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REALIZING INDIGENOUS RIGHTS IN INTERNATIONAL ENVIRONMENTAL LAW

A CANADIAN PERSPECTIVE

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Cover art by Shaun Hedican titled *Spring Energy*. Shaun Hedican is Anishinaabe and a member of the Loon Clan from Eabametoong. Currently, he resides on the Rocky Bay Reserve in Northern Ontario.

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ABOUT THE ILRP

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP will focus on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions between international and transnational law, indigenous law and constitutional law.

ABOUT THE AUTHOR



Risa Schwartz is a senior research fellow with CIGI's International Law Research Program. In this role, Risa will examine whether there are domestic and international legal obligations to engage indigenous peoples on the development and negotiation of international environmental agreements. Research will be undertaken in partnership with indigenous communities in Canada, concerning their specific treaty and Aboriginal rights, in order to determine when the duty to consult may be triggered for specific international agreements. This research will include meetings with indigenous communities and conducting workshops with leaders from indigenous political institutions. The objective is to advance the discourse on international law and related indigenous rights. Prior to joining CIGI, Risa was counsel to the Ministry of Aboriginal Affairs in Ontario.

EXECUTIVE SUMMARY

The Crown has a duty to consult Aboriginal peoples when it has either real or constructive knowledge of an Aboriginal right and title and is contemplating action that might affect either the right or title. To date, the majority of Canadian Aboriginal case law has focused on applying the duty to consult to statutory decisions that could interfere with domestic Aboriginal or treaty rights. Aboriginal peoples have an opportunity to transform international decision making if Canada determines there is a legal requirement to include indigenous voices when negotiating and ratifying international agreements, especially those pertaining to the environment.

Formal legal consultation with indigenous peoples on a country's international negotiating position for agreements that have the potential to impact indigenous rights will be a significant governance and policy shift. Even though the Federal Court of Appeal in *Hupacasath First Nation v Canada (Minister of Foreign Affairs)* rejected consultation requirements for the ratification of an international investment treaty, the negotiation of environmental agreements has much clearer links to Aboriginal rights. As well, the Canadian government's promise to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also has the potential to influence future court decisions. This proposed legal change is not without challenges. Given that there are more than 600 recognized First Nations bands in Canada and many non-status and urban indigenous populations, as well as Metis and Inuit peoples, a workable solution for legal consultation for legislation and other administrative matters should be a focus of indigenous political organizations as they prepare for the implementation of UNDRIP in Canada.

INTRODUCTION

Indigenous peoples have faced challenges participating in the negotiation and development of international law agreements, which has been demonstrated in Canada in a recent claim, brought by the Hupacasath First Nation (HFN). The HFN was attempting to push the consultation envelope as the First Nation sought to provide indigenous peoples in Canada with the ability to shape international policy on matters that may impact their rights. *Hupacasath First Nation v Canada (Minister of Foreign Affairs)* was the first case in Canada where a court was asked to determine whether there was a constitutional obligation to consult prior to ratification of an international investment treaty.¹ The Federal Court of Appeal determined that there is no duty on the government to consult a particular First Nations community prior to the ratification of an international investment treaty that Canada had negotiated with China, as the potential adverse impacts on Aboriginal rights was

deemed speculative. This decision can be seen as a narrow precedent, as it only concerns one international agreement and the potential impacts of this agreement on the rights of a particular First Nations community. *Hupacasath FC* was a difficult test case to expand consultation rights, given the uncertainties of linking impacts from future unknown foreign investments to adverse impacts to the specific Aboriginal and treaty rights of a particular First Nation.

While the impacts of an international investment agreement may be determined speculative by a Canadian court, a stronger precedent-setting case may involve challenging the lack of consultation when Canada negotiates environmental agreements, such as those regarding climate change, where a lack of negotiated stringent targets has the potential to impact the ability to hunt, fish and gather, activities that are clearly protected in the many treaties that blanket Canada. As well, formal consultation with indigenous peoples prior to acceding to biodiversity protocols, which aim to provide a process for access to and benefit sharing of traditional knowledge, would seem to be a prudent government action. Unlike the court's decision in *Hupacasath FC*, a future court may not be able to easily dismiss a claim that consultation was owed prior to the accession to or ratification of agreements such as the Paris Agreement on climate change or the Nagoya Protocol to the Convention on Biological Diversity, as there are clearer causal connections between these international environmental agreements and Aboriginal rights and interests. Governments, such as Canada, that are considering the policy and legal implications of implementing UNDRIP² should be informed on the breadth of the declaration's potential impacts for international decision making. UNDRIP implementation would build a stronger case that indigenous participation in the development of international agreements may be required, both in Canada, through its unique constitutional requirements, and internationally.

THE DUTY TO CONSULT AND ACCOMMODATE

The relationship between the Crown (federal and provincial governments of Canada) and Aboriginal³ peoples has rapidly changed over the past decade, due in part to the decision of the Supreme Court of Canada (SCC) in *Haida Nation*,⁴ which applied the constitutional protections set

1 2013 FC 900, [2014] 4 FCR 836, [2013] FCJ No 927 (FC) [*Hupacasath FC*].

2 *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [UNDRIP].

3 This paper uses the term "Aboriginal" when discussing rights in Canada as "aboriginal peoples" is the term specifically defined in section 35(2) of the *Constitution Act, 1982* as including the Indian, Inuit and Metis peoples of Canada.

4 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida Nation*].

out in section 35 of Canada's Constitution⁵ in a procedural duty to consult. The duty to consult is triggered "when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it."⁶ In *Haida Nation*, the SCC clarified that the source of "the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples."⁷ Known as a three-part test, the duty is applied when the following are present:

- there is knowledge by the Crown of an established or asserted Aboriginal or treaty right;
- Crown conduct is contemplated; and
- there is the potential for an adverse effect of the proposed Crown conduct on an established or asserted Aboriginal or treaty right.

The majority of Canadian Aboriginal case law has focused on applying the duty to consult to statutory decisions that could interfere with Aboriginal and/or treaty rights. Examples of statutory decisions that have been examined by the courts for adequacy of consultation include the issuance of approvals for mineral, oil and gas extraction or forest management undertakings. There is still debate over whether the duty extends more broadly to law making. Although the SCC has not yet ruled on whether the duty to consult applies to legislation, there is a lower court decision that recognized that the duty can be triggered by the introduction of a bill into Parliament, such as introduction of an omnibus bill that changed federal environmental assessment laws.⁸ The SCC's decision in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* did provide some guidance as to whether the duty to consult extends beyond individual resource extraction projects that impact Aboriginal territory. According to the SCC, "government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights."⁹

The decision in *Rio Tinto* leads to the question: are international agreements, such as the Paris Agreement,

"strategic high-level decisions" that impact Aboriginal rights? Canada has acknowledged in its duty to consult guidelines that the duty may be triggered by international agreements.¹⁰ As well, there are provisions in numerous modern treaties that require consultation before Canada consents to be bound by a new international treaty that would give rise to new international legal obligations that may adversely affect a right of a First Nation.¹¹

HUPACASATH FIRST NATION v CANADA

Similar to the transformative role Canada's Aboriginal peoples have carved out to shape resource development on traditional territories, there is an opportunity to influence international decision making if it is determined that there is a legal requirement to include indigenous voices when negotiating and ratifying international environmental agreements. Unfortunately, as mentioned above, the first case that sought to have these procedural rights applied to the international sphere was not in the area of environment.

In their memorandum of fact and law, the HFN set out some of their asserted Aboriginal rights, including Aboriginal title. The HFN claimed that their ability to exercise these rights would be impacted because their self-government powers would be constrained if the investment treaty with China was ratified. All the rights enumerated in the HFN's memorandum were tied to land use, conservation and protection of resources:

- the right to harvest, manage, protect and use fish, wildlife, and other resources in HFN's traditional territory in priority to all other users, subject only to conservation;
- the right to have access to exclusive and preferred areas to harvest or to use fish, wildlife and other resources in their traditional territory;
- the right to protect the habitats that sustain fish, wildlife and other resources which the Hupacasath have a right to harvest; and

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

6 *Haida Nation*, *supra* note 4 at para 35.

7 *Ibid* at para 16.

8 *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244.

9 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para 44 [*Rio Tinto*].

10 "Officials should assess whether provisions in land claim agreements or self-government agreements require that consultation take place in relation to legally binding international instruments. Second, officials must determine whether legislation requires Canada to consult on international instruments. Officials should seek legal advice, which will support the broader departmental or agency assessments and decision-making processes." Canada, Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, (Ottawa: Public Works and Government Services Canada, 2011) at 23, online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>.

11 For example, see art 24 of *Tla'amin Final Agreement*, Spring 2014, online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/eng/1397152724601/1397152939293>.

- the right to harvest, use and conserve fish, wildlife and other resources and to protect and manage the habitat of fish, wildlife and other resources in accordance with traditional Hupacasath laws, customs and practices both in their traditional and their modern form.¹²

The Federal Court was not swayed by the HFN’s argument that the ratification of the investment treaty triggered the duty to consult “because it grants Chinese investors new, substantive and enforceable rights with respect to the investments...in areas over which the HFN and other First Nations assert Aboriginal or treaty rights.”¹³

In dismissing the impacts of the investment treaty on the HFN as speculative, the first level court stated: “The potential adverse impacts that HFN claims the ratification of the [Canada-China Foreign Investment Promotion and Protection Agreement] CCFIPPA would have on its asserted Aboriginal rights, due to changes that the CCFIPPA may bring about to the legal framework applicable to land and resource regulation in Canada, are non-appreciable and entirely speculative in nature. Moreover, HFN has not established the requisite causal link between those potential adverse impacts and the CCFIPPA.”¹⁴

The decision was appealed to the Federal Court of Appeal. That court also found that any potential adverse impacts to the HFN from this investment agreement were speculative.¹⁵ The Federal Court of Appeal noted that the central issue of the appeal was whether the requirement of a causal relationship between the proposed Crown conduct and the potential adverse effects on an Aboriginal or treaty right was met.

Despite the loss of the appeal, the decision may be useful for future claims by Aboriginal peoples that consultation is triggered by the negotiation of an international agreement as it “leaves open the possibility that the negotiation of some international treaties may trigger the constitutional duty to consult.”¹⁶ Both courts accepted that the HFN had Aboriginal rights, which is the first hurdle of the three-part duty to consult test. The Federal Court of Appeal determined that it had the jurisdiction to hear a matter concerning treaty making, which is rooted in the federal

Crown prerogative.¹⁷ As well, the Federal Court of Appeal held that an exercise of the government prerogative, such as treaty making, was appropriately reviewable. Canada’s argument was that, even if the court had the jurisdiction to review the action of treaty making, it was not appropriate to do so. The Federal Court rejected this argument and stated, “Assessing whether or not legal rights [such as the right to be consulted] exist on the facts of a case lies at the core of what the courts do.”¹⁸ Therefore, the second part of the three-part test was met as the Federal Court of Appeal agreed with the First Nation that treaty making is contemplated Crown conduct that can attract consultation requirements.

Thus, the Federal Court of Appeal is acknowledging that the Crown’s duty to consult with First Nations could extend to treaty making and that a federal court has the ability to determine whether the duty has been triggered, based on the factual circumstances and the potential adverse impacts the particular treaty may have on Aboriginal rights. The challenge for indigenous peoples will be to craft an argument that passes the third prong of the three-part test and show that an international agreement has the potential to adversely impact a community’s constitutionally protected rights in a manner that is not speculative. In the *Hupacasath FCA* decision, the Federal Court of Appeal did not see any evidence that existing international investment agreements are causing the Canadian government to make decisions that do not respect Aboriginal rights. In the court’s view, the First Nation had not demonstrated a causal connection between the investment agreement and Aboriginal rights, and, therefore, the bilateral agreement with China did not trigger the duty to consult.

UNDRIP

Whether or not a successful argument can be made that the constitutional duty to consult is triggered by the negotiation and ratification of international treaties, it would only impact Canadian law. The adoption of UNDRIP in the many countries that voted in favour of the declaration has the potential to have a global effect on the negotiation of international agreements.

UNDRIP is a resolution of the United Nations General Assembly that was adopted on September 13, 2007, by a vote of 143 to four, with 11 abstentions. Declarations are

12 *Hupacasath FC*, *supra* note 1 (Memorandum of Fact and Law of the Applicant, Hupacasath First Nation, at para 4).

13 *Ibid* at para 103.

14 *Hupacasath FC*, *supra* note 1 at para 147.

15 *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 58, 379 DLR (4th) 737 [*Hupacasath FCA*].

16 Dwight Newman & Wendy Elizabeth Ortega Pineda, “Comparing Canadian and Colombian Approaches to the Duty to Consult Indigenous Communities on International Treaties” (2016) 25 Const Forum 29 at 29.

17 *Hupacasath FCA*, *supra* note 15.

18 *Ibid* at para 70.

considered to be “soft” law¹⁹ and are not legally binding in Canadian law, unless they have achieved the status of international custom²⁰ or they have been implemented into legislation. According to the SCC, customary international law should be incorporated into domestic law in the absence of conflicting legislation, which is known as the doctrine of adaptation. The SCC noted in *R. v Hape*, “Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly.”²¹ Custom²² is the oldest source of rules in the international legal system and can be ascertained through a long-standing and consistently applied practice of states. Sources of custom may include the following: diplomatic correspondence, policy statements, press releases, the opinion of international legal advisers and, of course, domestic legislation and decisions by international and domestic courts.²³

UNDRIP is not considered by legal academics as customary international law. It is a relatively new declaration and, although it was adopted by 143 countries, there is no evidence of uniform state practice. The International Law Association (ILA), a forum for international law scholars who discuss and study both private and public international law with the objective of furthering the understanding of and respect for international law, noted that some provisions of UNDRIP can be considered custom. According to the ILA, “UNDRIP as a whole cannot yet be considered a statement of existing customary international law. However, it includes several key provisions which correspond to existing State obligations under customary international law.”²⁴ This resolution is important as ILA resolutions generally fall under the category of “teachings

of the most highly qualified publicists,” which, pursuant to article 38(1)(d) of the Statute of the International Court of Justice, can be taken into consideration by the International Court of Justice as part of international law.²⁵

Legally binding sources of international law are treaties, conventions and protocols that bind the state signatories. The process for agreeing to treaties and conventions is called ratification. The act of a state signing the treaty signals preliminary endorsement, but at this point the treaty is not binding on the state.²⁶ Following its signature, the state fulfills its own domestic requirements in order to ratify the treaty. In Canada, this requires an order in council, authorizing the Minister of Foreign Affairs to sign an instrument of ratification. Once this instrument is deposited with the United Nations body that negotiated the treaty, the treaty is officially ratified. International treaties are not binding within Canada until implemented into domestic law. This can lead to a situation in which Canada is bound by the treaty as a matter of international law, but the treaty is not domestic law.

International law that has not obtained the status of custom can still have influence on Canadian courts. The SCC has considered international instruments as interpretive aids when interpreting Canadian legislation. In *Baker v Canada (Minister of Citizenship and Immigration)*, the court noted that Canada had ratified, but not implemented, the Convention on the Rights of the Child. The SCC determined that the convention’s provisions had no direct application within Canadian law because the convention had not been implemented, but there was an acknowledgement by the court that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”²⁷ Therefore, UNDRIP, although not implemented into Canadian law, may still be considered by the courts, especially in instances when a court is interpreting the constitutional requirements set out in section 35 of Canada’s Constitution.

The “declaration” term is often deliberately chosen to indicate that the document is not intended to create binding obligations, but that the endorsing states merely want to declare certain aspirations. UNDRIP articulates a series of rights for indigenous peoples that go well beyond the rights afforded Aboriginal peoples by current interpretations of section 35 of the Constitution. For example, UNDRIP requires free, prior and informed consent (FPIC) for legislative and administrative matters²⁸

19 Some international law scholars argue that UNDRIP “represents more than a mere *soft-law* instrument”. See International Law Association, Johannesburg Conference (2016), Implementation of the Rights of Indigenous Peoples Committee, “Implementation of the Rights of Indigenous Peoples: Interim Report” at 3, online: Draft Committee Reports <www.ila-hq.org/en/committees/draft-committee-reports-johannesburg-2016.cfm> [Interim Report].

20 *R v Hape*, [2007] 2 SCR 292.

21 *Ibid* at para 39.

22 The existence of customary international law consists of the following elements:

- duration of the proposed custom;
- widespread, consistent uniform state practice; and
- a belief on the part of states that the practice is mandatory and accepted as matter of law (*opinio juris*).

See Ian Brownlie, *Brownlie’s Principles of Public International Law*, 5th ed (Oxford: Oxford University Press, 2002) at 5–7.

23 *Ibid* at 5.

24 ILA, “Rights of Indigenous Peoples,” Resolution No 5/2012 at conclusion 2, online: <www.ila-hq.org/download.cfm/docid/6784224B-04C6-490A-A0724CC6BAF63838>.

25 *Statute of the International Court of Justice*, 26 June 1945, 59 Stat 1031, 3 Bevans 1179 (entered into force 24 October 1945).

26 If a state does not sign a treaty, it may still accede to it later in a similar manner to ratification.

27 [1999] 2 SCR 817 at paras 69–70.

28 UNDRIP, *supra* note 2, art 19.

while, as discussed earlier in this paper, the SCC has not yet determined whether there is a duty to consult for legislation and the Federal Court of Appeal has rejected the argument that consultation was required for the ratification of an international investment treaty. If Canadian courts start interpreting section 35 consultation rights in light of UNDRIP, this will have implications for the development of international treaties that impact indigenous lands.

The four countries that initially voted against UNDRIP were the United States, Australia, New Zealand and Canada, all of which have significant indigenous populations. Since 2007, all four have changed their positions and have shown qualified support for UNDRIP. Canada, in fact, has gone through two separate iterations of support for UNDRIP since 2007. In 2010, the government of the day called the declaration “aspirational” and noted that “Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.”²⁹ Brenda Gunn argues that Canada’s 2010 statement “attempts to subordinate the UN Declaration to Canadian law and not allow the UN Declaration to inform interpretations of Canadian law.”³⁰ Why was there such reluctance to accept a declaration that some international legal scholars see as including concepts from human rights declarations that Canada already supports?³¹

The answer lies in the concept of FPIC, which is mentioned in six articles of UNDRIP. Much of the consternation has been focused on article 32, which requires states to “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.”³² Canada’s former Conservative government noted, at any given opportunity, that they did not interpret FPIC as a veto,³³ even though the term “veto” is never used in UNDRIP. Although FPIC may provide indigenous communities with a better ability to shape

and derive benefits from projects on traditional lands, the reality is that collaboration with indigenous communities is already happening during the approval process of large resource projects across Canada. As well, consent is a matter of law when Aboriginal title has been determined by the court. However, there is still the potential for projects to proceed on Aboriginal title lands, absent the communities’ consent, if the government can justify the action through the courts.³⁴

Canada’s second endorsement of UNDRIP was influenced by the *Calls to Action* report of the Truth and Reconciliation Commission (TRC) of Canada. The TRC was established in 2008 by the terms of the Indian Residential Schools Settlement Agreement. Its mandate was to reveal the history of Indian residential schools in Canada, to document the harms done to Aboriginal peoples at the residential schools and to “guide and inspire a process of truth and healing, leading towards reconciliation within Aboriginal families and between Aboriginal peoples and non-Aboriginal communities, churches, governments and Canadians generally.”³⁵ The TRC spent six years travelling across Canada to directly listen to former students of the residential school system and document their experiences. One of the outcomes of the TRC was an articulation of 94 Calls to Action, recommendations to “redress the legacy of residential schools and advance the process of reconciliation.”³⁶ Implementation of UNDRIP, including FPIC, features in many of the calls to action in the report. Most notably, recommendation 43 calls upon “federal, provincial, territorial and municipal governments to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.”³⁷ The Liberal government election platform promised to implement all 94 TRC recommendations. In November 2015, in a marked break with the tradition of confidential mandate letters, the newly elected Liberal government publicly released all the prime minister’s letters to new ministers setting out their respective mandates. In order to emphasize the priority of the new government’s relationship with indigenous peoples, each letter highlighted the importance of renewing a nation-to-nation relationship. Every ministerial mandate letter included the following sentence: “No relationship is more important to me and to Canada than the one with indigenous peoples. It is time for a renewed, nation-to-nation relationship with indigenous peoples, based on recognition of rights,

29 Indigenous and Northern Affairs, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (12 November 2010), online: <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142> [Canada’s Statement].

30 Brenda Gunn, “Overcoming Obstacles to Implementing the UN Declaration of the Rights of Indigenous peoples in Canada” (2013) 31:1 Windsor YB Access Just 147 at 155.

31 See Interim Report, *supra* note 19, which cites the conclusions reached in ILA Resolution No 5/2012.

32 UNDRIP, *supra* note 2.

33 “In 2007, at the time of the vote during the United Nations General Assembly and since, Canada placed on record its concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto.” Canada’s Statement, *supra* note 29.

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

35 Canada, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 23.

36 *Ibid* at 320.

37 *Ibid* at 325.

respect, co-operation, and partnership.”³⁸ The Minister of Indigenous and Northern Affairs was specifically mandated to implement recommendations of the TRC, beginning with implementation of UNDRIP.

Therefore, it was not surprising that in May 2016 Canada removed its qualifications to supporting UNDRIP. The Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, announced at the 15th Session of the United Nations Permanent Forum on Indigenous Issues that Canada was now a full supporter of UNDRIP, “without qualification.” She went on to explain that UNDRIP would be implemented in accordance with Canada’s Constitution because “through Section 35, Canada has a robust framework for the protection of Indigenous Rights.”³⁹ The term “implementation” was of interest to many Canadian international legal scholars, as the domestic implementation of declarations, rather than a binding treaty, is a rare proposition.

Although issues around natural resources undertakings, and whether they are subject to FPIC, will continue to dominate the discussion in Canada, the application of FPIC in article 19 of UNDRIP is a game changer in the area of law and policy. Article 19 requires the participation of indigenous peoples in the making of government policies, laws and other administrative decisions that may affect them. Article 19 of UNDRIP, read in conjunction with other articles, such as article 41, has the potential to advance the discourse on international environmental law and related indigenous rights to be involved in the making of international environmental agreements.⁴⁰ Articles 19 and 41 complement each other, creating space for the participation of indigenous peoples at the United Nations during the negotiations of international laws that impact them and requiring their participation domestically as the government’s negotiating position is being crafted.

Indigenous peoples are calling for increased participation in the negotiation of international environmental agreements. The Permanent Forum on Indigenous Issues, the United Nations’ central coordinating body for

matters relating to the concerns and rights of the world’s indigenous peoples, has requested that the United Nations Framework Convention on Climate Change (UNFCCC) and its member states develop the mechanisms necessary to allow for participation of indigenous peoples in all aspects of the international dialogue on climate change.⁴¹ At each Conference of the Parties for the UNFCCC, the presence of indigenous peoples has increased, which has been noted by the international press.

Including the participation of indigenous peoples in the drafting and negotiation of international investment and trade agreements is also one of the recommendations of Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz. In 2015, the special rapporteur presented a report to the 70th Session of the UN General Assembly that outlined her concerns that international investment agreements may directly violate indigenous rights.⁴² Unlike the decisions of the Canadian courts in *Hupacasath*, the special rapporteur found that non-discrimination and expropriation clauses in international investment agreements have “significant potential to undermine the protection of indigenous peoples’ land rights and the strongly associated cultural rights.”⁴³ She further noted that these clauses may erode protections for indigenous lands and may be a significant barrier to indigenous land claims. Tauli-Corpuz states that she will be focusing on the impacts of these regimes throughout her mandate, as threats posed by international investment and trade agreements directly impact indigenous rights and contribute “to systematic injustices which tend to disproportionately impact indigenous peoples as some of the most globally marginalized.”⁴⁴

The special rapporteur makes numerous recommendations in this initial report, but her first recommendation is that states should develop participatory mechanisms so that indigenous peoples have the ability to comment on the negotiation and drafting of the language in the proposed agreements. Tauli-Corpuz relies on FPIC as included within UNDRIP, as well as the right to consultation in the International Labour Organization’s (ILO) Convention No. 169.⁴⁵ She notes that indigenous participations should “be part of broader efforts to increase the level of social

38 See online: Ministerial Mandate Letters <pm.gc.ca/eng/ministerial-mandate-letters>.

39 The Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous peoples” (Speaking notes, delivered at the United Nations Permanent Forum on Indigenous Issues, 10 May 2016), online: <www.metisnation.ca/wp-content/uploads/2016/05/Speech-Minister-Bennett-UNPFII-NEW-YORK-MAY-10-FINAL.pdf>.

40 Article 41 of *UNDRIP* states, “The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.” *Supra* note 2.

41 Permanent Forum on Indigenous Issues, *Report on the Tenth Session*, UNESCOR, 2011, Supp No 23, UN Doc E/2011/43-E/C.19/2011/14.

42 Victoria Tauli-Corpuz, *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples*, UNGAOR, 70th Sess, UN Doc A/70/301 (2015).

43 *Ibid* at para 23.

44 *Ibid* at para 73.

45 *Indigenous and Tribal Peoples Convention, 1989* (No 169), 27 June 1989, 72 ILO Official Bull 59, 28 ILM 1382 (entered into force 5 September 1991). Canada is not a signatory to the ILO Convention.

dialogue involved in the negotiations and drafting of such agreements.”⁴⁶ The special rapporteur is not aware of any indigenous peoples or indigenous representative institutions that have been invited to participate in the formal negotiations of international investment treaties that may impact them. The lack of participation itself may be a violation of FPIC.

Article 19 of UNDRIP requires that states “consult and cooperate in good faith with the indigenous peoples 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.”⁴⁷ The requirements of UNDRIP article 19 differ from Canadian law. The language in article 19, “may affect them,” is a far less stringent test than the requirements of *Rio Tinto* and *Hupacasath*, as there is no need to establish a non-speculative causal relationship between the proposed conduct and the potential for an adverse impact on Aboriginal rights. Another significant difference from Canadian law is that FPIC for legislative and administrative matters under UNDRIP is to be undertaken with representative institutions, rather than with the rights holders themselves. Consultation with indigenous political organizations, such as the Assembly of First Nations, Métis National Council or Inuit Tapiriit Kanatami, would be more practical and achievable for the federal and provincial governments than would consultation with individual indigenous communities. New responsibilities for FPIC may lead to internal governance struggles within the various organizations and criticism from communities that these umbrella organizations do not reflect their views. The problem of determining which are Canada’s representative organizations for indigenous peoples in Canada for UNDRIP implementations is a live issue for Canada, and the answer must lie with indigenous peoples themselves.⁴⁸ Given that there are more than 600 recognized First Nations bands in Canada, and many non-status and urban indigenous populations, as well as Métis and Inuit peoples, a workable solution for FPIC for legislation and other administrative matters should be a focus of indigenous political organizations as they prepare for the implementation of UNDRIP in Canada.

The mutual symbiosis of section 35 of the *Constitution Act, 1982* and UNDRIP has been recognized by both the Government of Canada and academics. Minister Bennett, in her speech to the United Nations on Indigenous

Issues, acknowledged the interaction of domestic and international law when she noted that “[b]y adopting and implementing the Declaration, we are breathing life into section 35 and recognizing it as a full box of rights for Indigenous peoples.”⁴⁹ Dwight Newman, in his book on the duty to consult, surmises that “Canada’s ongoing interaction with the Declaration on the duty to consult is part of an ongoing conversation in the international legal area...the evolution of international law in this area may have future impacts on the Canadian doctrine.”⁵⁰ With the political acceptance of the 94 calls to action of the TRC, the emphasis on renewing the nation-to-nation relationship and the promise of implementation of international indigenous law through UNDRIP, this future may have arrived.

49 Bennett, *supra* note 40.

50 Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 165.

46 *Ibid* at para 77.

47 UNDRIP, *supra* note 2.

48 The Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, Address (Notes for the Address delivered at the Assembly of First Nations Annual General Assembly, Scotiabank Convention Centre Niagara Falls, Ontario, 12 July 2016), [unpublished], online: <news.gc.ca/web/article-en.do?mthd=index&crtr:page=2&nid=1098629>.

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