 Walleye Seminar, held in Northern Saskatchewan, which explored consultation and engagement with northern communities and stakeholders in resource development.

10. Lambrecht, Kirk N. *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada*. University of Regina Press: Regina, 2013.

    Abstract: Supreme Court of Canada decisions have defined a general framework for the "duty to consult" Aboriginal peoples and accommodate their concerns over natural resource development, but anticipate the details of that framework will be expanded upon in the future. *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* offers a paradigm that advances that discussion.

    It proposes an integrated and robust planning model for natural resource extraction allowing Aboriginal peoples, industry, governments, tribunals, and the Courts to all make contributions to reconciliation in the context of sustainable development and environmental protection.

    Kirk Lambrecht surveys the law of actual and asserted Aboriginal rights and historical and modern Treaty rights in Canada and discusses the national and international purposes of environmental assessment and regulatory review. He appraises the fundamental principles of Supreme Court of Canada jurisprudence defining aboriginal consultation and accommodation as a constitutional imperative and uses case studies involving the National Energy Board to demonstrate how integrated process has evolved over time. Finally he offers general conclusions on the practical utility, and outstanding challenges, involving an integrated planning paradigm.

11. Papillon, Martin and Andre Juneau, ed. *Canada – The State of the Federation: Aboriginal Multilevel Governance*. McGill-Queen's University Press: Montreal, 2013.

    a. Theriault, Sophie. "Aboriginal Peoples' Consultations in the Mining Sector: A Critical Appraisal of Recent Reforms in Quebec and Ontario."

    b. Steinke, Bruno. "The Legal Duty to Consult and Canada's Approach to Aboriginal Consultation and Accommodation."

12. Ritchie, Kaitlin. "Issues associated with the implementation of the duty to consult and accommodate aboriginal peoples: threatening the goals of reconciliation and meaningful consultation". *University of British Columbia Law Review*, 46, 2 (2013).

13. Matiation, Stefan and Josee Boudreau. "Making a Difference: The Canadian Duty to Consult and Emerging International Norms Respecting Consultation with Indigenous Peoples." In *The Globalized Rule of Law: Relationships between International and Domestic Law*, edited by Oonagh E. Fitzgerald. Irwin Law: Toronto, 2006.

14. Lawrence, Sonia and Patrick Macklem. "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult." *Canadian Bar Review* 79 (2000): 252-279.

Abstract: The judiciary has repeatedly called on First Nations and the Crown not to tax the institutional competence of the judiciary by excessive litigation of disputes, and instead to attempt to reach negotiated settlements. It has also held that the Crown is under a duty to consult with a First Nation when it proposes to engage in an action that threatens to interfere with existing Aboriginal or treaty rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982. In this Article, the authors argue that the duty to consult requires the Crown, in most cases, to make good faith efforts to negotiate an agreement specifying the rights of the parties when it seeks to engage in an action that adversely affects Aboriginal interests.

15. Newman, Dwight. "Consultation and Economic Reconciliation." In *Recognition to Reconciliation*, edited by Patrick Macklem and Douglas Sanderson. Toronto: University of Toronto Press, 2016.

16. Bryant, Michael J. "The State of the Crown-Aboriginal Fiduciary Relationship: The Case for an Aboriginal Veto." In *From Recognition to Reconciliation*, edited by Patrick Macklem and Douglas Sanderson. Toronto: University of Toronto Press, 2016.

17. Graben, Sari and Abbey Sinclair "Administering Consultation at the National Energy Board." In *Recognition to Reconciliation,* edited by Patrick Macklem and Douglas Sanderson. Toronto: University of Toronto Press, 2016.

18. Napoleon, Val. "Living Together: Gitksan Legal Reasoning as a Foundation for Consent." In *Between Consenting Peoples: Political Community and the Meaning of Consent,* edited by Colin M. Macleod and Jeremy H.A. Webber. Vancouver: UBC Press, 2010.

19. Barelli, Mauro. "Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead." *The International Journal of Human Rights* 16, 1 (2012): 1-24.

Abstract: The indigenous rights regime fully recognizes the special relationship that indigenous peoples have with their ancestral lands. While it is clear that, before implementing development projects on these lands, states must consult the indigenous peoples concerned, doubts remain as to whether they also have the legal obligation to obtain their consent before taking any such action. Determining the actual meaning of the principle of free, prior and informed consent (FPIC) is crucial to answer this question. This article will argue that a flexible approach to FPIC is gaining increasing recognition internationally. This understanding of FPIC has its normative foundations in the UN Declaration on the Rights of Indigenous Peoples and has been further elaborated by the Inter-American Court of Human Rights.

20. Hanna, Philippe and Frank Vanclay. "Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent." *Impact Assessment and Project Appraisal* 31, 2 (2013): 146-157.

Abstract: The human right to self-determination is enacted in various international treaties and conventions. In order to facilitate self-determination, it is necessary to provide Indigenous peoples with opportunities to participate in decision-making and project development. The obligation for governments and companies to engage impacted communities is recognized in international law, especially with the principle of 'Free, Prior and Informed Consent', which is outlined in the United Nations Declaration on the Rights of Indigenous Peoples and in the International Labour Organization Convention 169. The encounter between human rights, Indigenous peoples and mining and other extractive industries is discussed, especially as it is has played out in Brazil. We recommend that companies should fully endorse and respect these internationally recognized human rights, including self-determination, even where not required by national or local legislation. We also discuss the relationship between Free, Prior and Informed Consent and Impacts and Benefits Agreements.

21. Szablowski, David. "Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice." *Canadian Journal of Development Studies* 30, 1-2 (2011): 111-130.

    Abstract: Free, prior, and informed consent (FPIC) is a key principle being promoted in an attempt to reshape a broad family of governance regimes designed to address the local consequences of extractive industry development in indigenous territory. This article explores the development of the principle of FPIC and the challenges that it presents to conventional forms of governance. FPIC is examined as a form of negotiated justice that aims to produce regulatory decisions through horizontal and decentralized forms of engagement. The article seeks to develop and clarify issues in building a critical research agenda on the operationalization of FPIC.

FPIC as "globalizing regime of negotiated justice" (112), explores "how the concept of consent is *operationalized* in contemporary regimes" as well as the "dimensions and implications" of "the requirement to inform" (112).

The target of FPIC as a globalizing regime of negotiated justice are those "[Extractive-Industry]-related natural resource and environmental conflicts" (112). They aim is to promote "direct 'horizontal' engagement between EI firms (or states) and affected communities, in order to influence decision making on EI development", where horizontal signals the attempt to "structure engagement as an interaction between nominally equal parties" (112). The assumption is that a principled procedural process or negotiated justice (i.e. product of "negotiations not adjudication, administrative decision making, or purely private, individual decision making") between firms and community actors can "check corporate power" (113). It thus represents a move away from top-down regulatory governance defined by "fixed statutes, detailed rules, and judicial enforcement"[134] to new governance models defined by plural normative authority and multiple actors (113), **a move driven by both changes in the global political economy of EI investment *and* ideological shifts in thinking about governance** (113).

> **Therefore,** "to be successful, FPIC regimes must provide an effective and comprehensive facilitative structure to encourage productive and informed processes of engagement, deliberation, and negotiation between corporate and community actors. Rushed timelines, unprepared communities, and poor information transfer serve to vitiate consent. In order to project a sufficiently strong "shadow," FPIC regimes need to be built and especially administered with attention to the dynamics taking place amid the three sets of forces outlined above, including the other legal regimes that regulate extractive industry development and relations with affected communities (e.g., environmental assessment, agrarian law), the relevant prevailing social norms and institutions likely to influence how different groups interpret and apply the rules, and the background of social relations, political economy, and ecology, etc." (p. 122-3).

22. Cathal M. Doyle. 2015. *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent*. Routledge.

    Abstract: The right of indigenous peoples under international human rights law to give or withhold their Free Prior and Informed Consent (FPIC) to natural resource extraction in their territories is increasingly recognized by intergovernmental organizations, international bodies, and industry actors, as well as in the domestic law of some States. This book offers a comprehensive overview of the historical basis and status of the requirement for indigenous peoples' consent under international law, examining its relationship with debates and practice pertaining to the acquisition of title to territory throughout the colonial era.

    Cathal Doyle examines the evolution of the contemporary concept of FPIC and the main challenges and debates associated with its recognition and implementation. Drawing on existing jurisprudence and evolving international standards, policies and practices, Doyle argues that FPIC constitutes an emerging norm of international law, which is derived from indigenous peoples' self-determination, territorial and cultural rights, and is fundamental to their realization. This rights consistent version of FPIC guarantees that the responses to questions and challenges posed by the extractive industry's increasingly pervasive reach will be provided by indigenous peoples themselves.

1. Lightfoot, Sheryl. *Global Indigenous Politics: A Subtle Revolution.* New York: Routledge, 2016.

Abstract: This book examines how Indigenous peoples' rights and Indigenous rights movements represent an important and often overlooked shift in international politics - a shift that powerful states are actively resisting in a multitude of ways. While Indigenous peoples are often dismissed as marginal non-state actors, this book argues that far from insignificant, global Indigenous politics is potentially forging major changes in the international system, as the implementation of Indigenous peoples' rights requires a complete re-thinking and re-ordering of sovereignty, territoriality, liberalism, and human rights.

2. Lightfoot, Sheryl. "Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere." *The International Journal of Human Rights* 16, 1 (2012): 100-122.

Abstract: In human rights commitment theory, state commitments to international regimes are generally interrogated as a binary calculation – either a state commits to a rights regime or it does not. This binary remains the dominant standard largely because existing scholarship focuses on state ratification of human rights treaties. However, when the analysis of state commitment is opened up to include human rights instruments other than treaties (e.g. human rights declarations), many more possibilities of nuanced state commitment behaviour can emerge in the grey zone between commitment and non-commitment. For example, if state commitments are defined more broadly to include public endorsements and expressions of support for human rights declarations, states exhibit a wider variety of commitment behaviour beyond the binary of ratification or non-ratification. This article aims to identify and discuss one such nuance of state commitment behaviour: the practice of selective endorsement, a pattern that lies at the intersection of rationalist and constructivist expectations on state commitment behaviour. The pattern of endorsements of the United Nations Declaration on the Rights of Indigenous Peoples by Anglosphere states demonstrates the practice of selective endorsement. By selectively endorsing Indigenous rights, the Anglosphere states: (1) removed concerns over the legitimacy of the process by which such rights norms emerged; (2) underscored the normative importance of this particular cluster of norms while simultaneously qualifying their status; and (3) strategically, collectively and unilaterally wrote down the content of the norms themselves so that they would align with the community's current policies and practices thus assuring compliance without any intent of further implementation. Indigenous rights activists must continue to place substantial political and moral pressure on states, demanding effective domestic implementation of the original Indigenous rights norms, regardless of the Anglosphere's selective endorsement of the Indigenous Rights Declaration.

3. Champagne, Duane. "UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights." *Wicazo Sa Review* 28, 1 (2012): 9-22.

4. Bellier, Irene and Martin Preaud. "Emerging issues in indigenous rights: transformative effects of the recognition of Indigenous peoples". *The International Journal of Human Rights* 16, 3 (2011): 474-488.

Abstract: The UN Declaration on the Rights of Indigenous Peoples (2007) marks a significant shift in the relations whereby indigenous peoples define themselves and their claims. They are now faced with the challenge of implementing international standards within national spaces. By adopting a global comparative perspective, our article aims to explore how this movement unfolds in a variety of local issues and strategies, building transnational links and differences. We first examine the acceptance of indigenous peoples' status across the globe before exploring the transformative effects of recognition around two major themes, indigenous rights to education and to land and natural resources. We argue that the recognition of indigenous peoples as subjects of international law has far-ranging implications for the global system as a whole, implicating other global or transnational agents, and potentially affecting the balance between economic and political powers.

5. Mitchell, Terry, ed. *The Internationalization of Indigenous Rights: UNDRIP in the Canadian Context*. Centre for International Governance Innovation, 2014.

   Abstract: An international indigenous rights regime has emerged over the last 30 years in response to the serious and protracted struggles that indigenous peoples globally experience in asserting their most basic human rights. A 2014 report confirmed that Canada, despite its strong legal frameworks, provides little exception to the human rights issue. Indigenous peoples globally have developed and advanced, after decades of dialogue and debate within the UN system and beyond, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The declaration now exists as an important international consensus document.

   This special report is comprised of 11 papers which provide reflections on the internationalization of indigenous rights and the relevance and positioning of UNDRIP within and by Canada. The papers were written by indigenous and non-indigenous scholars from a variety of disciplines including history, political science, law, psychology, sociology and Native studies. Contributors discuss the historical importance of the declaration and the conflicted nature of Canada's relationship to it.

   a. Coates, Ken and Carin Holroyd. "Indigenous Internationalism and the Emerging Impact of UNDRIP in Aboriginal Affairs in Canada."

   b. Boyer, Yvonne. "Using the United Nations Framework to Address and Protect the Inherent Rights of Indigenous Peoples in Canada."

   c. Howard-Hassmann, Rhoda E. "A Defense of the International Human Rights Regime."

   d. Thompson, Andrew S. "The Slow 'Evolution of Standards': The Working Group on Indigenous Populations and UNDRIP."

   e. Mitchell, Terry. "International Gaze Brings Critical Focus to Questions about Aboriginal Governance in Canada."

6. Pulitano, Elvira, ed. *Indigenous Rights in the Age of the UN Declaration*. Cambridge: Cambridge University Press, 2012.

   Abstract: This examination of the role played by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in advancing indigenous peoples' self-determination comes at a time when the quintessential Eurocentric nature of international law has been significantly challenged by the increasing participation of indigenous peoples on the international legal scene. Even though the language of human rights discourse has historically contributed to delegitimise indigenous peoples' rights to their lands and cultures, this same language is now upheld by indigenous peoples in their ongoing struggles against the assimilation and eradication of their cultures. By demanding that the human rights and freedoms contained in various UN human rights instruments be now extended to indigenous peoples and communities, indigenous peoples are playing a key role in making international law more 'humanizing' and less subject to State priorities.

   a. Pulitano, Elvira. "Indigenous Rights and International Law: An Introduction."

   b. Wiessner, Siegfried. "Indigenous Self-determination, Culture, and Land: A Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples."

   c. Schulte-Tenckoff, Isabelle. "Treaties, Peoplehood, and Self-determination: Understanding the Language of Indigenous Rights."

   d. Watson, Irene and Sharon Venne. "Talking up Indigenous Peoples' original intent in a space dominated by state interventions."

7. Gilio-Whitaker, Dina. "Idle No More and Fourth World Social Movements in the New Millennium."*South Atlantic Quarterly* 114, 4 (2015): 866-877.

   Abstract: From a fourth world perspective, this essay briefly assesses INM as the most visible Indigenous social movement of the twenty-first century thus far, analyzing similarities and differences between Indigenous social movements of the recent past and in the context of the international system.

8. Gover, Kristy. "Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples." *European Journal of International Law* 26, 2 (2015.): 345-373.

   Abstract: When the UN General Assembly voted in 2007 to adopt the Declaration on the Rights of Indigenous Peoples (UNDRIP), only Australia, Canada, New Zealand and the USA cast negative votes. This article argues that the embedding of indigenous jurisdictions in the constitutional orders of these states via negotiated political agreements limits their capacity to accept certain provisions of the UNDRIP. Once the agreement-making process is set in motion, rights that do not derive from those bargains threaten to undermine them. This is especially true of self-governance and collective property rights, which are corporate rights vested to historically continuous indigenous groups. Since these rights cannot easily be reconciled with the equality and non-discrimination principles that underpin mainstream human rights law, settler governments must navigate two modes of liberalism: the first directed to the conduct of prospective governance in accordance with human rights and the rule of law and the second directed to the reparative goal of properly constituting a settler body politic and completing the constitution of the settler state by acquiring indigenous consent. Agreements help to navigate this tension, by insulating indigenous and human rights regimes from one another, albeit in ways not always supported by the UNDRIP.

9. Davis, Megan. "To bind or not to bind: The United Nations Declaration on the Rights of Indigenous Peoples." *Australian International Law Journal* 19 (2012): 17-48.

   Abstract: In 2012, the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP') celebrates its fifth birthday. Since its adoption by the UN General Assembly in 2007, the UNDRIP has inspired expansive academic commentary. This literature has scrutinized every aspect of the UNDRIP, from questioning the strategy and motives of its Indigenous co-drafters, to its ostensible delimiting of Indigenous peoples' right to self-determination in international law, as well as the controversial unilateral expansion by the UN Permanent Forum on Indigenous Issues of its mandate to be the supervisory mechanism of state's implementation of the UNDRIP. In particular, there is acute interest in the UNDRIP's status in customary international law, no doubt generated by the over-eager scholars who claimed at the outset that some of the rights contained within the Declaration already form part of customary international law. The anxiety over whether aspects of the UNDRIP are binding or not binding is palpable, yet less attention is paid by the purveyors of this interpretation to the limitations of customary international law and the unrealistic expectations such speculation creates in Indigenous communities. Given the scrutiny it has attracted, this article traces some of the key themes emerging from the somewhat discursive multi-disciplinary commentary of the past five years, in order to reflect on the significance of the UNDRIP's fifth anniversary.

10. Carpenter, Kristin and Angela R. Riley. "Indigenous Peoples and the Jurisgenerative Moment in Human Rights." *California Law Review* 102 (2014): 173-234.

    Abstract: As indigenous peoples have become actively engaged in the human rights movement around the world, the sphere of international law, once deployed as a tool of imperial power and conquest, has begun to change shape. Increasingly, international human rights law serves as a basis for indigenous peoples' claims against states and even influences indigenous groups' internal processes of decolonization and revitalization. Empowered by a growing body of human rights instruments, some as embryonic as the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), indigenous peoples are embracing a global

"human rights culture" to articulate rights ranging from individual freedom and equality to collective self-determination, property, and culture. Accordingly, this Essay identifies and provides an account of what we see as an unprecedented, but decidedly observable, phenomenon: the current state of indigenous peoples' rights-manifesting in tribal, national, and international legal systems-reflects the convergence of a set of dynamic, mutually reinforcing conditions. The intersection of the rise of international human rights with paradigm shifts in postcolonial theory has, we argue, triggered a 'jurisgenerative moment" in indigenous rights. Bringing indigenous norms and values to their advocacy, indigenous peoples have worked to assert their voices in, and indeed to influence, the human rights movement. Indigenous peoples are now using the laws and language of human rights, shaped by indigenous experiences, not only to engage states but also as a tool of internal reform in tribal governance. This is, in our view, a jurisgenerative moment in indigenous rights-a moment when both the concept and practice of human rights have the potential to become more capacious and reflect the ways that individuals and peoples around the globe live, and want to live, today.

11. Ahren, Matthias. *Indigenous Peoples' Status in the International Legal System*. Oxford: Oxford University Press, 2016.

    Abstract: The book surveys how indigenous peoples—having historically been viewed by international law and those that created the law alike as mere 'ghosts in their own landscapes'—have recently emerged as international legal subjects and possessors of both sovereign (self-determination) and private (property) rights over territories. The work analyses and presents the rights indigenous peoples and communities hold under the contemporary indigenous rights discourse, positing that the content and scope of such rights can largely be understood by properly knowing the meaning of only two concepts: namely 'peoples' and 'equality'. The book's articulation of the indigenous rights discourse thus focuses heavily on two areas of law. First, it looks at the issue of indigenous peoples' potential status as international legal subjects and holders of peoples' rights. In doing so, the work directs particular attention to the right to self-determination including to what might be the content and scope of this right when applied not to aggregate populations of states but to segments of states such as indigenous peoples. Second, the book discusses the correct understanding of equality under contemporary international law and asserts that this right underpins a substantial number of the rights that make up the indigenous rights discourse. In this context, the book specifically targets indigenous communities' property rights over territories and natural resources traditionally used or otherwise situated on or under their land. It infers that the content and scope of such rights follow directly from a correct understanding of equality.

12. Watson, Irene. "Aboriginal(ising) International Law and Order and Other Centres of Power." *Griffith Law Review* 20, 3 (2011): 619-640.

    Abstract: The recognition of Indigenous peoples has been a subject of vigorous debate in international law and relations for more than five centuries, and in contemporary times it remains an unresolved dilemma. The irresolution remains even though the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) sets out minimum standards for Indigenous rights and much work has been done by UN bodies and human rights experts. In spite of these developments, the reality embodies ongoing violations of Indigenous peoples' rights across the globe. This article reviews the contemporary relations between Indigenous and non-Indigenous peoples and explores how those relations continue to be shaped by the dynamics of power – dynamics that centre western knowledges and understandings. This article also examines the resulting power imbalances and how those imbalances might be redressed through an approach that centres Aboriginal knowledges, understandings and perspectives on the nature of Aboriginality and the right to be Aboriginal. The ultimate goal is to assess how the centering of Aboriginal perspectives would assist the process of building more equitable relationships based upon principles of coexistence, and how such a process would go beyond the translation of Aboriginal rights done by Western interpreters. Essential to it is the capacity for peoples to determine and define their sense of self and Aboriginality. This article reviews developments in international law and approaches to the perceptions of Aboriginality and associated rights.

13. Samson, Colin and Elizabeth Cassell. "The long reach of frontier justice: Canadian land claims 'negotiation' strategies as human rights violations." *The International Journal of Human Rights* 17, 1 (2012): 35-55.

    Abstract: In this article, we argue that the Canadian land claims process is the product of a series of policies and laws directed at indigenous peoples which both denies them consent over the relinquishing of their lands, and is characterized by a lack of attention to the rights vested in indigenous peoples from colonial precedents. As a result, the contemporary Canadian land claims process does not measure up to the United Nations Declaration on Indigenous Peoples (UNDRIP) and other international human rights protocols. It does not meet even rudimentary standards in regard to providing informed consent, requiring indigenous peoples to extinguish their ownership of their lands, dividing indigenous peoples into configurations that are artificial and diminishing their negotiating power, and creating invidiously asymmetric responsibilities between the state and the indigenous party. Our analysis will principally be based on a reading of the Innu Nation Tshash Petapen (New Dawn) land claims agreement and the social and political contexts in which it is situated. We conclude from our readings that expedients used in the past to obtain indigenous peoples' lands and to circumvent the colonial laws governing relationships with indigenous peoples are still evident today in Canada. They survive as a kind of victor's justice worthy of the frontier.

14. Venne, Sharon. "The Road to the United Nations and Rights of Indigenous Peoples." *Griffith Law Review* 20, 3 (2011): 557-577.

    Abstract: Why did Indigenous peoples want to be recognized as nations and have our treaties recognized as international legal instruments? Why do Indigenous peoples want to have our territories and resources recognized under international law? Can a Declaration on the Rights of Indigenous Peoples accomplish those goals? Why did Indigenous peoples go to the United Nations? The simple answer is that the United Nations is an international body designed by the founders to promote self-determination and the rights of peoples. It should have been easy for Indigenous peoples to appear at UN meetings and to be recognized as nations and peoples, using the United Nations Charter. However, the road to the United Nations and recognition of our rights was not an easy one for Indigenous peoples.

15. Newcomb, Steven T. "The UN Declaration on the Rights of Indigenous Peoples and the Paradigm of Domination." *Griffith Law Review* 20, 3 (2014): 578-607.

    Abstract: This article argues that the term 'Indigenous peoples' is correctly interpreted as 'dominated peoples'. It is contended that the need for the UN Declaration on the Rights of Indigenous Peoples – adopted by the UN General Assembly on 13 September 2007 – was a direct consequence of (1) a tradition of states defining Indigenous peoples as 'less-than-human' and (2) states constructing and institutionalizing in law and policy a framework of domination against Indigenous peoples. However, far from being a remedy to these issues, not one of the 46 Articles of the UN Declaration addresses the issue of domination and Indigenous peoples. A critical examination of the UN Declaration must account for the fact that state actors involved in foreign and international affairs are intent on maintaining the status quo and are quite cognizant of the social construction of reality. In the United States in particular, the framework of domination that constitutes US Indian federal Indian law and policy is traced to arguments found in Vatican documents and Royal colonial charters of England that a discovering 'Christian prince or people', 'Christian state' or 'Christian power' had the right to assume an 'ultimate dominion' (right of domination) as against original non-Christian ('heathen' and 'infidel') nations and peoples. It was the issues of lands, resources and self-determination that arose from this Christian European system of categorization which drove American Indian elders, spiritual and ceremonial leaders, scholars and activists into the international arena in 1977, and eventually resulted in the UN Declaration being adopted 30 years later in 2007. It remains an open question as to whether the UN Declaration provides a means of overturning the dual tradition of domination and dehumanization that the United States and other states have built and maintained for more than two centuries. In the case of the United States, such a reform on the basis of the UN Declaration seems highly unlikely, given the unwillingness of the US government, including the US Supreme Court, to disavow or discontinue using its system of dominating categories against Indian nations and peoples.

16. Moreton-Robinson, Aileen. "Virtuous Racial States: The Possessive Logics of Patriarchal White Sovereignty and the United Nations Declaration on the Rights of Indigenous Peoples." *Griffith Law Review* 20, 3 (2014): 641-658.

    Abstract: In this article, I demonstrate how patriarchal white sovereignty deploys virtue to dispossess Indigenous peoples from the ground of moral value by focusing on the United Nations Declaration of the Rights of Indigenous Peoples. This will be explicated through analyzing the introduction and four key rights areas that were contested by Canada, Australia, the United States and New Zealand, and looking at core elements of their subsequent endorsement of the Declaration.

LEGAL PRECEDENT

CASE LAW

COMPARATIVE POLITICS: US/CANADA/NEW ZEALAND/AUSTRALIA

1. Wicks, Anthony. "Beyond *Audi Alterum Partem:* The Duty to Consult Aboriginal Peoples in Canada and New Zealand." *Journal of South Pacific Law*, 13, 1 (2009).

    Abstract: This paper explores the principle of audi alterum partem under administrative law and determines its application to the Māori people in New Zealand and the Aboriginal people in Canada. My basic argument is that the New Zealand courts should follow the lead of the Canadian courts in developing a special duty to consult Indigenous peoples that goes beyond the general duties of consultation imposed on decision makers. I will first consider what administrative law provides in terms of consultation rights. This provides a background against which to measure the development of a special duty to consult Aboriginal peoples. I will then consider the development of the duty in Canada before finally considering whether a similar duty could be found to exist under the Treaty of Waitangi in New Zealand.

2. Newman, Dwight and Wendy Elizabeth Ortega Pineda. "Comparing Canadian and Columbian approaches to the duty to consult indigenous communities on international treaties." *Constitutional Forum*, 25, 1 (2016).

3. Marshall, Virginia. *Overturning Aqua Nullius: Securing Aboriginal Water Rights.* Aboriginal Studies Press, 2017.

    Abstract: Overturning aqua nullius aims to cultivate a new understanding of Aboriginal water rights and interests in the context of Aboriginal water concepts and water policy development in Australia. In this award-winning work, Dr Marshall argues that Aboriginal water rights require legal recognition as property rights, and that water access and water infrastructure are integral to successful economic enterprise in Aboriginal communities. Aboriginal peoples' social, cultural and economic certainty rests on their right to control and manage customary water. Drawing on the United Nations Declaration on the Rights of Indigenous Peoples, Marshall argues that the reservation of Aboriginal water rights needs to be prioritised above the water rights and interests of other groups.

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