

Who's afraid of the big, bad FPIC? The evolving integration of the *United Nations Declaration on the Rights of Indigenous Peoples* into Canadian law and policy

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Canada's adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (the *UN Declaration* or *Declaration*) and developments of Canadian legal principles regarding Aboriginal consultation are converging to ensure more vigorous protection of Indigenous Rights in Canada. The *Declaration* provision which says Indigenous Peoples must give free, prior and informed consent (FPIC) to decisions and developments that affect their lands, resources or cultures lies at the heart of that document. Not coincidentally, interpretations of the spectrum of Indigenous consultation and consent required for Crown decisions that affect Aboriginal rights lie at the heart of the emerging jurisprudence in Canada on Indigenous consultation.

This convergence of international and domestic law on Indigenous consent is raising questions about the scope of the legal requirements for such "consent" in a Canadian context. It is also triggering fear from commentators who worry that complying with FPIC means giving Indigenous Peoples in Canada a "veto" on development, which could be economically ruinous. Some political and legal commentators also say the *Declaration* requirements are fundamentally incompatible with the evolving Canadian law on Indigenous consultation. This article considers them as converging branches on the constantly growing tree of Canadian law.

The ways Indigenous communities are working towards ensuring that their consent must be obtained for some decisions and developments, however, tells a more nuanced story about what Indigenous consent means — and is evolving to mean — in Canada. In this article (based on a speech delivered at a conference on FPIC in 2015)¹ I outline the Canadian context for FPIC by sharing stories that illustrate how Indigenous consent is currently evolving in Canadian law, and examine how Canadian law has evolved around the notion of consent. I discuss how we can move away from our fears about FPIC, and towards a more just and mutually beneficial implementation of FPIC.

Two stories of "free, prior and informed consent"

Let me share two stories from clients I have been privileged to work with. The first is about the Saugeen Ojibway Nation (SON), who live in the Bruce Peninsula and Lake Huron area of Ontario. The second deals with the Athabasca Chipewyan First Nation located in the midst of the Alberta oil sands. These stories demonstrate the nuanced ways in which some Indigenous Peoples in Canada are applying the standard of "consent" to development in their traditional territories.

Within the traditional territory of the SON — about 15 km from the Saugeen First Nation's reserve — is one of Canada's largest nuclear plants: the Bruce Nuclear Generating Facility at Kincardine.² Ontario Power Generation (OPG) is currently proposing to build a new facility to store nuclear waste in a deep geological repository at the Bruce Nuclear site along the shoreline of Lake Huron. The SON and their ancestors have lived in this area for thousands of years, and have an Aboriginal title claim to the beds of Lake Huron where the facility is located. The SON also has its own active commercial fishery, dependent on the whitefish and other fish in the area of the project.

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

The SON is dealing with their cultural understanding that beings evolve over time yet remain essentially the same, over thousands of years, including *doodem* or clan members who are linked to the SON such as the otter, sturgeon, bear, crane or loon. For Anishinabe people, these clans are literally family members — a concept that is particularly challenging to western minds.³ There is a long-term

obligation for community members to think of their clan family in the future — whether those clan members are in human or animal form. The future in the case of nuclear waste means thinking of what your *doodem* members may need a million years from now.

On a more practical level, the SON members have commercial treaty and Aboriginal fishing rights⁴ that depend on the health of those waters, and which could be affected by adverse effects — real or perceived — on the health of fish coming from an area in the vicinity of a nuclear waste site.

In the meantime, even without approval of a deep geological repository for storing nuclear waste, the SON still has a nuclear garbage site sitting above the surface of its lands at the Bruce Nuclear site. Regardless of what happens with future storage of nuclear waste, the Crown clearly has to deal with the SON on the current storage of nuclear waste already happening (which has occurred without consultation with the SON).

When assessed on both the scope of impact and the strength of the Aboriginal rights in question (since the SON has both an asserted land claim right plus fishing rights already proven at court), this project would fall in Canadian law on the higher — or even highest — end of the spectrum of requirement for Aboriginal consultation.

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

Consent doesn't just mean approval or no approval, however, in SON's view. The SON clearly see "consent" as a complex process of building a relationship, exchanging information, conducting analysis, dealing with "the legacy" of the already-existing issues related to nuclear waste storage, and fully integrating their community in the process of discussion, analysis and decision making.⁵

From this perspective, consent is a process or journey, not a destination.

Obtaining OPG's commitment to consent on this project was a critical win for the SON communities. Now, the Joint Panel conducting hearings on the project has reported and recommended that the project proceed. OPG made a commitment that the project will not proceed without the consent of the First Nations and this commitment exists in writing, but there is no legislative force or formal agreement in place to back up the commitment. SON's roadmap for this journey, and how they and the Crown deal with this nuclear waste storage case, will be an interesting practical test of what a consent process —

and a relationship — can look like.

The second story that I would like to offer, as a way into thinking about the evolution of FPIC, is the experience of the Athabasca Chipewyan First Nation (ACFN). The ACFN are Chipewyan-Dene Peoples who live in Northern Alberta and whose traditional



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territory has been deluged with oil sands projects. The ACFN has managed to focus domestic and international attention on the impacts of oil sands development on Indigenous Peoples, including raising public awareness about the cumulative impacts of very high intensity oil and gas development within one region. The ACFN contend that the intensity of oil and gas development is having devastating effects on their treaty harvesting rights, their culture, and the environment in which they live and upon which they rely. They say that the current "consultation and accommodation" framework in Canadian law is not protecting their Indigenous rights.

In 2015, the New Democratic Party (NDP) was elected in Alberta on a platform, among other commitments to "implement the 2007 [United Nations Declaration on the Rights of Indigenous Peoples] and build it into provincial law."⁶ The new government followed this up by giving all provincial government departments specific mandates to review, and report back, how this could done.⁷

These commitments led Alberta First Nations to hope and expect that there would be a shift in the Alberta political context to bring oil sands development more into line with international human rights requirements

by dealing responsively and consultatively with impacts on Indigenous Peoples' rights. In Alberta, Aboriginal consultation processes have historically been abysmal. Ironically, now Alberta may become the first jurisdiction in Canada to meaningfully enshrine the *Declaration*, including FPIC, principles into provincial law.

More recently, the new Liberal federal government also campaigned on a promise to ensure every new policy and law would meet with the principles of the *Declaration*⁸ and provided mandate letters to new cabinet ministers requiring the implementation of the *Declaration*.⁹

The question is whether these election promises and new mandates will actually effect a change on the ground in how industry operates, or in what the government requires to ensure development conforms with FPIC principles. The large ship of government does not turn easily or quickly, and election promises are a tiny rudder for a very big ship in a province and country so dependent on the same resources that the *Declaration* says should be the basis for the FPIC process.

For ACFN, while the ship is slowly turning, their community members face escalating environmental and social harms on their culture and rights:

- Regional caribou populations are crashing as industrial development displaces caribou through the region,
- trappers are unable to reach their traplines because access is cut off by changing water levels (due to diversion of water for oil sands projects,)
- water quality continues to deteriorate in the ACFN communities,
- ACFN members have extraordinarily high cancer rates which is triggering questions about links to oil sands development, and
- ACFN members continue to see the rapid destruction of areas available for hunting, trapping and traditional cultural activities.

The political commitments may be in place, but regional industry and government officials do not seem to have received the message yet.

The Challenge of FPIC in Canada

The SON and Athabasca Chipewyan stories demonstrate some common themes regarding FPIC in Canada. First, the current legal context for consultation continues to leave large gaps in protecting Indigenous Peoples' land and cultural rights in Canada. Consultation does happen, but often in a checkerboard and erratic fashion that does not really reflect FPIC principles. There are few systemic or regulatory commitments in place to ensure that FPIC principles are the threshold for protecting Indigenous rights.

However, increasing domestic pressure for FPIC compliance is clearly influenced by international processes. Some international banks and lenders now require that projects must comply with FPIC in order for them to receive international financing.¹⁰ This is happening in part as Indigenous communities in Canada are engaging more and more in international forums to bring visibility to their concerns. Both the SON and the Athabasca Chipewyan, for instance, have succeeded at elevating the visibility of their concerns domestically by generating international focus on their situations.

In addition to the above challenges, other fundamentally complex issues lie at the heart of the Crown-Aboriginal relationship and thus at the heart of FPIC. This includes the many legacies of the colonial relationship. For instance, in the SON case, while the First Nations and Crown discuss the question of nuclear storage, a significant nuclear waste storage site already exists within the territory, right on the shore of Lake Huron, and with clear evidence its operation has substantially affected fish in the area. Consent in this instance is not simply about whether the Indigenous community will say no or yes to proposed future project (or will have a say in developing alternatives); it is also about how the two parties address the colonial legacy issues.

Efforts to use an FPIC frame to address Indigenous Peoples' rights in Canada have elicited howls of protest, however. Opponents say it is impractical for Canada to abide by this international human rights instrument. Canadian law on Aboriginal consultation, they say, is incompatible with the *Declaration* and FPIC. Indigenous Peoples cannot "demand a veto" on development, they maintain. These objections relate more to the politics of FPIC (and its perceived constraint on development, particularly in the oil and gas sector), and ignore the reality that FPIC now exists as the international benchmark regarding obligations to Indigenous Peoples. On a practical level, FPIC is now clearly the standard that must be met in order to provide the legal, moral, and social support for projects to go ahead.

A big unresolved question in Canada is whether, as articulated in the *Declaration*, FPIC really is not compatible with Canadian law. The past federal government took this position, and some contemporary commentators continue to argue this, based on two premises. The first is that FPIC is inconsistent with the Constitution and the current state of Canadian law on Aboriginal consultation. The second is that international instruments are not legally binding.

Canada, however, has a long and robust history demonstrating that the Crown and Indigenous Peoples already accepted that Indigenous consent was needed

prior to taking Indigenous lands and resources. Indigenous Peoples' consistent expectation that they have the right to give or withhold consent to any taking of their lands and resources, as understood from their perspective, is a constant theme and tension in early continental North American history. The prime example is the Royal Proclamation of 1763, which guaranteed Indigenous Peoples' right to consent (through direct agreements with the Crown) before the sale or surrender of their lands for settlement.¹¹

The Evolution of Consent in Canadian Law

The principle of consent has developed more specific meaning in modern legal contexts, particularly in Canadian case law. A series of modern Supreme Court cases grapple with the notion of consent in the context of Aboriginal title cases, from *Calder*,¹² which first established that Aboriginal title could exist in Canadian law, to the recent historic case in *Tsilhqot'in Nation*¹³ in which the Supreme Court confirmed that the nation retains Aboriginal title to a large area of their traditional lands. This legal history demonstrates Canadian courts agreeing with the notion of Indigenous consent in a way that is consistent with the principles of FPIC.

Calder, a case brought by the Nisga'a Nation, was the first seminal Aboriginal title decision in Canada that established the legal principle that Aboriginal title can still exist in Canada. The Supreme Court judges hearing the case refer in their decision to correspondence dating from the 1850s between the colonial government in Victoria and the Imperial government in London. This 19th century correspondence refers to the expectations of the Nisga'a and other Indigenous groups in British Columbia that they must "consent" to the sale or taking of their lands, and outlines dialogue between London and Victoria about who should pay for that sale.¹⁴ The judgment in *Calder* also canvasses the history of cases in which American courts confirmed that the consent of Indigenous groups (through treaties) is required before the taking of their lands.¹⁵

The Supreme Court decision in *Delgamuukw*¹⁶ continued the arc of key Aboriginal title cases where the Supreme Court engages with the legal concepts of Aboriginal consent. In *Delgamuukw*, an Aboriginal title case brought by the Gitksan and Wet'suwet'en Nations, the court found again that it is possible to establish Aboriginal title in Canada, this time laying out more specifically the legal test for doing so.

Delgamuukw established the legal principles for how Aboriginal title could be proved and, if proved, the requirements for when the Crown could infringe or impede upon it. *Delgamuukw* also engaged with the legal questions of whether and when Aboriginal con-

sent is relevant. The Supreme Court in *Delgamuukw* made it clear that in some situations Aboriginal consent would be required before Aboriginal title could be infringed upon by the Crown:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. *In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands* [emphasis added].¹⁷

Subsequent Supreme Court decisions set out the legal framework for modern "Aboriginal consultation," building further on the principles set down in *Delgamuukw*. The 2004 Supreme Court decisions in *Haida*¹⁸ and the *Taku River Tlingit*²⁰ confirmed the obligation on the Crown to consult with Aboriginal groups, and accommodate their rights, where a Crown decision could impact them. In *Haida*, the Court ruled that the duty to consult First Nations or Aboriginal groups varies along a continuum or spectrum. Depending on how strong the Aboriginal right is, and how seriously it could be impacted by a Crown decision (such as a development permit), the consultation obligation can range from a minimum "duty to discuss" or provide information all the way up to the requirement for full consent on serious issues.²⁰ Recognizing this spectrum of obligation is a core component of the *Haida* decision. The analysis of the Supreme Court in *Haida* confirms that we must understand Indigenous rights as relational. When we talk about the depth of consultation and accommodation required — including whether consent is required — this is taking place within the give and take of a relationship.

Haida also introduces the question of whether and when Aboriginal groups can "veto" a decision of the Crown. In *Haida*, the Supreme Court finds there is no "duty to agree." In other words the consultation process does not give Aboriginal groups a veto over Crown decisions about what can be done with land pending final proof of a land claim.²¹ That Court says the key requirement for the consultation process is a "balancing of interests."²³ It does find that, in the case of serious impacts on Aboriginal rights and stronger claims with better evidence, then



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it is more likely that full consent would be required. This spectrum analysis is a helpful way of thinking about consent. It lies at one end of a spectrum to determine what is suitable in different situations, but the scope of the consent will vary depending on these circumstances.

The question of whether Aboriginal groups have a “veto” right was also explored in the *Mikisew*²³ case on treaty rights. *Mikisew* was about the right of the Mikisew Cree First Nation of Treaty 8 to be consulted about the construction of a road in Wood Buffalo Park that could affect hunting rights. In *Mikisew*, the Supreme Court again discusses when and whether an Aboriginal veto can occur, finding “had the consultation process gone ahead [as the Court said should have happened], it would not have given the Mikisew a veto over alignment of the road.”²⁴ The Court ruled in this case that the proposed project would have minimal potential impacts on the ability of the Mikisew Cree to exercise treaty rights — at the opposite end of the spectrum from those with proven rights and high impacts where the highest level of consultation and accommodation is required. Even in the situation of minimal impacts, the Supreme Court ruled that the Crown’s duty to consult and accommodate the Mikisew was still triggered, though the procedural requirements would be on the lower end of the spectrum of what was required of the Crown. In this specific instance, while there still had to be consultation, the Court felt a “veto” on development was not appropriate.

Even where there is a very minimal impact on Aboriginal rights, however, the Supreme Court is clear that Aboriginal consultation and accommodation is required. As the Court makes abundantly clear in *Mikisew*, the process does not merely mean giving the Aboriginal group an opportunity to “blow off steam.”²⁵ Consent in this situation is best understood as lying on a spectrum, as part of a relationship and process, rather than a simple “go/no go” decision.

Most recently, the Supreme Court released the seminal *Tsilhqot’in*²⁶ decision. We owe a deep debt of gratitude to the Tsilhqot’in Nation for their tenaciousness in bringing this Aboriginal title and rights case forward over the past 30 years. In *Tsilhqot’in*, for the first time in Canadian law, the Supreme Court affirmed that an Aboriginal group still retains Aboriginal title to their traditional lands because no treaty or surrender has occurred. The Supreme Court found that the Tsilhqot’in Nation retains full title to 1,700 km² of their territory and

continues to have other Aboriginal rights (such as harvesting rights) throughout their entire traditional territory beyond the 1,700 km² area where they retain land title.

The notion of consent is, thus, firmly embedded in the arc of modern Canadian law on Aboriginal rights and title.

In *Tsilhqot’in*, the Supreme Court expands on the notion of consent and places it within the context of a test for when the Crown can justifiably infringe on Aboriginal title. The court says,

The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified under s.35 of the *Constitution Act, 1982*.²⁷

The court then expands on this finding by articulating a more robust and detailed legal test for how the Crown would have to “justify” infringing on (or taking away from) Aboriginal title and rights when Aboriginal “consent” is the threshold to be met.²⁸

Tsilhqot’in is important because the Supreme Court explores the concept of Aboriginal consent in more detail than in any previous decisions. *Tsilhqot’in* focuses on the Aboriginal perspective on consent. In *Delgamuukw*, for instance, the Court examined the balancing test from the perspective of the State, asking what is in the public interest and what non-Aboriginal people need in terms of a process. In contrast, *Tsilhqot’in* clarifies that consent must also be seen from the perspective of the Aboriginal Peoples whose rights are being impacted.²⁹

The Supreme Court does not specifically state in the decision that they are endorsing FPIC, as articulated in the *UN Declaration*. The Court does, however, emphasize that “consent” is a starting point for analyzing what the Crown can and cannot do where Aboriginal title or an Aboriginal right has been proven and a potential impact on that right is serious.

The notion of consent is, thus, firmly embedded in the arc of modern Canadian law on Aboriginal rights and title. There is no conflict between Canadian legal principles of consent and the FPIC obligations under international law. The Indigenous consent principles in the *UN Declaration* and in Canadian law parallel one another and Canadian Supreme Court decisions indicate more specifically what “consent” means in a Canadian Indigenous context.

The Question of International Law

The past federal government and some current commentators also argue that international covenants and agreements are not enforceable in Canadian law and for this reason, it is inappropriate to apply FPIC in Canadian law and policy.³⁰

This is no longer a tenable position. In Canadian law there is a clear line of cases that outline how international human rights laws are enforceable in Canada and that customary law applies directly as part of Canadian domestic law.³¹ There is a presumption of conformity between Canadian statutes and international law unless a specific law explicitly contradicts such a presumption.³² The recent *CHRC v. Canada* case in the Federal Court and Federal Court of Appeal unpacks some of these principles even further, stating that “Parliament will be presumed to act in compliance with its international obligations,” and that courts will interpret Canadian law to be consistent with the values and principles of international law.³³

Why then, we must ask, do some commentators and politicians in Canada still use language about “veto”? This is the language of fear. Fear-mongering about Aboriginal people wanting to veto development (and thus presumably cripple the Canadian economy) is an example of “False Evidence Appearing Real” (or FEAR). Most commentaries on the dangers of an Indigenous veto attempt to imply that all development proposals are reasonable and that all Aboriginal groups are anti-development and unreasonable in their decision making. These presumptions connect to strong myths in the Canadian narrative of settler-Indigenous relations, and must be addressed squarely, and firmly dismissed. Indigenous groups are not simply “anti development.” Nor are Indigenous governments any more prone to be unreasonable in making decisions than non-Aboriginal governments are.

These false narratives can be countered by telling practical stories to illustrate the real evidence. There are many examples of First Nations thoughtfully and carefully balancing an interest in economic development with a commitment to long-term protection of lands and resources. One such example is the ACFN, mentioned above, who are at the forefront of developing regional businesses in the oil sands regions while also being vigilant about protecting their health, Indigenous rights and future. The false narratives about unreasonable or capricious decision-making by Indigenous governments can be addressed by looking to how the principles of administrative law regarding procedural fairness require Indigenous governments to be reasonable in decision making in the same way as non-Indigenous governments.

Another popular fear triggered by those who use the language of an “Aboriginal veto” over develop-

ment is the fear that assumes that any gains attained by Indigenous groups will be balanced by a loss to non-Indigenous Canadians. This suggests that recognizing Indigenous rights leads to win/lose scenarios, rather than opportunities for mutual gain. Again, practical examples can help to bely this myth.³⁴

The Importance of Stories

How do we refute these fears? We can do so by articulating and exposing them and by telling the stories about the alternatives. As one wise friend once told me, the struggle for Indigenous rights is a struggle to capture the imagination — to better understand current reality and open ourselves to better possible futures through storytelling, culture, music, and the arts.

We can also respond to those who dismiss the need to meaningfully recognize the rights of Indigenous Peoples in Canada or around the world by humanizing the context of FPIC. We can support robust institutions of Indigenous governance as one way to counter the narrative about capricious decision making in Indigenous governments. Most importantly, we can talk about Indigenous consent as a relational process rather than a one-point-in-time decision, as evidenced from the SON example above.

Finally, from a legal perspective, we must see the concept of FPIC and the Supreme Court’s discussions of Aboriginal consultation (including the need for Aboriginal consent in some situations) as one growing branch on the tree of Canadian law. The law is not static, as it might appear in the pages of a book. The law is an evolving, growing, organic process whereby our society decides on our common norms and values. These developments are part of an exciting and critical story in Canada about how we can foster reconciliation rather than confrontation over Indigenous rights. ●

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Endnotes

- 1 Free, Prior and Informed Consent: A Symposium on Human Rights, Indigenous Protocols and Good Practice. Conference at the University of Ottawa, May 20, 2015.
- 2 Saugeen First Nation is one of two SON communities. The other is Chippewas of Nawash Unceded First Nation.
- 3 For an interesting exploration of the significance of doodems in Anishinaabe culture (including for the people of the

- SON), see for instance Bohaker, Heidi, *Reading Anishinaabe Identities: Meaning and Metaphor in Nindoodem Pictographs*. *Ethnohistory* (2010) 57(1): 11-33.
- 4 The Ontario Courts confirmed SON's commercial Aboriginal and Treaty fishing rights in *R. v. Jones and Nadjwoon* (1993), 14 O.R. (3d) 421. The two SON communities are the only non-coastal First Nations who have gone to court and successfully proved a commercial Aboriginal fishing right.
 - 5 See, for instance, the *Oral Intervention from Saugeen Ojibway Nation In the Matter of Ontario Power Generation Inc.*, as part of the SON's submissions to the Deep Geologic Repository Joint Review Panel, available at <https://www.ceaa-acee.gc.ca/050/documents/p17520/93388E.pdf>.
 - 6 The NDP platform is available at <http://www.albertandp.ca/platform>.
 - 7 A copy of the mandate letters is available at <http://indigenous.alberta.ca/documents/Premier-Notley-Letter-Cabinet-Ministers.pdf>.
 - 8 See for instance Justin Trudeau's extensive address to the General Assembly of the Assembly of First Nations, available at: <https://www.liberal.ca/justin-trudeau-at-assembly-of-first-nations-36th-annual-general-assembly/>
 - 9 See for instance the mandate letter for the new Minister of Indigenous and Northern Affairs (renamed from Aboriginal and Northern Development), available at <http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter>.
 - 10 For more information about international lending standards and FPIC compliance, see <http://www.oktlaw.com/blog/what-canada-can-learn-from-the-world-bank/> and Oliver MacLaren, *Blowin' In The Wind: Strategies For Implementing FPIC And Maintaining Peace*, 2015 World Bank Conference On Land And Poverty, Washington DC, March 23-27, 2015
 - 11 For an excellent overview of the history and significance of the Royal Proclamation of 1763, see John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. Vancouver: UBC Press, 1997, available at [http://www.chiefs-of-ontario.org/sites/default/files/files/Borrows-WampumAtNiagara%20\(2\).pdf](http://www.chiefs-of-ontario.org/sites/default/files/files/Borrows-WampumAtNiagara%20(2).pdf)
 - 12 *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR 313 [hereinafter "*Calder*"]. The Supreme Court of Canada split on whether the Nisga'a Nation still maintained title, due partly to legal debates about whether the Royal Proclamation applied in British Columbia.
 - 13 *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [hereinafter "*Tsilhqot'in*"].
 - 14 *Calder* at pg. 330 and 411.
 - 15 *Calder* at pg. 339-341 and 385-386.
 - 16 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter "*Delgamuukw*."] The Supreme Court of Canada did not find that title was established in this case, as a result of other problems in the case history and evidentiary record and the Supreme Court sent the case back for re-trial.
 - 17 *Delgamuukw* at para. 168.
 - 18 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [hereinafter "*Haida*"]. The *Haida* and *Taku River Tlingit* cases addressed the question of what legal obligations arise when Aboriginal rights (including title) have been asserted but have not yet been proven. Prior to the *Haida* case, there was also legal uncertainty about who had the responsibility to consult with Aboriginal groups – was it Crown or industry or both? *Haida* and *Taku River Tlingit* clarified that it is the Crown that has the legal obligation to consult and accommodate Aboriginal groups (based on the historic relationship and on principles of the 'honour of the Crown') and that the Crown could delegate some of the practical aspects of the consultation process to industry, through environmental assessment processes for instance.
 - 19 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 [hereinafter "*Taku River Tlingit*"].
 - 20 *Haida* at para. 24 and 43-45.
 - 21 *Haida* at para. 42 and 48.
 - 22 *Haida* at para. 48.
 - 23 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 [hereinafter "*Mikisew*"].
 - 24 *Mikisew* at para. 66.
 - 25 *Mikisew* at para. 54-55.
 - 26 *Tsilhqot'in*, at 3.
 - 27 *Tsilhqot'in* at para. 76.
 - 28 The Supreme Court goes on to re-articulate the 'justification of infringement' test first set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In order to infringe on an Aboriginal right, including Aboriginal title, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group.
 - 29 *Tsilhqot'in* at para. 81.
 - 30 See for example: <http://www.theglobeandmail.com/opinion/editorials/adopting-un-indigenous-rights-declaration-may-only-make-damaged-relationship-worse/article25048043/>
 - 31 See, for instance, *R. v. Hape*, [2007] 2 S.C.R. 292.
 - 32 The Supreme Court in *R. v. Hape*, for instance, says the following at para 39: Despite the Court's silence in some recent cases, the doctrine of adoption [of international law] has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.
 - 33 *Canada (Attorney General) v. Canadian Human Rights Commission*, 2012 FC 445 at para 351; 2013 FCA 75.
 - 34 See, for instance, the case for – and of – mutual wins set out in Dean Jacobs, *Consulting and Accommodating First Nations in Canada: A Duty That Reaps Benefits* (Nin Da Waab Jig – Walpole Island Heritage Centre), April 2015.