

# Protecting Aboriginal Rights and Title in Canada: A Growing Space for the United Nations Declaration on the Rights of Indigenous Peoples

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## Abstract

In 2014, the Supreme Court of Canada issued a landmark decision in *Tsilhqot'in Nation v. British Columbia*. In this decision, the Supreme Court recognised Aboriginal title to a specific territory for the first time, along with Aboriginal rights to hunt, trap, and engage in other practices. While international human rights law relating to Indigenous peoples, notably the United Nations Declaration on the Rights of Indigenous Peoples, was not directly relied upon in this decision, the subsequent negotiations and outcome documents have gradually included the UN Declaration into the discussion, in conjunction with the political and legal shift towards recognition and acceptance of it in Canada. By exploring the political and legal struggles of the Tsilhqot'in, particularly after the 2014 decision, this paper considers a growing space for the UN Declaration in defining the declared Aboriginal rights and title.

**Key words:** Aboriginal rights and title, UN Declaration on the Rights of Indigenous Peoples, Consultation and Consent, British Columbia, Canada.

# Protegendo Direitos e Título Aborígenes no Canadá: Um Espaço Crescente para a Declaração das Nações Unidas sobre os Direitos dos Povos Indígenas

## Resumo

Em 2014, a Suprema Corte do Canadá emitiu uma decisão histórica em *Tsilhqot'in Nation v. British Columbia*. Nessa decisão, a Suprema Corte reconheceu o título aborígene de um território específico pela primeira vez, junto com os direitos dos aborígenes de caçar, usar armadilhas e realizar outras práticas. Embora o direito internacional sobre direitos humanos relativo aos povos indígenas, notadamente a Declaração das Nações Unidas sobre os Direitos dos Povos Indígenas, não tenha sido diretamente invocado nesta decisão, as negociações subsequentes e documentos de resultado gradualmente incluíram a Declaração das Nações Unidas na discussão, em conjunto com a mudança política e legal em direção ao reconhecimento e aceitação dela no Canadá. Ao explorar as lutas políticas e jurídicas dos *Tsilhqot'in*, especialmente após a decisão de 2014, este artigo considera um espaço crescente para a Declaração da ONU na definição dos direitos e títulos aborígenes declarados.

**Palavras-chave:** Direitos e títulos aborígenes, Declaração das Nações Unidas sobre os Direitos dos Povos Indígenas, Consulta e Consentimento, Colúmbia Britânica, Canadá.

# Protecting Aboriginal Rights and Title in Canada: A Growing Space for the United Nations Declaration on the Rights of Indigenous Peoples

Fumiya Nagai

## Introduction

In 2014, the Supreme Court of Canada (SCC) issued a landmark decision in *Tsilhqot'in Nation v. British Columbia*. In this decision, the SCC recognised Aboriginal title to a specific territory for the first time, along with Aboriginal rights to hunt, trap, and engage in other practices. Aboriginal title is a collective, inherent Aboriginal right to land in Canada, mainly defined in court. While this right is situated within the spectrum of Aboriginal rights, which emphasise specific practices integral to each distinctive culture, it also has unique features such as the external uniformity across Canada, applying to all Aboriginal groups. The court has identified its source as the exclusive, sufficient, and continuous occupation and use of the land prior and subsequent to the declaration of British sovereignty. It is determined by drawing on Indigenous perspectives, being called a unique, or *sui generis* right. According to Slattery, this right can also be regarded as “a generative right,” which “exists in a dynamic but latent form, which is capable of partial articulation by the courts but whose full implementation requires agreement between the Indigenous party and the Crown” (Slattery, 2006: 262). Indeed, concerning their Aboriginal title, the Tsilhqot'in have also engaged in negotiations with the federal and provincial governments, aiming to define their rights and resulting in several documents that have agreed to develop nation-to-nation relationships towards a lasting reconciliation. While they have mainly utilised the domestic framework as the primary venue to assert their rights, one of the notable aspects in the outcome documents through negotiations is increasing reference to not only domestic but also international human rights frameworks relating to Indigenous peoples, most notably the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Additionally, along with the title case and subsequent negotiations, the Tsilhqot'in have been compelled to fight against the mining attempt in their territory, and in this conflict, they have also gradually utilised the language and mechanisms of international human rights.

In this paper, by exploring the political and legal struggles of the Tsilhqot'in, I will consider a growing space for the UNDRIP in defining “generative” Aboriginal rights and title.<sup>1</sup> Firstly, to contextualise the Tsilhqot'in struggles for their rights, I will overview their title case and also clarify the political and legal shifts towards the UNDRIP in Canada. Subsequently, I will explore how the UNDRIP has been referred to in the outcome documents of negotiations between the Tsilhqot'in and the federal and provincial governments, as well as how the Tsilhqot'in have utilised international human rights as one of the means of protecting their land from the mining attempt. Through this exploration, I will clarify the increasing significance of the UNDRIP and international mechanisms in their struggles for Aboriginal rights, and also analyse its implications by exploring the conceptual scopes of the court's approach and international human rights, notably concerning the duty to consult and accommodate, and the right to free, prior and informed consent (FPIC).

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<sup>1</sup> Concerning this “generative” aspect of these rights, the recognition of the Tsilhqot'in Indigenous law in the outcome documents towards reconciliation has also been explored (Nagai 2021).

## Overview of Tsilhqot'in Aboriginal Title Case

The Tsilhqot'in Nation is one of the Indigenous nations in the interior of British Columbia, about 500 kilometres north of Vancouver, consisting of six communities with a total population of about 3,000.<sup>2</sup> Aboriginal rights and title have been recognised to a portion of their territory, mainly the community of Xenigwet'in. As one of the significant incidents, the Tsilhqot'in struggles for the land can trace back to the Chilcotin War in 1864, when the Tsilhqot'in members killed the road construction workers trespassing their territory without consent. It was a war for them, but the chiefs were deceived to be caught and hung up as murderers (Hewlett, 1973; Mole, 2009). At a similar time, particularly during the era of the gold rush, many of them passed away due to the pandemic brought by the outsiders, and the unilateral declaration of British sovereignty also incorporated the Tsilhqot'in territory into the British colonial territory, and later Canada, without their consent.<sup>3</sup> The direct cause of the Aboriginal title case occurred in the 1980s when the provincial government issued a commercial license for logging in the Tsilhqot'in territory. Despite the opposition from the Tsilhqot'in, additional commercial licenses for logging were issued in the 1990s, and this resulted in a lawsuit for the Tsilhqot'in Aboriginal rights and title in 1998, amended from their original legal proceedings started in 1989. The trial began in 2002 until 2007, spanning over 339 days during this period of time.<sup>4</sup>

In the trial decision in 2007, the Supreme Court of British Columbia (SCBC) recognised Aboriginal rights to hunt, trap, trade, or engage in other practices in their territory but did not make a declaration of the title to it due to the technical legal reasons. Chief Justice Vickers recommended a stay of proceedings and negotiations between the parties to achieve reconciliation. According to MacIntosh, the negotiation at this point went in good faith with the provincial government but not with the federal government (MacIntosh, 2014: 179-80). However, both federal and provincial governments ended up applying to lift the stay of proceedings, and the case went back to the courtroom, being appealed to the British Columbia Court of Appeal (BCCA). In its decision in 2012, however, the BCCA took a narrower form of Aboriginal title based on site-specific approach, which recognises the title only to specific sites such as salt lick, relying on the "integral to the distinctive culture" test, which MacIntosh points out as erroneously modified from the test articulated in the precedent (MacIntosh, 2014: 196-97). As the Tsilhqot'in asserted the territorial recognition of Aboriginal title, the case was further appealed to the SCC. Ultimately, in 2014, the SCC declared Aboriginal title to a specific area in the Tsilhqot'in territory, more than 1,700 square kilometres, dismissing the site-specific approach.

This decision was the first declaration of Aboriginal title in Canada in favour of the Tsilhqot'in, and while many have found remaining and potential limitations, challenges or uncertainties of this right, such as possible Aboriginal title claims to private property and actual governance aspects of the title land (c.f. Newman, 2017), the decision has also been regarded as a major step forward in Aboriginal rights and title claims.<sup>5</sup> Indeed, not only in the domestic but also international spheres, the Tsilhqot'in fights and the decisions of their court case have been introduced as an important incident along with other Indigenous peoples' struggles, as seen in statements and reports to international human rights bodies, such as the UN Expert Mechanism on the

2 Lane, Robert B. "Tsilhqot'in (Chilcotin)." *The Canadian Encyclopedia*, <https://www.thecanadianencyclopedia.ca/en/article/chilcotin-tsilhqotin>, accessed on 6 November 2021. Unless the access date is specified, all the links in the footnotes and references were accessed on 1 July 2020.

3 According to A Declaration of Sovereignty by the Tsilhqot'in Nation in 1998, "When the Queen of England extended to our nation the protection of her law, by including our territory in the colony of British Columbia in 1858, she did so without our knowledge or consent" ("1998 General Assembly of the Chilcotin Nation: A Declaration of Sovereignty," 17 April 1998, 2, <http://www.tsilhqotin.ca/Portals/0/PDFs/98DeclarationSovereignty.pdf>). In the Tsilhqot'in Aboriginal title case, the date of the Oregon Treaty in 1846, which divided the US and British territory west of the Rocky Mountains, was treated as the date of British sovereignty assertion (*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para.587).

4 For the background of the Tsilhqot'in Aboriginal title case, see *Tsilhqot'in Nation*, *supra* note 3, paras.60-100.

5 For instance, Amber Hildebrandt, "Supreme Court's Tsilhqot'in First Nation ruling a game-changer for all," *CBC News*, 27 June 2014, <https://www.cbc.ca/news/indigenous/supreme-court-s-tsilhqot-in-first-nation-ruling-a-game-changer-for-all-1.2689140>, accessed on 10 August 2021.

Rights of Indigenous Peoples (EMRIP),<sup>6</sup> the UN Permanent Forum on Indigenous Issues (PFII),<sup>7</sup> as well as the Human Rights Council for the Universal Periodic Review.<sup>8</sup> Subsequently, after this decision was handed down, the Tsilhqot'in started to engage in negotiations with the provincial and federal governments to further define and embody their rights. Importantly, while Aboriginal rights and title were declared based on the domestic framework and the tests developed in court, the negotiations and outcome documents have gradually referred to the UNDRIP, building on the recent political and legal shifts towards recognition of it in Canada.

## UNDRIP and Political and Legal Atmosphere in Canada

The UNDRIP was adopted by the UN General Assembly in September 2007 after more than two decades of negotiations at the UN and through the direct participation of Indigenous representatives. The UN generally recognises certain shared characteristics of Indigenous peoples that derive from historical and ongoing colonialism, including “state-sponsored genocide, forced settlement, relocation, political marginalization, and various formal attempts at cultural destruction” (Niezen, 2003: 5). While the UNDRIP itself does not contain a definition clause of Indigenous peoples because of, for example, the emphasis on self-identification and risk of excluding certain groups, the issue of historical injustice and oppression is widely reflected in various definitions as one of the significant attributes and also finds an echo in the preamble (Castellino and Doyle, 2018: 34). Indeed, the global Indigenous politics that attained the adoption of the UNDRIP can be recognised as “the world’s post-colonial completion project” (Lightfoot, 2016: 200). In this context, one of the important achievements of Indigenous peoples, through global politics, is that Indigenous peoples have come to be recognised as “peoples” who hold the collective rights of self-determination, lands, territories, or resources under the protection of international law. Since its adoption, the UNDRIP has existed as the most comprehensive document and the global consensus on Indigenous peoples’ human rights.<sup>9</sup>

At the adoption of the UNDRIP in 2007, Canada was one of the four states that voted against it, asserting in its statement that the UNDRIP is “not a legally binding instrument,” “has no legal effect in Canada,” and “its provisions do not represent customary international law.”<sup>10</sup> Yet, Canada has since shifted that position along with other political developments. One of the first important shifts was seen in November 2010, when Canada issued a Statement of Support, clarifying that it would interpret “the principles” of the UNDRIP “in a manner that is consistent with our Constitution and legal framework,” while it continued to see it as an aspirational, “non-legally binding document that does not reflect customary international law nor change Canadian laws.”<sup>11</sup> In 2012, however, Canada highlighted in its conversation with the UN Committee on the Elimination of Racial Discrimination (CERD) that “Canadian courts could consult international law sources

6 “Statement by International Chief Wilton Littlechild, Expert Member (WEOG Region),” 8 July 2014, <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH87c4/4834d7db.dir/EM14wilton074.pdf>; “Joint Statement of the Grand Council of the Crees (Eeyou Istchee); Canadian Friends Service Committee (Quakers); Assemblée des Premières Nations Québec-Labrador/Assembly of First Nations of Quebec and Labrador; Chiefs of Ontario; Federation of Saskatchewan Indian Nations; First Nations Summit; First Peoples Human Rights Coalition; Indigenous Rights Centre; Indigenous World Association; Inuit Circumpolar Council; KAIROS: Canadian Ecumenical Justice Initiatives; Native Women’s Association of Canada; Union of British Columbia Indian Chiefs,” 7-11 July 2014, <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH019d/f8d1de47.dir/EM14paulo90.pdf>.

7 “Statement presented by the Assembly of First Nations,” 20 May 2013, <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASHa172/1075458a.dir/Pf13Shaum105.pdf>.

8 First Nations Summit, “Submission: Universal Periodic Review of Canada,” September 2008, paras.9-12, [https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH01d4/7bb9ca7c.dir/FNS\\_CANUPR\\_S42009\\_JOINT.pdf](https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH01d4/7bb9ca7c.dir/FNS_CANUPR_S42009_JOINT.pdf).

9 For more details on the global Indigenous politics and the path to the adoption of the UNDRIP, see (Lightfoot 2016).

10 “Statement by Ambassador John McNee Permanent Representative of Canada to the United Nations to the 61st Session of the General Assembly on the Declaration on the Rights of Indigenous Peoples,” 13 September 2007, <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0159/08e5eac.dir/canexplanat.pdf>, accessed on 10 August 2021.

11 Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples,” 12 November 2010, <https://www.rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904>, accessed on 10 August 2021.

when interpreting Canadian laws, including the Constitution.”<sup>12</sup> In 2015, in the final report of the Truth and Reconciliation Commission (TRC), the Calls to Action, particularly the 43rd Call to Action, called upon all levels of governments to implement the UNDRIP as “the framework for reconciliation,” and in the same year, the Prime Minister’s mandate letters to the Ministers also referred to implementing the UNDRIP. For example, the letter to the Minister of Indigenous and Northern Affairs (INA) includes the mandates to achieve “reconciliation” and implement TRC’s recommendations, “starting with the implementation of” the UNDRIP.<sup>13</sup> Furthermore, at the annual session of the PFII in May 2016, the Minister of INA announced that Canada is “a full supporter of the Declaration, without qualification,” and intends “nothing less than to adopt and implement the Declaration in accordance with the Canadian Constitution,” quoting Prime Minister Justin Trudeau that said, “No relationship is more important to me and to Canada than the one with Indigenous peoples.”<sup>14</sup>

Along with these shifts in the political support for the UNDRIP, legislative developments have also occurred in recent years. Notably, on the national level, private member’s Bill C-262 was introduced by Romeo Saganash in April 2016. While this Bill does not codify the UNDRIP into Canadian law directly, it aimed to provide a “legislative framework for a national reconciliation” by ensuring the consistency of Canadian laws with the UNDRIP, applying it in interpreting Indigenous peoples’ rights and also creating national plans.<sup>15</sup> The Bill passed the House of Commons in May 2018, but it eventually died on the Senate’s Order Paper in June 2019. Yet, it was followed by British Columbia’s Bill 41, *the Declaration on the Rights of Indigenous Peoples Act*, which passed the legislative body in November 2019. Co-developed by the provincial government and the Indigenous peoples’ organisations in British Columbia, the passage of this Bill made British Columbia the first province in Canada, or in the Commonwealth, to adopt a legislative framework for implementing the UNDRIP.<sup>16</sup> While some parts of the Bill may be regarded as broad and may not bring immediate changes, it requires the provincial government to prepare action plans to achieve the objectives of the UNDRIP and to enter into decision-making agreements with Indigenous governing bodies, as well as to commit to a generational work to align provincial laws with the UNDRIP<sup>17</sup>. Subsequently, on the federal level, Bill C-15, *the United Nations Declaration on the Rights of Indigenous Peoples Act*, also passed the legislative body and came into force in June 2021. This Act aims to affirm the UNDRIP “as an international human rights instrument that can help interpret and apply Canadian law” and to provide a framework to advance the implementation of the UNDRIP, seeing it “as a key step in renewing the Government of Canada’s relationship with Indigenous peoples.”<sup>18</sup>

<sup>12</sup> UN Doc. CERD/C/SR.2142, 2 March 2012, para.39.

<sup>13</sup> Justin Trudeau, Prime Minister of Canada, “Minister of Indigenous and Northern Affairs Mandate Letter,” 12 November 2015, <https://pm.gc.ca/en/mandate-letters/2015/11/12/archived-minister-indigenous-and-northern-affairs-mandate-letter>.

<sup>14</sup> Government of Canada. “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10,” 10 May 2016, <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10.html>, accessed on 10 August 2021.

<sup>15</sup> Gunn, Brenda. “The Senate halts recognition of Indigenous rights on National Indigenous Peoples Day,” *Canadian Lawyer*, 24 June 2019, <https://www.cigionline.org/articles/senate-halts-recognition-indigenous-rights-national-indigenous-peoples-day>.

<sup>16</sup> Lightfoot, Sheryl. “B.C. takes historic steps towards the rights of Indigenous Peoples, but the hard work is yet to come,” *The Narwhal*, 23 November 2019, <https://thenarwhal.ca/b-c-takes-historic-steps-towards-the-rights-of-indigenous-peoples-but-the-hard-work-is-yet-to-come/>.

<sup>17</sup> Melnitzer, Julius. “Why B.C.’s Indigenous rights bill is ‘impractically broad’ and inconsistent with Canadian law: The main issue with Bill 41 appears to be whether the legislation gives First Nations a veto on resource projects,” *Financial Post*, 29 November 2019, <https://business.financialpost.com/commodities/energy/why-b-c-s-indigenous-rights-bill-is-impractically-broad-and-inconsistent-with-canadian-law>; Singh, Sharon, David Bursey, Charlotte Teal and Radha Curpen. “British Columbia’s UNDRIP Legislation: A Framework to Advance Reconciliation,” *The Canadian Bar Association*, 6 December 2019, <https://www.cba.org/Sections/Business-Law/Articles/2019/UNDRIP>; O’Callaghan, Kevin, and Madison Grist. “Update on Bill 41: With DRIPA as Law, What Can We Expect Next?” *Indigenous Law Bulletin* (FASKEN), 16 December 2019, <https://www.fasken.com/en/knowledge/2019/12/with-dripa-as-law-what-can-we-expect/>.

<sup>18</sup> Government of Canada. “Background: United Nations Declaration on the Rights of Indigenous Peoples Act,” 19 July 2021, <https://www.justice.gc.ca/eng/declaration/about-apropos.html>, accessed on 10 August 2021.

Additionally, multiple Canadian courts have acknowledged the importance of the UNDRIP by referring to Canada's increasing political support, as well as by recognising the usefulness of it in interpreting domestic law, while they tend to regard the UNDRIP as aspirational and non-binding. For example, the Federal Court recognised in the decision of 2015 that the "UNDRIP may be used to inform the interpretation of domestic law," while it may not create substantive rights or "displace Canadian jurisprudence or laws."<sup>19</sup> Acknowledging Canada's political commitment to implementing the UNDRIP, the Supreme Court of Yukon similarly agreed in the decision of 2017 that "UNDRIP can be used as an aid to the interpretation of domestic law."<sup>20</sup> Notably, in the decision of 2020 at the Canadian Human Rights Tribunal concerning the rights of the First Nations child, the Panel broadly applied the UNDRIP by referring to it more than 40 times, including the references from its precedence, and pointed out that "international instruments such as UNDRIP, should inform the contextual approach to statutory interpretation," as well as the interpretation of "the scope and content of human rights in Canadian law."<sup>21</sup>

As such, while some challenges may remain, the political and legal atmosphere has been changed towards the implementation of the UNDRIP, and these practices have also related to the Tsilhqot'in struggles for defining their Aboriginal rights. Notably, in negotiations and outcome documents between the Tsilhqot'in Nation and the federal and provincial governments based on the 2014 decision, the parties have gradually referred to the provisions of the UNDRIP in clarifying the scope of the Tsilhqot'in Aboriginal rights and title. Additionally, the Tsilhqot'in have also utilised the international human rights framework in their struggles for protecting their rights from the mining attempt in their territory.

## Outcome Documents Subsequent to the Tsilhqot'in Decision

One of the first outcomes to follow the SCC's ruling in favour of Tsilhqot'in Aboriginal title was a Letter of Understanding, signed by the Tsilhqot'in Nation and British Columbia in September 2014, which agreed to strengthen their government-to-government relationship and to undertake negotiations in good faith towards reconciliation.<sup>22</sup> In September 2015, they also signed the Letter of Intent to outline the understanding of the next steps, particularly on "Further Community Engagement" and "Economic Opportunities."<sup>23</sup> In these documents, however, there was no mention of the UNDRIP. Subsequent to these Letters, both parties later signed the Nenqay Deni Accord in February 2016, under which a five-year framework has been established to advance and achieve a lasting reconciliation, setting out five sub-tables in specific areas and eight pillars of reconciliation.<sup>24</sup>

<sup>19</sup> *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981, paras.103-104.

<sup>20</sup> *Ross River Dena Council v. Canada (Attorney General)*, 2017 YKSC 59, paras.301-311.

<sup>21</sup> *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (representing the Minister of Indigenous and Northern Affairs Canada)* 2020 CHRT 20, paras.151-2.

<sup>22</sup> "Letter of Understanding between Xenigwet'in First Nations Government, Tsilhqot'in National Government, on behalf of the Tsilhqot'in Nation and Her Majesty The Queen in right of the Province of British Columbia," 10 September 2014, [http://www.tsilhqotin.ca/Portals/0/PDFs/LOU\\_Tsilhqotin\\_BC.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/LOU_Tsilhqotin_BC.pdf).

<sup>23</sup> "Letter of Intent between Her Majesty The Queen in right of the Province of British Columbia and The Tsilhqot'in Nation," 24 September 2015, [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/tng\\_letterofintent\\_2015sept24\\_02.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/tng_letterofintent_2015sept24_02.pdf).

<sup>24</sup> The specific areas include: Social, Cultural, Education and Justice; Governance; Lands and Resources; Declared Title Area Implementation; and Economic Development. The eight pillars include: Tsilhqot'in Governance; Strong Tsilhqot'in Culture and Language; Healthy Children and Families; Healthy Communities; Justice; Education and Training; Tsilhqot'in Management Role for Lands and Resources in Tsilhqot'in Territory; and Sustainable Economic Base.

This Accord mentions Canada's issues of the Statement of Support for the UNDRIP in November 2010, as well as Mandate Letters to the Ministers in November 2015 for the implementation of the UNDRIP.<sup>25</sup> Subsequently, in October 2017, the Tsilhqot'in and British Columbia also signed the Letter of Commitment to this Accord, which further clarifies that "the Government of British Columbia has committed to implement" the UNDRIP.<sup>26</sup>

A similar practice of referencing the UNDRIP can be seen in the separate negotiations and outcome documents between the Tsilhqot'in and the federal government. One of the first was a Letter of Understanding in January 2017, under which the parties would commit to renewing and strengthening their nation-to-nation relationship, and negotiating in good faith to achieve lasting reconciliation. This Letter mentions Canada's full endorsement of the UNDRIP "without qualification" in May 2016 and its commitment to implementing it "in partnership with Indigenous Peoples," and this Letter also includes the implementation of it, including the right to FPIC as one of the priority issues.<sup>27</sup> In November 2018, the Tsilhqot'in Nation and the federal government also signed a Pathway Letter that affirmed the shared vision of the Letter of Understanding on the next steps on the path to reconciliation, confirming the Tsilhqot'in's rights of governance and self-determination. As one of the "touchstones to guide" them, this Letter also mentions working together to implement the UNDRIP, including the right to FPIC.<sup>28</sup>

Building on these separate negotiations and ongoing reconciliation efforts, the Tsilhqot'in, provincial and federal governments signed a tripartite Pathway Agreement in August 2019, based on the shared vision, mutual commitment, and clear transformative steps towards a lasting reconciliation. This Agreement also refers to Canada's full support of the UNDRIP in May 2016. Among several paragraphs that reinforce the provisions of the UNDRIP, the Agreement clarifies that it "is grounded in recognition and respect for the rights of the Tsilhqot'in Nation, as Indigenous peoples, to self-determination and self-governance," as affirmed by the UNDRIP that also recognises their rights to "the preservation, practice and revitalization of Indigenous cultures and traditions."<sup>29</sup> Additionally, the Agreement also clarifies that the Tsilhqot'in Aboriginal rights "are recognized and reconciled in a manner that reflects" the UNDRIP, including the principle of FPIC, along with the Tsilhqot'in decision in 2014 and the Constitution.<sup>30</sup>

As such, in conjunction with the political and legal shifts in Canada, the process defining Tsilhqot'in Aboriginal rights and title has been gradually connecting them with the rights articulated in the UNDRIP, clarifying that they are Indigenous peoples under international law. In addition, importantly, while they mainly utilised the domestic framework to assert their rights and title in court, they have also long recognised their struggles as international. Notably, as A Declaration of Sovereignty at the General Assembly of the Tsilhqot'in Nation in 1998 says, they "have asked the United Nations to supervise discussions between the Tsilhqot'in Nation and Canada to assist us in our decolonization" because "Canada has stolen our lands and continues to have an interest in maintaining control over them," and it "is difficult to ask a thief to sit in judgment of his theft."<sup>31</sup> It also asserts, "if Canada again refuses to negotiate or chooses to bring unacceptable conditions to

25 "Nenqay Deni Accord: The People's Accord," 11 February 2016, para.C, [http://www.tsilhqotin.ca/Portals/0/PDFs/Nenqay\\_Deni\\_Accord.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/Nenqay_Deni_Accord.pdf).

26 "Nenqay Deni Accord: Letter of Commitment," 31 October 2017, [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/tsilhqotin\\_letter\\_of\\_commitment\\_nenqay\\_deni\\_accord\\_-\\_oct\\_31\\_2017.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/tsilhqotin_letter_of_commitment_nenqay_deni_accord_-_oct_31_2017.pdf).

27 "Letter of Understanding between The Tsilhqot'in Nation and Her Majesty The Queen in right of Canada," 27 January 2017, [http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2017\\_01\\_27\\_Tsilhqotin\\_Canada\\_LOU.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2017_01_27_Tsilhqotin_Canada_LOU.pdf).

28 "Gwets'en nilt'i 'Towards it, We Are Striving'," 2 November 2018, [http://www.tsilhqotin.ca/Portals/0/PDFs/2018\\_11\\_PathwaysAgreement.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/2018_11_PathwaysAgreement.pdf).

29 "Gwets'en Nilt'i Pathway Agreement," 25 July 2019, paras.1.2 and 6.2, [http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019\\_Gwets%27enNilt%27iPathwayAgreement.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019_Gwets%27enNilt%27iPathwayAgreement.pdf).

30 Ibid., para.12.1.

31 "1998 General Assembly of the Chilcotin Nation: A Declaration of Sovereignty," 17 April 1998, <http://www.tsilhqotin.ca/Portals/0/PDFs/98DeclarationSovereignty.pdf>.



the negotiations, the Tsilhqot'in Nation will consider itself free to pursue whatever course of action it may decide upon," including "our rightful place in the United Nations' Organizations and other international groups."<sup>32</sup> As shown in these words, indeed, the Tsilhqot'in have also expanded their field for the struggles into the international arena when facing "unacceptable conditions," particularly against the mining attempts in their territory. Especially with a mining project of Taseko Mines Limited (Taseko), they have used not only domestic but also international human rights instruments and mechanisms to fight for protecting their rights and lands.

## **Taseko's Mining Projects and Use of International Framework**

The mining project by Taseko, initially known as Prosperity Project, proposes the development of an open-pit gold-copper mine in the Teztan Biny Region in the Tsilhqot'in territory, which includes Teztan Biny (Fish Lake), Yanah Biny (Little Fish Lake) and Nabas area. The project is in an area where Aboriginal rights to hunt, trap and trade have been recognised in court and is adjacent to the Aboriginal title area proven in the 2014 Tsilhqot'in case. For the Tsilhqot'in, this region is a sacred area of profound cultural and spiritual importance, with various inhabitants such as rainbow trout and grizzly bear, being used for hunting, trapping, ceremonies, spiritual practices, or community gatherings.

While an exploration of this area was initially undertaken in the 1930s, Taseko conducted exploratory drillings particularly in the 1970s and 80s, and proceeded with extensive drilling and other programmes in the 1990s, advancing to the pre-feasibility and feasibility stages by 1998.<sup>33</sup> While the Tsilhqot'in have opposed these mining attempts and rejected the project in the 1990s, gold and copper prices strengthened in 2006, and Taseko prepared and entered environmental assessments from both provincial and federal governments to start the project in 2009.<sup>34</sup> In January 2010, British Columbia issued an environmental assessment certificate for this project. However, the federal government did not issue a certificate in November 2010. According to a comparative study on these assessments, one of the significant differences was in the information received from the Tsilhqot'in. The study points out that, while a joint review of the federal and provincial offices was initially suggested, Taseko objected to this suggestion, and the provincial office followed this Taseko's opinion despite the Tsilhqot'in opposition and began a separate review process. As a result, the Tsilhqot'in "felt betrayed" by this provincial decision and became uncooperative with its review process (Haddock, 2011: 8-11). As the Tsilhqot'in already rejected the project proposal in the 1990s, the Tsilhqot'in were also reluctant to participate in the federal review,<sup>35</sup> but the federal panel was able to consider the concerns of the Tsilhqot'in more broadly.

Subsequently, however, Taseko submitted a revised proposal, known as New Prosperity Project, for federal approval only three months after the federal rejection without any consultation or consent with the Tsilhqot'in.<sup>36</sup> The Tsilhqot'in continued to oppose and brought this issue into the international arena, notably seen in a shadow report for Canada's Periodic Report to the CERD in 2012. In this report, asserting that the Taseko's project has been advanced without any consultation or consent from the Tsilhqot'in, they argue, among multiple recommendations, that Canada should take "immediate and effective measures to implement"

<sup>32</sup> Ibid.

<sup>33</sup> Taseko Mines Limited. "New Prosperity: Project Summary." <https://www.tasekomines.com/properties/new-prosperity/project-summary>.

<sup>34</sup> The Tsilhqot'in Nation, "Submission to Canada's 19th and 20th Periodic Reports: Shadow Report by the Tsilhqot'in Nation on the denial of Indigenous peoples' rights in Canada with a focus on the Extractive Sector Operating within Canada," January 2012, paras.24-25, [https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0184/bac2941e.dir/Tsilhqotin\\_Canada80.pdf](https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0184/bac2941e.dir/Tsilhqotin_Canada80.pdf).

<sup>35</sup> Ibid., para.25.

<sup>36</sup> Ibid., paras.29-31.

the UNDRIP by fully recognising rights to land and FPIC when the decisions affecting Indigenous land should be made for extractive activities, and it should also respect the Tsilhqot'in Nation's position on this project that it must be rejected.<sup>37</sup> At the same session, another report by the Mining Watch Canada also mentions the issue of the consultation processes of Taseko's project and the government's reviews.<sup>38</sup> Subsequently, in October 2013, the federal panel recognised possible significant and immitigable impacts of the project on the site and rejected this proposal, acknowledging the "unique and of special significance" of the area for the Tsilhqot'in cultural identity and heritage<sup>39</sup>, and the federal government accepted this view and rejected the project again in February 2014. On the decisions of the federal panel and government, Taseko filed applications for a judicial review in the Federal Court, which rejected them in 2017. While Taseko appealed to the Federal Court of Appeal, it upheld the Federal Court's decision in December 2019, and the SCC also rejected Taseko's leave to appeal in May 2020, rendering the Taseko's project dead.<sup>40</sup>

Before this decision was handed down, however, Taseko applied to amend and extend its provincial environmental assessment certificate in conformity with the New Prosperity Project, and was granted a five-year extension until January 2020. Based on the gathered geological and engineering data in the preparation of an exploratory drilling programme, Taseko also submitted a notice of exploratory drilling work to the province in October 2016, which does not require a federal environmental assessment certificate. The province's Senior Inspector of Mines approved this application in July 2017 despite the continuing opposition from the Tsilhqot'in. The Tsilhqot'in challenged this provincial approval in court, but both the SCBC and the BCCA concluded that the approval was "reasonable," and the SCC declined to hear a further appeal in June 2019.<sup>41</sup> Subsequently, Taseko's contractors attempted to bring heavy equipment to the Teztan Biny Region for the drilling programme. However, the Tsilhqot'in engaged in direct action such as peaceful protest and roadblock to prevent the company's workers from accessing the site in July 2019.<sup>42</sup> In this atmosphere of intensified conflict, both the Tsilhqot'in Nation and Taseko made competing injunction requests to the court over the summer, and in September in 2019, the court rejected Taseko's injunction seeking to stop the Tsilhqot'in blockade and granted the Tsilhqot'in an injunction halting the Taseko drilling programme.<sup>43</sup>

In the meantime, as the series of decisions of the drilling programme indicated some limitations of the domestic framework, the Tsilhqot'in have also approached multiple international human rights organs, relying on the rights specified in the UNDRIP. In June 2017, for example, the Tsilhqot'in Nation met with the representatives from the UN Working Group on Business and Human Rights and proposed a number of issues related to the effects of business on the human rights of the Tsilhqot'in, notably their struggles against

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37 Ibid., Recommendations.

38 Mining Watch Canada. "Fundamental Improvements Needed: The Mining Sector and Indigenous Rights in Canada," January 2012, p.6, [https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH017e/f3bf1faec.dir/MW\\_Canada80.pdf](https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH017e/f3bf1faec.dir/MW_Canada80.pdf).

39 Federal Review Panel, "Report of the Federal Review Panel: New Prosperity Gold-Copper Mine Project," 31 October 2013, pp.ix-x, <https://ceaa-acee.gc.ca/050/documents/p63928/95631E.pdf>.

40 Tsilhqot'in National Government. "New Prosperity Mine is Finally Dead: Tsilhqot'in Nation Celebrates the Supreme Court of Canada's Decision to Deny Taseko Mines Limited's Appeal," 14 May 2020, <http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2020%2005%2014%20New%20Prosperity%20Mine%20is%20Finally%20Dead%20-%20Tsilhqotin%20Nation%20Celebrates%20the%20Supreme%20Court%20of%20Canadas%20Decision%20to%20Deny%20Taseko%20Mines%20Limiteds%20Appeal.pdf>.

41 Tsilhqot'in National Government. "Submission of the Tsilhqot'in Nation to the Special Rapporteur: For Urgent Attention to Imminent Human Rights Violation at Teztan Biny (Fish Lake)," 8 July 2019, paras.19-20, <http://www.tsilhqotin.ca/Portals/0/PDFs/2019%2007%2008%20Tsilhqot'in%20Nation%20Submission%20to%20the%20Special%20Rapporteur.pdf>.

42 Lamb-Yorsk, Monica. "Tsilhqot'in Nation stops Taseko Mines exploratory drilling," *Williams Lake Tribunal*, 2 July 2019, <https://www.wltribune.com/news/tsilhqotin-stop-taseko-mines-exploratory-mine-drilling>.

43 Palframan, Andrea. "Tsilhqot'in win injunction: Taseko drilling and road building HALTED pending civil case," *RAVEN*, 9 September 2019, <https://raventrust.com/2019/09/09/tsilhqotin-win-injunction-taseko-drilling-and-road-building-halted-pending-civil-case/>.

the Taseko's mining project.<sup>44</sup> From April to May 2019, in their first historic visit to the UN, the Tsilhqot'in representatives participated in the annual session of the PFII to share their experiences on the international stage, build connections with and learn from other Indigenous participants and groups from around the world.<sup>45</sup> They also delivered a statement in the session, which asserted the remaining limitations of recognising and implementing their rights, title and jurisdiction to their homeland despite the 2014 landmark decision,<sup>46</sup> aiming to hold the federal and provincial governments "accountable for fully implementing their title, jurisdiction and human rights as Indigenous peoples."<sup>47</sup> At the fifth year anniversary of their title case in June 2019, they critiqued the Taseko's mobilisation of personnel and machinery for the drilling programme despite "the commitment by British Columbia and Canada to" the UNDRIP.<sup>48</sup> In their statement on this conflict, they describe the drilling programme as "an imminent violation" of human rights under the UNDRIP, emphasising the fact that both Taseko and British Columbia "do not have the consent" of the Tsilhqot'in,<sup>49</sup> and this causes a direct violation of Tsilhqot'in Indigenous law as well.<sup>50</sup> In July 2019, the Tsilhqot'in also submitted a report to the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, requesting urgent action on an imminent violation of the Tsilhqot'in human rights caused by the Taseko's mining project and drilling programme, highlighting the gap between the province's public commitments to honour and implement the UNDRIP and its conduct.<sup>51</sup> Additionally, in November 2019, the Tsilhqot'in representatives further participated in the 8th UN Forum on Business and Human Rights "to highlight the need for free, prior informed consent as a fundamental condition of business and to join Indigenous peoples around the world in calling for the implementation of" the UNDRIP.<sup>52</sup>

As such, in the conflict of Taseko's attempt to mine in the Teztan Biny Region, the Tsilhqot'in have referred to international human rights instruments, notably the rights under the UNDRIP, and also participated in and utilised various international mechanisms. In conjunction with the gradual inclusion of the UNDRIP into outcome documents between the Tsilhqot'in and the federal and provincial governments, the language and mechanism of international human rights have now become an important framework for the Tsilhqot'in struggles for their Aboriginal rights and title. One of the important aspects of this is that the rights under the UNDRIP are considered more far-reaching than Aboriginal rights as articulated in the court and may challenge domestic Aboriginal rights and title. For instance, while these domestic rights are proven based on

44 Tsilhqot'in National Government. "Tsilhqot'in Nation meets with United Nations Working Group on Business and Human Rights Nation excited to take efforts to international level," 6 June 2017, <http://www.tsilhqotin.ca/Portals/0/PDFs/2017%2006%2006%20Tsilhqot%27in%20NR%20-%20United%20Nations%20Working%20Group%20Mt%20Polley.pdf>.

45 Tsilhqot'in National Government. "Tsilhqot'in Nation Makes Historic First Visit to United Nations Delegation in New York City for U.N. Permanent Forum on Indigenous Issues," 29 April 2019, [http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019\\_%2004\\_%2029%20TsilhqotinNationMakesHistoricFirstVisitToUN.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019_%2004_%2029%20TsilhqotinNationMakesHistoricFirstVisitToUN.pdf).

46 "Statement delivered by Tribal Chair Joe Alphonse on behalf of the Tsilhqot'in Nation," 1 May 2019, <https://cendoc.docip.org/collect/cendocdo/index/assoc/HASH015b28f7157d.dir/PF19ALPHONSE040501.pdf>.

47 Tsilhqot'in National Government. "Tsilhqot'in Nation Delivers Historic Statement to the United Nations Chiefs Present to the UN Permanent Forum on Indigenous Issues and Bring Drum Song to the Floor of the Assembly," 2 May 2019, [http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019\\_%2005\\_%2002%20-%20Press%20Release\\_TNG%20UN%20Presentation.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019_%2005_%2002%20-%20Press%20Release_TNG%20UN%20Presentation.pdf).

48 Tsilhqot'in National Government. "Tsilhqot'in Nation Marks the 5th Anniversary of Historic Supreme Court of Canada Victory," 26 June 2019, <http://www.tsilhqotin.ca/Portals/0/2019%2006%2026%20Tsilhqot%27in%20Nation%20Commemorate%205th%20Anniversary%20of%20SCC%20Victory.pdf>.

49 "Statement from the Tsilhqot'in Nation on Escalating Conflict at Teztan Biny (Fish Lake)," 25 June 2019, [http://www.tsilhqotin.ca/Portals/0/Statement\\_From\\_TsilhqotinNation\\_20190625%281%29.pdf](http://www.tsilhqotin.ca/Portals/0/Statement_From_TsilhqotinNation_20190625%281%29.pdf).

50 Tsilhqot'in National Government. "Tsilhqot'in Nation announces peaceful action to protect Teztan Biny and Yanah Biny Calling on Government of British Columbia to intervene," 1 July 2019, <http://www.tsilhqotin.ca/Portals/0/2019%2007%2001%20Tsilhqot%27in%20Announces%20Peaceful%20Action.pdf>.

51 Tsilhqot'in National Government, *supra* note 41; "Tsilhqot'in Nation Takes Struggle to protect Teztan Biny to the United Nations: Submission to the UN Special Rapporteur highlights imminent violation of human rights and extends invitation to visit Teztan Biny," 16 July 2019, [http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019\\_07\\_16\\_TsilhqotinNationTakesStruggletoprotectTeztanBinytotheUN.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019_07_16_TsilhqotinNationTakesStruggletoprotectTeztanBinytotheUN.pdf).

52 Tsilhqot'in National Government. "Tsilhqot'in Delegation Attending the United Nations Forum on Business and Human Rights in Geneva," 22 November 2019, [http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019%2011%2022\\_Tsilhqot%27inAttendUNForuminGeneva.pdf](http://www.tsilhqotin.ca/Portals/0/PDFs/Press%20Releases/2019%2011%2022_Tsilhqot%27inAttendUNForuminGeneva.pdf).

non-Indigenous events such as pre- and post-contact or assertions of British sovereignty, the rights articulated in the UNDRIP are “vested in peoples,” who “should draw their meaning from international law and be regarded as a political category,” also strengthening the application of Indigenous peoples’ own law (Borrows, 2017: 21). Notably, the concept of FPIC, drawn from the UNDRIP, and which the Tsilhqot’in often emphasise, is also seen as having a broader scope than the duty to consult and accommodate based on the asserted or established Aboriginal rights in Canada.

### Conceptual Scopes of Duty to Consult and Accommodate, and FPIC

The Canadian duty to consult and accommodate was outlined in the SCC’s decision in *Haida Nation v. British Columbia (Minister of Forests)*. Both federal and provincial governments have this duty in the case of asserted rights and title, and the content of it “varies with circumstances,” depending on the proportion to “a preliminary assessment” on how much the case supports the existence of rights or title, and to “the seriousness of the potentially adverse effect upon the right or title claimed.”<sup>53</sup> In the context of established claims, quoting the passage from *Delgamuukw v. British Columbia*<sup>54</sup> and also transposing it to pre-proof consultation, the SCC’s decision in *Haida Nation* points out “good faith on both sides” as required at all stages, and “the intention of substantially addressing [Aboriginal] concerns’ ... through a meaningful process of consultation” as the “common thread on the Crown’s part.”<sup>55</sup> While “[s]harp dealing is not permitted,” the court says, “there is no duty to agree; rather, the commitment is to a meaningful process of consultation.”<sup>56</sup> Against this background, the court turns to the kind of duties that may emerge in separate situations, pointing out that each case needs to be considered individually and flexibly, and for the court’s review, it notes, the focus is “not on the outcome, but on the process of consultation and accommodation” if the government is correct on “the seriousness of the claim or impact of the infringement” and “acts on the appropriate standard.”<sup>57</sup> This approach on reasonableness was relied upon in the court’s decision on the provincial Inspector’s approval of the Taseko’s drilling programme on the land with the established Tsilhqot’in Aboriginal rights to hunt, trap and trade. In this decision, given by the BCCA, the court recognised the necessity of a “deep level of consultation” due to the “combination of the strength of the Aboriginal rights, and the extent of interference” with the unique and special significance for the Tsilhqot’in cultural identity and heritage.<sup>58</sup> As the “crux of the dispute,” the court points out non-reconciliation of the parties because of “an honest but fundamental disagreement.”<sup>59</sup> By examining whether the provincial Inspector misconceived or failed to seriously consider the Tsilhqot’in position, or to provide a reasonable explanation, the court recognises the “process of consultation was adequate and reasonable in the circumstances.”<sup>60</sup> The court also says as to the substantive decision, while “it was open to” the Inspector to reject the Taseko’s application, that “does not mean that the approval” was “unreasonable,” and “the decision he made was within the range of reasonable outcomes,”<sup>61</sup> recognising the approval as acceptable despite the unacceptance by the Tsilhqot’in.

<sup>53</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para.39.

<sup>54</sup> *Delgamuukw* was the first Canadian case where the SCC gave a comprehensive account of Aboriginal title in 1997, providing the jurisprudential backdrop to the recognition of Aboriginal title in the 2014 Tsilhqot’in decision.

<sup>55</sup> *Haida Nation*, *supra* note 53, para.42.

<sup>56</sup> *Ibid.*, para.42.

<sup>57</sup> *Ibid.*, para.63.

<sup>58</sup> *William v. British Columbia (Attorney General)*, 2019 BCCA 74, para.38.

<sup>59</sup> *Ibid.*, para.39.

<sup>60</sup> *Ibid.*, para.56.

<sup>61</sup> *Ibid.*, paras.52-54.

Differently, in the case of Aboriginal title land, as described in *Delgamuukw*, “there is always a duty to consultation” as it also “encompasses within it a right to choose to what ends a piece of land can be put,” which Aboriginal rights to hunt, fish, or trap do not necessarily contain.<sup>62</sup> In *Tsilhqot’in Nation*, the SCC also regards that “[t]he 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”.<sup>63</sup> In this regard, the court has recognised aspects of FPIC of self-determining peoples that have the “right to choose” on their land, and in *Haida Nation*, referring to *Delgamuukw*, the SCC also noted that “on very serious issues,” including in unresolved claims, the content of the duty to consult required “full consent,” which contains the elements of “free,” “prior” and “informed” under the UNDRIP (Joffe, 2018: 3-4). However, according to Reynolds, a “fundamental feature of Aboriginal law is the ability of the federal and provincial governments to infringe constitutionally protected Aboriginal and treaty rights,” including title (Reynolds, 2018: 108), as summarised in *Tsilhqot’in Nation*, if the government shows “(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.”<sup>64</sup>

In contrast, the right to FPIC in international law has been discussed as having a more general emphasis on outcomes and self-determining choices of Indigenous peoples rather than consultation processes. According to Barelli (2012), the normative foundation of FPIC is Article 32 of the UNDRIP, whose paragraph 2 in particular says: “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.” According to him, “the centre of the controversy” lies in “the interpretation of the expression ‘consult in order to obtain,’” and while it seems “fairly evident that this expression should not be interpreted as requesting states to obtain the consent of indigenous peoples before implementing any project on their lands,” that does not mean “a mere right of participation and consultation to indigenous peoples” (Barelli, 2012: 11). He argues, FPIC needs to be “approached with a certain degree of flexibility,” and must be read in conjunction with the right to self-determination to freely determine and pursue their economic, social and cultural development (Article 3), as well as the right to own and control their lands and resources (Article 26) (Barelli, 2012: 11). In such regard, particularly, FPIC interrelates with the right to self-determination that is the cornerstone right for Indigenous peoples and that ensures the dual aspects of “autonomous governance” and “participatory engagement” (Anaya, 2009: 192), and Anaya recognises FPIC as “safeguards against measures that may affect indigenous peoples’ rights.”<sup>65</sup> Acknowledging the FPIC’s relationship with self-determination, Doyle also says by relying on Anaya’s reports that “[i]n the context of development projects, the requirement for FPIC is triggered by proposed activities in, or affecting, indigenous territories, irrespective of whether formal title is held over them” (Doyle, 2015: 140).<sup>66</sup> He sees the “relationship between FPIC and self-determination” as “a mutually reinforcing one” and explains that “to realise the developmental aspect of the right to self-determination, indigenous peoples must be able to withhold consent,” by also referring to treaty bodies’ positions on FPIC after the adoption of the UNDRIP that “affirms not only a requirement to ‘seek’ consent but also to guarantee that consent is obtained or secured” (Doyle, 2015: 131). The EMRIP also highlights that “the right to self-determination” constitutes

62 *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, para.168.

63 *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, para.76.

64 *Ibid.*, para.77.

65 UN Doc. A/HRC/21/47, 6 July 2012, para.80.

66 UN Doc. A/HRC/21/47, 6 July 2012; UN Doc. A/HRC/12/34, 15 July 2009, para.44.

a duty to obtain indigenous peoples' FPIC, "not merely to be involved in decision-making processes, but a right to determine their outcomes."<sup>67</sup> In the context of extractive activities, it further mentions, "[t]he right of indigenous peoples to participate in decision-making ... is not confined to situations where indigenous peoples have a State-recognized title to the lands, territories and resources," but "extends to situations where indigenous peoples own, use, develop and control land, territories and resources under their own indigenous laws."<sup>68</sup>

As such, the scope of FPIC is seen as broader than the scope of the duty to consult and accommodate articulated in the Canadian courts, with its focus on outcomes and Indigenous peoples' choices particularly in relation to their right to self-determination. However, it is notable that the right to FPIC does not give veto power to Indigenous peoples. According to 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," and the principles of it are "designed to build dialogue" to "work in good faith towards consensus" and "a mutually satisfactory agreement" by avoiding "the imposition of the will of one party over the other."<sup>69</sup> Joffe clarifies as well that "veto" implies "complete and arbitrary power, with no balancing of rights," which is "neither the intent nor interpretation of 'consent' in Canadian and international law" (Joffe, 2018: 1-2). Doyle also points out that one of the important aspects of FPIC is to "address the huge power asymmetries between companies, States and indigenous peoples" (Doyle, 2015: 251). Also, according to one of the major positions in relation to the requirement of FPIC, summarised by Doyle, "there is a legitimate limitation to their exercise of the right to self-determination based on the necessity to protect the self-determination rights of others" (Doyle, 2015: 147). There is also "a clear acknowledgement" that, similar to states, "Indigenous peoples and their decision-making structures" need to "have a commitment to respect and ensure individual human rights" (Scheinin and Ahrén, 2018: 86). As Barelli points out the certain flexibility of FPIC, it is thus not an absolute but relational right, depending on the circumstances but being read in conjunction with the right to self-determination and other relevant rights under international law, with focus on outcomes and self-determining choices of the peoples. In this regard, referring to the right to FPIC and the UNDRIP may implicitly provide the broadening scope with Aboriginal rights and title in the process of defining substantive meanings of these "generative" rights.

## Conclusion

For the recognition and implementation of Aboriginal rights and title, the Tsilhqot'in have mainly utilised the domestic framework, and the SCC finally declared their rights and title for the first time in the 2014 decision. While international human rights law relating to Indigenous peoples was not directly relied upon in this case, the subsequent negotiations and outcome documents have gradually included the UNDRIP into the discussion, in conjunction with the political and legal shifts towards recognition and acceptance of the UNDRIP in Canada. In addition, particularly in their struggles for protecting their land from the mining attempt in their territory, the Tsilhqot'in have also increasingly utilised the rights articulated in the UNDRIP, notably the right to FPIC, and the international human rights framework. As such, in defining, protecting and implementing their "generative" Aboriginal rights, the Tsilhqot'in have grown the space for the UNDRIP, which has broader conceptual scope than that of Aboriginal rights and title articulated in the Canadian courts, as notably seen in the comparison between the notions of FPIC, and the duty to consult and accommodate.

<sup>67</sup> UN Doc. A/HRC/18/42, 17 August 2011, Annex, para.34.

<sup>68</sup> UN Doc. A/HRC/EMRIP/2012/2, 30 April 2012, Annex, para.6.

<sup>69</sup> UN Doc. A/HRC/12/34, 15 July 2009, paras.46 and 49.

However, it may also be crucial to learn whether the conceptual values of these rights are actually reflected and contributing to the improvement of the relationship between the Tsilhqot'in Nation and the federal and provincial governments, as well as people's practices and use of lands on the ground. To further explore the meaning of implementing Aboriginal rights, it may thus remain important to keep considering how they are and will be embodied and realised.

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