The Canadian Courts' Approach to the 'Duty to Consult' Indigenous Peoples: A Comparative Overview

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Abstract

Articles 18, 19 and 23 of the United Nations Declaration on the Rights of Indigenous Peoples 2008 and Articles 6 and 15 of the ILO Convention Concerning Indigenous and Tribal People No 169 of 1989, generated a concept of the 'duty to consult' indigenous peoples in matters that adversely affect their interests. The question as to whether this 'duty to consult' had not developed into a rule of customary international law, was raised at the International Law Association's meeting in Sofia in 2012. To answer this question a survey of state practice needs to be undertaken. This article focusses on the state practice of Canada regarding the 'duty to consult' as illustrated by decisions of that country's courts. It can be implied that Canadian courts see the 'duty to consult' as an obligation which must be adhered to. Canadian courts have recognised the 'duty to consult' since the judgment in *R v Sparrow* in 1990, but the elaboration of the concept came strongly to the fore in a trilogy of cases in 2004 and 2005 in the *Haida Nation*, *Taku River Tlingit First Nation* and *Mikisew Cree First Nation* cases. Since then, the concept has been incisively discussed and applied in the Canadian Supreme Court in the *Rio Tinto*, *Little Salmon*, *Moses* and the *Behn/Moulton Contracting* cases from 2010 to 2013. The above developments are encapsulated in the 2017 Ontario Superior Court case of *Saugeen First Nation*. The example of Canadian courts accepting 'the duty to consult' its indigenous peoples has manifested itself in other jurisdictions, particularly in Australia and recently in South Africa; and indicates an evolving international customary law norm.

Keywords: Indigenous people; duty to consult; evolving norm of customary international law

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Introduction

In the 1990s, international law became an active field of juridical development, especially regarding claims of indigenous peoples at the national level in North America and Australasia. Such claims were wrapped in language drawn from the rapidly forming emergent international law. The shape that international law took during this period was extremely attractive to indigenous peoples. International law began to articulate specific norms for indigenous peoples during the 1990s, with regard to land claims specifically. During the 1990s international law and municipal law converged with much of the judicial vocabulary channelled through international institutions. The field of indigenous peoples' rights travelled rapidly from a smattering of norms located in disparate instruments largely associated with the remit of the International Labour Organisation (ILO) and as a dimension of minority rights, to being a distinct emerging field demanding the attention of the United Nations (UN). The imprimatur for the UN to become involved was the 1982 UN Working Group on Indigenous Populations which reviewed developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations.

Thirty years later, in 2012, at its Sofia meeting, the International Law Association (ILA) passed a resolution to bring out a report on which the rights of indigenous peoples had or had not developed into customary international law.[1] One of the issues it was envisaged to traverse was that of consultation with indigenous peoples. The concept of consultation with indigenous peoples emerged from Articles 18, 19 and 32 of the 2008 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[2] which states as follows:

> 18 Indigenous peoples *have the right to participate in decision making in matters which would affect their rights,* through representatives chosen by themselves in accordance

1 International Law Association Resolution No 5/2022, Appendix.

2 [Emphasis added]. The UNDRIP is annexed to GA Res UNGAOR 61st Sess No 49, vol III, UN Doc A/61/49 (2008) 15. See in general George Barrie, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2013) TSAR 292; Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realising the UN Declaration on the Rights of Indigenous Peoples* (Purich 2010). Claire Charters, 'The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples' (2007) 4 NZ Yearbook of International Law 121. One hundred forty-four states supported the UNDRIP, eleven states abstained and four states: Australia, Canada, New Zealand and the United States, voted against the UNDRIP. In 2010, Canada declared that it would take steps to endorse the UNDRIP in a manner fully consistent with Canada's constitution and laws (*House of Common Debates* No 074 (8 April 2008) 4656). In 2010, New Zealand announced its support for the UNDRIP (Human Rights Council report of the *Working Group on the Universal Periodical Review: New Zealand* UN Doc A/HRC/12/8 (4 June 2009) para 15). Australia reversed its opposition and endorsed the UNDRIP in 2009 (Statement on the United Nations Declaration on the Rights of Indigenous People delivered at Parliament House, Canberra 3 April 2009). The United States endorsed the UNDRIP in 2010; Mark Tushnet, Mark Graber and Stanford Levinson (eds), *The Oxford Handbook of the US Constitution* (Oxford University Press 2015) 712.

with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.

19 *States shall consult* and co-operate 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.

32(1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

(2) S*tates shall consult* and co-operate 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 and territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

(3) States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The UNDRIP was preceded by the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries No 169 of 1989 (ILO No 169) which, in Article 6 and 15(2), provides that:[3]

6 (1) In applying the provisions of this Convention, *Governments shall:*

(a) *Consult the peoples concerned*, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) Establish means by which *these peoples can freely participate*, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provided the resources necessary for this purpose.

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

3 [Emphasis added]. ILO No 169 is to be found at ILO Official Bulletin Vol 72, Ser A, No 2, 59 (entered into force 5 September 1991).

> 15(2) In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they *shall consult these peoples*, with a view to ascertaining whether and to what degree their interest would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

The above provisions of the UNDRIP and the ILO No 169 generated a serious consideration of the evolving concept of a 'duty to consult' indigenous peoples in matters which seriously affect them and has led to various publications on the issue.[4]

The answer to the question as to whether the 'duty to consult' is developing into a rule of customary international law, will depend on two factors which give the 'duty to consult' its law hallmark. The first factor is the behaviour and practice of states, and the second factor is the subjective conviction held by states that the behaviour or practice in question is compulsory and not discretionary. Succinctly put, custom in international law is a practice followed by states, especially practices followed by concerned states, because they feel legally obliged to behave in such a way.

This article focusses on the state practice of Canada regarding the duty to consult its indigenous peoples as illustrated by the courts of that country. Decisions of domestic courts which relate to international law matters are indicative of the views of the government where such courts are situated. As held by Marshall CJ in *Thirty Hogshead of Sugar, Bentzon v Boyle*,[5]

> [t]he decisions of the Courts in every country show how the law of nations in the given case is understood in that country, and will be considered in adopting the rule which is to prevail in this.

4 Stephen Anaya, *Indigenous Peoples and International Law* (Oxford University Press 2004); Dwight G Newman, *Revisiting the Right to Consult Indigenous People* (Purich 2004); Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous People's Claims in International and Comparative Law' (2001) 34 New York Univ J of Intl L and Politics 189; James Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Purich 2008); Solomon Derso (ed), *Perspectives on the Rights of Minorities and Indigenous Peoples of Africa* (Pretoria University Press 2010); Alexandra Xanthaki, *Indigenous Rights and United Nations Standards* (Cambridge University Press 2007); Paul McHugh, *Aboriginal Title* (Oxford University Press 2011).

5 (1815) 9 Cranch 191 198.

‘Indigenous Peoples’

In spite of the fact that the term ‘indigenous peoples’ (indigenous is used synonymously with ‘aboriginal’) is used in international law and in literature generally, the definition of the term is not yet universally resolved—just as the term ‘peoples’ in international law also evades definition. It is generally accepted that ‘indigenous peoples’ are descendants of original inhabitants of territories which were colonised. Such colonisation led to indigenous territories being ‘legitimately’ acquired by the application of the doctrine of *terra nullius* or the use of treaties. These were the classical means of dispossession which were motivated by the three ‘Cs’ of ‘civilisation’, ‘Christianisation’, and ‘commerce’. In this way the international law of that time developed an arsenal of legal theories legitimising the acquisition of indigenous peoples’ territories. As seen by the indigenous peoples, this dispossession of their lands led to their marginalisation, their subjugation, and the exploitation of their lands; and must be seen as a remaining vestige of a colonial past.

Indigenous peoples form a non-dominant sector of society; they have a strong sense of self-identity; they have a strong emotional bond with ‘their’ lands; and they are determined to preserve, develop, and transmit their ancestral territories to future generations. It is submitted by indigenous peoples that the dominant feature of the pre-colonial ‘ownership’ of their ancestral lands was collective ownership with its source in indigenous customary laws, and that this was never recognised by the colonial powers and, subsequently, independent states. The nexus between indigenous peoples and their ancestral land is seen to be a definitive factor that distinguishes them from the rest of the population.

Overshadowing the debate regarding the relationship between indigenous peoples and their ancestral territories is the right of self-determination—the ultimate purpose of which is the right to manage territory with maximum liberty. Self-determination does not necessarily mean independence in the sense of statehood but is understood to also refer to internal political and economic organisation of a ‘people’ (such as an ‘indigenous people’) without affecting already existing international relations.

Since indigenous peoples, depending on which state they find themselves in, either claim the right to own their ancestral land or the right to manage the land’s natural resources, the doctrine of a ‘duty to consult’ indigenous peoples has had a major impact on the nature of international law relative to indigenous peoples, and has impacted on domestic legal systems. This has been especially so in states where indigenous populations represent an important part of the population and have been dispossessed by colonial settlement.

'Duty to Consult'

Why is there a 'duty to consult' with indigenous peoples? Two examples related to one indigenous nation should suffice to answer this question. In 1976, a dam of the United Nuclear Corporation's nuclear facility in New Mexico known as Church Rock, built on the verge of a Navajo reservation, collapsed spilling 1,100 tons of radioactive waste and 93 million gallons of mine effluent into the Puerco river and the Navajo's water supply. The consequences of this catastrophe for the Navajo nation were a deadly legacy of contaminated tailings, polluted water supplies and chronic illnesses. Prior to the 1960s, the Navajo reservation was known to have the cleanest air in the United States. The Four Corners coal power plant, which started operating on the reservation in 1963, has subsequently become an environmental nightmare emitting over 15 million tons of sulphur dioxide, nitrogen oxides and carbon dioxides per year, as well as 93, 000 kilograms of mercury per year. No other power plant in the United States puts more pollutants in the air than the Four Corners plant. Pollution on the Navajo reservation is ten times worse than in a city such as Los Angeles.

If there had been adequate consultation with the Navajo's regarding the plan to erect a nuclear facility and a coal power plant on the reservation, would the environmental impact have been as disastrous as what has materialised?

Canadian Courts and the Duty to Consult

The understanding of the 'duty to consult' by Canadian courts was emphatically illustrated in the trilogy of cases: *Haida Nation v British Columbia (Minister of Forests*;[6] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*[7] and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*.[8]

In *Haida Nation*, McLachlin CJ explained the Canadian application of the duty to consult. At issue was the government's replacement and transfer of a tree farm license to a large forestry corporation named Weyerhauser. This was done without consulting the Haida Nation. The Supreme Court held that the government should have consulted the Haida Nation prior to transferring the license because the Crown was bound to act honourably in its relations with the aboriginal peoples.[9] McLachlin CJ held that a duty to consult arose when the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely

6 2004 SCC 73 (2004) 3 SCR 511. In *R v Sparrow* (1990) 1 SCR 1075, the Canadian Supreme Court referred to a 'duty to consult' emanating from section 35 of the Constitution Act 1982 which recognises aboriginal rights. This 'duty to consult' here was based on a constitutional imperative and had no international law connotation.

7 2003 SCC 74 (2004) 3 SCR 550.

8 2005 SCC 69 (2005) 3 SCR 388.

9 *Haida Nation* (n 6) para 277. See *Manitoba Métis Federation Inc v Canada (Attorney General)* 2013 SCC 14.

affect it.[10] What also had to be taken account of, held McLachlin CJ, was the seriousness of the potential adverse impact[11] on the aboriginal right or title[12] claimed.

In the companion *Taku River*[13] case, the Supreme Court held that the government had met the necessary consultation requirements. The case arose from a mining company's application to reopen an old mine in Northwest British Columbia. The company intended to build a 160-kilometre road to the mine through traditional Taku River Tlingit Nation territory. The Tlingit raised concerns about the possible impacts on wildlife and other traditional uses of the territory. The court found that there had been a significant consideration of the Tlingit's concerns including strategies relating to wildlife migration and the impact on the environment after consultation.[14]

The *Mikisew Cree*[15] case arose following protests by the Mikisew Cree Nation against the location of a winter road near their reserve in northern Alberta. The Mikisew Cree submitted that the road would affect their traditional lifestyle because it crossed a number of their trap lines and hunting grounds. The Supreme Court held that in the circumstances there was a duty to consult, that there had not been adequate consultation, and that the government must reassess their initial decision in light of the findings of the court.[16]

In these three cases the Canadian Supreme Court established a new legal doctrine relating to government consultation with aboriginal nations relating to decisions which seriously impact on such nations economically, their natural resource developments and their traditional lifestyle. These three cases dramatically transformed the discourse.[17]

After these three cases, five years passed until the *Rio Tinto Alcan v Carrier Sekani Tribal Council* case in 2010.[18] The case concerned applications for renewals of energy-production deals at hydro-electric facilities powered by dams that had been built decades ago with no consultation and with clear impacts on the aboriginal nation in the area. Questions were raised concerning the role of a utilities commission in relation to the duty to consult as well as any other consultation obligations arising from such renewals relating to various administrative boards and the like. The Supreme Court opined that

10 ibid para 35.
11 ibid para 43–45.
12 The term 'aboriginal title' encompasses the legal protection of extant indigenous land rights and long-standing customary practices to land. See Louis A Knafla and Haijo Westra, *Aboriginal Title and Indigenous Peoples* (UBC Press 2010); McHugh (n 4) 328.
13 *Taku River* (n 7).
14 ibid para 41.
15 *Mikisew Cree* (n 8).
16 ibid para 59–69.
17 Newman (n 4) 17.
18 2010 SCC 43 (2010) 2 SCR 650.

the government is constantly obligated to see that consultation occurs but that the courts will not determine how this consultation must take place. The Supreme Court also importantly placed limits on the duty to consult holding that the duty was not retrospective but a forward-looking duty that attaches to potential future impacts of decisions being made today.[19]

In 2010, in *Quebec (Attorney General) v Moses*[20] and *Beckman v Little Salmon/ Carmacks First Nation*,[21] the Supreme Court held that despite modern treaties with aboriginal nations which define how consultation is to take place, the underlying constitutional consideration to consult continues to exist and gives the ultimate protection to aboriginal nations. In *Behn v Moulton Contracting Ltd*,[22] the Supreme Court left the question open as to whether the duty to consult is only to communities or can also be to individuals.

A major unresolved issue is the question whether contemplated legislative action entails consultation. This question arises from the interpretation of Article 19 of the UNDRIP which declares 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 affect them.

The issue of contemplative action was raised in *Ross River Dena Council v Government of Yukon.*[23] In this case an aboriginal community claimed to be affected by preliminary exploration activities under the Yukon's statutory free-entry mining regime. Under this regime, anyone could stake a new claim and under statute have the right to have that claim automatically registered which allowed certain limited activities. The Yukon Court of Appeal held that the government had to redesign the statutory regime so as to create a role for consultation at an earlier stage before the automatic registration leads to activities on the claim. An appeal was denied by the Supreme Court which means that the decision was left in place. It has been submitted that the Supreme Court did not wish to consider the issue at that time but may do so in the future.[24]

The question as to when precisely a duty to consult may arise is predominantly answered by McLachlin CJ's statement where he stated that the duty arises when the Crown (government) has knowledge, real or constructive, of the potential existence of the

19 ibid para 55.
20 2010 SCC 17 (2010) 1 SCR 557.
21 2010 SCC 53 (2010) 3 SCR 103.
22 2013 SCC 26.
23 2012 YRCA 13.
24 Newman (n 4) 23.

aboriginal right or title and contemplates conduct that might adversely affect it. What constitutes government knowledge needs more elucidating by the courts. In *Native Council of Nova Scotia v Canada*[25] the court held that a substantial amount of evidence supporting aboriginal rights must be presented in a submission that consultation had not taken place. If not, a duty to consult was not sufficiently generated. Similarly, in *Ahousat Indian Band v Canada (Minister of Fisheries & Oceans)*[26] the court emphasised that the proof submitted of an aboriginal right giving rise to consultation requirements, needed to go beyond mere submissions. What also needs more clarity is what conduct would adversely affect aboriginal rights? In *R v Douglas*[27] it was held that there must be an appreciable adverse effect on the First Nations' ability to exercise their aboriginal right. According to *R v Lefthand*[28] there must be some unreasonableness, hardship, or interference. The case law also does not appear to be clear as to what level of government contemplation of future plans is needed for such planning to trigger the duty to consult. In *Dene Tha' First Nation v Canada (Minister of the Environment)*[29] Phelan J[30] used the example of government planning a gas pipeline. If a plan was envisaged and a roadmap was in the contemplation of government officials, the court held that there should at that early stage, be consultation with the affected indigenous nations. This resonates with the *Rio Tinto*[31] case where it was held that the duty to consult extends to strategic, higher-level government decisions that may have an impact on aboriginal claims and interests.

The duty to consult is basically owed to aboriginal communities in the main. The duty to consult at present does not apply to class representatives or individuals.[32] In *Behn v Moulting Contracting*,[33] however, the court recognised the need for this position to be reconsidered regarding the duty to consult towards individuals where aboriginal rights are individually held. In many instances, due to the complexity of the composition of some aboriginal groups, it is difficult to ascertain precisely with whom to consult. This can create tensions within a group. Tensions can also arise where aboriginal groups have overlapping interests such as in *Enge v Mandeville*,[34] where the court held that there was a duty to consult a First Nation aboriginal group and a Métis group (Métis describes individuals of mixed-aboriginal and non-aboriginal ancestry). The case concerned both groups having prima facie caribou hunting and harvesting rights.

25 2007 FC 45 (2007) 2 CNLR 233.
26 2008 FCA 212 297 DLR (4th) 722.
27 2007 BCCA 265 278 DLR (4th) 653 para 44.
28 2007 ABCA 206 77 Alta LR (4th) 2003 para 37.
29 2006 FC 1354 (2007) 1 CNLR 1.
30 ibid para 100.
31 *Rio Tinto* (n 18) para 44.
32 *Campbell v British Columbia (Minister of Forests and Range)* 2012 BCCA 468 (2013) 1 CNLR 10.
33 2013 SCC 26.
34 (2013) 4 CNLR 50 (NWTSC).

The capacity of an aboriginal group to consult effectively with the government may in many instances be determined by adequate funding being made available. The Canadian Supreme Court's creation of a duty to consult has risked imposing hefty costs on many aboriginal communities especially in long-term negotiations. The Métis Nation of Saskatchewan for example estimated that it incurred CAD40, 000 in consultation costs with the Canadian Nuclear Safety Commission regarding abandoned uranium mines. The question arises whether the duty to consult should include adequate funding.

What constitutes meaningful consultation was addressed in *White River First Nation v Yukon (Minister of Energy, Mines and Resources).*[35] It was seen to be the form of consultation which generates an appropriate level of respect for aboriginal rights and comprises a genuine process for feedback that is appropriate in the given circumstances and allows the government to take proper account of such feedback. Meaningful consultation must also entail procedural fairness as understood in administrative law requirements such as adequate notice and audi alteram partem.[36]

The degree of consultation necessary can be determined by the seriousness of the impact of the contemplated government action on the affected aboriginal community. An important factor would be whether the potential government action has an irreversible effect in contrast to a more transient effect. In the former instance the degree of consultation is expected to be higher than in the latter instance. This approach emerged from *Kwikwetlem First Nation v British Columbia (Utilities Commission).*[37] A higher consultation may also be required if the impact is on an economic interest rather than on a cultural interest. The level of the duty to consult may differ from minimal notice and disclosure to incisive consultation that follows more complex approaches and more complex dispute resolution procedures. There does not appear to be an all-determinative test regarding the practice of consultation, and the different ways of reaching a determination acceptable to all concerned parties. Creativity is possible in attaining a meaningful consultation. The duty to consult may in particular circumstances apply over a period and in others be a once-off consultation. In *Ka'a'gee Tu First Nation v Canada (Indian Affairs and Northern Development)*[38] it was held that there had been a breach of the duty to consult because, although the Ka'a'gee Tu had had the chance to participate in some consultations, they were not consulted in the final stage of the decision-making.

35 2013 YKSC 66.

36 For procedural fairness in Canadian administrative law see *Canadian Pacific Railway Company v Vancouver (City)* (2006) SCC 5 (2006) 1 SCR 227.

37 2009 BCCA 68 para 70.

38 2007 FC 764 (2008) 2 FCR 473.

What makes consultation meaningful will thus differ from case to case, but the minimum will constantly be appropriate *timing,* appropriate *notice,* and adequate *opportunity to respond.* These prerequisites emerged clearly in the *Brokenhead Objiway Nation v Canada (Attorney General)*[39] case, which concerned the duty to consult in the context of a set of oil pipeline projects, one of which was the Keystone Pipeline. In his judgment, Barnes J emphasised the principle that the content of the duty to consult with First Nations must be proportionate to both the potential strength of the claim or right asserted and the anticipated impact of a development or project on the asserted interests.[40]

Concerns have been raised in Canada that the government may exploit the fact that the duty to consult does not include a veto by aboriginal communities to authorise developments after attempts at consultation.[41] According to *Haida Nation*[42] the duty to consult does not include an aboriginal power of veto over any particular government decision. As seen by Newman,[43] it is important for the courts and policymakers to ensure that the duty to consult fulfils its purposes as a procedure but does not become an effective veto power which it is not meant to be. In the 2009 Annual Report of the United Nations Special Rapporteur of the Situation of Human Rights and Fundamental Freedoms of Indigenous People,[44] the report suggests that the UNDRIP[45] does not create a veto power when it comes to consultation. Rather it creates an obligation to engage a process in good faith. However, the 2013 Annual Report of the Special Rapporteur on the Rights of Indigenous Peoples,[46] though still not specifically adopting a veto power, stated that aboriginal peoples have the right to withhold consent to resource developments on their traditional territories.

Above exposition of the views of the courts in Canada is an indication of state practice in that country in the context of the overarching duty of the federal and provincial governments, the aboriginal communities, and industry stakeholders[47] to develop an effective means of applying the duty to consult indigenous peoples. The cases discussed above, which, as it were, set out the state practice in Canada regarding the duty to consult are encapsulated in the recent case of the Ontario Superior Court of *Saugeen First*

39 2009 FC 484.

40 ibid para 23. For the application of proportionality in South Africa see George Barrie, 'The Application of the Doctrine of Proportionality in South African Courts' (2013) 28 SAPL 40.

41 Gordon Christie, 'A Colonial Reading of Recent Jurisprudence: *Sparrow; Delgamuukw* and *Haida Nation*' (2005) 23 Windsor Yearbook of Access to Justice 17.

42 *Haida Nation* (n 6) para 48.

43 Newman (n 4) 172.

44 UN Doc A/HRC/12/34 (15 July 2009).

45 UNDRIP (n 2).

46 UN Doc A/HRC/24/41 (1 July 2013).

47 See David Szablowski, *Law and Local Struggles: Mining, Communities and the World Bank* (Oxford University Press 2007) 208–305.

Nation v Ontario (Minister of Natural Resources and Forestry).[48] The case concerned the Crown's duty to consult with, and accommodate, the rights and interests of the Saugeen Ojibway Nation (SON) in connection with T&P Hayes Ltd.'s application for a license for a quarry (the project) on SON traditional lands. SON and the Crown agreed that the duty to consult was applicable in the case. The court decided that the scope of the duty to consult required the Crown (i) to give notice to SON by giving formal notice of the project to the SON Environment Office; (ii) to give information to SON about the details of the project; (iii) to provide SON with CAD10, 914 in funding—the Minister of Natural Resources and Mining agreed to fund SON for obtaining expert assistance; (iv) to communicate with SON about SON's concerns regarding the project after SON had the benefit of expert advice; and (v) to follow a reasonable process thereafter to complete adequate consultations, and, where appropriate, accommodation of the SON's concerns.

Australia

Australia's consultation system has developed in a different way to that of Canada in that it is based on *statutory norms* and less on judicial decisions. Following on *Mabo and Others v Queensland (No 2)*,[49] (*Mabo (No 2)*). Australia chose a legislative framework regarding the so-called 'right to negotiate'. After the High Court held that the aboriginal Meriam people (applicants) had pre-existing land rights recognised by the common law, a Native Title Act (1993) (Cth)[50] was passed by the Commonwealth parliament to recognise and protect what was referred to as 'native title'. Native title allowed for the full protection and enjoyment of 'native' land rights in a similar fashion to freehold title. Section 25(2) of the Native Title Act refers to a right to negotiate relating to future acts done after 1 January 1994 that have effects on native title. According to section 25(2): 'before the future act is done, the parties must negotiate with a view to reaching an agreement about the act.' Sections 26 to 30 provide that in relation to proposed government actions such as mining-related grants and title-related grants to third parties, a compulsory negotiation process commences between the government, the third-party beneficiary, and the registered native title holder. Sections 35 to 36 provide that if such negotiation is unsuccessful the matter goes to the Native

48 (2017) 4 CNLR 213.

49 (1992) HCA 23 (1992) 175 CLR 1. It is not within the purview of this article to discuss the background and details of *Mabo (No 2)*. See George Barrie, 'Aboriginal Land Rights in Australia Remains an Unruly Horse' (2009) TSAR 155; McHugh (n 4) 95; Peter H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English – Settler Colonialism* (Toronto University Press 2005). The latter is a highly readable discussion of the *Mabo (No 2)* case.

50 This Act was amended by the Native Title Amendment Act (1998) (Cth) which diminished the area of land over which native title may exist. This followed upon acrimonious litigation in *Wik People v Queensland* (1996) 187 CLR 1.

Title Tribunal to adjudicate whether the action may proceed and on what conditions. 'Negotiation' in practice means nothing less than consultation.

The different states of the Australian federation (Commonwealth) may follow their own consultation prescriptions.[51] The state of Queensland has developed its own 'right to negotiate' framework especially in the context of that state's mining industry[52] with the Native Title (Queensland) State Provisions Amendment Act (No 2) 1998 (Queensland); the Native Title State Provisions Act 1999 (Queensland) and the Native Title Resolution Act 2000 (Queensland). This legislative framework provides for two negotiation systems. For low-impact exploration activities a less demanding negotiation process is demanded whereas for high-impact mining and exploration activities a more demanding negotiation process is predicated. Should negotiations stall, a Queensland based Land and Resources Tribunal will adjudicate on the issue which is a speedier process than approaching the National Native Tribunal. The state of Western Australia has similarly developed its own negotiation policies relating to native title and related issues. An example of this is the Noongar native title settlement in Western Australia in 2013, which was based on negotiations and consultation and played itself out in *Bennell v State of Western Australia.*[53]

It can be implied from *Mabo (No 2)*[54] that the Australian High Court took into consideration the existence of customary international law where Brennan J stated:

> It is contrary both to *international standards* and to the values of our common law to entrench a discriminatory rule which … denies indigenous inhabitants a right to occupy their traditional land.

South Africa

In South Africa, two recent cases may have emphasised an emerging 'duty to consult' indigenous peoples. These are *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*[55] and *Baleni and Others v Minister of Mineral*

51 See Sam Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill, *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press 2015).

52 Katherine Morgan-Wicks, 'Balancing Native Title and Mining, Interests: The Queensland Experience' in Christopher JF Boge (ed), *Justice for All? Native Title in the Australian Legal System* (Lawyers Books Publications 2001) 65; Ciaran O'Faircheallaigh, 'Negotiating Protection of the Sacred? Aboriginal-mining Company Agreements in Australia' (2008) 39 Development and Change 25.

53 (2006) FCA 1243. See John Host and L Chris Owen, *Its Still in My Heart, this is My Country – The Single Noongar Claim History* (UWA Publishing 2009); George Barrie, 'Land Claims by Indigenous Peoples – Litigation versus Settlement?' (2018) TSAR 344, for an extensive discussion of this settlement.

54 *Mabo (No 2)* (n 50) 29.

55 2019 2 SA 1 (CC).

Resources.[56] Space does not permit an extensive discussion of these two decisions and the discussion relative to these two cases will be confined as to what the respective courts held regarding the 'duty to consult indigenous peoples.' In the case of *Maledu*, the 37 applicants were members of the Lesetheng Village Community, part of the Bakgatla-Ba-Kgafela community. They claimed ownership in respect of farmland registered in 1919 in the name of the Minister of Rural Development and Land Reform 'in trust' for the Bakgatla-Ba-Kgafela community. They claimed ownership of the farmland by virtue of it having been purchased by their forebearers. During 2008, the first respondent concluded a surface lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority for mining operations on the farmland. Because the mining operations would impact negatively on the applicants' occupation of the farm, they obtained a spoliation order against the respondents. The respondents then obtained an eviction order in the High Court to evict the applicants and to interdict them from entering the farm. The High Court rejected all the applicants' defences. The Supreme Court of Appeal refused the applicants leave to appeal and the applicants approached the Constitutional Court which then granted leave to appeal. A question before the Constitutional Court was whether the applicants had been consulted and had consented to being deprived of their informal land rights or interests in the farm as required by section 2 of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The Constitutional Court[57] held that with the advent of constitutional democracy, customary law was restored to its rightful place. Further, where land was held on a communal basis, a person may be deprived of such land or right in land in accordance with the custom or usage of the community concerned, except where the land in question is expropriated.[58] The Constitutional Court maintained that section 2(4) of the IPILRA required that affected parties must be given sufficient notice and be afforded a reasonable opportunity to participate at any meeting where a decision to dispose of their rights to land is to be taken. Moreover, that such a decision can only be taken with the support of the majority of affected persons having an interest in or rights to the land concerned. The Constitutional Court could find no shred of evidence that the prescripts of section 2(4) of the IPILRA had been followed and ordered that the High Court judgment be overturned. Most significantly, the Constitutional Court held[59] that the IPILRA provides that no person may be deprived of any informal right to land without his or her consent which clearly implies prior consultation.

The *Baleni* decision concerned an Australian mining company, Transworld Energy and Mineral Resources (SA) Pty Ltd (TEM), who wanted to mine titanium-rich sands as part of the Xolobeni Mineral Sands Project. TEM applied for mining rights relating to

56 Case No 73768/2016 Gauteng High Court, Pretoria. See S Dimba, 'Xolobeni High Court Judgement: The Rights of Indigenous People Over Proposed Mining Extractivism' (2019) 2 African LR 33.

57 para 94.

58 para 96.

59 ibid.

titanium ore and other heavy minerals in the Xolobeni area in the Eastern Cape. The proposed area comprised 2895 hectares and a strip of coastal land 22 kilometres long and 1.5 kilometres inland from the high-water mark. The majority of the applicants in the Xolobeni area together with their families lived within or in proximity to the proposed mining area. The applicants approached the High Court to seek to prevent the proposed mining operation from taking place.

TEM wanted to conduct open-cast mining activities on 900 hectares within the proposed mining area. The area was considered by the applicants to be an essential site for family graves and essential for family and community rituals. Most of the inhabitants affected by the proposed mining activities had lived in the area for generations and the community was made up of a collection of intertwined relationships between the living and the dead. The specific community residing in the proposed mining area were known as the Umgungundlovu community and were proud of their membership of the greater Amadiba Traditional Community. Land, according to the community's customary law, accrued to members of the Umgungundlovu community. The community wished to protect their customary law and did not want TEM to mine on their ancestral land. The community also strongly opposed the proposed mining for fear of the disastrous social, economic, and ecological consequences.

The applicants submitted that they had not been consulted on the mining activities and relied on section 2(1) of the IPILRA which in their view mandated that their consent after consultation is required before they may be deprived of their land. The court agreed with the applicants and was satisfied that the grant of mineral rights would constitute a deprivation for purposes of the IPILRA which necessitated the consent of the community after consultation.[60] The court ordered that in terms of the IPILRA[61] read with section 22 of the Mineral Petroleum Resources Development Act 28 of 2002, the community must first give their full and informed consent prior to any mining rights being granted on the Umgungundlovu ancestral land. Such 'full and informed consent' can only be preceded by consultation. In coming to its decision, the court referred to the Constitutional Court case *Alexkor Ltd v Richtersveld Community*[62] where it was held that indigenous law must now be an integral part of our law and it also emphasised that 'consent' means 'agreement' as was made clear in *Bengwenyama Minerals Pty Ltd and Others v Genorah Resources (Pty) Ltd and Others*.[63] Agreement implies that there was prior consultation. The court in coming to its decision also referred extensively[64] to international law instruments which require that communities similar to such as the Umgungundlovu community, have the right to grant or refuse their free, prior and

60 IPILRA para 59. This is in conformity with ss 19 and 32 of the UNDRIP.
61 IPILRA para 84.
62 2004 5 SA 460 (CC).
63 2011 4 SA 113 (CC).
64 *Bengwenyama* paras 63–67.

informed consent after consultation to any mining development that will significantly affect them. These international law instruments are General Recommendations 21: Indigenous Peoples issued in terms of the Convention on the Elimination of Racial Discrimination; the International Convention on Economic, Social and Cultural Rights, the International Convention on Civil and Political Rights and the interpretation of the African Charter by the African Commission on Human and Peoples' Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya*.[65]

The court's interpretation of these international instruments is in accordance with the UNDRIP[66] which, in section 19, declares that states shall consult and cooperate in good faith with indigenous peoples through their own representative institutions to obtain their free, prior and informed consent before implementing administrative or legislative measures that may affect them.

Other Jurisdictions

The Inter-American Court of Human Rights (IACrtHR) in the *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*[67] handed down a landmark decision as to whether the obligation to consult with indigenous peoples regarding matters which are of vital concern to them has become a general principle of international law. Briefly put, the Sarayaku indigenous people sued the Ecuadorian state before the IACrtHR for violating several of their constitutional rights such as the right to property and freedom of movement. The Ecuadorian government had granted concessions for oil exploration and exploitation of hydrocarbons and the use of explosives in these activities in the Sarayaku territory without consulting the Sarayaku community. The court considered whether under international law the right to consultation is a fundamental guarantee that safeguards the participation of indigenous people in decisions likely to affect their rights. The court found that such participation and consultation is enshrined in Articles 6 and 15 of the ILO Convention No 169 and Articles 18,19 and 32 of the UNDRIP and led to the conclusion that the obligation to consult in addition to being treaty based is also a general principle of international law. The court consequently held that Ecuador, by failing to consult the Sarayaku people on the execution of a project that would have a direct impact on their territory and lives, failed to comply with its obligations under the principles of general international law.

Peru became the first Latin American state to pass legislation on consultation with indigenous people with the adoption of *Ley de Derecho a la Consulta Previa a los*

65 ACHPR Communication 276/2003, (1982) 58 *ILM* 1982. See George Barrie, 'The Quest for Indigenous Land Rights Intensifies: *Mabo (no 2)*, *Delgamuukw*, *Richtersveld* and Now the *Endorois* of Kenya' (2011) 26 SAPL 497.

66 UNDRIP (n 2).

67 Inter-Am Crt HR (Ser C) No 242 (27 June 2012) para 164.

Pueblos Indigenas u Originarios Reconocido[68] in 2011. The constitution of Bolivia[69] has entrenched consultation provisions as does Ecuador's constitution.[70] On 5 November 2009, United States President Obama signed and distributed a memorandum on tribal consultation policies to the relevant government departments.[71] In December 2011, the United States[72] became the last of the four states (Canada, New Zealand, Australia and the United States) that initially voted against the UNDRIP, to endorse the UNDRIP.

Conclusion

There are approximately one million indigenous people in Canada, descendants of the first inhabitants of North America. Article 35(2) of the Canadian Constitution Act 1982 defines 'aboriginal peoples' of Canada as the Indian, Inuit and Métis peoples of Canada. Canada has a long history of dialogue with indigenous people. This dialogue was not always based on respect for aboriginal cultures and the customs and laws in relation to their lands. 'Dialogue' has now developed into 'consultation' as has been illustrated by the decisions of Canadian courts. These decisions can be seen to be a manifestation of state practice indicating an evolving rule of customary international law. As seen by Asch[73] in the period ending 1996, in Canada it was important to realise that only a few years before that, the exercise of governmental power on land was unmitigated but had moved to a theory of indigenous rights which seeks to balance the supremacy of state power with respect to cultural difference. This theory, as has been indicated above, has developed into a court-based legal doctrine of consultation with indigenous peoples in matters which adversely affect them.

The Canadian decisions are contributing and engaging with other norms developing within international law relating to states' relationships with indigenous peoples. Despite the UNDRIP being a UN Declaration[74] and not a treaty as such, the values it

68 Ley No 29785 (7 September 2011 (Peru).

69 Constitution of Bolivia (2009) ss 30(15) 352.

70 Constitution of the Republic of Ecuador (2008) s 57(7).

71 *Office of the Press Secretary, Executive Office of the President, Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation (2009).* This memorandum was sent to the departments of the environment, energy and interior. The latter department is very much involved with consultations with Indian tribes. For the position in the USA prior to the 2009 Obama memorandum see Matthew Fletcher, 'The Supreme Court's Indian Problem' (2008) 59 Hastings LJ 579; David Getches, 'Beyond Indian Law: The Rehnquist Courts Pursuit of States' Rights, Color-blind Justice and Mainstream Values' (2001) 86 Minnesota LR 267.

72 See (n 2).

73 Michael Asch, 'From Calder to Van der Peet, Aboriginal Rights and Canadian Law 1973 – 1996' in Paul Havemann (ed), *Indigenous Peoples Rights in Australia, Canada and New Zealand* (Oxford University Press 1999) 428.

74 UN Declarations that have had a major influence on the development of international law are Declaration of Legal Principles Governing the Activities of States in the Exploration and the Use of Outer Space (GA Res 1962 XIII) 1963; Declaration on the Granting of Independence to Colonial

embodies have clearly, through the Canadian courts, become values to which Canada aspires. In *Simon v Canada*[75] the Federal Court held:

> Indeed, while this instrument [UNDRIP] does not create substantive rights, the Court nevertheless favours *an interpretation that will embody its values.*

The Canadian state practice regarding consultation with indigenous peoples in matters which adversely affect them clearly transmits directly into international customary law as it indicates consistency and *opinio juris sive necessitates.*

Stephen J Choi and Mitu Gulati[76] are of the opinion that the rationale for using domestic court decisions as evidence of customary international law is the same as that for using international tribunal cases. After an incisive study they conclude that out of 287 international and domestic tribunal cases related to a finding of customary international law, 97 domestic law cases were cited to support a finding that there was a rule of customary international law. Allen Boyle and Christine Chinkin[77] see decisions of national courts as formative of state practice and opinio juris. Also, Boas[78] is of the opinion that a state's opinio juris can be derived from decisions of that state's national tribunals. In the *Arrest Warrant* case[79] the International Court of Justice in determining state practice in relation to customary international law examined decisions of national courts.

The only rationale which can be suggested for the Canadian courts to apply so assiduously the 'duty to consult' when it comes to governmental decisions, which can adversely affect the rights of its indigenous peoples, is the powerful effect of Articles 6 and 15 of the ILO No 169[80] and Articles 18, 19 and 32 of the UNDRIP[81] on Canadian domestic law. In so doing these decisions of Canadian courts by implication reflect the opinion of their government and are but a further factor in ascertaining 'a general practice accepted as law' which is 'evidence of international custom'.[82] These decisions

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Countries and Peoples (GA Res 1514 XV) 1960, and the Universal Declaration of Human Rights (GA Res 217 AIII) 1948.

75 2013 FC 1117 para 121 [Emphasis added].

76 Stephen J Choi and Mitu Gulati, 'Customary International Law: How do the Courts do it? in Curtis A Bradley (ed), *Customs Future: International Law in a Changing World* (Cambridge University Press 2016) 117 132.

77 Allen Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 278.

78 Gideon Boas, *Public International Law* (Edward Elgar 2012) 82.

79 *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (2002) ICJ Rep 3 para 58.

80 See (n 3).

81 See (n 2).

82 Article 38(1) of the Statute of the International Court of Justice.

are mere examples of evolving customary international law being raised and applied in domestic courts.

Despite the statement in *Simon v Canada*[83] that the court favours an interpretation that will embody the values of the UNDRIP, Canadian courts have been cautious to apply the UNDRIP in a direct way. The UNDRIP is, however, likely to continue to have an indirect and gradual effect on Canadian courts and will continue to be treated as an aspirational statement of aboriginal rights. Canada's ongoing interaction with the UNDRIP's references to the 'duty to consult' will be part of the ongoing conversation as to whether the 'duty to consult' has become part of international customary law. What is clear is that Canada's relationship with its indigenous peoples is based on a set of developing international legal norms which has influenced Canada's state practice. The 'duty to consult' as interpreted and applied by Canadian courts will comparatively influence other countries that are facing similar issues.[84] Although of recent vintage, the *Maledu*[85] and the *Baleni*[86] cases would appear to be moving in the same direction as the Canadian courts, the Australian courts, and the decisions of the courts and state practice in North and South America. To this must be added the UNDRIP[87] which is the product of a major political organ of the UN which has been endorsed by all but two members of the UN General Assembly and in 6 sections uses the term 'consultation'.

In the context of this article section 32 of the UNDRIP merits special mention where it states:

> States shall consult and cooperate in good faith with the indigenous people 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 and territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

In the second paragraph of this article reference was made to the ILA's resolution in 2012 to bring about a report on which rights of indigenous peoples had developed into customary international law. The report was also to explore the issue of consultation with indigenous people. It would appear from above that in Canada, Australia, South America, the USA, and recently in South Africa, the state practice regarding the exploitation of the natural resources on the lands of indigenous peoples necessitates

83 *Simon v Canada* (n 64).

84 Stewart Sutcliffe (ed), *Mining Law: Jurisdictional Comparisons* (Sweet and Maxwell 2012) discusses consultation requirements with indigenous peoples in relations to mining operations in Argentina, Australia, Brazil, Canada, Colombia, Finland, Mexico, Namibia and Venezuela.

85 *Maledu* (n 56).

86 *Baleni* (n 57).

87 UNDRIP (n 2).

prior consultation with the latter. This state practice, it is submitted, is a sign of an evolving rule of customary international law.[88]

88 For customary international law in general see John Dugard, *Dugard's International Law: A South African Perspective* (Juta 2018) 30.

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