Duty to Consult with Indigenous Peoples in Canada, Where Are We Today?

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By the

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Acknowledgments

Dedication
This project is dedicated to the memory of Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director (1992-2024), whose vision, dedication, and contributions were integral to this report.

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I- Introduction

Many Indigenous[1] peoples around the world face challenges in accessing information and lack knowledge of their fundamental political and human rights. Ongoing conflicts persist between governments and Indigenous groups regarding demands for legal recognition, land access and treaty rights.

Traditional lands are sacred to Indigenous peoples. They are an important part of their culture and identity, and they have supported them for thousands of years.[2]

According to the International Labour Organization (ILO):

> Most indigenous peoples have a special relationship to the land and territories they inhabit. It is where their ancestors have lived and where their history, knowledge, livelihood practices and believes are developed. To most indigenous peoples the territory has a sacred or spiritual meaning, which reaches far beyond the productive and economic aspect of the land.[3]

Indigenous peoples wish to retain their lands and resources so they can enhance productivity while preserving their traditional connection to these territories.[4]

The United Nations defined Indigenous peoples' natural resources as follows:

> In general, these are the natural resources belonging to indigenous peoples in the sense that an indigenous people has historically held or enjoyed the incidents of ownership, that is, use, possession, control, right of disposition, and so forth. These resources can include air, coastal seas, and sea ice as well as timber, minerals, oil and gas, genetic resources, and all other material resources pertaining to indigenous lands and territories. There appears to be widespread

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[1] In this report, "Indigenous" will be used to refer collectively to Indigenous peoples, while "Aboriginal" will specifically denote the legal rights recognized under the Canadian Constitution. The Canadian Constitution recognizes three distinct groups of Indigenous (Aboriginal) peoples: First Nations, Métis, and Inuit. In alignment with international agreements, the Canadian Government now primarily uses the term "Indigenous peoples" in place of "Aboriginal peoples. See: Government of Canada, Indigenous Peoples and human rights (2024), online: <https://www.canada.ca/en/canadian-heritage/services/rights-indigenous-peoples.html>.

[2] John Borrows, "Crown and Aboriginal Occupations of Land: A History & Comparison" (15 October 2005), online: <https://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/History_of_Occupations_Borrows.pdf> at 3 [Borrows].

[3] Indigenous & Tribal Peoples' Rights in Practice, A Guide to ILO Convention No. 169 (2009), online: ILO < https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf> [Indigenous & Tribal Peoples' Rights in Practice] at 91.

[4] Borrows at 3.

> understanding that natural resources located on indigenous lands or territories, resources such as timber, water, flora and fauna, belong to the indigenous peoples that own the land or territory.[5]

Indigenous peoples have attempted to protect their relationship with the land in different ways. However, this has not prevented others from occupying their territories.

Indigenous peoples in North America occupied the lands long before the arrival of people from other continents. Indigenous nations sometimes entered into treaties with one another to prevent war and establish peaceful relations with their neighbours. However, land passed from Indigenous peoples to non-Indigenous peoples through force and occupation. At times, treaties were signed between Indigenous and non-Indigenous groups prior to non-Indigenous occupation, seeking consent from Indigenous peoples for settlement and resource use.[6]

In 1982, section 35(1) of the *Constitution Act* recognized and affirmed the existing Aboriginal and treaty rights of Indigenous peoples, acknowledging their presence in Canada and their established communities on the land long before the arrival of European settlers.[7]

Maria Morellato noted:

> What s[ection] 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s[ection] 35(1) must be directed towards the reconciliation of the preexistence of aboriginal societies with the sovereignty of the Crown.[8]

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[5] Erica-Irene A. Daes, "Prevention of Discrimination and Protection of Indigenous Peoples, Indigenous Peoples' Permanent Sovereignty Over Natural Resources" (13 July 2004), online: Economic and Social Council, United Nations < http://hrlibrary.umn.edu/demo/IndigenousSovereigntyNaturalResources_Daes.pdf> at 13.
[6] Borrows at 5.
[7] *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Constitution Act*, 1982].
[8] Maria Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights" (February 2008), online: National Centre for First Nations Governance < https://fngovernance.org/wp-content/uploads/2020/05/maria_marletto.pdf> at 8.

Canadian law recognized Aboriginal and treaty rights before 1982, but they were not "immune from the doctrine of parliamentary sovereignty."[9] Parliament, under its authority granted by section 91(24) of the *Constitution Act, 1867*, could amend or extinguish these rights, as it had control over "Indians and lands reserved for the Indians".[10]

The duty to consult originated as part of the test to determine whether a government infringement on an existing section 35 right could be justified. If the government violates one of these rights, it must consult with the affected Indigenous groups about its decision.[11]

According to Malcolm Lavoie:

> The duty to consult is also fast becoming the most practically significant legal tool available for challenging resource development projects. Because the duty to consult is a constitutional obligation, litigation based on it can delay or possibly halt a project, even if that project is supported by a government with a legislative majority.
>
> The duty to consult applies in relation to a broad range of government decisions that could affect constitutionally protected Aboriginal rights, from those dealing with small-scale local projects all the way up to major projects with national implications.[12]

The duty to consult Indigenous peoples has become a constitutional obligation that applies to government decisions potentially affecting Aboriginal and treaty rights. This duty plays a crucial role in deciding whether and when major resource development projects can proceed in Canada.

At the international level, the recognition of Indigenous peoples' human rights has considerably progressed, particularly since the adoption of the United Nations Declaration on the

[9] Peter W. Hogg & Daniel Styler, "Statutory Limitation of Aboriginal or Treaty Rights: What Counts as Justification" (2015-2016), Lakehead Law Journal at 1 [Hogg & Styler].
[10] Hogg & Styler at 1.
[11] Malcolm Lavoie, "Assessing the Duty to Consult" (2019), online: Fraser Institute < https://www.fraserinstitute.org/sites/default/files/assessing-the-duty-to-consult.pdf> at 11 [Lavoie].
[12] Lavoie at 9-10.

Rights of Indigenous Peoples in 2007.[13] Furthermore, a strong jurisprudence has developed from international human rights bodies and regional human rights institutions.[14]

II- United Nations Declaration on the Rights of Indigenous Peoples

A- General Provisions

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration) was adopted by the United Nations in September 2007. The Declaration is an international instrument that recognizes:

> […] the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.[15]

The Declaration also reaffirms that:

> […] indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.[16]

The Declaration contains 46 articles covering the rights of Indigenous peoples. Article 3 states that "Indigenous peoples have the right to self-determination," and article 4 affirms that "in exercising their right to self-determination, they have the right to autonomy or self-government in matters relating to their internal and local affairs."

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[13] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), online: United Nations < https://social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf> [UNDRIP].
[14] Alexandra Xanthaki et al., eds, *Indigenous Peoples' Cultural Heritage: Rights, Debates and Challenges* (Leiden: Brill, Ministry for Foreign Affairs of Finland, 2011), online: Ministry for Foreign Affairs of Finland < https://library.oapen.org/bitstream/handle/20.500.12657/51053/external_content.pdf?sequence=1&isAllowed=y> at 20.
[15] UNDRIP Preamble.
[16] UNDRIP Preamble.

Article 18 states:

> 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.

The Declaration focuses on consultation and participation and makes it clear that the purpose of consultation is to achieve free, prior and informed consent. Article 19 affirms that:

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

Article 26(3) obliges States to give legal recognition and protection to Indigenous peoples' lands, territories and resources, taking into account Indigenous peoples customs, traditions and land tenure systems. Article 27 obliges States to "recognize and adjudicate the rights of indigenous peoples to their lands, territories and resources."

It is important to note that the rights mentioned in the Declaration "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world".[17]

In Canada, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) describes UNDRIP as follows:

> The United Nations Declaration on the Rights of Indigenous Peoples is a document that describes both individual and collective rights of Indigenous peoples around the world. It 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. It addresses the rights of Indigenous peoples on issues such as: culture, identity, religion, language, health, education, community.[18]

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[17] UNDRIP art 43.

[18] Implementing the United Nations Declaration on the Rights of Indigenous People – What Good Looks Like, Policy Recommendations from the Business Council of British Columbia's Indigenous Affairs and Reconciliation Committee (October 2019), online: Bennet Jones < https://www.bennettjones.com/Publications-Section/Articles/David-Bursey-Authors-BCBCs-Policy-Paper-Implementing-UNDRIP-What-Good-Looks-Like> at 13.

UNDRIP is a declaration. Unlike a treaty or a convention, declarations are not signed or ratified by States. Therefore, UNDRIP does not legally bind States that support it.

John Borrows et al. noted:

> An international declaration is a statement of intent for future action. This directs the parties' work in a particular field, in this case in the field of human rights as it deals with Indigenous peoples. It is distinguished from an international treaty. Treaties are binding on the parties (sometimes called conventions). A declaration is not binding in that same way, it's a statement of what they hope to do in the future, and usually a declaration comes before a treaty. So it's nonbinding, it's a statement of intent to act, and it sets out the aspirations.[19]

Because UNDRIP is neither a convention nor a treaty, it is not legally binding unless it is adopted in a State's legislation. Therefore, States are presumed to take measures to implement the provisions of UNDRIP through their own legislation.[20]

To assist with the implementation of UNDRIP, the United Nations Human Rights Council appoints a Special Rapporteur on the rights of Indigenous peoples.[21] The Special Rapporteur is an expert designated to "investigate, monitor, and report on the human rights situation of indigenous peoples or on specific cases of alleged violation against the rights of indigenous peoples."[22]

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[19] John Borrows et al., "The UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from B.C." (December 2020), online: Yellowhead Institute < https://yellowheadinstitute.org/wp-content/uploads/2020/12/yellowhead-institute-bc-undrip-report-12.20-compressed.pdf> at 9.
[20] Terry Mitchell and Charis Enns, "The UN Declaration on the Rights of Indigenous Peoples: Monitoring and Realizing Indigenous Rights in Canada," Policy Brief No. 39 (April 2014), online: CIGI < https://www.cigionline.org/sites/default/files/cigi_pb_39.pdf> at 5 [Mitchell and Enns].
[21] See United Nations Human Rights Special Procedures, Special Rapporteur on the rights of Indigenous Peoples, online: <https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples>.
[22] Mitchell and Enns at 5.

B- Free, Prior and Informed Consent

UNDRIP outlines several fundamental rights, including the right to self-determination, the right to be free from discrimination, and the right to free, prior and informed consent (FPIC).[23]

While UNDRIP mentions FPIC, it does not provide a specific definition for the term.[24] As a result, there has been debate over whether FPIC grants Indigenous peoples a veto power over decisions affecting their lands, resources, and communities. However, it is important to note that the word "veto" is not explicitly mentioned in the Declaration.[25]

FPIC is rooted in Indigenous peoples' fundamental right to self-determination. It empowers Indigenous peoples to accept or reject proposals and projects that may impact their rights and interests.[26]

Multiple articles within UNDRIP emphasize the importance of FPIC, highlighting the need to protect Indigenous rights and ensuring their meaningful participation in decisions that affect them. [27] According to UNDRIP, States are required to obtain Indigenous peoples' free, prior and informed consent before the approval of any project impacting their lands, territories and other resources.[28]

UNDRIP also mandates that States take measures to redress and mitigate any adverse impacts resulting from violations of Indigenous rights. This includes compensation and redress

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[23] Doing Business in Canada Guide, Section XV: Indigenous, online: Blakes < https://www.blakes.com/pages/doing-business-in-canada-guide/section-xv-indigenous> [Blakes].
[24] Chenoa Sly, "Accommodating UNDRIP: Bill C-262 and the future of Duty to Consult" (26 July2018), online: Centre for Constitutional Studies < https://ualawccstest.srv.ualberta.ca/2018/07/accommodating-undrip-bill-c-262-and-the-future-of-duty-to-consult/>.
[25] Indigenous Rights, Questions and Answers about the United Nations Declaration on the Rights of Indigenous Peoples, online: KAIROS < https://www.kairoscanada.org/what-we-do/indigenous-rights/undrip-questions-answers>.
[26] Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law," (Winter 2011), online: Northwestern Journal of International Human Rights < https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1125&context=njihr> at 55 [Ward].
[27] UNDRIP arts 10, 19, 27, 28, 29.2, 30, 32.2.
[28] UNDRIP art 32(2).

for "forced removals of Indigenous peoples from their lands or territories; the taking of cultural, intellectual, religious, and spiritual property; and land acquisitions without free, prior, and informed consent of Indigenous peoples."[29]

The purpose of FPIC is to ensure that Indigenous peoples have a genuine opportunity to participate in decisions that affect their lands and interests. Therefore, consent must "be given that is free from coercion, intimidation, or manipulation, made prior to any authorization or commencement of activities, and "informed" with the benefit of all relevant information."[30]

III- Implementing UNDRIP in Canada

When the United Nations adopted UNDRIP in 2007, Canada, along with three other countries, opposed its adoption.[31] Canada's concern was that the autonomy granted to Indigenous peoples under the Declaration could conflict with Canadian laws and potentially weaken government authority, especially in relation to land and resource disputes.

However, in 2010, Canada reversed its position and issued a Statement of Support endorsing the principles of the Declaration.[32] In this statement, Canada emphasized that the Declaration was a non-legally binding document that did not alter Canadian law. Then, in 2016, Canada took a further step by declaring its full support for the Declaration. [33]

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[29] UNDRIP arts 10,11, 28.
[30] Blakes.
[31] United Nations Declaration on The Rights of Indigenous Peoples, online: United Nations Department of Economic and Social Affairs < https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples#:~:text=The%20United%20Nations%20Declaration%20on,%2C%20Bangladesh%2C%20Bhutan%2C%20Burundi%2C>.
[32] Tom Flanagan, "Squaring the Circle Adopting UNDRIP in Canada" (2020), online: Fraser Institute < https://www.fraserinstitute.org/sites/default/files/squaring-the-circle.pdf> at 1 [Flanagan].
[33] Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult (March 2011), online: Government of Canada < https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729#chp1_4_2> [Aboriginal Consultation and Accommodation].

A- The *Impact Assessment Act*

The *Impact Assessment Act* (*IAA*), enacted in 2019, states in its preamble that the Government of Canada is committed to implementing UNDRIP.[34] The *IAA* outlines the process by which the Government of Canada assesses the impacts of designated projects, including those pursued on federal lands or outside of Canada.

The Canadian Environmental Assessment Agency defines "impact assessment" as:

> … a planning and decision-making tool used to assess:
>
> - positive and negative environmental, economic, health, and social effects of proposed projects
> - impacts to Indigenous groups and rights of Indigenous peoples.[35]

The *IAA* mandates the assessment of designated projects if they have the potential to affect the rights of Indigenous peoples. Additionally, the *IAA*'s provisions apply alongside the duty to consult and accommodate Indigenous peoples.[36]

According to the Government of Canada:

> Indigenous peoples have a unique role in the Crown's assessment of the impacts of major projects. The *Impact Assessment Act* recognizes the special Constitutional relationship between the Crown and Indigenous peoples and the particular perspectives and interests they bring to the process.
>
> Reconciliation needs to be at the centre of all aspects of the Government of Canada's relationship with Indigenous peoples. The approach of including Indigenous peoples in impact assessment, such as through the early identification of potential impacts of projects on Aboriginal and treaty rights, or the development of Indigenous-led studies, reflects the Government of Canada's commitment to advancing reconciliation through a renewed, nation-to-nation, Inuit-Crown and government-to-government relationship based on the recognition

[34] *Impact Assessment Act*, SC 2019, c 28, s 1.
[35] Overview of the Impact Assessment Act, Level 1 Training (Summer 2019), online: Canadian Environmental Assessment Agency <https://www.canada.ca/content/dam/iaac-acei/documents/mandate/president-transition-book-2019/overview-impact-assessment-act.pdf> at 4.
[36] Policy Context: Assessment of Potential Impacts on the Rights of Indigenous Peoples, online: Government of Canada <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/assessment-potential-impacts-rights-indigenous-peoples.html>.

> of rights, respect, cooperation and partnership. Participation of Indigenous peoples in impact assessment aligns with the Government of Canada's commitment to implement the *United Nations Declaration on the Rights of Indigenous Peoples*.[37]

B- The Impact Assessment Agency of Canada

The Impact Assessment Agency of Canada (Agency) plays a key role in implementing the provisions of UNDRIP by partnering with and involving Indigenous peoples during all phases of federal assessments.[38] The Agency is responsible for conducting impact assessments that examine "both positive and negative environmental, economic, social, and health impacts of potential projects" under the *IAA*.[39] Moreover, the Agency leads "all federal assessments of designated projects, working with federal departments and in cooperation with provinces, territories, and Indigenous jurisdictions."[40]

The Government of Canada asserted:

> The Agency consults with and encourages the participation of Indigenous peoples in the impact assessment of projects for a variety of reasons, including:
>
> - to promote communication, relationship-building, cooperation and partnership with Indigenous peoples with respect to impact assessments;
> - to meet the Crown's common law duty to consult by ensuring respect and protection of the rights of the Indigenous peoples of Canada recognized and affirmed in section 35 of the *Constitution Act, 1982*.[41]

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[37] Policy Context: Indigenous Participation in Impact Assessment, online: Government of Canada <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/policy-indigenous-participation-ia.html> [Indigenous Participation].
[38] Implementing the United Nations Declaration on the Rights of Indigenous Peoples, online: Government of Canada < https://www.canada.ca/en/impact-assessment-agency/programs/participation-indigenous-peoples/implementing-united-nations-declaration-rights-indigenous-peoples.html> [Implementing the United Nations Declaration].
[39] Impact Assessment Agency of Canada, online: Government of Canada < https://www.canada.ca/en/impact-assessment-agency.html>.
[40] Overview of the *Impact Assessment Act*, online: Government of Canada < https://elearning.iaac-aeic.gc.ca/mod01/mod01_01_01-en.html>.
[41] Indigenous Participation.

The *IAA* provides the following for Indigenous communities:

- to collaborate with the Agency to conduct parts of an assessment
- to work in partnership with the Agency
- to undertake Indigenous-led assessments
- to lead parts of the Agency's assessment through delegation
- to substitute an Indigenous jurisdiction's process for the federal assessment process.[42]

Under the *IAA*, the Agency is required to consult with any Indigenous group that may be impacted by potential projects. In addition, the *IAA* demands that impact assessments determine whether Indigenous peoples, Aboriginal and treaty rights were affected

C- *United Nations Declaration on the Rights of Indigenous Peoples Act*

In June 2021, Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* (*Act*).[43] The *Act* sets out Canada's obligation to support the human rights of Indigenous peoples as confirmed by UNDRIP. These rights include the right of self-determination and the right to have treaties respected and enforced. Developed with Indigenous peoples, the *Act* creates a legislative framework to implement UNDRIP in Canada.

The *Act* applies specifically to the federal government and has two key goals. As outlined in section 4, the purposes of the *Act* are to: "(a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and (b) provide a framework for the Government of Canada's implementation of the Declaration."

Section 5 requires the Government of Canada to take all necessary measures to ensure that federal laws are consistent with the Declaration, and to do so in consultation and cooperation with Indigenous peoples.

[42] Implementing the United Nations Declaration.
[43] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

According to the Government of Canada:

> The *Act* will provide a shared road map for Indigenous peoples, industry, communities and government to work together. It will help strengthen relations between the Government of Canada and Indigenous peoples. It will also ensure Indigenous rights are carefully considered in reviewing and updating federal laws that affect those rights.[44]

This *Act* is an important first step in ensuring that the standards affirmed by UNDRIP are applied by the federal government, especially in regard with the requirement to obtain "free, prior and informed consent" in consultations with Indigenous peoples.[45]

IV- International Convention on the Elimination of All Forms of Racial Discrimination

A- Provisions

The International Convention on the Elimination of All Forms of Racial Discrimination[46] (ICERD) is a landmark international treaty that was adopted in 1965 and entered into force in 1969.[47] As one of the oldest conventions aimed at combatting discrimination, ICERD defines and prohibits racial discrimination while promoting equality for all people, regardless of race, ethnicity, or national origin.

Article 1 of the ICERD defines racial discrimination as:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

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[44] Backgrounder: *United Nations Declaration on the Rights of Indigenous Peoples Act*, online: Government of Canada < https://www.justice.gc.ca/eng/declaration/about-apropos.html>.
[45] Sander Duncanson et al., "Federal UNDRIP Bill Becomes Law" (22 June 2021), online: Osler < https://www.osler.com/en/resources/regulations/2021/federal-undrip-bill-becomes-law>.
[46] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[47] Gay McDougall, "International Convention on the Elimination of All Forms of Racial Discrimination" (2021), online: United Nations Audiovisual Library of International Law < https://legal.un.org/avl/pdf/ha/cerd/cerd_e.pdf> [McDougall].

The ICERD is focused on promoting racial equality and combating discrimination in all forms. Countries that ratify the ICERD, referred to as States Parties, are committed to eliminating racial discrimination and fostering mutual understanding among all races.[48]

Canada ratified the ICERD in 1970.[49] By becoming a party to the Convention, Canada formally acknowledged the need to prohibit racial discrimination and agreed to follow the provisions of the Convention.

B- The Committee on the Elimination of Racial Discrimination

In addition to outlining the obligations of States Parties, the ICERD created the Committee on the Elimination of Racial Discrimination (the CERD) to monitor its implementation by States Parties.[50]

The CERD was the first body established by the United Nations to monitor and review the actions taken by States Parties in implementing the ICERD. Under the ICERD, States Parties must submit periodic reports to the CERD every four years, outlining the measures they have taken to combat racial discrimination. They must also provide brief updates every two years.[51]

According to the Office of the United Nations High Commissioner for Human Rights:

> The Convention establishes three procedures to make it possible for CERD to review the legal, judicial, administrative and other steps taken by individual States to fulfil their obligations to combat racial discrimination. The first is the requirement that all States which ratify or accede to the Convention must submit periodic reports to CERD. A second procedure in the Convention provides for State-to-State complaints. The third procedure makes it possible for an individual or a group of persons who claim to be victims of racial discrimination to lodge a complaint with CERD against their State. This may only be done if the State

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[48] McDougall.
[49] See Government of Canada, International Human Rights Treaties to which Canada is a Party, online: <https://www.justice.gc.ca/eng/abt-apd/icg-gci/ihrl-didp/tcp.html>.
[50] UN Committee on the Elimination of Racial Discrimination, online: United Nations Sustainable Development < https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=680&menu=3170>.
[51] United Nations, Fact Sheet No.12, The Committee on the Elimination of Racial Discrimination, online: <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet12en.pdf> at 2&4 [Fact Sheet No.12].

> concerned is a party to the Convention and has declared that it recognizes the competence of CERD to receive such complaints.[52]

Based on country reviews, the CERD issues an analysis along with a list of recommendations that are specific to each State Party. In addition, the CERD has to "give opinions and make recommendations on petitions to United Nations bodies from individuals and groups in United Nations Trust Territories and Non-Self-Governing Territories who allege racial discrimination."[53] The CERD also offers "its views and recommendations on reports provided by other United Nations bodies of legislative, judicial, administrative and other measures to combat racial discrimination in these Territories."[54]

Since its creation, the CERD has reviewed the Government of Canada's reports. Notably in 2007, after assessing Canada's efforts to eliminate racial discrimination, the CERD issued several recommendations, including:

- Canada consult Indigenous Peoples on a legislative solution to the discriminatory effects of the Indian Act against Indigenous women and children;
- Wherever possible, Canada engage in good faith negotiations based on recognition and reconciliation to settle Indigenous land claims; and,
- Canada engage in effective consultations with Indigenous communities to develop mechanisms to ensure application of the *Canadian Human Rights Act*.[55]

In 2017, the CERD raised concerns about Canada's failure to fully implement ICERD's provisions related to Indigenous rights. The CERD noted:

> Violations of the land rights of indigenous peoples continue in the State party; in particular, environmentally destructive decisions for resource development which affect their lives and territories continue to be undertaken without the free, prior and informed consent of the indigenous peoples, resulting in breaches of treaty obligations and international human rights law.[56]

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[52] Fact Sheet No.12 at 2-3.
[53] Fact Sheet No.12 at 3.
[54] Fact Sheet No.12 at 3.
[55] International (United Nations)-Defined Meaningful Consultation, online: Christian Aboriginal Infrastructure Developments < https://caid.ca/int_def_con.html>.
[56] Canada: International Law Obligations to Suspend Construction of Pipeline and Stop Use of Force Against Wet'suwet'en (17 March 2020), online: Lawyers' Rights Watch Canada < https://www.lrwc.org/canada-legal-brief-international-law-wetsuweten/> [Canada: International Law Obligations].

The CERD issued recommendations and requested that Canada provide, within one year, information on the implementation of these recommendations. Unfortunately, Canada did not meet this deadline.[57]

In 2019, the CERD again expressed concerns over the development of large-scale projects in Canada without obtaining the free, prior and informed consent of Indigenous communities. The CERD criticized Canada's "refusal to consider free, prior and informed consent as a requirement for any measure, such as large-scale development projects, that may cause irreparable harm to indigenous peoples' rights, culture, lands, territories and way of life."[58]

In 2020, the CERD called on the Government of Canada to "immediately suspend construction of the Trans Mountain Expansion, Coastal GasLink Pipeline and Site C Dam, until free, prior and informed consent" is obtained from all impacted Indigenous communities."[59] The CERD also recommended that Canada include the requirement for free, prior and informed consent requirement in its domestic legislation.

V- Organization of American States

The Organization of American States (OAS) was established in 1948 with the signing of the *Charter of the Organization of American States* (*OAS Charter*) in Bogotá, Colombia. The *OAS Charter* came into force in December 1951.[60]

[57] Canada: International Law Obligations.
[58] Canada: International Law Obligations.
[59] Canada: International Law Obligations.
[60] The Organization of American States, online: OAS < https://www.oas.org/en/about/who_we_are.asp>.

The OAS is the oldest regional organization in the world, built on four pillars: democracy, human rights, security and development.[61] Canada has been a member of the OAS since 1990 and is legally bound by the *OAS Charter.*[62]

The *OAS Charter* is divided into three parts:

> Part One describes the purposes and principles of the OAS as well as the rules and responsibilities of its member states, the mechanisms of peaceful dispute settlement between states, collective security and the key role social justice and development play in the achievement of peace and security. Part Two describes the organs of the OAS and their roles, including the General Assembly, the General Secretariat, the Inter-American Juridical Committee and the Inter-American Commission on Human Rights. Part Three describes the relationship of the Charter with the Charter of the United Nations and contains various miscellaneous provisions as well as the mechanisms of ratification and entry into force of the Charter.[63]

According to article 1 of the *OAS Charter*, the purpose of the OAS is to achieve among its member states "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."[64]

The *OAS Charter* created the Inter-American Human Rights System (IAHRS), which includes the Inter-American Commission on Human Rights (IACHR) as one of its principal organs. [65] The IACHR's mission is to monitor the human rights situation in the OAS Member States.[66]

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[61] Canada and the Organization of American States, online: Government of Canada < https://www.international.gc.ca/world-monde/international_relations-relations_internationales/oas-oea/index.aspx?lang=eng>.
[62] Inter-American Commission on Human Rights, online: < https://www.cidh.oas.org/basicos/english/basic22.charter%20oas.htm>.
[63] Charter of the Organization of American States, 30 April 1948, 119 UNTS 3 (entered into force 13 December 1951), online: < http://humanrightscommitments.ca/wp-content/uploads/2019/04/Charter-of-the-Organization-of-American-States.pdf> at 2.
[64] General Overview of the Organization of American States (OAS), online: UNC < https://guides.lib.unc.edu/internationallaw/oas>.
[65] Canada: International Law Obligations.
[66] Inter-American Commission on Human Rights, online: OAS

To protect equality rights, the IACHR determined that Indigenous peoples must participate in the "decision-making processes of political, social, cultural and economic institutions that affect them."[67] This participation must include the right to consultation, and "when applicable," the right to free, prior and informed consent.[68]

VI- Indigenous and Tribal Peoples Convention (ILO Convention No. 169)

In 1989, the International Labour Organisation (ILO) adopted the Indigenous and Tribal Peoples Convention (ILO Convention No. 169).[69] However, Canada is not a party to the ILO Convention No. 169.[70]

Article 3(1) of the ILO Convention No. 169 states:

> Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

The ILO Convention No. 169 sets out the requirement for Indigenous peoples to participate in decision-making measures that may affect their rights or interests. Under the Convention, consultation is considered a significant means of dialogue to reconcile conflicting interests.[71]

Article 6 states:

> 1. In applying the provisions of this Convention, governments shall:
> (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration

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< https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp>.
[67] Canada: International Law Obligations.
[68] Canada: International Law Obligations.
[69] Indigenous and Tribal Peoples Convention, ILO Convention No 169, 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991), online: International Labour Organization < https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169>.
[70] Up-to-date Conventions and Protocols not ratified by Canada, online: International Labour Organization < https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102582>.
[71] Indigenous & Tribal Peoples' Rights in Practice at 59&60.

is being given to legislative or administrative measures which may affect them directly;
(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7(1) adds:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

The basic principle of the ILO Convention No. 169 is that Indigenous peoples have rights to the natural resources on their lands, including the right to participate in the use, management, and protection of these resources.[72]

VII- Treaty Rights, Aboriginal Rights and Aboriginal Title

A- Treaty Rights

Treaty rights refer to Aboriginal rights that are established in formal agreements between the government (the Crown) and Indigenous groups. These treaties set out the rights and obligations of both parties and include both historic and modern treaties.

[72] Indigenous & Tribal Peoples' Rights in Practice at 107.

Treaty rights are collective, meaning they belong to the Indigenous group that signed the treaty and are exercised within the areas specified in the agreement. These rights can vary depending on the terms of the treaty but do not belong to individuals.[73]

i- Historic Treaties

Between 1871 and 1921, the Crown negotiated eleven Numbered Treaties covering a vast area extending from the Lake of the Woods in present-day Ontario and Manitoba, across the Prairies to the Rocky Mountains, and northward to the Beaufort Sea. These Treaties guarantee "reserve lands, annuities, and the continued right to hunt and fish on unoccupied Crown lands in exchange for Aboriginal title."[74]

In addition, these treaties included:

> clauses for schools or teachers to educate children, and agricultural implements were promised to assist Aboriginal signatories in their transition towards an agricultural lifestyle. Aboriginal signatories were encouraged to settle on reserve lands in sedentary communities, learn agriculture and receive an education.[75]

According to the Centre for Constitutional Studies:

> Beginning in the early 1700s, the British Crown, and later Canada, formed treaties with Indigenous peoples. Under these treaties, the government took control of large areas of land and, in exchange, promised to provide certain benefits. The promised benefits vary from treaty to treaty, but commonly include reserve lands, fixed yearly payments, and rights to hunt and fish. Many of the numbered treaties (Treaties 1-11 signed between 1871 and 1921) also include the provision of agricultural implements, livestock, ammunition, and clothing.[76]

The historic treaties did not cover all of Canada, leaving many regions without formal agreements between Indigenous groups and the Crown.

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[73] Blakes.
[74] The Numbered Treaties (1871-1921), online: Government of Canada < https://www.rcaanc-cirnac.gc.ca/eng/1360948213124/1544620003549> [The Numbered Treaties].
[75] The Numbered Treaties.
[76] Aboriginal Rights, Section 35, online: Centre for Constitutional Studies < https://www.constitutionalstudies.ca/the-constitution/aboriginal-rights/> [Aboriginal Rights].

ii- Modern Treaties

Modern treaties differ significantly from historical treaties. While historical treaties were often brief and open to interpretation, modern treaties are much longer, more detailed, and provide clearer terms. The primary focus of modern treaties is reconciliation, with the goal of fostering a positive and long-term relationship between Indigenous and non-Indigenous communities. [77]

Modern treaties can include provisions for "consultation and participation requirements, ownership of lands, wildlife harvesting rights, financial settlements, participation in land use and management in specific areas, and self-government."[78]

Since 1975, the Government of Canada has signed multiple modern treaties with Indigenous groups, recognizing their rights and providing new opportunities for self-governance. These treaties typically provide Indigenous groups with the following rights and benefits:

- Ownership of lands
- Self-government
- Consultation and participation requirements
- Wildlife harvesting rights
- Financial settlements
- Participation in land use and management
- Resource revenue sharing and measures to participate in the Canadian economy.[79]

[77] The Canadian Government's "Duty to Consult" Indigenous People: Meaning, History and Consequences (4 April 2019), online: University of Guelph < https://www.uoguelph.ca/fare/FARE-talk/transcripts/duty-to-consult.html#:~:text=Dwight%20Newman%3A%20In%20simple%20terms,the%20potentially%20affected%20Aboriginal%20communities> [University of Guelph].
[78] INAN - Section 35 of the *Constitution Act 1982* - Background - Jan 28, 2021, online: Government of Canada < https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/inan-jan-28-2021/inan-section-35-consitution-act-1982-background-jan-28-2021.html>.
[79] Blakes.

B- Aboriginal Rights

Aboriginal rights refer to the collective rights of different Indigenous groups, deriving from their original status in Canada. These rights are defined as "elements of customs, practices or traditions integral to an Indigenous community's culture prior to first contact with Europeans."[80]

According to Blakes:

> Aboriginal rights include a range of cultural, social, political, and economic rights, including Aboriginal title, the right to harvest a particular resource (such as fish, game, or trees in a particular location), and other cultural and societal rights. Canadian courts have also recognized Aboriginal rights in respect of customary adoption, customary marriage, and the right to use tobacco for spiritual, religious, ceremonial and healing purposes. Aboriginal rights vary from group to group depending on the customs, practices and traditions that have formed part of their distinctive cultures.[81]

In *Mitchell v MNR*, the Supreme Court of Canada confirmed that:

> […] European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights.[82]

One of the key Aboriginal rights is Aboriginal title.[83] However, Aboriginal rights are collective in nature and do not belong to one specific individual; they are held by all members of a particular Aboriginal group. Therefore, an Indigenous group can have Aboriginal rights in a certain area without necessarily holding Aboriginal title over that area.[84]

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[80] Aboriginal Rights.
[81] Blakes.
[82] *Mitchell v M.N.R.*, 2001 SCC 33, [2001] 1 SCR 911 at para 10.
[83] University of Guelph.
[84] Blakes.

C- Aboriginal Title

Aboriginal title is the right to "exclusive use and occupation of the lands to which it applies."[85] This right flows from Indigenous peoples' exclusive occupation and possession of land prior to the arrival of European settlers. Aboriginal title gives ownership rights similar to those given to privately owned lands, but it is held by the Indigenous community as a whole.[86]

According to Derek Inman et al.:

> Aboriginal title refers to the inherent Aboriginal right to a land or a territory, meaning that this right stems from Aboriginal peoples' longstanding use, and prior occupancy, of the land or territory in question. The Canadian legal system recognizes Aboriginal title as a right sui generis, or "as a unique collective right to the use of, and jurisdiction over, a group's ancestral territories."[87]

In addition, Aboriginal title holders have the right to exclude others from the lands they hold under Aboriginal title, as they have the exclusive right to decide how the land will be used. They can also benefit from the land's use, provided that such use does not harm the collective nature of the right.[88]

In *Delgamuukw v British Columbia*, the Supreme Court of Canada discussed the nature of Aboriginal title:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests. [89]

The Supreme Court further clarified that Aboriginal title is not merely a right to carry out specific activities, but a right to the land itself.[90]

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[85] Blakes.
[86] Blakes.
[87] Derek Inman et al., "We Will Remain Idle No More": The Shortcomings of Canada's 'Duty to Consult' Indigenous Peoples", online: Goettingen Journal of International Law 5 (2013) 1, 251-285 < https://www.gojil.eu/issues/51/51_article_inman_smis_cambou.pdf> at 258 [Derek Inman et al.].
[88] Blakes.
[89] *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para 115 [*Delgamuukw*].
[90] *Delgamuukw* at paras 137-141.

In *Tsilhqot'in Nation v British Columbia*, the Supreme Court stated:

> Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.
> Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it.
> […]
> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. [91]

Issues related to Aboriginal title often arise where treaties do not address land matters. For example, a significant portion of British Columbia remains subject to ongoing land claims, where there are neither historic nor modern treaties.[92]

VIII- Section 35 of the *Constitution Act* 1982

Both Aboriginal and treaty rights are constitutionally protected under section 35 of the *Constitution Act* 1982 which states:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
> (2) In this Act, aboriginal peoples of Canada includes the Indian, Inuit and Métis peoples of Canada.[93]

Section 35 recognizes and affirms Aboriginal rights, but it did not create them.[94] These rights are mainly based on the "continued occupation of lands by Aboriginal peoples since before

[91] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 at paras 73-74 &76 [*Tsilhqot'in Nation*].
[92] University of Guelph.
[93] *Constitution Act*, 1982.
[94] Constitution Act, 1982 Section 35, What is Section 35 of the Constitution Act?, online: IndigenousFoundations

European settlement." Aboriginal rights existed prior to section 35 but were not constitutionally protected, which allowed the Government of Canada to unilaterally extinguish or limit them.[95]

In the 2021 case of *R v Desautel*, the Supreme Court stated:

> […] the Aboriginal peoples of Canada under s[ection] 35(1) are the modern successors of those Aboriginal societies that occupied Canadian territory at the time of European contact. This may include Aboriginal groups that are now outside Canada.[96]

A- Existing Aboriginal and Treaty Rights

The meaning of the term "existing" was clarified in *R v Sparrow*:

> The word "existing" makes it clear that the rights to which s[ection] 35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect. This means that extinguished rights are not revived by the *Constitution Act, 1982*. […]
>
> Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982.[97]

According to the Centre for Constitutional Studies:

> The word "existing" means that section 35 only applies to Aboriginal and treaty rights that were not extinguished when the *Constitution Act, 1982* came into effect. Before section 35 recognized and affirmed Aboriginal and treaty rights, those rights could have been "extinguished" by either: (1) "surrender to the Crown"; or (2) "a clear and plain intention" by the Crown to extinguish that right through legislation or treaty. However, mere regulation of an Aboriginal right is *not* sufficient to extinguish that right. Now that section 35 provides constitutional protection to Aboriginal and treaty rights, the Crown may no longer

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< https://indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35/> [What is Section 35 of the Constitution Act?]

[95] Derek Inman et al. at 259.

[96] *R v Desautel*, 2021 SCC 17 at par 31 [*R v Desautel*].

[97] *R v Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075 [*Sparrow*].

> unilaterally extinguish them. But if a right was previously extinguished, neither section 35 nor any other provision of the *Constitution Act, 1982* can revive it.[98]

Section 35 protects Aboriginal and treaty rights that existed in 1982 or were recognized afterward. However, it does not define these rights.[99] As mentioned earlier, Aboriginal rights have been interpreted to include "a range of cultural, social, political, and economic rights including the right to land, as well as to fish, to hunt, to practice one's own culture, and to establish treaties."[100]

It is important to note that Part II of the *Constitution* starts with section 35, which falls outside of the *Charter of Rights and Freedoms* (the *Charter*). Therefore, section 35 is exempt from the "notwithstanding clause" that applies to the *Charter*, meaning the federal government cannot override Aboriginal rights.[101]

B- Recognized and Affirmed Rights

Aboriginal and treaty rights are not absolute under section 35. This section only recognizes and affirms them, meaning the Crown may be justified in interfering with these rights in certain circumstances.

In *R v Sparrow*, the Supreme Court explained:

> Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.
> […]
> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s[ection] 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s[ection] 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that

[98] Section 35 Aboriginal and Treaty Rights (9 September 2021), online: Centre for Constitutional Studies < https://www.constitutionalstudies.ca/2021/09/section-35-aboriginal-and-treaty-rights/>.
[99] Derek Inman et al. at 259.
[100] What is Section 35 of the Constitution Act?
[101] What is Section 35 of the Constitution Act?

> reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[102]

Hogg and Styler further clarified:

> The *Sparrow* ruling that section 35 was a constitutional guarantee led to another question. Because section 35 was outside the *Charter*, it was not subject to the section 1 qualification that rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Did that mean that no limits to Aboriginal or treaty rights could be enacted? The *Sparrow* Court answered no: like *Charter* rights, the section 35 rights were not absolute. The words "recognized and affirmed" impliedly authorized federal laws (later expanded to include provincial laws as well) that could be justified as reasonable limits on Aboriginal and treaty rights.[103]

However, justifying an infringement of an Aboriginal or treaty right is a high threshold to meet. As the Supreme Court stated in *Reference re Secession of* Quebec: "the protection of these rights … reflects an important underlying constitutional value." [104]

To protect Aboriginal and treaty rights, Canadian Courts developed the principle of the duty to consult and, where appropriate, accommodate Indigenous groups.

IX- Source of the Duty to Consult

When the Crown is considering a decision that is likely to impact Indigenous rights, it has a duty to consult and, where possible, accommodate Indigenous peoples.

Although, the duty to consult is not expressly mentioned in the *Constitution Act* or any other legislation, it is a constitutional requirement. The duty is grounded in the honour of the Crown and cannot be removed or restricted by legislation, as it is enshrined in section 35 of the *Constitution Act*.[105]

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[102] *Sparrow*.
[103] Hogg & Styler at 2.
[104] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at para 82.
[105] Isabelle Brideau, "The Duty to Consult Indigenous Peoples" (12 June 2019), online: Library of Parliament < https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201917E#txt7> [Brideau].

The honour of the Crown derives from the "Crown's assertion of sovereignty over Indigenous people" which requires that Aboriginal and treaty rights be determined, recognized and respected.[106] Therefore, the Crown has to participate honourably in the process of negotiation and must take Indigenous interests into consideration.

In addition, the duty to consult has developed through case law under section 35 of the *Constitution Act,* which provides special protection for Aboriginal and treaty rights.[107]

Below are several Supreme Court decisions which relate either to Aboriginal rights, Aboriginal title, or treaty rights.

A- *R v Sparrow*

The Crown's duty to consult with Indigenous peoples was first recognized by the Supreme Court in the 1990 decision, *R v Sparrow*.[108]

In this case, Ronald Sparrow was charged under section 61(1) of the *Fisheries Act* for fishing with a drift net longer than permitted under his Band's Indian fishing licence. While Sparrow admitted to the facts, he defended the charge on the grounds that he was exercising his existing Aboriginal right to fish. He further argued that the net length restriction contained in the Band's licence was inconsistent with section 35(1) of the *Constitution Act* and therefore invalid.

In *Sparrow*, the Supreme Court asserted that the origin of the Crown's duty to consult is related to the unique historical relationship between the Crown and Indigenous peoples.

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[106] Natai Shelsen, "Aboriginal law 101: What is the duty to consult?", online: Goldblatt Partners < https://goldblattpartners.com/unsolicited-blog/aboriginal-law-101-what-is-the-duty-to-consult/>.
[107] Christina Allard, "The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts', online: Arctic Review on Law and Politics Vol. 9, 2018, pp. 25–43 < https://www.diva-portal.org/smash/get/diva2:1192869/FULLTEXT01.pdf> at 13 [Allard].
[108] *Sparrow.*

B- *Haida Nation v British Columbia (Minister of Forests)*

In *Haida Nation v British Columbia (Minister of Forests)*[109] (as well in the *Taku River* and *Mikisew Cree* decisions, discussed below), the Supreme Court held that the Crown bears a duty to consult and, where appropriate, accommodate when it considers actions that may adversely impact potential or established Aboriginal or Treaty rights.[110]

In *Haida Nation*, the government of British Columbia replaced a "tree farm licence" and approved its transfer from one forestry corporation to another in an area of Haida Gwaii which was subject to a claim of Aboriginal title. However, the Crown failed to consult the Haida Nation before replacing and transferring the licence.

The Supreme Court found that the Haida Nation had a strong claim to title over Haida Gwaii, and that this claim was affected by the granting of the licence. The Supreme Court ruled that the Crown had breached its duties and concluded that the Crown was required to consult and accommodate the Haida Nation regarding the proposed licences.

The Supreme Court stated:

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.
>
> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.
>
> […] The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake.

[109] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511 [*Haida Nation*].
[110] Aboriginal Consultation and Accommodation.

> The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing".[111]

This process of reconciliation flows from the Crown's duty of honourable dealing toward Indigenous peoples. This duty, in turn, stems from the Crown's assertion of sovereignty over Indigenous peoples and its *de facto* control of land and resources that were formerly under the control of those people.[112]

C- *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*

In *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),*[113] the government of British Columbia approved a mining project that required the construction of an access road crossing the traditional territory of the Taku River Tlingit First Nation (TRTFN). The TRTFN sought to have the government's decision quashed, arguing that the mining project would unjustifiably infringe their Aboriginal rights and claim to title.

Before the project was approved, a three-and-a-half-year environmental assessment was conducted, during which the TRTFN participated. However, during the assessment process, the TRTFN opposed the proposed project recommendations and expressed dissatisfaction with the process.

The Supreme Court held that:

> The TRTFN was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement

[111] *Haida Nation* at paras 16-19.
[112] *Haida Nation* at para 32.
[113] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

> with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.[114]

D-*Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*

In *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*,[115] the federal government approved a plan to construct a road through a portion of the Mikisew Cree First Nation (MCFN) reserve land. The MCFN argued that the road would affect their traditional hunting and trapping rights and alleged that they had not been adequately consulted. They also claimed that the Crown had not made efforts to minimize the impact on their treaty rights.

The Supreme Court ruled that even when the Crown exercises its right to "take up" lands under the treaty, it must still act in accordance with its obligations rooted in the honour of the Crown.

The Supreme Court asserted:

> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.[116]

The Supreme Court decided that, in the case of a treaty, the Crown, as a party to the agreement, must always be aware of the duty to consult's contents.[117] The Crown must then assess the extent to which an Aboriginal right could be adversely affected and determine whether the duty to consult is triggered.[118]

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[114] *Taku River* at para 22.
[115] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*].
[116] *Mikisew Cree* at para 57.
[117] *Mikisew Cree* at para 34.
[118] *Mikisew Cree* at para 34.

E- *Little Salmon/Carmacks First Nation v Yukon (Minister of Energy, Mines and Resources)*

After 20 years of negotiation, the Little Salmon/Carmacks First Nation signed a land claim agreement in 1997 with the federal and the Yukon Territory governments. Under this "final agreement," the First Nation gained the right to access certain Crown lands for hunting and fishing purposes.[119]

In 2001, Mr. Paulsen, a non-Indigenous individual, applied for an agricultural land grant of sixty-five hectares of Yukon Crown land. In 2004, the Yukon Government approved the grant and transferred sixty-five hectares of this land to him.

However, this transferred land fell within the boundaries of a trapping concession[120] held by Mr. Sam, a member of the Little Salmon/Carmacks First Nation (and his father before him) since 1957. The concession gave Mr. Sam the right to trap commercially in the area.

The Little Salmon/Carmacks First Nation expressed concerns about Mr. Paulsen's application, fearing that it would threaten their Aboriginal rights and interests particularly in relation to trapping, trapline cabins and cultural sites.[121] Despite these concerns, Mr. Paulsen's application was approved.

The Little Salmon/Carmacks First Nation filed a petition demanding a declaration that the honour of the Crown required the Yukon government to consult with them and make reasonable efforts to accommodate their rights and interests that were adversely affected by Mr. Paulsen's land grant application.

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[119] *Little Salmon/Carmacks First Nation v Yukon (Minister of Energy, Mines and Resources)*, 2008 YKCA 13 [*Little Salmon/Carmacks*].
[120] "A Registered Trapping Concession (RTC) is a legal boundary of an area. The holder of a concession has the exclusive right to trap fur-bearing animals within it. Trapping mostly occurs along waterways", Government of Yukon, "Find Registered Trapping Concession map data" online: <https://yukon.ca/en/outdoor-recreation-and-wildlife/hunting-and-trapping/find-registered-trapping-concession-map-data>.
[121] *Little Salmon/Carmacks* at para 16.

The Yukon Supreme Court held that the duty to consult had been met.[122] The Court reasoned:

> Mr. Sam was aware of the Paulsen application. He specifically asked that Little Salmon/Carmacks act on his behalf in the LARC [Land Application Review Committee] process. It would be unreasonable in those circumstances to demand consultation with him. Further, the duty to consult, as an adjunct to the implementation of the Final Agreement, can only apply between the parties to the agreement – Yukon and the First Nation – and not to individual members of the First Nation.[123]

The Court concluded that "a constitutional duty to consult applies in the context of the Final Agreement. The duty to consult in this case was triggered but was at the lower end of the spectrum and was met."[124]

F- *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*

In *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, [125] the Supreme Court addressed the duty to consult as a constitutional requirement that arises from the honour of the Crown.

The case involved the construction of a dam and reservoir by the government of British Columbia in the 1950s, which impacted the flow of water into the Nechako River, an area claimed by the Carrier Sekani as their ancestral homeland. Despite their fishing rights in the Nechako River, the Carrier Sekani were not consulted about the dam project.

In 2007, the government of British Columbia sought approval from the British Columbia Utilities Commission (the Commission) for a new Energy Purchase Agreement (EPA) between Alcan and BC Hydro, selling excess power generated by the dam. The First Nations

[122] *Little Salmon/Carmacks* at para 115.
[123] *Little Salmon/Carmacks* at para 116.
[124] *Little Salmon/Carmacks* at para 117.
[125] *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto Alcan Inc.*].

argued that the new EPA should be subject to consultation under section 35 of the *Constitution Act*, asserting that it could adversely affect their rights.

The Commission acknowledged its power to assess the adequacy of consultation but argued that the 2007 EPA would not affect any Aboriginal right and thus did not require consultation.

Building on its decision in *Haida Nation*, the Supreme Court held that the duty to consult is triggered when "the Crown is informed of the potential existence of the Aboriginal right or title and considers actions that might adversely affect it."[126]

The Supreme Court held:

> The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right.
>
> Grounded in the honour of the Crown, the duty has both a legal and a constitutional character … The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests.[127]

G-*Tsilhqot'in Nation v British Columbia*

The Tsilhqot'in Nation is composed of six bands that share a common culture and history. For centuries, these bands lived, hunted and trapped in a remote valley in central British Columbia. Despite their long-standing connection to the land, the Tsilhqot'in Nation had unresolved land claims and no treaty.

[126] *Rio Tinto Alcan Inc.* citing *Haida Nation* at para 35.
[127] *Rio Tinto Alcan Inc. at paras 33-34.*

In 1983, the government of British Columbia issued a commercial logging licence for an area located within the traditional territory of the Tsilhqot'in Nation. The Tsilhqot'in Nation opposed the granting of the licence, asserting that the affected area was Aboriginal land over which they held title.

In its decision, the Supreme Court discussed the pre-existing Aboriginal sovereignty over a territory and stated that: "the Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown."[128]

The Supreme Court further explained:

> Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s[ection] 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.[129]

In these decisions, the Courts determined that the duty to consult emerges from the Honour, which arises from the Crown's special relationship with Indigenous peoples. The Courts clarified that this duty applies when the Crown makes decisions that may adversely impact the rights recognized and affirmed under section 35 of the *Constitution Act*, 1982. The Courts also highlighted the necessity for the Crown to act in good faith, taking into account the interests and rights of Indigenous peoples in a manner consistent with the Honour of the Crown.

X- Parties Involved in the Consultation Process

The consultation process involves several parties including the Crown, Indigenous peoples and Crown-Indigenous Relations and Northern Affairs Canada. Each of these parties

[128] *Tsilhqot'in Nation* at para 69.
[129] *Tsilhqot'in Nation* at para 80.

plays an important role in ensuring that Aboriginal and treaty rights are respected and that consultation processes are conducted properly.

A- The Crown

The duty to consult belongs to the Crown, meaning that it is the responsibility of the federal, provincial, and territorial governments to fulfill this duty. This obligation arises when a government makes decisions that may impact Aboriginal or treaty rights as recognized and affirmed under section 35 of the *Constitution Act*, 1982.

Nigel Bankes explains:

> It is the Crown contemplating "the conduct" that might adversely affect the Aboriginal right or title or treaty right that has the responsibility to discharge the duty to consult and accommodate. Within the Canadian federal system that Crown might be the Crown in right of Canada (i.e. the federal government), or the Crown in right of Province (i.e. a provincial government), or both with respect to some projects.[130]

In *Haida Nation*, the Supreme Court ruled that the duty to consult rests solely with the Crown, not private sector proponents. The honour of the Crown cannot be delegated:

> It is suggested […] that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, […], flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments […] However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.[131]

[130] Nigel Bankes, "The Duty to Consult in Canada Post-Haida Nation", Arctic Review on Law and Politics Vol. 11, 2020, pp. 256–279 at 262 [Bankes].
[131] *Haida Nation* at para 53.

This decision left unclear the role of quasi-governmental bodies, such as "agencies, boards, municipalities, universities, schools and hospitals, Crown corporations," in making decisions that could impact Aboriginal rights protected under section 35.[132]

Christina Allard notes:

> […], the duty to consult primarily belongs to governments, but can be delegated to third parties, normally in relation to an EIA [environmental impact assessment]. Nevertheless, ultimate responsibility for the duty rests on the Crown alone, although it is becoming more common for industry stakeholders and Aboriginal communities to engage in corporate consultation and in fact make it a non-optional practice.[133]

In *Rio Tinto Alcan Inc.*, the Supreme Court ruled that administrative tribunals can fulfill the Crown's duty to consult, as long as they have been expressly or impliedly authorized to engage in consultation and have been given the authority to do what they are asked to do in connection with the consultation.[134]

In *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, the Supreme Court held that regulatory agencies could perform the Crown's duty to consult, provided the agency has the necessary powers.[135] If an agency fails to provide adequate consultation, the Crown must take steps to ensure meaningful consultation and accommodation before any project approval.[136]

In *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, the Supreme Court confirmed that:

> […] while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to

[132] Lori Sterling and Peter Landmann, "The Duty to Consult Aboriginal Peoples – Government Approaches to Unresolved Issues", online: < https://docslib.org/doc/6459679/the-duty-to-consult-aboriginal-peoples-government-approaches-to-unresolved-issues> at 6.
[133] Allard at 14.
[134] *Rio Tinto Alcan Inc.* at para 59-60.
[135] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 SCR [*Chippewas of the Thames*].
[136] *Chippewas of the Thames* at para 32.

> consult has been satisfied or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments […]. Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is […] a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties are obliged to act diligently to advance their respective interests).
>
> Further, because the honour of the Crown requires a meaningful, good faith consultation process […], where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.[137]

The Crown can delegate some elements of the duty to an industry proponent. However, the duty to consult rests with the Crown, which is responsible for ensuring affected Indigenous groups are appropriately consulted regarding any decisions that may impact their rights.[138]

B- Indigenous Peoples

The consultation process must include all Indigenous peoples who may be impacted by a proposed government decision. It is the Crown's responsibility to determine which Indigenous groups are likely to be affected by its projects.

The duty to consult is owed to the community as a whole, not to individual members, since Aboriginal and treaty rights are collective rights. While Indigenous groups have the right to

[137] *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 SCR 1069 at paras 22-23 [*Clyde River*].
[138] Jeffrey Callaghan et al., "The Duty to Consult Indigenous Groups: 5 FAQs" (21 June 2021), online: McInnes Cooper < https://www.mcinnescooper.com/publications/the-duty-to-consult-indigenous-groups-5-faqs/> [Callaghan et al.].

designate individuals to represent them during consultations, individuals are generally not consulted separately.[139]

In the case of *Beckman v Little Salmon/Carmacks First Nation*, the Supreme Court decided that an individual member of the Little Salmon/Carmacks "was a derivative benefit based on the collective interest of the First Nation" but he "was not, as an individual, a necessary party to the consultation."[140]

However, in *Behn v Moulton Contracting Ltd.*, the Supreme Court recognized that some rights could have both collective and individual aspects. The Supreme Court stated:

> […] certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.[141]

In *Sipekne'katik v Alton Natural Gas Storage LP*, the Nova Scotia Supreme Court clarified that while the Crown carries the duty to consult with legitimate representatives of the Band, it is the Band's responsibility to pick those representatives.[142] Furthermore, the Band must communicate with its members regarding the content and results of the consultations.

Finally, it is important to note that the duty to consult can extend to Indigenous persons who are not Canadian citizens and who do not reside in Canada. The 2021 Supreme Court decision in *R v Desautel* confirmed that section 35 of the *Constitution Act,* 1982 protects the Aboriginal rights of Indigenous groups, even for those cross-border groups, so long as the rights of the group are tied to lands and territories in Canada.[143]

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[139] Callaghan et al.
[140] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 35.
[141] *Behn v Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 SCR 227 at para 33.
[142] *Sipekne'katik v Alton Natural Gas Storage LP*, 2020 NSSC 111.
[143] *R v Desautel*.

C- Crown-Indigenous relations and Northern Affairs Canada (CIRNAC)

Since 2008, Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), - formerly known as Indigenous and Northern Affairs Canada - has been providing guidelines, training, and tools to federal departments and agencies to support the Government of Canada in accomplishing its duty to consult Indigenous peoples.[144]

According to the Government of Canada:

> CIRNAC coordinates with federal departments and agencies to build, maintain and strengthen relationships with Indigenous peoples, provinces, territories, industry and the public. To support an effective and efficient whole-of-government approach to consultation and accommodation, CIRNAC is committed to developing relationships with Indigenous peoples. This approach ensures that Indigenous groups are appropriately consulted when the federal government considers action that may have an adverse effect on potential or established Aboriginal or treaty rights.[145]

In addition, CIRNAC assists in developing memoranda of understanding (MOUs) or informal agreements, between provincial or territorial governments and the Government of Canada. These MOUs help develop a better process for consultation which can include, among others:

- on-going information sharing
- strengthening a community of practice
- discussing key issues for collaboration.[146]

XI- When Does the Duty to Consult Apply?

The duty to consult is triggered when there is a government decision that could affect Aboriginal or treaty rights, and when the government has knowledge of the potential or

[144] Government of Canada and the Duty to Consult, online: Government of Canada < https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810> [Government of Canada and the Duty to Consult].
[145] Government of Canada and the Duty to Consult.
[146] Government of Canada and the Duty to Consult.

established existence of these rights.[147] The duty to consult applies to asserted Aboriginal rights, title and treaties and modern land claim agreements.[148]

Government actions that may trigger the duty to consult include: "the issuance of permits, licences and regulatory project approvals."[149] This duty may arise particularly in "the context of environmental assessments, regulatory processes and natural resources; examples include a decision regarding a pipeline that may affect Indigenous groups' access to and supply of an animal population, or a change in policy or regulation that restricts land use."[150]

In *Haida Nation,* the Supreme Court stated that "the duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it."[151]

Later, in *Rio Tinto Alcan*, the Supreme Court clarified the circumstances when the duty to consult is triggered, as set out in *Haida Nation*, setting out a three-element test: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[152]

In addition to the criteria outlined in *Haida Nation* and *Rio Tinto Alcan*, the Supreme Court in *Mikisew Cree* added:

> […] On the part of the Crown, the duty to consult serves two distinct objectives: first is a fact-finding function, as through consultation the Crown learns about the content of the interest or right, and how the proposed Crown conduct would impact that interest or right. The second objective is practical; the Crown must consider whether and how the Aboriginal interests should be accommodated. The Crown must approach the process with a view to reconciling interests. Where it is shown that the duty to consult has not been fulfilled, the decision in question will be quashed and, in effect, the decision maker will be told to "go back and do it again", this time with adequate consultation. Where consultation has been

[147] University of Guelph.
[148] Robert Irwin, "Duty to Consult" (28 September 2018), online: The Canadian Encyclopedia <https://www.thecanadianencyclopedia.ca/en/article/duty-to-consult> [Irwin].
[149] Brideau.
[150] Brideau.
[151] *Haida Nation* at para 35.
[152] *Rio Tinto Alcan* at para 31.

> adequate, but the duty to accommodate has not been fulfilled, various remedies can arise, both procedural and substantive.[153]

In *Chippewas of the Thames*, the Supreme Court affirmed that historical impacts do not trigger the duty to consult, and past grievances are not addressed under this duty. Instead, the duty to consult focuses on managing potential impacts arising from a current proposed project[154]

XII- What Kind of Consultation is Required?

The duty to consult must be fulfilled before any decision or action that could impact an Aboriginal or treaty right is made. While the specific timing depends on the circumstances of each case, consultation must occur before the potential impact arises and continues throughout the life of the project**.**

A- Level of Consultation

The level of consultation varies from case to case. It is determined by the proof of the existence of the Aboriginal right or title and the seriousness of the potential adverse impacts on the right or title claimed.[155]

In *Delgamuukw*, the Supreme Court explained:

> […] the nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.[156]

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[153] *Mikisew Cree* at para 156.
[154] *Chippewas of the Thames* at para 41.
[155] Blakes.
[156] *Delgamuukw* at para 168.

The duty to consult exists on a spectrum. According to the Supreme Court of Canada in *Haida Nation*, full consent from the Indigenous group is only required for serious issues.[157] Within this spectrum, the duty to consult varies from simple notification to meaningful consultation and accommodation.[158]

A straightforward consultation is required when the claim to an Aboriginal right or title is weak. In such cases, the Indigenous right is restricted, and the possibility for infringement is minimal. In these situations, the Crown's obligation may be satisfied simply by providing notice of the potential infringement. On the other hand, when a prima facie claim to the Aboriginal right or title is strong, the Crown may be required to engage in deep consultation, considering the significance of the right and the potential for infringement.[159]

In *Haida Nation*, the Supreme Court affirmed:

> […] the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect

[157] *Haida Nation* at para 24.
[158] Allard at 14-15.
[159] Blakes.

> reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.[160]

The Supreme Court has outlined what constitutes deep consultation. It emphasized that Indigenous rights-holders must be provided with adequate funding to participate meaningfully in the consultation process. This funding could support activities such as the submission of scientific evidence. Additionally, affected Indigenous groups must receive thorough and timely responses to their questions and concerns.[161]

In *Tsilhqot'in Nation v British Columbia*, the Supreme Court stated that "the duty to consult must be discharged prior to carrying out the action that could adversely affect the right."[162]

In *Clyde River,* the Supreme Court stated:

> Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process.[163]

Therefore, Crown decisions made without adequate consultation will be quashed by the court.

[160] *Haida Nation* at paras 43-45.
[161] Brideau.
[162] *Tsilhqot'in Nation* at para 78.
[163] *Clyde River* at para 24.

B- Reasonable and Meaningful Consultation

The Crown must conduct consultation in good faith to achieve meaningful engagement. However, there are no specific requirements regarding how the consultation process must take place.[164]

The Supreme Court in *Haida Nation* stated:

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised […], through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.[165]

Every consultation must be reasonable and meaningful to uphold the honour of the Crown. Both the Crown and Indigenous groups must work towards understanding and addressing each other's concerns to reconcile the Crown's sovereignty with Aboriginal and treaty rights protected under section 35 of the *Constitution Act*.[166]

In *Tsleil-Waututh Nation v Canada (Attorney General)*, the Federal Court of Appeal confirmed that when deep consultation is required, the Crown must go beyond merely listening to and addressing the concerns of Indigenous groups.[167] The Crown must take part in meaningful two-way dialogue with Indigenous groups.

In *Tsleil-Waututh Nation*, the Federal Court of Appeal asserted:

> […] meaningful consultation is not just a process of exchanging information. Meaningful consultation "entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback." Where

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[164] Callaghan et al.
[165] *Haida Nation* at para 42.
[166] Catherine Bell, "The Constitutional Duty to Consult with Indigenous People" (7 February 2020), online: < https://www.constitutionalstudies.ca/wp-content/uploads/2020/06/Duty-to-Consult-Presentation-Slides.pdf> at 17.
[167] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153, [2019] 2 FCR 3 [*Tsleil-Waututh Nation*].

> deep consultation is required, a dialogue must ensue that leads to a demonstrably serious consideration of accommodation.[168]

In *Coldwater First Nation v Canada (Attorney General)*, four Indigenous communities challenged the decision of the Governor in Council (GIC) to approve the Trans Mountain Pipeline Expansion Project (the Project) through a judicial review to the Federal Court of Appeal.[169] The challenge was based on environmental grounds, with the Indigenous groups alleging that the Crown failed to fulfill its duty to consult.

The Project involved the expansion of an existing pipeline running from Edmonton, Alberta, to Burnaby, British Columbia. The Federal Court held that the Crown must show that it has meaningfully considered and addressed the rights claimed by Indigenous groups.[170] The Federal Court of Appeal added that consultation must be meaningful and not simply a rubber-stamping exercise. [171]

XIII- Failure to Fulfill the Duty to Consult

According to the Supreme Court in *Sparrow,* Aboriginal rights that were not eliminated prior to the enactment of section 35 of the *Constitution Act* continue to exist. However, these rights are not absolute and may be infringed by the Crown under certain circumstances.

Any limitation on Aboriginal rights must be justified by the Crown. To do so, the Crown must show that its infringement "serves a compelling and substantial objective and that the limit is justifiable in light of the special trust relationship and responsibility of the government vis-à-vis Aboriginal people."[172]

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[168][168] *Tsleil-Waututh Nation* at para 501.
[169] *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34, [2020] 3 FCR 3 at para 40 [*Coldwater First Nation*].
[170] *Coldwater First Nation* at para 40.
[171] *Coldwater First Nation* at para 77.
[172] Jula Hughes and Roy Stewart, "Urban Aboriginal People and the Honour of the Crown – A Discussion Paper, online: University of New Brunswick Law Journal, Vol. 66, 2015
< https://www.canlii.org/en/commentary/doc/2015CanLIIDocs222#!fragment/zoupio-_Tocpdf_bk_71/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zhoBMAzZgI1TM

A- Infringement

An infringement of an Aboriginal or treaty right cannot be justified if the government fails to consult or accommodate the Aboriginal rights-holders.[173]

In *Sparrow*, the Supreme Court confirmed that "whether an Indigenous group has been consulted with respect to an implemented measure is one factor to consider in assessing if an infringement on an Aboriginal or treaty right is justified."

The Supreme Court further explained that when considering whether an infringement of Aboriginal or treaty rights could be justified, the following question should be addressed: "is there a valid legislative objective?"[174]

If a valid legislative objective is found, the analysis proceeds to the second part of the justification inquiry. The Supreme Court emphasized:

> […] the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.[175]

The case of *R v Badger* involved Treaty 8, which guarantees the right to hunt, and the implementation of Alberta legislation that prohibited hunting out-of-season or without a license.[176] The Supreme Court held that, like Aboriginal rights, treaty rights are not absolute and can be abridged by the Crown if the infringements satisfy the requirements set in *Sparrow*.

The Supreme Court added:

> […] there are also significant aspects of similarity between aboriginal and treaty rights. Although treaty rights are the result of mutual agreement, they, like

A7AEYAlABpk2UoQgBFRIVwBPaAHJ1EiITC4Ei5Ws3bd+kAGU8pAEJqASgFEAMo4BqAQQByAYUcTSMD5oUnYxMSA> at 266.

[173] Hogg & Styler at 10.

[174] *Sparrow.*

[175] *Sparrow.*

[176] *R v Badger,* 1996 CanLII 236 (SCC), [1996] 1 SCR 771 at para 74 [*Badger*].

> aboriginal rights, may be unilaterally abridged. […] It follows that limitations on treaty rights, like breaches of aboriginal rights, should be justified.[177]

In *Delgamuukw*, the Supreme Court asserted that "there is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified."[178]

In *Tsilhqot'in Nation*, the Supreme Court explained:

> […] to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest.[179]

However, even if the duty to consult does not apply to the parliamentary legislative process, the Supreme Court ruled that if legislation infringes an Aboriginal or treaty right, the legislation will be invalid unless the Crown can justify the infringement by meeting the requirements outlined in *Sparrow*.

In *Mikisew Cree,* the Supreme Court stated:

> All legislation that could potentially have an adverse effect on an Aboriginal right or claim would be presumptively unconstitutional unless adequate consultation had occurred. Practically, this would transform pre-legislative consultation from a factor in the *Sparrow* framework […], to a constitutional requirement. Such consultation would be not only with proven rights holders, but with anyone with an unproven Aboriginal interest that might be adversely impacted by contemplated legislation. [180]
>
> …
>
> […] It is settled jurisprudence that where a right is infringed and where that infringement has not been justified (to the requisite legal standard), then the courts will grant a substantive remedy to prevent the infringement or (if that is not possible) to mitigate its consequences for those whose s[ection] 35 rights were infringed. In the case of infringing legislation, provisions found not to be justified will be a nullity and will not authorize any regulatory action.[181]

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[177] *Badger* at para 77.
[178] *Delgamuukw* at para 168.
[179] *Tsilhqot'in Nation* at para 125.
[180] *Mikisew Cree* at para 152.
[181] *Mikisew Cree* at para 154.

B- Remedies for Breach

A judicial declaration can serve as a remedy for a breach if the Crown fails to fulfill its duty to consult. The Indigenous community may seek a declaration that any decision made without consultation is void. However, this does not necessarily halt the project but provides a chance to address issues resulting from the failure.[182]

Court-ordered remedies for failing to consult vary depending on the situation. These may include injunctions, damages, or orders requiring the Crown to honor its consultative obligations. The court can also mandate that the Crown engage in consultations with specific Indigenous groups, establishing clear requirements for the process.[183]

In *Rio Tinto Alcan Inc.*, the Supreme Court noted:

> The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct.[184]

In *Tsilhqot'in Nation*, the Supreme Court confirmed that "if the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out."[185]

Furthermore, to avoid being found in breach of the duty to consult, the Crown should seek consent from Indigenous groups both before and after claims are established.

In *Tsilhqot'in Nation*, the Supreme Court emphasized that:

> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title

[182] Bankes at 263.
[183] Brideau.
[184] *Rio Tinto Alcan Inc.* at para 37.
[185] *Tsilhqot'in Nation* at para 89.

> holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s[ection] 35 of the *Constitution Act, 1982*.[186]
>
> Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.[187]

Consultation is vital to protecting Indigenous rights and resources. Failure to consult meaningfully can delay or even cancel projects.[188]

XIV- Consent and Veto

The duty to consult does not provide Indigenous groups with a veto power over proposed new projects, even though in some situations, the consultation process may seem to have a similar effect. The primary purpose of the duty to consult is to ensure meaningful engagement, not to guarantee a particular outcome.[189]

In *Ktunaxa Nation v British Columbia*, the Supreme Court clarified that the duty to consult is a right to a process, not a right to a particular outcome. The Supreme Court added that the Crown can meet its obligation to consult and accommodate without providing the specific accommodation sought by the affected Indigenous group.[190]

However, the absence of a veto power does not mean the Crown can proceed with a decision regardless of Indigenous opposition. The Crown still has to accommodate the concerns of the Indigenous group, even when consent is not required. In addition, consent may be required when there is an established Aboriginal right, and the Crown's decision will have a significant impact on that group.

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[186] *Tsilhqot'in Nation* at para 76.
[187] *Tsilhqot'in Nation* at para 97.
[188] Irwin.
[189] *Haida Nation* at para 48.
[190] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386 at paras 79&114 [*Ktunaxa Nation*].

The Supreme Court has confirmed that in certain cases, Indigenous consent may be required, such as when provincial fishing and hunting regulations impact traditional lands or when the Crown seeks to use land where Aboriginal title has been established. If consent is not granted, the Crown's only recourse is to justify the infringement under section 35 of the *Constitution Act*.

In *Tsilhqot'in Nation*, the Supreme Court stated:

> […] if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.[191]

Under current jurisprudence, Indigenous groups have the right to be consulted and accommodated when appropriate. However, their claims are limited by the fact that consultation does not grant them a veto power over Crown decisions.

In January 2023, a rare agreement was reached between a coal company and a First Nation in British Columbia, granting the Indigenous community the power to veto a proposed mining project. Typically, natural resource companies must consult Indigenous peoples on significant development projects, but this agreement could have wider implications for how resource projects are developed in Canada.[192]

What makes this agreement unique is that it allows the First Nation to act as a "regulator and reviewer" of the proposed $400-million Crown Mountain coal mine. This deal effectively gives the Indigenous community veto power, enabling them to fully reject the proposal.[193]

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[191] *Tsilhqot'in Nation* at para 92.
[192] Kyle Bakx, "First Nation Can Veto Proposed B.C. Coal Mine as Part of Unique Deal with Developer" (18 January 2023), online: CBC News < https://www.cbc.ca/news/canada/calgary/bakx-first-nation-coal-veto-developer-1.6717396> [Bakx].
[193] Bakx.

XV- The Duty to Accommodate

Consultation may involve accommodating the concerns of Indigenous groups affected by Crown actions. Accommodation can modify a development project's extent, location, or timing. It can also include adjustments to Crown policy proposals, for example, implementing short-term solutions during the consultation process can avoid permanent harm or reduce the effect of infringement.[194] Additionally, according to the Supreme Court, the rights of Indigenous groups must be balanced with other societal interests when it comes to the duty to accommodate.[195]

Like the duty to consult, the duty to accommodate is based on the honour of the Crown and cannot be delegated.[196]

In *Ktunaxa Nation*, the Supreme Court stated that "many accommodations had been made with respect Ktunaxa spiritual concerns," including the removal of a proposed chair lift to protect the grizzly bear population and limiting development to the upper half of the valley, "as well as extensive environment reserves and monitoring."[197]

In certain situations, the duty to consult may require the Crown to go beyond consultation and accommodation. However, recent court decisions have confirmed that the duty to consult and accommodate ensures a right to a process, not to a particular outcome.[198]

Under current jurisprudence, Indigenous peoples have the right to be consulted and accommodated where appropriate. However, the jurisprudence is clear that consultation is not a veto power, and the federal government can infringe upon Aboriginal title when necessary.

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[194] *Haida Nation* at para 47.
[195] *Haida Nation* at paras 47&50 and *Chippewas of the Thames* at para 59.
[196] *Haida Nation* at paras 10&53.
[197] *Ktunaxa Nation* at para 112.
[198] See *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215 and *Ktunaxa Nation*.

XVI- Free, Prior and Informed Consent

The right to self-determination is affirmed in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR)[199] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[200] which states: "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

As mentioned previously, UNDRIP affirms the right to self-determination and the principle of Free, Prior, and Informed Consent (FPIC). Indigenous peoples have the right to self-determination, which includes control over traditional lands and resources. Therefore, Indigenous peoples should have the right to object or grant consent for development projects on their lands, particularly those that may affect their resources.[201]

A- Principles

The concept of FPIC was not explicitly mentioned by the Supreme Court in *Haida Nation*. It was not until 2014 that Canadian courts began referencing this concept. Since the adoption of UNDRIP in 2007, FPIC has gained recognition both internationally and in Canada.[202]

Tara Ward stated:

> […] the concept of FPIC is contained within its phrasing: it is the right of indigenous peoples to make free and informed choices about the development of their lands and resources. The basic principles of FPIC are to ensure that indigenous peoples are not coerced or intimidated, that their consent is sought and

[199] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) online: United Nations < https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.
[200] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976), online: United Nations <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.
[201] Ward at 55.
[202] Bankes at 257.

> freely given prior to the authorisation or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected.[203]

In 2017, the Government of Canada established ten Principles respecting the Government of Canada's relationship with Indigenous peoples (Principles). [204] These Principles were adopted to renew the Crown-Indigenous relationship.

According to the Government of Canada:

> These Principles are based on the recognition of Indigenous peoples, governments, laws, and rights, including the right to self-determination and the inherent right of self-government and form the foundation for shifting Canada's approach to partnering with Indigenous peoples and governments.[205]

Principle 6 clearly addresses the concept of FPIC. It states:

> 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.[206]

According to this Principle, the Crown-Indigenous relationship should go beyond the duty to consult on Aboriginal rights, lands, and territories. If the government intends to take an action that may adversely impact Indigenous communities, then the duty to consult may be triggered.[207]

The Government of Canada stated:

> The importance of free, prior, and informed consent, as identified in the UNDRIP, extends beyond title lands. To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that

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[203] Ward at 54.
[204] Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, online: Government of Canada < https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html> [Principles].
[205] Principles.
[206] Principles.
[207] Loïc Welch, "Omni May Not Include All: Case Comment on Mikisew Cree First Nation v. Canada (Governor General in Council), 2018 SCC" (12 March 2019), online: McGill Journal of Law and Health <https://mjlh.mcgill.ca/2019/03/12/omni-may-not-include-all-case-comment-on-mikisew-cree-first-nation-v-canada-governor-general-in-council-2018-scc/>.

> Indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.[208]

Principle 7 emphasizes that:

> The Government of Canada recognizes that respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.[209]

This Principle stresses the importance of working in partnership to recognize Aboriginal rights. Any infringement of Aboriginal or treaty rights must be justified according to the highest standards set by Canadian courts.

B- Implementation of These Principles

In January 2020, the CERD criticized three major projects in Canada on the grounds of FPIC. These projects included the Site-C hydroelectric project in northeastern British Columbia, the Coastal GasLink pipeline connecting British Columbia gas fields to the projected LNG plant in Kitimat, and the TMX oil-pipeline expansion from Alberta to Vancouver.[210]

The CERD called for the discontinuation of these projects, stating that the affected First Nations had not given their "free, prior, and informed consent" to the proponents. The Site-C hydroelectric project was approved by the courts, while Coastal GasLink had signed agreements, with the approval of the province, with the elected governments of all 20 First Nations.[211]

The CERD condemned Canada for failing to comply with international human rights law, declaring that "Canada is misinterpreting free, prior and informed consent by focusing on a process, but not a particular result."[212]

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[208] Principles.
[209] Principles
[210] Flanagan at 12.
[211] Flanagan at 12.
[212] Sarah Cox, "UN Committee Rebukes Canada for Failing to Get Indigenous Peoples' Consent for Industrial Projects" (15 January 2021), online: The Narwhal < https://thenarwhal.ca/un-rebukes-canada-industrial-projects/>.

In April 2023, several First Nations planned to take the Ontario and Canadian governments to court, arguing that they did not agree to the Crown's authority to "take up" lands in Treaty 9 territory without their consent.[213]

The First Nations claimed:

> They never agreed to cede, release, surrender or yield up their jurisdiction to govern and care for the lands, as it says in the written treaty, which was first entered into in 1905. They never consented to the Crown taking exclusive jurisdiction over the land. The Crown's taking and forced imposition of exclusive jurisdiction disabled any ability of the plaintiffs to give or withhold free, prior and informed consent.[214]

The First Nations are seeking $95 billion in damages and are requesting injunctions to prevent both the federal and provincial governments from regulating or enforcing regulations on Treaty 9 lands without their consent.[215]

XVII- Duty to Consult with Indigenous Peoples in Alberta

Alberta seeks to reconcile First Nations' protected rights with other common societal concerns and is committed to addressing adverse impacts on Treaty rights and traditional uses through a meaningful consultation process.[216]

A- Initiatives

According to the Government of Alberta:

> Alberta's management and development of provincial Crown lands and natural resources is subject to its legal and constitutional duty to consult First Nations

[213] Annette Francis, "'We never surrendered our rights': Treaty 9 Nations launching $95B lawsuit against Canada, Ontario" (27 April 2023), online: APTN News < https://www.aptnnews.ca/national-news/we-never-surrendered-our-rights-treaty-9-nations-launching-95b-claim-lawsuit-against-canada-ontario/>.
[214] Logan Turner, "Can the Crown Make Land Decisions Without First Nations Consent? Treaty 9 Lawsuit Argues No" (26 April 2023), online: CBC News < https://www.cbc.ca/news/canada/thunder-bay/treaty-nine-lawsuit-1.6822266> [Turner].
[215] Turner.
[216] Kurt Borzel and Rob Buck, "Indigenous Consultation in Alberta" (19 April 2022), online: Canadian Institute Forestry < https://www.cif-ifc.org/wp-content/uploads/2022/05/KurtBorzelRobBuck-20220419-Indigenous-Consultation-in-Alberta-CIF-Presentation-April-2022.pdf> at 4.

> and, where appropriate, accommodate their interests when Crown decisions may adversely impact their continued exercise of constitutionally protected Treaty rights and traditional uses.
>
> … Consultation is a process intended to understand and consider the potential adverse impacts of anticipated Crown decision on First Nations and Metis settlements, with a view to substantially address them.[217]

In 2013, Alberta released its *Policy on Consultation with First Nations on Land and Natural Resource Management* (Policy) which established the Aboriginal Consultation Office (ACO). [218] The ACO was set up in the same year, and both the Policy and the ACO aim to centralize and standardize consultation process to benefit all involved parties, including government, industry, and First Nations. [219]

The ACO plays a vital role in implementing the Policy by managing all aspects of First Nations consultation, including policy development, pre-consultation assessment, management and execution of the consultation process, assessment of consultation adequacy and consultation capacity-building initiatives with First Nations.[220]

The Government of Alberta stated that "the ACO directs, monitors, and supports the consultation activities of Government of Alberta departments such as Environment and Protected Areas (EPA) and Forestry, Parks and Tourism (FPT)."[221] Furthermore, to guarantee that consultations are well managed, the ACO signed a joint operating procedure with the Alberta

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[217] Indigenous Consultations in Alberta, online: Alberta Government < https://www.alberta.ca/indigenous-consultations-in-alberta.aspx#:~:text=Alberta's%20management%20and%20development%20of,of%20constitutionally%20protected%20Treaty%20rights>.
[218] The Government of Alberta's policy on consultation with First Nations on land and natural resource management, 2013, online: Alberta Government < https://open.alberta.ca/publications/6713979>.
[219] Roy Millen and Katie Slipp, "Centralizing The Duty To Consult: Alberta's New Aboriginal Consultation Office" (21 November 2013), online: mondaq <https://www.mondaq.com/canada/indigenous-peoples/276040/centralizing-the-duty-to-consult-alberta39s-new-aboriginal-consultation-office> [Millen and Slipp].
[220] Millen and Slipp.
[221] Proponent-led Indigenous Consultations, online: Alberta Government < https://www.alberta.ca/proponent-led-indigenous-consultations.aspx>.

Energy Regulator, a procedure that provides a matrix to find out when and to what extent consultation is required.[222]

In addition to the 2013 Policy, the Government of Alberta has developed the following guidelines, policies and procedures:

- Guidelines on Consultation with First Nations on Land and Natural Resource Management 2014;[223]
- Policy on Consultation with Metis Settlements on Land and Natural Resource Management 2015;[224]
- Guidelines on Consultation with Metis Settlements on Land and Natural Resource Management 2016;[225] and
- the Government of Alberta's Proponent Guide to First Nations and Métis Settlements consultation procedures 2019.[226]

Before developing these policies and guidelines, Alberta addressed various cases, including the well-known case of the Lubicon Lake Band.

B- Lubicon Lake Band

Through the *Indian Act* of 1876 and Treaty 8 of 1899, (which relate to Aboriginal land rights in northern Alberta), the Government of Canada allowed the Indigenous community of that area to pursue their traditional way of life. But despite that, the Canadian government allowed the government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests, such as leases for oil and gas exploration.[227]

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[222] Alberta Energy Regulator, Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (31 October 2018), online: Alberta Energy Regulator < https://static.aer.ca/prd/documents/actregs/JointOperatingProcedures.pdf> at 8-15.
[223] The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management, online: Alberta Government < https://open.alberta.ca/publications/3775118-2014>.
[224] The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015, online: Alberta Government < https://open.alberta.ca/publications/policy-on-consultation-with-metis-settlements-2015>.
[225] The Government of Alberta's Guidelines on Consultation with Metis Settlements on Land and Natural Resource Management 2016, online: Alberta Government < https://open.alberta.ca/publications/guidelines-on-consultation-with-metis-settlements-2016>.
[226] The Government of Alberta's Proponent Guide to First Nations and Métis Settlements Consultation Procedures [2019], online: Alberta Government < https://open.alberta.ca/publications/goa-proponent-guide-to-first-nations-and-metis-settlements-consultation-procedures-2019>.
[227] *Lubicon Lake Band v Canada*, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), online: Human Rights Library, University of Minnesota

In doing so, the Government of Canada was accused of violating the Lubicon Lake Band's right to self-determination and, consequently, the right to "determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources" as outlined in article 1 of the International Covenant on Civil and Political Rights.[228]

In the 1980s, multiple attempts were made to negotiate with the federal and provincial governments regarding the Lubicon Lake Band's land rights, but all efforts failed. The Band's representatives also filed several lawsuits seeking recognition of their rights to their land, its use, and the benefits of its natural resources, as well as to stop the development in the area. However, all these legal actions were dismissed.[229]

In 1987, after exhausting all legal options within the Canadian court system, the United Nations Human Rights Committee (UNHRC) agreed to study the case. The UNHRC examined whether the Lubicon's rights under the International Covenant on Civil and Political Rights were being violated.[230]

In 1990, the UNHRC concluded that "historical inequities and more recent developments have endangered the way of life and the culture of the Lubicon Cree." The Committee determined that "so long as they continue," these threats are a violation of the Lubicon Lake people's fundamental human rights.[231]

In 2018, after decades of negotiations, an agreement was reached to settle the Lubicon Lake Band land claim.

< http://hrlibrary.umn.edu/undocs/session45/167-1984.htm> [*Lubicon Lake Band*].
[228] *Lubicon Lake Band.*
[229] *Lubicon Lake Band.*
[230] Canada "Time is Wasting": Respect for the Land Rights of the Lubicon Cree Long Overdue, online: Amnesty < https://www.amnesty.org/en/wp-content/uploads/2021/06/amr200012003en.pdf> at 4-5 [Time is Wasting].
[231] Time is Wasting at 2.

The Government of Canada announced:

> The Lubicon Lake Band, the Government of Alberta, and the Government of Canada signed the treaty benefits and land claim agreements after members of the community voted overwhelmingly in favour of the settlement.
> The agreement includes a land allocation of more than 95 square miles for the Lubicon Lake Band, as well as $95 million in financial compensation from Canada. In addition, Alberta is providing $18 million. The agreement will also include infrastructure such as roads, housing, utility services, internet and a school.
>
> This historic agreement will address a decades-long land claim and will contribute to improving the quality of life for members of the Lubicon Lake Band.
> The settlement was approved by Lubicon Lake Band members in a community vote that took place between September 14 and October 15, 2018. This is a historic occasion for the members of the Lubicon Lake Band, for Alberta and for all of Canada.
>
> With this settlement, the Lubicon Lake Band will finally receive the lands and treaty benefits to which they are entitled under Treaty 8.[232]

Many Indigenous peoples in Canada, including the Lubicon Cree in Alberta, and most Indigenous peoples in British Columbia, Quebec and the eastern provinces, have never signed treaties with the Crown. They have also never renounced their inherent Aboriginal land and resource rights. Despite this, the Crown has unilaterally taken their lands and resources without consent.[233]

It is important to note that since the Lubicon case was filed in the Canadian courts, there has been considerable progress regarding the duty to consult. As shown above, this duty can be triggered whenever there is knowledge of the potential existence of an Aboriginal right or title.

[232] Lubicon Lake Band, Alberta and Canada Celebrate Historic Land Claim Settlement, online: Government of Canada < https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2018/10/lubicon-lake-band-alberta-and-canada-celebrate-historic-land-claim-settlement.html>.
[233] Time is Wasting at 6.

C- John Malcolm

Between 1975 and 1981, the New Town of Fort McMurray, along with Northward Developments Ltd. (Syncrude-owned), evicted the families of Moccasin Flats to build the River Park Glen housing complex. These evictions devastated the Moccasin Flats families, severing their connections to the land and disrupting their cultural and socio-economic resources. [234]

In 2018, in protest over the removal of the Moccasin Flats Families, John Malcolm - who had grown up in Moccasin Flats - built and lived in a teepee on the site. Declaring his deep connection to the land, he stated, "this is my land. This is where I am from."[235] Malcom's family had received no compensation for their removal, as his grandmother lost her Indian status after marrying a white man. He demanded an apology, compensation, and treaty status for the Moccasin Flats families.[236]

In September 2018, the Government of Alberta addressed the issue in a letter, stating: "Alberta does not currently require consultation with any of the groups stated to be represented by John Malcolm under Alberta's First Nations consultation policies."[237]

The duty to consult cannot be applied retroactively under Canadian law; it pertains only to present actions, not past ones. As mentioned earlier, in *Chippewas of the Thames*, the Supreme Court stated: "The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances."[238]

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[234] Hereward Longley et al., "The Moccasin Flats Evictions: Métis Home, Forced Relocation, and Resilience in Fort McMurray, Alberta (8 February 2019), online: University of Alberta < https://www.ualberta.ca/native-studies/media-library/rcmr/scrip-conference/powerpoint-presentations/jolymf2018-keynote-presentation-rcmrpdf--updated.pdf> at 2.
[235] David Thurton, "Teepee-Raising Protests Forced Removal of Indigenous Families in Fort McMurray" (21 June 2018), online: CBC News < https://www.cbc.ca/news/canada/edmonton/moccasin-flats-fort-mcmurray-indigenous-1.4713292> [Thurton].
[236] Thurton.
[237] Teck Frontier- the A CO's Scope of Participation in the Hearing (19 September 2018), online: Alberta Government < https://aeic-iaac.gc.ca/050/documents/p65505/125363E.pdf>.
[238] *Chippewas of the Thames* at para 41.

XVIII- Duty to Consult with Indigenous Peoples in British Columbia

In 2019, British Columbia became the first Canadian jurisdiction to incorporate the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) into law with the enactment of the *Declaration on the Rights of Indigenous Peoples Act* (the *Act*).

A- *Declaration on the Rights of Indigenous Peoples Act*

Section 3 of the *Declaration on the Rights of Indigenous Peoples Act* (*Act*) states:

> In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

The *Act* establishes an action plan to implement the provisions of UNDRIP and build stronger relationships with Indigenous communities. This action plan requires the government to submit an annual report "prepared in consultation and cooperation with the Indigenous [p]eoples in British Columbia."[239]

In 2021, Murray Rankin, Minister of Indigenous Relations and Reconciliation, released a statement, saying:

> Currently, we are finalizing an action plan under the [Declaration on the Rights of Indigenous Peoples Act], in consultation and cooperation with Indigenous Peoples in B.C.," he wrote. "The final action plan will provide a province-wide, whole-of-government roadmap over the next five years to advance reconciliation and implement the [United Nations] declaration in B.C.[240]

[239] Frances Rosner, "BC Leads Canada on the Implementation of the United Nations Declaration of the Rights of Indigenous", online: The Canadian Bar Association < https://www.cbabc.org/BarTalk/Articles/2019/December/Columns/BC-Leads-Canada-on-the-Implementation-of-the-Unite>.

[240] Matt Simmons, "two Years After B.C. Passed its Landmark Indigenous Rights Act, Has Anything Changed?" (13 December 2021), online: The Narwhal < https://thenarwhal.ca/bc-undrip-two-years/> [Simmons].

In March 2022, the Province, in consultation with Indigenous peoples, released the historic Declaration Act Action Plan.[241] Additionally, British Columbia amended its *Human Rights Code* to include Indigenous identity as a protected ground against discrimination.[242]

However, two years after the *Act*'s enactment, the province had made little substantive progress. Despite the *Act* requiring the government to "take all measures necessary" to align BC laws with UNDRIP, by that time, only one clause of one BC statute had been amended.[243]

The lack of substantial progress disappointed Merle Alexander, a lawyer at Miller Titerle Law and a hereditary chief of Kitasoo Xai'xais First Nation. He remarked, "I don't think that First Nations expected things to dramatically change overnight, but it's also taken two years to create one clause in one BC statute." [244]

However, it is worth nothing that since 2021, some progress has been made in implementing the *Act*. The 2023 and 2024 Declaration Act Annual Reports highlight ongoing efforts, with work expanding from 34 to 60 of 89 planned actions.[245] Key advancements include reforms in land rights, Indigenous-led education initiatives, child and family services reforms, and economic partnerships. However, challenges remain, and the reports emphasize the need for sustained commitment to fully align BC's laws with UNDRIP.

The full impact of the *Act* on the duty to consult with Indigenous peoples in British Columbia is yet to be seen.

[241] Indigenous Peoples and B.C. Lead the Way Forward Together (28 November 2022), online: British Columbia Government < https://www.govtmonitor.com/page.php?type=document&id=4631849>.
[242] *Human Rights Code*, RSBC 1996, c 210 at sections 8-11&13.
[243] Simmons.
[244] Simmons.
[245] Government of British Columbia, Annual Report (2024), online: < https://declaration.gov.bc.ca/annual-report/>.

B- ***Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.***

In *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, the Supreme Court of British Columbia considered the implications of Canada and British Columbia's UNDRIP legislation in its analysis. However, the Court's ruling did not rely on UNDRIP.

The Court acknowledged that in November 2019, British Columbia became the first jurisdiction in Canada to pass legislation affirming the application of UNDRIP, and in 2021, the federal government followed suit with its own UNDRIP legislation.[246]

The Court noted:

> UNDRIP states in plain English that Indigenous peoples such as the plaintiff First Nations in this case have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories.[247]

The defendants - Canada, the Province of British Columbia, and Rio Tinto Alcan Inc. - argued that "the recent UNDRIP legislation has no immediate impact on existing law and is simply 'a forward-looking' statement of intent that contemplates an 'action plan' yet to be prepared and implemented by either level of government.[248]

The Court questioned whether the UNDRIP legislation would substantively affect the common law regarding Aboriginal rights and Aboriginal title. Justice Kent noted that "even if it [UNDRIP legislation] is simply a statement of future intent, … it is one that supports a robust interpretation of Aboriginal rights."[249]

[246] *Thomas and Saik'uz* at paras 205-206.
[247] *Thomas and Saik'uz* at para 208.
[248] *Thomas and Saik'uz* at para 211.
[249] *Thomas and Saik'uz* at para 212.

However, Justice Kent added: "I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case and I will leave it to that Court to determine what effect, if any, UNDRIP legislation has on the common law."[250]

[250] *Thomas and Saik'uz* at para 212.

XIX- Recommendations

The Alberta Civil Liberties Research Centre offers the following recommendations:

1. Business companies can engage directly with Indigenous Peoples, but the constitutional obligation to consult and accommodate stays exclusively with the Crown. For federal matters, this duty lies with the federal Crown, and for provincial jurisdictional issues, the duty is owed by the province.

2. Consultations must be conducted in a matter that respects and upholds Indigenous peoples' right to self-determination.

3. The federal government must develop, publicly release, and implement an action plan, in collaboration with Indigenous peoples, to achieve the objectives of UNDRIP.

4. British Columbia has taken the lead in legislating UNDRIP, and all provinces should follow suit.

5. Provinces should incorporate UNDRIP principles into their laws, following British Columbia's approach.

6. Provincial governments, like the federal government and the government of British Columbia, must fully adopt and implement UNDRIP by developing action plans and strategies to achieve this goal.

7. Federal and provincial governments should involve the business community in planning the implementation of UNDRIP.

8. Federal and provincial governments should align their UNDRIP implementation strategies to prevent conflicts and inconsistencies.

9. Federal and provincial governments should establish clear guidelines on:
   (a) The role of the Crown and Indigenous groups;
   (b) The consultation process and obtaining the consent of Indigenous peoples;
   (c) The situations in which the duty to consult is triggered and how to fulfill that duty; and
   (d) Identifying the appropriate Indigenous group to consult and defining the nature and content of consultation.

10. Federal and provincial governments must establish procedures for handling conflicts where Indigenous consent is withheld and provide justification for any infringement deemed to be in the public interest.

11. Federal and provincial governments should build strong relationships with Indigenous communities based on respect, trust, and collaboration.

12. Indigenous groups should clearly identify their authorized representatives for consultation and negotiation processes.

13. Federal and provincial governments must obtain the free, prior and informed consent of Indigenous peoples before taking any action that may impact their rights, lands, territories, and resources.

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