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Cover Page Footnote

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CHANGE BY DRIPS AND DRABS OR NO CHANGE AT ALL: THE COMING UNDRIP BATTLES IN CANADIAN COURTS

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Abstract

The enactment of the United Nations Declaration on the Rights of Indigenous Persons (**"UNDRIP"**) into Canadian law has long been a goal for Indigenous groups in Canada. Its enactment has been entailed as potentially game changing. Commentators have argued that the incorporation of UNDRIP into Canadian law will produce a wholesale transformation of Canadian law, including providing a veto to Indigenous groups to development on their traditional lands and eliminating the doctrine of discovery. In this paper, I consider various arguments that have been advanced as to how UNDRIP may require changes to Canadian law. I argue, conversely, that Canada's decision to unequivocally endorse UNDRIP is likely to have profoundly limited consequences for the Canadian legal order, particularly if it is not enacted in the legislation of all provinces. I focus on three particular issues: 1. The mechanism of incorporation of UNDRIP and what specific legislative mechanisms will be used to incorporate UNDRIP into Canadian law; 2. The impact of incorporation or lack thereof of UNDRIP into provincial law; and 3. The role of international law, including soft-law instruments, in the interpretation of the constitution or of legislation in Canada. After considering all three areas of law, I argue that in all three cases, the effects of UNDRIP are likely to be minimal, at least in the short term.

I. INTRODUCTION

The United Nations Declaration on the Rights of Indigenous Persons (**"UNDRIP"**) has been hailed as potentially game-changing for Indigenous rights in Canada.[2] Indigenous groups have long argued for UNDRIP's enactment into Canadian law. The Truth and Reconciliation Commission of Canada, in its final report, stated that UNDRIP provides "the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada."[3]

Implicit in those preceding comments is the view that the recent decision of the Canadian federal government to embrace UNDRIP will modify the Canadian legal order in a significant way. Some commentators have further argued that UNDRIP will require the Canadian Supreme Court to reject its distinction between pre-and post-Confederation Indigenous rights,[4] or, even more radically, that accepting UNDRIP requires abandoning all Crown claims to land that resulted from the doctrine of discovery, treaties, or the assertion of Crown sovereignty.[5] Per this view, fully

[2] Indigenous is capitalized following contemporary usage in Canada.

[3] ASSEMBLY OF FIRST NATIONS, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, https://www.afn.ca/policy-sectors/implementing-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-2/... [perma.cc].

[4] John Borrows, *Revitalizing Canada's Indigenous Constitution: Two Challenges*, UNDRIP IMPLEMENTATION: BRAIDING INTERNATIONAL, DOMESTIC AND INDIGENOUS LAWS (Centre for International Governance Innovation),),20, 2222 (2017))). https://www.cigionline.org/static/documents/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf. [perma.cc]]

[5] Gordon Christie, *Implementation of UNDRIP within Canadian and Indigenous Law Assessing Challenges*, MORE REFLECTIONS ON THE BRAIDING OF INTERNATIONAL, DOMESTIC AND INDIGENOUS LAWS (Waterloo: Imprint Centre

integrating UNDRIP into the Canadian legal order would require a wholesale transformation of the Canadian constitution and the basis of Crown title.[6]

Concerns about potential modifications as a result of the legislative incorporation of UNDRIP have been expressed by some constitutional law scholars and former judges, who have argued that UNDRIP may have unintended or unpredictable consequences within the Canadian legal order.[7]

In this paper, I consider various arguments that have been advanced as to how UNDRIP may require changes to Canadian law. I argue, however, that Canada's decision to endorse UNDRIP unequivocally is likely to have profoundly limited consequences for the Canadian legal order, particularly if it is not enacted in the legislation of all provinces. I focus on three particular issues: 1. The mechanism of incorporation of UNDRIP and what specific legislative mechanisms will be used to incorporate UNDRIP into Canadian law. 2. The impact of incorporation or lack thereof of UNDRIP into provincial law. 3. The role of international law, including soft-law instruments, in the interpretation of the constitution or of legislation in Canada. I argue that in all three cases, the effects of UNDRIP are likely to be minimal, at least in the short term.[8]

II. THE HISTORY AND CONTENT OF UNDRIP

Efforts to protect the rights of Indigenous persons, including the right of self-determination, began in earnest at least as early as the 1970s.[9] By the 1980s, Indigenous groups' push for the

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for International Governance Innovation),), 25, 29 (2019). https://www.cigionline.org/sites/default/files/documents/UNDRIP%20II%20Special%20Report%20lowres.pdf. [perma.cc].

[6] This view may well be incompatible with the savings clause contained in UNDRIP itself. Article 46(1) provides that: "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States" (emphasis added).

[7] Dwight Newman and John C. Major, "Implementing UNDRIP is vital. But Bill C-262 is flawed, and the Senate cannot rush its work," *The Globe and Mail*, June 9, 2019; Dwight Newman & Ken Coates, "Bill on implementing UNDRIP 'simplistic and laden with circular tension'," *The Hill Times* (14 December 2017), online: <www.hilltimes.com/2017/12/14/bill-implementing-undrip-simplistic-laden-circular-tensions/128903>; Thomas Isaac & Arend JA Hoekstra, "Implementing UNDRIP in Canada: Challenges with Bill C-262," online: Cassels Brock Lawyers <www.casselsbrock.com/CBNewsletter/Implementing_UNDRIP_in_Canada__Challenges_with_Bill_C_262>; Harry Swain & Jim Baillie, "The Trudeau Government Signs on to Give Aboriginals Veto Rights Nobody Else Has." Financial Post (26 January 2018), online: <http://business.financialpost.com/opinion/the-trudeau-government-signs-on-to-giveaboriginals-veto-rights-nobody-else-has>; Dwight Newman, "Written Brief to House of Commons Standing Committee on Indigenous and Northern Affairs re Bill C-262", online: <www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR9762671/br-external/NewmanDwight-e.pdf<; Dwight Newman's oral presentation to the House of Commons Standing Committee on Indigenous and Northern Affairs, online: <www.ourcommons.ca/DocumentViewer/en/42-1/INAN/meeting-101/evidence>.

[8] There is one group of plaintiffs who frequently cite UNDRIP and whose cases make up a significant portion of reported decisions. Part of the sovereign citizen movement, they argue that Canadian law does not apply for a number of different reasons – mostly because they allege that they are not Canadian citizens but are instead descendants of non-recognized Indigenous groups. Courts have uniformly rejected these arguments (*See, Guibord v. Nat'L Bank of Can.*, 2022 ONSC 1801 (CanLII; *Woodley v. Cipolla*, 2022 ONSC 7096 (CanLII)).

[9] S. JAMES ANAYA, INDIGENOUS PERSONS IN INTERNATIONAL LAW, 86 (Oxford University Press 1986).

recognition of a right to culture in international law and for the need to create an international legal instrument protecting Indigenous group rights had received greater acceptance.[10] In 1982, the United Nations Economic and Social Council (**"ECOSOC"**), one of the six principal organs of the United Nations, established the Working Group on Indigenous Populations. Then-Special Rapporteur José Martínez Cobo submitted a report in 1983 to ECOSOC on the conditions of Indigenous persons in member states of the United Nations.[11] The Cobo Report—as it became known—called for significant legal and political reforms to protect the rights of Indigenous persons, including the rights of Indigenous communities to retain their traditional lands.[12]

After more than two decades of discussion, UNDRIP was formally adopted by the United Nations General Assembly on September 13, 2007: with 143 states voting in favour, 4 states voting against, and 11 states abstaining. As written, it covers a wide range of matters, including but not limited to self-determination and self-government, education, health, environmental protection, language, culture, economic development (including intellectual property rights), and control over traditional lands and resources.

Commentators have described UNDRIP as providing the necessary recognition that Indigenous groups cannot be "integrated into the engulfing society against their will" and are ill-served by the modern system of liberal rights.[13] Per the view of many involved in the drafting of UNDRIP, as well as commentators, a human rights system with uniform standards applicable to individuals rather than groups is incompatible with the needs of Indigenous groups, most notably those Indigenous groups whose survival is most at stake.[14]

The four countries who voted against UNDRIP: Australia, Canada, New Zealand, and the United States of America, generally accepted the need for such a declaration but disagreed with the specific wording of certain articles or the process under which UNDRIP was adopted. Ultimately, each of the dissenting states would reverse its position and endorse UNDRIP in full.[15]

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[10] KAREN ENGLE, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 141, 142 (2011).

[11] José Martínez Cobo, *Study of the Problem of* United *Discrimination Against Indigenous Populations*, United Nations Subcommission on Prevention of Discrimination and Protection of Minorities (1983), https://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf. [perma.cc].].

[12] José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations. Volume 5, Conclusions, Proposals and Recommendations*, UNITED NATIONS SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES (1986), https://digitallibrary.un.org/record/133666?ln=en. [perma.cc].

[13] Mattias Ahrén, The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Persons: An Introduction, in Claire Charters and Rodolfo Stavenhagen, eds, *Making the Declaration Work*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS 200, 201 (2009), https://www.iwgia.org/images/publications/making_the_declaration_work.pdf. [perma.cc].

[14] Certainly, this is the view of some practitioners. *See, e.g.*,Olthuis, Kleer, Townshend, *Aboriginal Law Handbook*, 221 (Lorraine Land & Matt McPherson eds., Toronto, Ontario, THOMPSON REUTERS: CARSWELL 5th ed. 2018) (2012).

[15] S JAMES ANAYA & LUIS RODRÍGUEZ-PIÑERO, PART I THE UNDRIP'S RELATIONSHIP TO EXISTING INTERNATIONAL LAW, CH.2 THE MAKING OF THE UNDRIP (Jessie Hohmann & Marc Weller eds., *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* OXFORD: OUP, 2018), citing to: For Australia, *see* J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" (3 April 2009). For Canada, see Ministry of Aboriginal Affairs and Northern

The exact status of UNDRIP at international law is unclear. As a General Assembly Resolution, it is not a treaty. However, some commentators have argued that given UNDRIP's "character and background … the Declaration … [should carry] significant normative weight" and that it "can be seen as embodying to some extent general principles of international law."[16] Alternatively, insofar as it reflects the practice of states, it is at least arguable that "some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law."[17]

Broadly, UNDRIP contains aspirational rights for self-determination and self-government.[18] Article 3 provides a general right for self-government, stating that: "Indigenous peoples have the right to self-determination. By virtue of that right, Indigenous people can freely determine their political status and pursue their economic, social, and cultural development."[19] To facilitate that autonomy, Article 4 directs governments to provide effective means to exercise Indigenous rights: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[20] Article 5 provides that the right to self-government includes the right for each group to establish its own political and legal system of governance: "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[21] Where national legislative measures will specifically impact Indigenous groups, Article 19 creates specifical procedural obligations, including 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."[22]

Development, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010). For New Zealand, see P Sharples, Minister of Māori Affairs, "Opening Statement," UN Permanent Forum on Indigenous Issues, Ninth Session (19 April 2010); "Ministerial Statements—UN Declaration on the Rights of Indigenous Peoples—Government Support," (20 April 2010) 662 NZPD 10229. For the United States, see State Department, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples," (9 December 2010). See also United Nations, "UN Expert Welcomes United States' Endorsement of the Declaration on the Rights of Indigenous Peoples," Press Release (17 December 2010).

[16] *Id.* at 62.

[17] *Id.*; *See also* Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 215 (2014), citing to U.S. Department of State, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples," online: http://www.state.gov /documents/organization/184099.pdf.. [perma.cc]. Second International Decade of the World's Indigenous People Note by the Secretary-General, A/64/338, para. 48.

[18] *See* comments of Rapporteur Anaya, *infra*.

[19] *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res 61/295, Art. 3 (Oct. 2, 2007) [hereinafter UNDRIP].

[20] *Id*. at Art. 4.

[21] *Id*. at Art. 5.

[22] *Id*. at Art. 19.

UNDRIP additionally provides protections for Indigenous lands, and creates processes for the recovery of lands that have been lost and for consultation where states' activities may potentially affect them. In particular, Article 26(1) provides that: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[23] With respect to specific developments on Indigenous territory, Article 32 provides:

> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.[24]

Where the rights of Indigenous persons are violated, UNDRIP provides that Indigenous groups shall be given access to an effective remedy through one of two mechanisms: access to courts, or other processes designed to adjudicate disputes. Article 8(2) provides that: "States shall provide effective mechanisms for prevention of, and redress for" state action which has deprived Indigenous communities of their cultural identity, resources, lands or which effected forced transfer or assimilation.[25] Alternatively, Article 27 provides that states shall create a mechanism for the restoration of Indigenous rights:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open, and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[26]
>
> Such procedures shall provide a meaningful opportunity for redress:
>
> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.[27]

[23] *Id*. at Art. 26(1).
[24] *Id*. at Art. 32.
[25] *Id*. at Art. 8(2).
[26] *Id*. at Art. 27.
[27] *Id*. at Art. 29.

In so far as UNDRIP is not a treaty, however, the specific mechanisms of enforcement will depend on how it is enacted in the national laws of each state.[28] The mode of incorporation will ultimately determine the impact of UNDRIP.

III. THE MECHANISM OF INCORPORATION

Much of the effect of UNDRIP will depend on how it is incorporated into domestic law. International law is not automatically part of the Canadian legal order.

At least in principle, Canada is a dualist legal system like the United Kingdom.[29] Customary international law, as part of the law of nations, forms part of the legal system of both countries without legislative adoption.[30] Conversely, treaties, which may be entered into by the executive, must be enacted by parliament before they become part of the law of Canada.[31]

Although Canada initially declined to sign UNDRIP, the new Liberal government—elected in 2015—announced at a meeting at the United Nations on May 10, 2016, that it was a "full supporter, without qualification" of UNDRIP, and committed "to adopt and implement" UNDRIP in accordance with the Canadian constitutional framework.[32]

United Nations declarations are generally non-binding as a matter of international law and do not form a part of domestic law. As a result, to date, Canadian courts have largely embraced the view that UNDRIP is an "aspirational" document,[33] imposing obligations of progressive realization of states.[34] This view appears consistent with UNDRIP's last preamble, which states

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[28] In any event, even if it were a treaty, the four original hold-out states have dualist legal systems, requiring specific legislation to give force to international law.

[29] As traditionally understood, dualism states that international law is not uniformly and automatically part of the domestic legal system. GIB VAN ERT, *Dubious Dualism: The Reception of International Law in Canada*,, 44 VAL. U. L. REV. 927 (2010) (suggesting also that the claim of dualism is overstated).

[30] *Nevsun Resources Ltd. v. Araya*, [2020] S.C.C. 5, para. 87; Campbell McLachlan, Foreign Relations Law, Cambridge: CUP, 2014, 3.14; *See also*, Blackstone 1783, IV, 67; Triquet v. Bath (1764) 3 Burr 1478, 1481, 97 ER 936.

[31] Campbell McLachlan, *Foreign Relations Law*, CAMBRIDGE: CUP ed 3.11 (2014) noting that treaties have no function within the legal system by themselves. As Lord Atkin stated, "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law" (Attorney General for Canada v. Attorney General for Ontario [1937] AC 326, 347, (1937) 8 ILR 41 (PC).). This rule is subject to the restriction that such treaties must not infringe on the powers of the provinces absent their consent

[32] Government of Canada, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada," https://www.justice.gc.ca/eng/declaration/index.html. [perma.cc].

[33] *Snuneymuxw First Nation v Sch. Dist. No. 68*, [2014] BCSC 1173, para. 59 [*Snuneymuxw*]; *Hupacasath First Nation v Can. (Minister of Foreign Affairs)*, [2013] F.C. 900, para. 51 [*Hupacasath*]; *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, [2022] BCSC 15 (CanLII), the court declined to give effect to UNDRIP, writing at para 212 ("It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, 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").

[34] OLIVIER DE SCHUTTER, *International Human Rights Law Cases, Materials, Commentary: The progressive realization of human rights and the obligation to fulfil* 461461461-512 (CAMBRIDGE: CUP 3rd ed.. 2010).

that the General Assembly: "Solemnly proclaims the following [Declaration] as a standard of achievement to be pursued in a spirit of partnership and mutual respect."[35]

Although some commentators have suggested that UNDRIP is customary international law, to date Canadian courts have rejected that view.[36] As a result, it does not appear to impose international legal obligations on the Canadian government nor create causes of action or impose sanctions for breach.[37]

Nevertheless, although declarations are not considered binding at international law, they can be enacted into domestic law and produce domestic legal effects *qua* municipal law. This has been the approach taken by the Canadian federal government in other instances. Legislation implementing UNDRIP, the *United Nations Declaration on the Rights of Indigenous People Act* (**"*UNDRIP Act*"**), was proclaimed on June 21, 2021.[38] That legislation's preamble states that: "[t]he Declaration is affirmed as a source for the interpretation of Canadian law."[39]

Moreover, the *UNDRIP Act* requires the federal government to ensure that the laws of Canada are consistent with UNDRIP: The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.[40]

In order to ensure consistency, the process of implementation will require the relevant Minister to develop a plan to reform Canadian laws to give effect to UNDRIP.[41] Presumably after drafting the plan, Parliament will amend Canadian laws.

Additionally, as UNDRIP was drafted in largely aspirational language, it leaves courts a minimal role in ensuring compliance. For instance, it could have been drafted in a manner to give courts the power to review other legislation to ensure compliance, to create rules for legislative interpretation, or even to declare legislation inoperative. The use of legislation to alter the interpretation of statutes has a history in Canada dating back to before the *Constitution Act, 1982*, which brought into force the *Canadian Charter of Rights and Freedoms*. Uncontroversially, for instance, the *Interpretation Act* provides specific instructions to courts on how to interpret federal legislation, including by providing specific rules of statutory construction.[42] The *UNDRIP Act* could have been written so as to require courts to rely on the Act when interpreting the meaning of federal law.

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[35] UNDRIP, *supra* note 19, Preamble.
[36] *Snuneymuxw*, [2014] BCSC, para. 59; *Hupacasath*, [2013] F.C., para. 51; *Nevsun Resources Ltd v Araya*, 2020 S.C.C., para. 80 ("customary international law would require a showing of the consistent practice of states abiding by a rule as if it were legally binding").
[37] *Snuneymuxw*, [2014] BCSC, para. 59; *Hupacasath*, [2013] F.C., para. 51; *Sackaney v Canada*, [2013] T.C.C. 303 [*Sackaney*]; *TA v. Alberta (Children's Services)*, 2020 ABQB 97 at para. 79; *Simon v Canada*, 2013 FC 1117 at para. 121, *reversed on other grounds*, 2015 FCA 18; *Watson v Canada*, 2020 FC 129 (CanLII) at para. 351 [*Watson*].
[38] As of this writing, no court decision has yet interpreted the meaning of the provisions of the *UNDRIP Act*.
[39] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.
[40] UNDRIP, *supra* note 19, s.5.
[41] *Id*. at s.6(1) ("The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration"). The *Act* allows the government to designate the minister who will lead consultation under s.6(1).
[42] *Interpretation Act*, RSC 1985, c I-21 (Can.).

As an example of an approach that could have been adopted, in the realm of human rights, the federal government introduced the *Canadian Bill of Rights* in 1960 as a quasi-constitutional provision to create protections for human rights within the scope of parliament's legislative authority and to control the interpretation of federal legislation.[43] Although the *Canadian Bill of Rights* has been largely superseded by rights provisions contained in the *Constitution Act, 1982*, it remains in effect. The *Canadian Bill of Rights* instructs courts to interpret laws as rights compliant as far as possible:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared…[44]

In its decisions, the Supreme Court of Canada (**"SCC"**) has gone further than the plain text of the statute and interpreted the wording of the *Canadian Bill of Rights* to require courts to make a finding of inoperability where an act, passed within the sphere of federal legislative authority and not containing an opt-out, could not reasonably be construed as rights compliant.[45]

Had the *UNDRIP Act* contained specific operational language requiring the specific construction of statutes, it could have compelled courts to construct federal laws or, possibly, the constitution, in a manner that favours Indigenous groups and their rights under UNDRIP. As it stands now, however, no such construction is required, and an act that does not comply with UNDRIP remains in force, subject only to the normal rules of constitutional review and legislative interpretation.

IV. FEDERALISM AND THE AUTHORITY TO LEGISLATE OF ABORIGINAL INTERESTS

Answering any question about the incorporation of international law in Canada requires an additional determination of whether the Federal government is constitutionally permitted to enact the relevant implementing legislation (or, alternatively, about the scope of such legislation).[46] As a baseline rule, the federal government can only enact implementing legislation concerning matters falling within its core competencies.[47]

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[43] *Canadian Bill of Rights*, SC 1960, c 44 (Can.).
[44] *Id.*, at s.2.
[45] *The Queen v. Drybones*, 1969 CanLII 1 (SCC), [1970] SCR 282 at 294 (Richie, J, wrote that if a law cannot be "sensibly construed and applied" without infringing the right, it must be declared inoperative); affirmed, e.g., in *R. v Kapp*, 2008 SCC 41 (CanLII), [2008] 2 SCR 483 at 88; *Hak c Procureur général du Québec*, 2021 QCCS 1466 (CanLII) at para 827; *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5 (CanLII) at para 122. *But see, Attorney General of Canada v. Lavell*, 1973 CanLII 175 (SCC), [1974] SCR 1349, 1390 (finding that the Bill of Rights did not affect legislation governing Indigenous persons and tribal membership).
[46] *Canada (AG) v. Ontario (AG)*, [1937] UKPC 6, [1937] A.C. 326 (generally known as the *Labour Convention Reference*).
[47] The actual scope of federal power is subject to a complicated constitutional analysis beyond the scope of this paper. *See, e.g., Gen. Motors of Can. Ltd. v. City Nat'l Leasing*, [1989] 1 S.C.R. 641.

The *Constitution Act, 1867* divides legislative competencies between the Federal and provincial governments. The *Constitution Act, 1867* provides that the Federal government shall have jurisdiction over Aboriginal persons. Section 91 states that:

> …it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated [including]… (24) Indians, and Lands reserved for the Indians.[48]

As a result, only the Federal government is empowered to legislate over Aboriginal lands and make laws concerning Aboriginal rights.

In limited circumstances, provincial legislation may be enacted and be found constitutional even if that legislation affects aboriginal persons or interests as defined by s. 91(24).[49] However, this ability has been severely curtailed by the courts. Under Canada's division of competencies, the constitution has been interpreted to mean that provinces may not legislate concerning the so-called "core of Indianness."[50]

Conversely, the Federal government has limited ability to legislate over lands and resources, even if they are subject to land claims unless they have already been set aside for reserves or subject to aboriginal title. Instead, authority over lands and resources generally falls within the provincial sphere of authority.[51]

Thus, the domestic effect of UNDRIP may depend in significant part on the extent to which provinces incorporate UNDRIP into their own laws. The *UNDRIP Act* specifically recognizes the constitutional role of other levels of government, stating that: "the Government of Canada acknowledges that provincial, territorial, and municipal governments each have the ability to

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[48] *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3.

[49] The *Indian Act* does provide a carve-out for laws of general application: *Indian Act*, RSC 1985, c I-5, s 88 ("Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the First Nations Fiscal Management Act, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts").

[50] *Dick v. La Reine*, 1985 CanLII 80 (SCC), [1985] 2 SCR 309. While initially the phrase "core of Indianness" might have referred to any regulation of reserves or Indigenous lands, or the rights of Indigenous persons under the federal Indian Act, its scope has been greatly reduced by the subsequent decisions of the Canadian courts, which have greatly limited the core of aboriginal rights over which provinces may not legislate in areas as diverse as child welfare, labor rights, etc. *See, e.g.*, KERRY WILKINS, *Life Among the Ruins: Section 91(24) After Tsilhqot'in and Grassy Narrows* (2017) 55:1 ALTA. L. REV. 91.

[51] *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, s 92(5) ("The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon"); s 92(13) ("Property and Civil Rights in the Province"); s 92a ("92A (1) In each province, the legislature may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy"). There is a narrow exception for federally owned property (*Constitution Act, 1867*, ss. 91(1A), 108).

establish their own approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority…"[52]

To date, only British Columbia has enacted legislation purporting to incorporate UNDRIP into provincial law through the *Declaration on the Rights of Indigenous Peoples Act* (**"*DRIPA*"**).[53] Similar to the federal statute, *DRIPA* provides merely that: "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."[54]

As a result of *DRIPA*, British Columbia has commenced the process of reforming its legal framework. In 2021, Attorney General David Eby introduced Bill 18, which makes Indigenous identity a protected ground under the British Columbia Human Rights Code (which it likely already was under other provisions in the act). Bill 29[55], which amends the *Interpretation Act* so that provincial laws are constructed to uphold, and not diminish, the rights of Indigenous people protected under s.35.[56] Nevertheless, tribunals have consistently rejected the view that *DRIPA* was designed to change the interpretation of provincial statutes or create substantial rights for Indigenous persons.[57]

V. INTERNATIONAL LAW AS INTERPRETATIVE GUIDE

Finally, in many common law countries, including Canada, international law can play a limited, hermeneutic role. When Parliament legislates, there is a presumption that when courts are called upon to interpret that legislation, it is assumed to have legislated in conformity with customary

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[52] *UNDRIP Act*, *supra* note 19, Preamble.

[53] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44; Manitoba has enacted the Path to Reconciliation Act, CCSM c R30.5, but that act has been described as merely aspirational and imposing no obligations on government with respect to UNDRIP *(Manitoba Metis Federation Inc. v The Government of Manitoba et al.*, 2018 MBQB 131 (CanLII) at para 87). That Act itself only references UNDRIP in the preamble ("AND AFFIRMING that the Government of Manitoba is committed to reconciliation and will be guided by the calls to action of the Truth and Reconciliation Commission and the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples").

British Columbia has one of the largest per capita Indigenous populations in Canada and, more importantly, has a number of outstanding land claims based on claims that the land was never properly ceded to the government.

[54] *Id*. at s 3.

[55] *Province Introduces Legislation to Uphold Indigenous Rights*, BC GOV NEWS (November 21, 2021), https://news.gov.bc.ca/releases/2021AG0073-002191. [perma.cc].

[56] Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35; Shari Narine, "New BC bills welcomed, but UNDRIP implementation moving at a snail's pace," The Toronto Star, November 19, 2021, online: <https://www.thestar.com/news/canada/2021/11/19/new-bc-bills-welcomed-but-undrip-implementation-moving-at-a-snails-pace.html>. [perma.cc].

[57] *British Columbia (Health) (Re)*, 2020 BCIPC 66 (CanLII); *Yahey v. British Columbia (Attorney General)*, 2021 BCCA 127 (CanLII); *Royal British Columbia Museum, BC Archives (Re)*, 2021 BCIPC 38 (CanLII) at para. 38 (declining to interpret the *Freedom of Information and Protection of Privacy Act* as requested by an Indigenous group, but merely noting that change might be required to bring the relevant act into conformity with UNDRIP).

Most recently, the BCSC found that it was bound by Supreme Court precedent and declined to give effect to UNDRIP. *See, e.g., Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15.

international law.[58] Even if a specific instrument is not customary international law, courts may, in limited circumstances, turn to international law (including soft-law or non-binding instruments) when interpreting domestic law.[59] Even though much of the language in UNDRIP is hortatory, Canadian courts may find that Canadian constitutional law provides heightened protections for aboriginal rights, similar to those contained in UNDRIP.

The SCC has recently had to grapple with how much courts may rely on non-binding international law instruments. The law in the area remains unsettled, and in two recent cases, a schism has emerged between different factions of the SCC. In *Nevsun*, decided in early 2020, Eritrean conscripts brought suit in British Columbia against Nevsun Resources, a Canadian mining consortium, alleging that Nevsun had committed, *inter alia*, the tort of slavery under customary international law, for which it could be held liable in Canada.[60] Nevsun brought a motion to strike, alleging that the claim disclosed no reasonable cause of action.[61] By a five-four vote, the SCC declined to strike the claim and instead allowed the case to proceed to trial in British Columbia.[62] Justice Abella, writing for the majority and the liberal wing of the court, found that it was not plain and obvious that the action was doomed to fail.[63]

In obiter, Justice Abella wrote that national courts, including Canadian courts, should play a role in generally developing customary international law. In particular, the decisions of Canadian courts were evidence of international law.[64] In her view, not only should international law inform

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[58] A different view is that customary international law is incorporated into the common law and thus the presumption is of consistency with the common law. With respect to the United Kingdom: Sir William Blackstone, *Commentaries on the Laws of England: Book the Fourth* (1769) at 67 ("the law of nations . . . is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land"); see, also, *Triquet v Bath (1764)*, 3 Burr 1478, (KB); *Chung Chi Cheung v The King*, [1939] AC 160 (PC); *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] 1 QB 529 (Eng CA); Hersch Lauterpacht, "Is International Law a Part of the Law of England?" (1940) 25 *Transactions of the Grotius Society*: *Problems of Peace and War: Papers Read Before the Society in the Year 1939* at 51. Ian Brownlie, *Public International Law* (Oxford, OUP, 2003) at 41 ("[t]he dominant principle . . . is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority"). With respect to Canada, see: *Using International Law* at 184-208; *The Ship "North" v The King* (1906), 37 SCR 385; *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] SCR 483.

[59] Campbell McLachlan, Foreign Relations Law, Cambridge: CUP, 2014, 3.14 ("[("[t]he common law nevertheless continued to accept that, at least in some circumstances, treaties might be referred to in the construction of legislation as a presumption of consistency between the external and internal legal orders"); *R v. Keyn* (1876) LR 2 Ex D 63, 85 per Sir Robert Phillimore.

[60] *Nevsun Res Ltd. v. Araya*, [2020] S.C.C. 5.

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Nevsun Res. Ltd.*, [2020] S.C.C. at 70, 72, 79; citing to Gérard V. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues* (1996), 34 CAN. YB INTL LAW 89 at 100-1; Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 Cardozo J Intl & Comp L 587 at 616; see also René Provost, "Judging in Splendid Isolation" (2008), 56 Am J Comp L 125 at 171); *Case concerning certain German interests in Polish Upper Silesia* (*Germany v. Poland*) (1926), PCIJ Ser A, No 7 at 19 (legal decisions are "facts which express the will and constitute the activities of States"); *Prosecutor v Jelisić*, IT-95-10-T, Judgment, 14 December 1999 (ICTY, Trial Chamber) at para 61; *Prosecutor v Krstić*, IT-98-33-T, Judgment, 2 August 2001 (ICTY, Trial Chamber), at paras 541, 575, 579-89; *Prosecutor v Erdemović*, IT-96-22-A,

the development of Canadian jurisprudence (notably through the adoption of customary international law), but conversely, national courts could aid in the development of customary international law.[65]

However, in another 2020 case, the SCC returned to the role of international law, this time focusing in particular on its role as an interpretive mechanism. This time, a slightly reconstituted court split 5-3, with the majority advocating for a reduced role for international law in Canadian courts.[66]

In that case, *9147-0732 Québec*, the court was asked to consider specifically whether s.12 of the *Charter of Rights and Freedom*, which prohibits cruel and unusual treatment or punishment, could apply to corporations.[67] A panel of the Quebec Court of Appeals had found that a fine levied against a corporation in a regulatory prosecution violated s.12. The SCC overturned that decision and found that corporations were not entitled to s.12 protections (affirming what most commentators had thought the law was prior to the decision of the Quebec Court of Appeal).

Going beyond what was strictly required to determine the case's outcome, in *9147-0732 Québec*, the majority argued that the interpretation of s.12, and presumably other *Charter* and constitutional provisions, did not require a turn to international law or the constitutional law of other states. The majority held that international law should play only a limited role in the Canadian constitutional structure.[68] Proposing what most legal scholars would take to be a rereading of the role of international law in *Charter* jurisprudence, the majority concluded that the role of international law "has properly been to *support* or *confirm* an interpretation" of constitutional provisions, not to define their scope.[69]

In particular, the SCC stated that where a lower court relies on international law, particularly on soft law instruments, it must state clearly why it is doing so and on what authority:

> [W]e are wary of [the minority's] approach, which appears to give … non-binding instruments similar weight to binding ones. We therefore highlight that these instruments are merely persuasive here, and that a court relying upon them should explain *why* it is doing so, and *how* they are being used (that is, what weight is being assigned to them).[70]

Joint separate opinion of Judge McDonald and Judge Vohrah, 7 October 1997 (ICTY, Appeal Chamber) at paras 47-55.

[65] *Nevsun Res. Ltd.*, 2020 SCC at para. 71; citing to Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law* (2011), 60 ICLQ 57 at 69; *Hesitant Embrace* at 4-6, 8, 56; Hugh M. Kindred *The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach*, in Oonagh E. Fitzgerald, ed, *The Globalized Rule of Law: Relationships between International and Domestic Law* (Toronto: Irwin, 2006) 5 at 7.

[66] One judge (Justice Kassirer) considered it unnecessary to reach the international law question.

[67] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 [*9147-0732 Québec*]; analyzing, *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 12 [*Charter*].

[68] *9147-0732 Québec*, *supra*, at para 23.

[69] *9147-0732 Québec*, *supra*, at para 28 (emphasis in original). Legal scholars often consider the case a departure from the rule laid down in *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699.

[70] *9147-0732 Québec*, *supra*, at para 40 (emphasis in original).

The key takeaway, therefore, is that it is clear that at least a significant segment of the Canadian judiciary is worried that international law has penetrated too deeply into the Canadian legal order.

Canadian courts may be able to rely on UNDRIP when interpreting constitutional protections. As this paper will argue, the view of the majority of courts, certainly before the enactment of the *UNDRIP Act*, was that UNDRIP *neither changes* specific laws or laws of the general application nor renders any such laws unconstitutional. Excluding a small number of outliers, courts have taken the position that Canada's endorsement of UNDRIP does not by itself change Canada's domestic laws, in particular, because the provisions of UNDRIP are often too vague to be helpful.[71] Moreover, it is an open question whether the protection of aboriginal rights under UNDRIP is more robust or provides a more precise standard of conduct than those already provided for under the Canadian constitutional order, or if UNDRIP creates additional rights not currently provided by s.35.

VI. SECTION 35 PROTECTIONS

The *British North America Act, 1867*, provided the foundations for Canada's constitutional order until the *Constitution Act, 1982* was adopted.[72] Before 1982, Indigenous rights were protected in the common or statutory law.[73] Additional protections for Indigenous groups were incorporated into the Canadian constitutional order when the constitution was patriated in 1982.[74] Section 35 of the *Constitution Act, 1982* contains provisions protecting aboriginal rights:

> 35 (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.
> (3) For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[75]

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[71] *Snuneymuxw*, [2014] BCSC at para. 59; *Hupacasath*, [2013] F.C. at para. 51. Relying on the general rule that international instruments, even those that the government of Canada has ratified, have no enforceable effect within domestic Canadian law unless and until they are implemented domestically, through valid legislation (*Baker v Canada (Minister of Citizenship & Immigration)*, [1999] S.C.C. 699 at para. 69; *Smerek v Areva Resources*, [2014] SKQB 282 at para. 16; *Nevsun Res. Ltd.*, [2020] S.C.C. at paras 158-159).

[72] *The British North America Act, 1867*, 30 Vic. 3 (dated March 29, 1867) (subsequently renamed the Constitution Act, 1867).

[73] R. v. Van der Peet, 1996 CanLII 216 (SCC), [1996] 2 SCR 507, https://canlii.ca/t/1fr8r, [perma.cc].https://canlii.ca/t/1fr8r,[perma.cc]. Para 125 ("Prior to 1982, the doctrine of aboriginal rights was founded only on the common law and aboriginal rights could be extinguished by treaty, conquest and legislation as they were ‘‘‘dependent upon the good will of the Sovereign.").

[74] *Canada Act 1982 (UK)*, 1982, c 11, s 35.

[75] Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35.

Section 35 has been interpreted as imposing specific standards of conduct on both the federal and provincial governments.[76] Any governmental action having a non-trivial effect[77] on the rights of a group's aboriginal or treaty rights must be consistent with the honour of the Crown and with the Crown's fiduciary duty to Aboriginal persons.[78] Similarly, legislation that infringes on aboriginal or treaty rights is of no force or effect unless it can be shown to be similarly consistent with the Crown's obligations.[79]

In *Sparrow*, the SCC recognized the existence of constitutional restrictions on government action flowing from the honour of the Crown:

> The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples.[80]

Where government action affects such rights, either proven or credibly asserted, of an aboriginal group, governments have a duty to consult with the affected Indigenous group:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.[81]

Beginning with *Guerin*, courts have found that the Crown owes a fiduciary duty to Indigenous groups in certain circumstances. [82] Such fiduciary duties can either be *sui generis*, or

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[76] DWIGHT NEWMAN, *The Section 35 Duty to Consult*, THE OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION Oxford: OUP, 2017.

[77] *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2012 FCA 73 (CanLII), <https://canlii.ca/t/fqlhhhttps://canlii.ca/t/fqlhh>, at para 9.

[78] Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (2014), at pp. 88-89

[79] *The Constitution Act, 1982*, §52.

[80] *R v. Sparrow*, [1990] SCJ No 49, at para. 52-63, [1990] 1 SCR 1075; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) at para. 16 and 32, [2004] 3 SCR 511 [*Haida Nation*]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII) at para. 24, [2004] 3 SCR 550.

[81] *Haida Nation*, *supra*, at para 32.

[82] *Guerin v The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335 [*Guerin*] at 382, noting that the Crown will have special obligations when exercising control over, generally, aboriginal lands ("It should be noted that fiduciary duties generally arise only about obligations originating in a private law context. Public law duties, which require the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in exercising its legislative or administrative function. The mere fact, however, that it is the Crown that is obligated to act on the Indians' behalf does not of itself remove the Crowns' obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crowns' obligation to the Indians with respect to that interest is, therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary").

ad hoc.[83] Where there is a breach of that duty, equitable principles of restitution will apply.[84] As the SCC wrote in *Guerin*:

> [T]he nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.[85]

In some limited circumstances, courts have found that UNDRIP may inform the scope of the duty to consult.[86] They have also stated that UNDRIP can be used to interpret the scope of the honour of the Crown.[87] Subsequent sections consider whether, even if UNDRIP can be applied to the obligations of the Crown, it is likely to increase either procedural or substantive obligations.

VII. POTENTIAL LOCATIONS OF INTERACTION

A. Duty to Consult Versus FPIC

Much of the debate involving UNDRIP has turned on whether the requirement of consultation is heightened under UNDRIP as compared to Canadian law. On its face, UNDRIP appears to provide for a heightened standard of consent for projects affecting Aboriginal interests, as it

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[83] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4. For a general description of *ad hoc* duties, see: *Galambos* v *Perez*, 2009 SCC 48.

[84] *Southwind v. Canada*, 2021 SCC 28 (CanLII)

[85] *Guerin*, [1984] 2 S.C.R. at 376.

[86] *Nunatukavut Cmty Council Inc. v Canada (Attorney General)*, [2015] F.C. 981 at para 102 ("Nalcor submits that Parliament did not ratify UNDRIP and does not create substantive rights. The question of whether a duty to consult has been discharged must be determined solely by the application of the test set out in *Haida* and *Rio Tinto*. This Court has rejected the application of UNDRIP in the context of the duty to consult (*Hupacasath* at para 51). And, although UNDRIP may inform the contextual approach to statutory interpretation, there is no issue of statutory interpretation in this case.").

[87] *Taku River Tlingit First Nation v. Canada (Attorney General)*, 2016 YKSC 7 at para 100 ("Although not enforceable against Canada, the Supreme Court has confirmed UNDRIP's usefulness in interpreting Canada's Constitution in *Nunatukavut Cmty Council Inc. v. Canada (Attorney General)*, 2015 FC 981, 103. I agree with the NCC's general premise that UNDRIP may be used to inform the interpretation of domestic law. As Justice L'Heureux' Dubé stated in Baker, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In Simon, Justice Scott, then of this Court, similarly concluded that while the Court will favor interpretations of the law embodying UNDRIP's values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity with Canada's international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favored."); *Ross River Dena Council v Canada*, 2017 YKSC 59 (CanLII) at para 303 ("*Ross River Dena Council v Canada*, 2017 YKSC 59 (CanLII)"). In *Hupacasath*, disagreeing with the court in *Nunatukavut Cmty Council*, the Federal Court found UNDRIP did not appear to change the scope of the duty to consult. Affirmed at *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 (CanLII). In a recent trade-related case, the court declined to rely on UNDRIP to require disclosure of government documents (Imai v. Canada (Foreign Affairs), 2021 FC 1479 (CanLII) at para 12).

requires Aboriginal persons' approval for all developments that might affect them.[88] However, that would almost certainly be a misreading of UNDRIP's requirements for free prior and informed consent (**"FPIC"**).[89]

As the Report of the Expert Mechanism on the Rights of Indigenous Peoples[90] noted, Article 19 of UNDRIP requires states to "consult and cooperate in good faith with [any] indigenous peoples concerned through their own representative institutions to obtain their free, prior and informed consent" before government action proceeds.[91] Consent should be the objective of the process.[92] To obtain that consent, FPIC requires that governments put in place a process of dialogue and negotiation.

In particular, the use of the phrase "consult and cooperate" "denotes a right of Indigenous peoples to influence the outcome of decision-making processes impacting on them, not a mere right to be involved in such processes or merely to have their views heard on measures affecting them."[93] The process should be sufficiently open-ended that it includes the possibility for Indigenous peoples "to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor."[94]

As part of exercising good faith, the state should "endeavour to achieve consensus on the procedures to be followed; facilitate access to such procedures through broad information; and create a climate of confidence with Indigenous peoples which favours productive dialogue."[95]

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[88] Certainly, this is the view of some practitioners. *See*, Lorraine Land and Matt McPherson, *Aboriginal Law Handbook*, *supra* note 14, at 223.

[89] It is worth noting that courts have found that UNDRIP's provisions were already incorporated into Canadian law, prior to the endorsement of UNDRIP. See, e.g., *Métis Nation of Alberta Ass'n v Alberta (Indigenous Relations)*, 2022 ABQB 6 (CanLII), para 377 ("In *AltaLink*, Feehan JA suggested that the Crown might consider non-binding sources of domestic and international law and policy, including the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"), citing it as a "useful tool" to help the Crown better understand what reconciliation is and how it can be best served: para 123. While this comment was not made in relation to an analysis of procedural fairness, I acknowledge that, as UNDRIP came into force in Canada on June 21, 2021 under Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2021, c 14, it may now form part of the governing statutory scheme. While the adoption of UNDRIP post-dates the Decision, many of the principles contained therein were already acknowledged in the common law."), citing to *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 (CanLII)."

[90] *Free, Prior and Informed Consent: a Human Rights-Based Approach- Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (August 10, 2018), https://www.ohchr.org/en/documents/thematic-reports/free-prior-and-informed-consent-human-rights-based-approach-study-expert. [perma.cc].

[91] UNDRIP, *supra*, Article 19.

[92] *Free, Prior and Informed Consent*, *supra* note 90, at para 15; *Final report, of the study on indigenous peoples and the right to participate in decision-making, Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/18/42 ["*Final Report*"] at para. 9; *Case of the Kíchwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations)*, Inter-American Court of Human Rights, Judgment of June 27, 2012, Series C No 245.

[93] *Free, Prior and Informed Consent*, *supra* note 90, at para 15.

[94] *Draft Study*, *supra*, at para 15.

[95] *Expert Mechanism on the Rights of Indigenous Peoples Eleventh session, 9–13 July 2018, Item 4 of the provisional agenda, Study and advice on free, prior and informed consent, Draft study on Free, Prior and Informed Consent: A Human Rights-Based Approach, Study of the Expert Mechanism on the Rights of Indigenous Peoples*, HUMAN RIGHTS COUNCIL, citing to *Final report*, *supra*, at para 9.

Consultation must begin at an early stage and have, as its objective, consent. In the words of the Inter-American Court of Human Rights in the *Saramaka Cases*, it requires consultation at the "early stage" and provisions of "early notice."[96] Indigenous people should be included as soon as possible and provided with the necessary time to "absorb, understand, analyse information and the time necessary to allow Indigenous peoples to undertake their own decision-making processes."[97] They should be provided with "information that is objective, accurate, and clear" and "presented in a manner and form understandable to indigenous peoples, with translation services and in a language that they understand."[98] The information provided should include the nature, size, pace, reversibility and scope of any proposed project or activity, the reasons for the project, the areas to be affected, social, environmental and cultural impact assessments, and the kind of compensation or benefit sharing schemes that will be included.[99]

Consultation must, in the words of Rapporteur Anaya, be conducted "in good faith, with the objective of achieving their agreement or consent."[100] The duty to consult "is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement."[101] The scope of the duty to consult will depend on the likely impact of the action: "The specific characteristics of the consultation procedure that is required by the duty to consult will necessarily vary depending upon the nature of the proposed measure and the scope of its impact on indigenous peoples."[102]

However, FPIC is limited. As Rapporteur Anaya notes:

> [i]t would be unrealistic to say that the duty of States to consult directly with indigenous peoples through special, differentiated procedures applies literally, in the broadest sense, whenever a State decision may affect them, since almost all legislative and administrative decisions that a State adopts may affect the indigenous peoples of the State along with the rest of the population in one way or another.

UNDRIP does not create a right of consultation when a state is considering laws of general application. Instead:

> a purposive interpretation of the various relevant articles of the United Nations Declaration on the Rights of Indigenous Peoples, in light of other international instruments and related jurisprudence, leads to the following assessment of the scope of application of the duty to

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[96] *Draft Study*, *supra*, at para. 20; *Case of the Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Inter-American Court of Human Rights, Judgment of November 28, 2007, Series C No 172 at para 133.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* para. 39, U.N. DOC. A/HRC/12/34 (2013) [hereinafter Anaya, *Human Rights*].
[101] *Id.* para 44.
[102] *Id.* para. 45.

consult: it applies whenever a State decision may affect indigenous peoples in ways not felt by others in society.[103]

Moreover, FPIC does not generally create a right to prevent development or the use of lands and resources. In the words of Anaya, it "should not be regarded as according indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples."[104] Only in unusual and rare cases will the requirement of consultation "harden into a prohibition of the measure or project in the absence of indigenous consent."[105]

Even taken at its strongest, FPIC might add little to the existing s.35 mechanisms. In part, this is because the law on the duty to consult and accommodate (**"DTCA"**) is well-developed in the Canadian legal system. Cases regarding the scope of the DTCA form a significant part – perhaps three-quarters – of all cases filed by Indigenous groups.[106]

Under Canadian constitutional law, the Crown's duty to consult and accommodate aboriginal peoples is grounded in the principle of the honor of the Crown. It derives from the Crown's assertion of sovereignty in the face of prior aboriginal occupation. Courts have found that the Crown's honour cannot be interpreted narrowly or technically but must be given full effect promote the reconciliation mandated by s.35(1) of the Constitution Act, 1982.

The DTCA applies where the Crown knows, or should know, of proven or credibly asserted Aboriginal or treaty rights, and intends to undertake conduct that may infringe on those rights.[107] The DTCA exists "when the Crown has … knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[108] As with FPIC, it arises prior to proof or assertion of aboriginal rights or title.[109]

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[103] *Id.* para. 43.

[104] *Id.* para. 46. *See also*, Anaya, *Human Rights* at para. 27 (2013)("Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending upon the nature of and potential impacts of the activities on the exercise of their rights. In all instances of proposed extractive projects that might affect indigenous peoples, consultations with them should take place and consent should at least be sought, even if consent is not strictly required"). This also appears to be the view of the Canadian government. *See, e.g.*, Canada, Parliament, House of Commons Debates, 43th Parl, 2nd Sess, Vol 150, No 60 (17 February 2021)

[105] Anaya *Human Rights* §.47 (suggesting that the two key situations will be where the project will involve relocation of a group from its traditional lands or where a project will involve the storage or disposal of toxic wastes on Indigenous lands). There is at least one case which goes further: in a case involving the Saramaka people of Suriname, the Inter-American Court of Human Rights held that "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions" (*The Case of Saramaka v Suriname, supra* note 96, §§134).

[106] Citation removed to preserve anonymity during review.

[107] *See Haida Nation*, [2004] S.C.C. at para. 16, 35.

[108] *Id*. §. 35; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* [2010] S.C.C. 43, para 31 (Can.).

[109] *Delgamuukw v. Brit. Columbia,* [1997] 3 S.C.RR 1010, para. 168 (Can.). ("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, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: Guerin. 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

In the recent case of *Ktunaxa Nation*, the SCC stated that the DTCA involved a four-step process:

> (1) the consultation process is triggered when the Crown has real or constructive knowledge of the existence of an Aboriginal treaty right or other rights.
> (2) It then must determine the level of consultation required.
> (3) Consultation must take place at the appropriate level.
> (4) If the consultation shows it to be appropriate, accommodation of the Aboriginal interest must take place.[110]

Moreover, as courts have noted, the mere existence of a modern treaty does not constitute a complete code for the Crown-Aboriginal relationship and does not exhaust the duty to consult about unknown future actions.[111]

The DTCA exists on a spectrum based on the strength and nature of the underlying claim and the strength of the potential adverse impact of the proposed Crown conduct on the relevant claim. In cases where the impact on aboriginal rights is likely to be severe, then the DTCA is one of deep consultation.[112]

As with FPIC, the DTCA has both informational and response components.[113] In cases where the obligation is more than minimal or the aboriginal right is likely to be affected in a meaningful way, it includes the right to make submissions, a requirement that there be formal hearings to test evidence, a right to submit written reasons, a requirement that government focus its analysis on impacts on Indigenous rights, including but not limited to environmental impacts, opportunities for robust participation opportunities, a requirement that the government provide funding (including for technical experts) to aboriginal groups participating in the process, elimination of communication barriers (including e.g., translation services, alternative means of access to information if internet access is available), and participation as panel members.[114]

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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"); *See generally Haida Nation*, [2004] S.C.C. 74.

[110] *Ktunaxa Nation v. Brit. Columbia (Forests, Lands and Nat. Res. Operations)*, 2017 S.C.C. 54 (CanLII), [2017] 2 S.C.R. 386 [*Ktunaxa Nation*] § 80; *See Haida Nation,* [2004] S.C.C. at para. 16 et passim.

[111] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII), [2010] 3 SCR 103 (noting that a treaty does not exhaust the duty to consult unless the parties have contracted out of it expressly in the treaty in a manner which does not offend the honor of the Crown).

[112] *Ktunaxa Nation,* [2017] S.C.C. at para. 79; *Haida Nation,* [2004] S.C.C. at para. 4344.

[113] *Mikisew Cree First Nation v. Can. (Minister of Canadian Heritage),* [2005] S.C.C. 69 (CanLII), [2005] 3 SCR 388 [*Mikisew Cree*].

[114] *Clyde River (Hamlet) v. Petrol. Geo Servs. Inc.*, 2017 SCC 40, [2017] 1 SCR 1069; *Saugeen First Nation v Ontario (MNRF),* 2017 ONSC 3456 (CanLII).

As with FPIC, there must be the possibility of accommodation and the goal must be to obtain consent. The process should not merely be an opportunity for Indigenous groups to "blow off steam" before the government proceeds to do what it intended to do all along.[115]

Importantly, as with FPIC, provided consultation is meaningful, there is no ultimate duty to reach an agreement.[116] Moreover, it also imposes an obligation on aboriginal groups. Aboriginal groups must take reasonable positions and cannot act to frustrate the negotiations.[117]

The parallelism between FPIC and DTCA is not accidental. Aboriginal law in Canada has been heavily influenced by international law and the jurisprudence of other courts.[118] For that reason, it might not be surprising that there is not a great deal of daylight between UNDRIP and the Canadian constitutional order.

B. Tensions Between FPIC and DTCA

The duty to consult before implementing legislation is one place where there may be divergence between FPIC and DTCA. Article 19 provides in part that governments must consult with aboriginal groups to obtain FPIC "before adopting and implementing legislative or administrative measures that may affect them."[119] Academic commentary has made clear that this only applies when measures are contemplated specifically affecting aboriginal interests. However, if Article 19 is read as requiring consultation at two distinct moments, once before adopting and a second time before implementing legislation, there may be tension with the approach of Canadian courts.

The SCC has previously held that the DTCA is not triggered when parliament adopts legislation, but only when governmental action is contemplated.[120] If Article 19 imposes a requirement of consultation prior to the enactment of legislation rather than enactment and implementation, then Canada's approach may not be in compliance with UNDRIP.

Additionally, an alternative reading of UNDRIP's FPIC obligations might be possible. On that view, UNDRIP actually creates two or more different levels of FPIC.[121] With respect to forward looking consultation, a possible argument is that one must attempt to obtain the consent of Indigenous groups prior to governments undertaking *any* action.

Thus, Articles 19 and 32(2), which include the specific language 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

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[115] *Mikisew Cree,* [2005] S.C.C. at para. 54.
[116] *Taku River Tlingit First Nation v. Brit. Columbia (Project Assessment Director),* [2004] 3 S.C.R. 550, 2004 S.C.C. 74, para. 2 (Can.).
[117] *See generally Haida Nation,* [2004] S.C.C. 74*; Ktunaxa Nation,* [2017] S.C.C. 69.
[118] Many early Canadian cases cited cases from American courts. For instance, *Johnson v. McIntosh* (1823), 21 US 240 and *Worcester v. State of Georgia* (1832), 31 U.S. 530 were cited in *Calder et al. v. Attorney-General of British Columbia,* 1973 CanLII 4 (SCC), [1973] SCR 313.
[119] UNDRIP, *supra* note 19, Article 19.
[120] *See Mikisew Cree,* [2005] S.C.C. 69.
[121] The author acknowledges helpful comments by Kerry Wilkins on this point.

undertaking certain measures might be taken to impose a lesser obligation on governments than Articles 10 and 11.

Conversely, Articles 10 and 11(2), which deal with compensation for displacement from land and territories, might be argued to impose an actual obligation that states obtain consent by virtue of their (arguably) stronger language. Article 10 requires that: "No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return," and Article 11(2) provides that: "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

Finally, Article 29(2), discussed above, suggests a heightened requirement where there is the potential for extreme environmental degradation. The text requires that: "States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent."[122] If there is a requirement of actual consent before actions are undertaken affecting Indigenous lands, then any actions by the Canadian state affecting reserve lands may be subject to a higher threshold under UNDRIP than under existing Canadian law.

C. Self-Government in Canada and under UNDRIP

Article 4 of UNDRIP provides a general right of self-determination. While silent on its specifics, commentators have suggested that the general framework can be gleaned from other provisions,[123] including the possibility of establishing:

(a) "distinct political, legal, economic, social and cultural institutions" (Article 5);
(b) the right to "maintain and develop their political, economic and social systems or institutions" (Article 20);
(c) the right to determine membership in those institutions (Article 33(2)); and,
(d) the right to participate in those structures through "decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures" (Article 18).

While s.35 does provide significant protections for aboriginal self-government rights, such protections are limited and do not generally go as far as similar rights in the United States.[124] Rights

[122] UDRIP, *supra* note 19, Article 29.

[123] JESSIE HOHMANN & MARC WELLER, THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY (Oxford: OUP, 2018) at 144-145.

[124] *R. v. Pamajewon*, [1996] 2 S.C.R. 821, para. 25 (Can.). (applying the test from Van der Peet that aboriginal rights must be part of "a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right" and thus declining to find a right to organize high-stakes gambling). This is in contradiction to the broader rights of self-government in the United States.

of self-government are generally limited to those available under the *Van der Peet* test.[125] Canadian courts have found that the right to self-governance under UNDRIP does not create a right of self-governance allowing aboriginal groups to bypass labour laws protecting the right to unionize,[126] does not inform the interpretation of tax statutes,[127] or inform the provision of education services to children living on reserve.[128]

Article 5 of UNDRIP may require states to permit Indigenous groups to create their own judicial systems, including their courts. To date, there have been few courts for aboriginal persons created in Canada and all appear to have been created as part of the provincial court system (not as stand-alone courts) and function mostly in criminal matters.[129]

If self-government rights under UNDRIP extend to the right to establish one's own courts, then a court could find a violation of UNDRIP when tasked with interpreting Canadian laws. However, it is unclear if separate courts would be constitutionally permissible or how they be established. The SCC has recently found that governmental authority to oust provincial superior court's jurisdiction is limited under Section 96 of the *Constitution Act, 1867*.[130]

D. Challenges to Court Procedure

Indigenous communities have finally attempted to rely on UNDRIP either to overcome procedure hurdles to challenging government action, or as a shield to prevent challenges to the actions of Indigenous organizations.

With respect to overcoming procedural hurdles, UNDRIP requires Indigenous communities to have access to national courts to challenge government actions. Specifically, Article 8(2) provides that: "States shall provide effective mechanisms for prevention of, and redress for" state action.

The literature on Article 8 is sparse. Some Indigenous groups have relied on Article 8(2) to argue that it prevents technical defences, such as laches, estoppel, or limitations periods from applying to Indigenous claims. However, it seems unlikely that Article 8(2) creates an absolute bar to such provisions. If it did, however, aspects of the Canadian legal system would require reform. In the only case to consider the issue to date, *Watson*, which was decided prior to the

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[125] *R. v. Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507. For criticism, see, C. Kent McNeil, "Judicial Approaches to Self-Government since Calder: Searching for Doctrinal Coherence", in Hamar Foster, Heather Raven, and Jeremy Webber, eds., Let Right Be Done: Aboriginal Title, the *Calder* Case, and the Future of Indigenous Rights (Vancouver: UBC Press, 2007), 129-52.

[126] *Mississaugas of Scugog Island First Nation v. Nat'l Automobile, Aerospace, Transp. and Gen. Workers Union of Canada*, 2007 ONCA 814; Delgamuukw, supra, had previously found that s.35 by itself does not by itself create a right of self-governance (para 170).

[127] *Sackaney, supra* n.37.

[128] *Snuneymuxw, supra* n.33.

[129] *See, e.g.*, "Specialized Courts," Provincial Court of British Columbia, at www.provincialcourt.bc.ca/ bout-the-court/specialized-courts; Elsipogtog Healing to Wellness Court in New Brunswick athttpsat://www.ulcc-chlc.ca/ULCC/media/EN-Other-Documents/Elsipogtog-Healing-to-Wellness-Court.pdf>; Indigenous Peoples Court of Thunder Bay at https://tbifc.ca/program/indigenous-peoples-court-coordinator/; Akwesasne Mohawk Court at http://www.akwesasne.ca/justice/akwesasne-court/docket/

[130] *Reference re Code of Civil Procedure (Que), art 35*, [2021] S.C.C. 27 (CanLII); *see also, Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714.

proclamation of Canada's federal statute recognizing UNDRIP as part of Canadian law, the Federal Court of Canada found that UNDRIP did not impose an obligation on the government to change statutes of limitations.[131]

Indigenous groups have also relied on UNDRIP to obtain standing in as intervenors in challenges to government actions. For the most part, Indigenous groups have been granted standing, even if courts have declined to rely on UNDRIP when granting standing.[132] In some cases, they have restricted arguments with respect to UNDRIP entirely.[133]

VIII. CONCLUSION

[131] *Watson*, [2020] F.C. 129 (CanLII) at 351 ("[351] Although Canada's endorsement of UNDRIP and the Principles may be perceived as a positive public policy step towards reconciliation, neither UNDRIP or the Principles can change, or overturn limitation periods set out in statute. Currently, UNDRIP is a non-binding United Nations resolution supported by Canada as a political commitment. The principles are not legally binding on the Crown. Although UNDRIP and the Principles might be able to aid in the interpretation of Canadian domestic law, the Watson Plaintiffs have not pointed to any area of limitations statutes where either would be a relevant interpretive aid *Nunatukavut Cmty Council Inc v. Canada (Attorney General)*, 2015 FC 981 §103-106, 260 ACWS (3d) 651). [352] Although the Supreme Court of Canada in Manitoba Metis at para 141 indicated that reconciliation must "weigh heavily in the balance" when applying limitation periods, it only carved out a narrow exception to limitation periods for constitutional declarations. The Supreme Court did not indicate that the Court could ignore applicable statutory limitation periods generally for the purpose of furthering reconciliation"). This issue has emerged as a key demand of Indigenous groups. The Truth and Reconciliation Commission of Canada called on governments to review statutes of limitation in its report. Recommendation 26 states: "We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform to the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people"). *See also*, *Wesley v. Alberta*, 2022 A.B.K.B. 713 (CanLII) § 145-149 ("However, I agree with the Applicants that UNDRIP is, on its face a non-binding, aspirational document. The preamble proclaims UNDRIP to be a "standard of achievement to be pursued in a spirit of partnership and mutual respect". Although it may be used as an interpretive aid, it has no legal force in Canada or Alberta, and is not part of the law of Alberta: *East Prairie Metis Settlement v. Canada (Attorney General)*, 2021 A.B.Q.B. 762 §35 [East Prairie]. This means that even if the CLPA or the limitations legislation in Alberta violated UNDRIP, this would not be a basis to challenge those pieces of legislation: East Prairie at para 35… I adopt the following comments from Phelan J. of the Federal Court in Watson v. Canada, 2020 FC 129 § 351-352: "Although Canada's endorsement of UNDRIP and the Principles may be perceived as a positive public policy step towards reconciliation, neither UNDRIP or the Principles can change or overturn limitation periods set out in statute. ... Although UNDRIP and the Principles might be able to aid in the interpretation of Canadian domestic law, the Watson Plaintiffs have not pointed to any area of limitations statutes where either would be a relevant interpretive aid (Nunatukavut Community Council Inc v Canada (Attorney General), 2015 FC 981 §103-106, 260 ACWS (3d) 651)."… I am not prepared to accept that the provisions of the Declaration and the UNDRIP Act apply and displace the clear statutory language of Alberta's limitations legislation."); *Flette et al. v. The Government of Manitoba et al.*, 2022 MBQB 104 (CanLII); Director and R., 2022 BCPC 15 (CanLII) §35

[132] *Metis Child, Family and Cmty. Servs. v. CPR et al*, 2022 MBCA 40 (CanLII) (para 25). In some cases, individuals have also attempted to rely on UNDRIP to create standing to challenge tribal actions, but these appear to have been rejected as well (*Chambaud v. Dene Tha' First Nation*, 2022 FC 970 (CanLII)). In at least one other, a First Nation attempted to rely on UNDRIP to avoid judicial supervision, but that motion failed (*George v. Heiltsuk First Nation*, 2022 FC 1786 (CanLII)). In at least one instance, however, standing was denied and the UNDRIP argument failed: *Newcrest Red Chris Mining Ltd. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union*, Local 1-1937, 2023 BCLRB 10 (CanLII).

[133] *Skeena Res. Ltd. v. Mill*, 2022 BCSC 1360 (CanLII) ("[53] The reconciliation, DRIPA and UNDRIP issues are sufficiently undefined and the way in which they might relate to the issues defined by the parties to the appeal is not articulated. As such, they run the risk of expanding the scope of the case beyond the appeal as framed by the parties.").

From this survey, it is by no means clear that the enactment of UNDRIP will lead to substantial changes in Canadian law. Moreover, it is an open question whether legislation can change the interpretation of the Canadian constitution. Nevertheless, where legislation signals Canada's embrace of specific international norms, courts have been willing to interpret Canadian law in light of those international instruments.

To date, there are only two areas, extradition law and family law, where UNDRIP has created undisputed effects. Courts have found that UNDRIP may also be implicated in the interpretation of statutory provisions regarding the extradition of aboriginal offenders.[134] Courts have also relied on UNDRIP when considering the best interests of the child test.[135] However, it is difficult to draw any firm conclusion as similar provisions to UNDRIP have already been incorporated into family law in so far as it deals with the custody of aboriginal children.

Nonetheless, in at least one other case, courts have relied on UNDRIP, albeit in obiter, to find that classroom presentations on aboriginal culture and religion do not violate s.2 protections of freedom of religion. In that case, *Servatius*, the Supreme Court of British Columbia rejected an argument that teaching about native culture violated state neutrality.[136] It held that *DRIPA*:

> "provides that in consultation and cooperation with the Indigenous peoples of British Columbia, the government must take all measures necessary to ensure the laws of the province are consistent with *UNDRIP*. For the purposes of our case, it is notable that *UNDRIP* includes the right for Indigenous peoples to "manifest, practise, develop and teach their spiritual and religious traditions, customs and

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[134] *See Sheck v. Can. (Minister of Justice),* [2019] B.C.C.A. 364 (dealing with the extension of Gladue principles to extradition).

[135] *See First Nations Child & Family Caring Soc'y of Can. et al. v. Att'y Gen. of Can.* (representing the Minister of Indigenous and Northern Affairs Canada), 2021 CHRT 41 (CanLII) at para 262 ("Jordan's Principle is meant to meet Canada's positive domestic and international obligations towards First Nations children under the *CHRA*, the *Charter*, the ***Convention on the Rights of the Child*** and the ***UNDRIP*** to name a few."), approved of in *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada* (representing the Minister of Indigenous and Northern Affairs Canada), 2022 CHRT 8 (CanLII); *RR v. Vancouver Aboriginal Child and Family Services Society* (No. 6), 2022 BCHRT 116 (CanLII); *SK v. DG, 2022* A.B.Q.B. 425 (CanLII) §253 ("It is essential that Indigenous children be given the opportunity to maintain and develop strong connections with their family, with their Indigenous group, community or people to which they belong and to preserve their connection to their culture. It is also important to recognize Canada's obligations pursuant to the *United Nations Declaration on the Rights of Indigenous Peoples* to ensure Indigenous families and communities retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child: see *UNDRIP*"). SK v Alberta (Child, Youth and Family Enhancement Act, Director), 2022 ABPC 144 (CanLII) at para 30 ("To be properly willing and able to parent an Indigenous child, an applicant must demonstrate that they will meet the spirit and the letter of requirements set out in the *CYFEA*, the *Federal Act,* and the *UNDRIPA* and that there is adequate assurance that the child's connections to his family, community and culture, and be respected, nurtured and encouraged so that the child will be protected from the risk of assimilative forces inherent in adoption by a non-indigenous person.") and para 41 ("A theme that runs consistently through the *CYFEA*, the *Federal Act* and the *UNDRIPA* is that an Indigenous child's interests are best met when they are connected to their families, communities, and cultures. EB of Kanaweyimik testified that in her view the best place for a child to stay connected to his culture is in its home community in the care of family or community members. It is hard to disagree with this opinion."). Nonetheless, guardianship was awarded to a non-Indigenous individual with the proviso that the child be informed of the child's status as a First Nations Individual and the rights the child may have.

[136] Plaintiffs incorrectly claimed that s.2 of the Charter guaranteed state neutrality.

> ceremonies" (Article 12(1)); the right to "the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information" (Article 15(1)); and the right to "promote, develop and maintain their institutional structures and distinctive customs, spirituality, traditions, procedures, [and] practices" (Article 34)."[137]

To that end, it found that parents could not object to students learning about Indigenous culture in classrooms. Nevertheless, other than a handful of potential changes, UNDRIP appears unlikely to affect substantial changes in the laws governing Indigenous persons in Canada. Canadian courts seem unlikely to reject wholesale Crown title to Canadian lands, as some commentators have suggested UNDRIP requires.[138] In the short-term at least, s.35 will likely remain the entry point for aboriginal rights litigation.

[137] *Servatius v. Alberni Sch. Dist. No. 70*, 2020 B.C.S.C. 15 (CanLII) §37; holding affirmed in *Servatius v. Alberni Sch. Dist. No. 70*, 2022 BCCA 421 (CanLII).
[138] That would almost certainly require a constitutional amendment.