The Right to Withhold Consent in *Tsilhqot'in Nation*

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Introduction

The concept of Aboriginal title has been known to exist under Canadian law since 1973[1], yet it took over 40 years for the first declaration of Aboriginal title to be made by the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*.[2] This historic decision was an important victory for more than just the Tsilhqot'in and was cause for

[1] *Calder v British Columbia (Attorney General)*, [1973] SCR 313, 34 DLR (3d) 145.

[2] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 [*Tsilhqot'in Nation*].

celebration by many other Aboriginal groups directly affected by it.[3] In many ways, however, the victory was bittersweet, representing the failure to resolve these issues through negotiation. Aboriginal title can also be recognized by agreement, but for many reasons this has proven too difficult for the parties thus far, forcing groups like the Tsilhqot'in to take the route through the courts—one that is exhausting, expensive and even unfair given that these courts exist in a legal system outside of their own. But whatever the cost, the outcome here is significant. Not only do the Tsilhqot'in now have proven Aboriginal title to over 1700km^2 of their traditional territory, but the Court has also taken the opportunity to clarify several aspects of what Aboriginal title means.

A long-standing source of uncertainty has been the question of how much control title-holders will have over the use of their lands. In a country whose economy is so reliant on access to Crown land for natural resource development, the possibility of a "veto"[4] by Aboriginal groups is a concern for many. The test for justification of infringement is a crucial mediator between a title-holder's right to withhold consent and the Crown's capacity to direct the use of the land. *Tsilhqot'in Nation* addresses this balance, alleviating some concerns while raising others. This paper will argue that the Court has strengthened the role of consent by establishing a number of conditions under

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[3] CBC News, "Tsilhqot'in First Nation granted B.C. title claim in Supreme Court ruling" *CBC News* (26 June 2014) online: <http://www.cbc.ca/news/politics/tsilhqot-in-first-nation-granted-b-c-title-claim-in-supreme-court-ruling-1.2688332>.

[4] "Veto" is somewhat of a loaded term. Here, "right to withhold consent" will be used as a more general term that reflects the broader range of degree and form that a right to withhold consent can take.

which justified infringement can be precluded and consent must be obtained, providing real content to the right to withhold consent within Aboriginal title. It will further argue that this elevation of the right to withhold consent is supported by international legal norms regarding the rights of Indigenous peoples, and can fit with the interests of the business community.

Beginning with some brief background on the Tsilhqot'in claim of Aboriginal title, this paper analyzes the test for justification of infringement as outlined in *Tsilhqot'in Nation*. With reference to past jurisprudence, the Court's guidance on each element of the test is scrutinized to reveal how the right to withhold consent has been strengthened and where its limitations remain. Attention then shifts to international legal norms and how the rights of Indigenous peoples in international human rights law may accord with and support this stronger role of consent in Canadian Aboriginal law. Finally, the impact of the right to withhold consent on business actors is considered, with an example of how some industries already appreciate the value of obtaining consent, and the additional incentive newly outlined in *Tsilhqot'in Nation* regarding the consequences of proceeding without it.

Background to *Tsilhqot'in Nation*

The territory of the Tsilhqot'in Nation lies in the central interior of British Columbia, southwest of Williams Lake.[5] In 1983, the Province granted a forest licence

[5] See *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, [2008] 1 CNLR 112 at paras 30 (for the six bands comprising the Tsilhqot'in Nation), 40-46 (for detailed description of the claim area) [*Tsilhqot'in Nation* 2007].

within this territory to Carrier Lumber Ltd. The Xeni Gwet'in First Nation, one of the six Tsilhqot'in bands, objected to the licence and sought a declaration prohibiting commercial logging on their territory. Blockades by the Xeni Gwet'in eventually led to a promise by the Premier that no logging would occur without their consent. Negotiations followed but were ultimately unsuccessful, and the original claim was amended to include a claim for Aboriginal title on behalf the Tsilhqot'in Nation in 1998.[6]

It is fitting that the events that sparked the claim of Aboriginal title centred on consent. The Xeni Gwet'in have a sacred duty to protect their territory on behalf of all Tsilhqot'in people. To fulfil this duty, any logging of the area must be on terms they can agree with.[7] Since their traditional authority over that territory exists in a separate legal system from that which the Province and the logging companies abide by, the Tsilhqot'in chose to pursue a claim of Aboriginal title in the hope that it would be a legal tool which could at least partially restore their control of the land.

The content of Aboriginal title would have been a substantial source of uncertainty at the time the action was launched. The specific rights that the Tsilhqot'in stood to gain if granted a declaration of Aboriginal title were unknown. They had been negotiating for a right of first refusal to logging in their territory,[8] but there was no guarantee that this right would follow from a successful claim. Today, the content of Aboriginal title remains a significant question, but through *Tsilhqot'in Nation* the SCC

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[6] *Tsilhqot'in Nation*, *supra* note 2 at para 5.

[7] *Tsilhqot'in Nation* 2007, *supra* note 5 at para 24.

[8] *Tsilhqot'in Nation*, *supra* note 2 at para 5.

has provided considerable guidance, particularly with respect to the effect of withholding consent to activities on title lands.

Tsilhqot'in Nation and Consent: Justification of Infringement

The ability of the Tsilhqot'in to restrict the use of their title lands to only that which they consent to was a central issue in *Tsilhqot'in Nation*, but this was not the first time the Court had addressed the subject. In *Delgamuukw*[9] and *Haida Nation*[10], the issue of consent had been discussed primarily in the context of the duty to consult. In *Tsilhqot'in Nation,* the Court elevates the role of consent from that of a mere potential goal of consultation to a necessary condition for certain actions on title lands and the "starting point"[11] for any discussion of justified infringement.

The Court outlined the process for justification of infringement as follows:

> The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title-holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982…To justify overriding the Aboriginal title-holding

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[9] *Delgamuukw v British Columbia,* [1997] 3 SCR 1010, [1998] 1 CNLR 14 [*Delgamuukw*].

[10] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

[11] Sharon Mascher, "Today's Word on the Street—'Consent', Brought to You by the Supreme Court of Canada" *The University of Calgary Faculty of Law Blog on Developments in Alberta Law* (2014) online: <http://ablawg.ca/2014/07/08/todays-word-on-the-street-consent-brought-to-you-by-the-supreme-court-of-canada/> at 1-2 [Mascher].

> group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group.[12]

By beginning the justification process with the question of consent, the Court has highlighted its importance. The first thing that governments should be concerned about is whether the title-holders consent to a contemplated action. But while Aboriginal title-holders have a right to require their consent to any use of title lands, this right is not absolute. The three requirements for justification of infringement are the conditions for constitutionally valid derogation of that right, and the strictness of these requirements thus determines how strong the title-holders' right to withhold consent is.

Discharge of the Duty to Consult and Accommodate

The above outline of how the Crown can justify infringement of Aboriginal title refines and consolidates several strains of past jurisprudence. The first to notice is the altered role of the duty to consult and accommodate.

In *Delgamuukw*, the only mention of consent in the context of infringement was in reference to the depth of consultation required for justification: "In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[13]

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[12] *Tsilhqot'in Nation, supra* note 2 at paras 76-77.

[13] *Delgamuukw, supra* note 9 at para 168.

Significant refinement of the duty to consult of course came later in *Haida Nation.* The Court grounded the duty to consult in the honour of the Crown, which derives from the assertion of sovereignty and the necessity of the Crown to act honourably in order to achieve the reconciliation of this assertion of sovereignty with the pre-existence of Aboriginal societies.[14] Also, given that *Haida Nation* was primarily concerned with the duty to consult where aboriginal rights or title have not yet been proven, it further clarified that "the Aboriginal consent spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case."[15]

Tsilhqot'in Nation took the step of incorporating the duty to consult as an explicit step in the test for justified infringement, shifting the frame of analysis by requiring first the determination of whether or not the consent of the title-holder to the potential infringement has been obtained. If there is no consent, then the analysis proceeds to whether the Crown has managed to discharge its duty to consult.

This sets up potential circumstances under which consent will be a necessary condition for an impugned government action to proceed: when the Crown either does not, or cannot, discharge its duty to consult. If the Crown has not discharged its duty to consult, it may conduct further consultation or accommodation to attempt to satisfy this duty.[16] But if the duty to consult with respect to a proposed governmental action requires the Crown to obtain consent, and the title-holder withholds its consent, then the duty to

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[14] *Haida Nation, supra* note 10 at paras 16-17.

[15] *Haida Nation, supra* note 10 at para 48.

[16] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 69, [2005] 3 SCR 388.

consult cannot be discharged and justification of the proposed infringement is precluded. We know from *Delgamuukw* and *Haida Nation* that consent is a possible requirement at the upper end of the spectrum of the duty to consult in cases of established rights, such as the Tsilhqot'in now have, but the scope of this right to withhold consent is then dependent on how onerous the duty to consult is in each specific circumstance.

In *Tsilhqot'in Nation*, the Court reaffirms that "the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse affect the contemplated government action would have on the claimed right."[17] In cases of established rights, the strength of the claim is clearly maximized and the level of consultation required will depend solely on the seriousness of the adverse effect. This means that in situations where the adverse affect of the government action is sufficiently serious, such that the level of consultation required is consent, the justification of infringement analysis could end at this early stage, regardless of how compelling and substantial the objective may be, or whether fiduciary obligations can still be fulfilled.

Although the duty to consult is typically viewed as the procedural end of the justification of infringement analysis, this potential to preclude infringement is also complementary to those remaining substantive elements of the test. The inclusion of the duty to consult within the justification of infringement analysis expands the circumstances under which justification can be substantively precluded because the duty to consult, though also grounded in the honour of the Crown, is aimed at protecting and balancing different interests from that of the compelling and substantive objective and

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[17] *Tsilhqot'in Nation, supra* note 2 at para 79.

fiduciary obligations stages. The duty to consult is meant to promote honourable negotiation in the process of reconciliation, which continues beyond the establishment of rights.[18] Its purpose is to protect the Aboriginal interest pending the resolution of claimed rights, but also to ensure that the Crown acts honourably as it contemplates or carries out justified infringement of established rights.[19] In contrast, the honour of the Crown in relation to the fiduciary duty owed to the title-holder is meant to ensure that any particular action by the Crown reflects a proportionate balancing of the Aboriginal and non-Aboriginal interests at stake. What the duty to consult adds is a focus on the aspects of reconciliation that depend on *how* the Crown deals with the title-holders, not simply *what* it does to the title lands.

A potential objection here may be that "the adverse effect of a contemplated government action" means the effect of only the contemplated action that requires justification, such as the renewal of a forest licence, and does not include the effects of any consultative actions associated with that ultimate government action. While that view may be a plausible interpretation of the wording the Court has used, it does not accord with a liberal and purposive interpretation of the duty to consult. The consultation stages of a contemplated action clearly engage the honour of the Crown, and to ignore consultative actions in the weighing of the adverse effect of the ultimate proposed action would leave open the potential for dishonourable action in consultation to occur without any resultant increase in the level of consultation required. If the duty to consult is meant to ensure honourable conduct by the Crown through the consultation stages of justified

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[18] *Haida Nation, supra* note 10 at para 32.

[19] *Tsilhqot'in Nation, supra* note 2 at para 91.

infringement, then consideration of the "adverse effect of a contemplated government action" must include the effects of any planning and consultation necessary to carry it out.

This attention to how the Crown consults with title-holders throughout the process of infringement could lead to a situation where a proposed infringement might be justifiable as a proportionate balancing of the interests at stake (and thereby consistent with fiduciary obligations), but, because of dishonourable conduct by the Crown leading up to or during the implementation of that infringement, the duty to consult then cannot be discharged because consent must be obtained. As stated in *Haida Nation*, "the level of consultation required may change as the process goes on and new information comes to light,"[20] and so, this heightened duty to consult would have been precipitated by the new or increased adverse effect of that dishonourable conduct of the Crown.

This adverse effect would derive more from the honour of the Crown in its consultation with the title-holder than it would from the honour of the Crown in its balancing of Aboriginal and non-Aboriginal interests, as would be caught by the proportionality of impact component of the fiduciary obligations analysis. This broadens the scope of government action that could be argued to preclude justification because the proposed action itself, which is what the fiduciary obligations step is concerned with, would not have changed. Essentially, the consultation regarding a proposed action could fail to uphold the honour of the Crown to such a degree that the action should only be allowed to proceed if the title-holder consents to it, regardless of how otherwise justifiable the proposed action is itself.

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[20] *Haida Nation, supra* note 10 at para 45.

This expansion of the grounds under which justification of infringement may be precluded strengthens the right to withhold consent for holders of Aboriginal title. It provides circumstances under which the full consent of the title-holders will be required: 1) where consultation and accommodation has failed to uphold the honour of the Crown, and 2) where the adverse effect of the contemplated government action is sufficiently serious that the level of consultation required to uphold the honour of the Crown is consent.

Of course, there has yet to be any duty to consult litigation in the context of proven Aboriginal title, and exactly what the honour of the Crown demands in this context is still open to some speculation.

Compelling and Substantial Objective

A similar situation exists for the requirement of a compelling and substantial objective. Although it has been employed in the justification of infringement of Aboriginal rights since *Sparrow*[21], and in the more relevant context of rights without internal limits since *Gladstone*[22], what may constitute a compelling and substantial objective for the infringement of Aboriginal title specifically is still a matter of debate, one which relies heavily on a short extract from *Delgamuukw*.

In *Tsilhqot'in Nation,* the Court reaffirms the past guidance on compelling and substantial objectives from *Gladstone*, namely that these objectives will be directed at either the recognition of the prior occupation of North America by Aboriginal peoples, or

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[21] *R v Sparrow*, [1990] 1 SCR 1075, [1990] 3 CNLR 160 [*Sparrow*].

[22] *R v Gladstone,* [1996] 2 SCR 723, [1996] 4 CNLR 65 [*Gladstone*].

the reconciliation of this prior occupation with the Crown's assertion of sovereignty.[23] It further cites the notorious passage in *Delgamuukw* that lists a few examples from the broad range of legislative objectives that could justify the infringement of Aboriginal title:

> …the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims…[24]

Additional guidance in *Tsilhqot'in Nation* is limited, but, as Sharon Mascher explains, the Court emphasizes that the compelling and substantial objective must also be considered from the Aboriginal perspective, suggesting that *Delgamuukw* tended to be more lenient with limits on Aboriginal rights that furthered a view of reconciliation that perhaps favoured the interests of the broader public.[25] If this emphasis on a more equal balancing of interests within the concept of reconciliation is real, it should also weigh in favour of a more strict interpretation of justifiable infringement, again increasing the value of Aboriginal title-holders' right to withhold consent.

Consistency with Fiduciary Obligations

The third element of the test also comes from *Sparrow* and *Gladstone*, but in *Tsilhqot'in Nation* the Court clarifies its content specific to the Crown's fiduciary duty in relation to Aboriginal title, and incorporates new elements borrowed from jurisprudence

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[23] *Tsilhqot'in Nation, supra* note 2 at para 81; *Gladstone, supra* note 22 at para 72.

[24] *Delgamuukw, supra* note 9 at para 165; *Tsilhqot'in Nation, supra* note 2 at para 83.

[25] Mascher, *supra* note 11 at 3-4.

on section 1 of the *Charter*.[26] The result yields two sets of conditions under which full consent to a proposed infringement will be required: when the infringement substantially deprives future generations of the benefit of the land, or is inconsistent with the Crown's obligation of proportionality.

Aboriginal title entails particular constraints on the Crown because it is a group interest that inheres in present and future generations. Since the beneficial interest vests communally, infringement of Aboriginal title that deprives future generations of the benefit of the land cannot be justified as it will be inconsistent with the Crown's fiduciary obligations.[27] This explicitly protects the Aboriginal group's right to withhold consent where infringement could have substantial long-term impacts.

The Court also states that implicit in the Crown's fiduciary duty is an obligation of proportionality in the justification process, which is broken down into the three requirements of rational connection, minimal impairment and proportionality of impact[28]—all taken from section 1 jurisprudence. While there is criticism of whether the adoption of section 1 principles into the section 35 context is appropriate,[29] with respect

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[26] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982*, c 11 (UK), at s 1.

[27] *Tsilhqot'in Nation, supra* note 2 at para 86.

[28] *Tsilhqot'in Nation, supra* note 2 at para 87.

[29] See e.g. John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am Indian L Rev 37 at 59; Nigel Bankes & Jennifer Koshan, "Tsilhqot'in: What Happened to the Second Half of Section 91(24) of the Constitution Act, 1867?" *The University of Calgary Faculty of Law Blog on Developments in Alberta Law* (2014) online:

to protecting the right to withhold consent these borrowed concepts do attempt to bring acts of infringement more in line with reconciliation. If consent is absent, justifiable acts must be necessary to achieve the government's objective, go no further than necessary, and the benefits of the objective must not be outweighed by the adverse effects on the Aboriginal interest.[30] In this way, any justified infringement must hew closely to its compelling and substantial objectives, objectives that should be directed at reconciliation.[31]

Core Content of the Right to Withhold Consent

From the above analysis, there are at least four examples of how the Court in *Tsilhqot'in Nation,* through the right to withhold consent, has provided protection for the right of Aboriginal title-holders to control the uses to which their title lands are put. Justified infringement is precluded, and the Crown must obtain consent when:

1) the duty to consult has not been, or cannot be, discharged—such as when:
    a. the consultation and accommodation conducted has failed to uphold the honour of the Crown, or
    b. the adverse effect of the contemplated government action is sufficiently serious that the level of consultation required is consent

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<http://ablawg.ca/2014/07/07/tsilhqotin-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867/> at 2.

[30] *Tsilhqot'in Nation, supra* note 2 at para 87.

[31] *Gladstone, supra* note 22 at para 72.

2) there is no compelling and substantial objective present with sufficient regard for both the Aboriginal perspective and that of the broader public
3) the infringement would substantially deprive future generations of the benefit of the title lands, or
4) the Crown cannot fulfill its obligation of proportionality—such as when:
    a. the infringement is not rationally connected to the government's goal
    b. the infringement does not minimally impair the title-holder's rights, or
    c. the adverse impact on the Aboriginal group is disproportionate to the benefits of the infringement

Tsilhqot'in Nation thus establishes a strong right to withhold consent for Aboriginal title-holders, outlining various circumstances under which the Crown must obtain their full consent. This right may not be absolute, but it is clear that the Court wants the government to have consent firmly in mind whenever it contemplates action that may infringe on Aboriginal title.

Many have remarked that the real impact of *Tsilhqot'in Nation* may be in pushing provincial and federal governments to take the Aboriginal claims more seriously. "History has shown that Aboriginal communities need to have real and substantial powers before other Canadians, including government, industry and the public, come to the table,"[32] and this decision is a clear signal from the Court that it is time for

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[32] See e.g. Ken Coates & Dwight Newman, "Tsilhqot'in ruling brings Canada to the table", *The Globe & Mail* (11 September 2014) online: <http://www.theglobeandmail.com/globe-debate/tsilhqotin-brings-canada-to-the-table/article20521526/>.

governments to get serious about land claims. But these calls from the courts for governments to engage with their moral and legal duties to negotiate are nothing new. One such call from *Haida Nation*, echoed in *Tsilhqot'in Nation,*[33] reminds governments that, "the potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation."[34] With a BC Treaty Process that has produced only two in-force treaties in over twenty years,[35] one wonders just what it will take for land claims to be resolved and reconciliation to finally unfold. Perhaps *Tsilhqot'in Nation* will precipitate real progress, but perhaps we should also be looking for a push from somewhere beyond our own borders.

International Human Rights Law

The rights of Indigenous peoples is a rapidly developing area within international human rights law that covers a wide range of rights meant to protect not only basic human rights like physical survival and integrity, but also collective rights, such as rights to land and self-government. The right to free, prior and informed consent (FPIC) is one example with far-reaching implications, particularly for colonial states like Canada that

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[33] *Tsilhqot'in Nation, supra* note 2 at para 17.

[34] *Haida Nation, supra* note 10 at para 25.

[35] British Columbia Treaty Commission, *Annual Report 2014* (Vancouver: BC Treaty Commission, 2014) online: <http://www.bctreaty.net/files/pdf_documents/BCTC-Annual-Report-2014.pdf> at 29.

rely heavily on natural resource development. In 2007, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the General Assembly marked the formal recognition of many rights of Indigenous peoples, including the right to FPIC.[36]

The development of international legal norms regarding the consent of Indigenous peoples to activities that affect them could potentially have a major influence on Aboriginal law in Canada. Many provisions in UNDRIP are directly relevant to the issues in *Tsilhqot'in Nation*, but a crucial question is how influential these norms are.

United Nations Declaration on the Rights of Indigenous Peoples

The right to FPIC finds expression in numerous articles of UNDRIP.[37] The ones most relevant to the right to withhold consent in relation to the use of Aboriginal title lands in Canada are articles 19 and 32(2):

> Article 19
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> States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. [Emphasis added.]
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> Article 32(2)
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> States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free

[36] *United Nations Declaration on the Rights of Indigenous Peopl*es, 61/295, UNGAOR, 61st Sess, No 49, Vol III, (13 September 2007) UN Doc A/61/49(2008) at preambular para 4 [UNDRIP].

[37] See UNDRIP, *supra* note 36 at arts 10, 11, 19, 28, 29, 32.

> 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. [Emphasis added.][38]

At face value, these are very strong rights. Before implementing legislation or approving any project that will affect Indigenous peoples' lands, the state must obtain their free, prior and informed consent. In comparing these provisions with our domestic law on Aboriginal title, some conformity may be found with the duty to consult and the emphasis on consent in *Tsilhqot'in Nation*, but it is difficult to see how these articles leave any room for the concept of justifiable infringement.

This was a critical issue for the federal government when UNDRIP was tabled before the UN General Assembly. In 2007, in defence of the decision to vote against the Declaration, Minister of Indian Affairs and Northern Development, Chuck Strahl, asserted that, "In Canada, you are balancing individual rights vs. collective rights, and [this] document…has none of that…By signing on, you default to this document by saying that the only rights in play here are the rights of the First Nations. And, of course, in Canada, that's inconsistent with our constitution."[39] Important, therefore, is article 46.

> Article 46(2)
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> In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth

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[38] UNDRIP, *supra* note 36 at arts 19, 32(2).

[39] Montreal Gazette, "Tories defend 'no' in native rights vote", *Montreal Gazette* (14 September 2007) online: <http://www.canada.com/montrealgazette/news/story.html?id=5a03839b-6ee5-4391-8cd8-fe9338ac7baf>.

> in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. [Emphasis added.][40]

The above plainly contradicts the former Minister's characterization of UNDRIP. The rights of First Nations are not the only rights in play. Article 46(2) expressly allows for limitations that are necessary for the recognition of the rights of others and to meet the needs of a democratic society, thus providing scope for an interpretation of the rights guaranteed in UNDRIP that could potentially accommodate the Canadian concept of justifiable infringement.

Though these limitations may soften the rights to FPIC in articles 19 and 32 to some extent, this does not necessarily mean that justifiable infringement as understood today is fully consistent with the rights guaranteed in UNDRIP. While, for example, the language in article 46 of a "just and most compelling requirement" may be a conspicuous analogue to our "compelling and substantial objective," interpreting the content of UNDRIP, and, for that matter, our own section 35, is a process that is still far from complete. This uncertainty regarding the strength and scope of rights declared by UNDRIP raises valid questions as to what degree the implementation of UNDRIP might actually advance Indigenous rights to consent under Canadian law. Of course, the strict, legal resolution of such questions often only comes once the norms are implemented and

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[40] UNDRIP, *supra* note 36 at art 46(2).

applied, which leads to the vital issue of UNDRIP's binding effect as a 'soft law' instrument of the General Assembly.

The Binding Effect of UNDRIP

General Assembly resolutions, such as UNDRIP, have no binding effect, *per se*, but the norms they contain or elaborate on can be considered binding to the extent that they embody customary rules of international law.[41] Even when the norms do not constitute a binding form of international law, resolutions of the General Assembly still exert their own normative force as soft law.[42]

In Canada, the doctrine of adoption dictates that prohibitive rules of customary international law are automatically incorporated into domestic law in the absence of conflicting legislation.[43] For example, Article 32 of UNDRIP would be considered prohibitive if interpreted as the rule that states cannot approve a project affecting Indigenous lands or territories without their free, prior and informed consent. The key question, however, is whether these rights to FPIC are customary rules. While some

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[41] *Charter of the United Nations,* 26 June 1945, Can TS 1945 No 7 at art 11 [*UN Charter*]; *Statute of the International Court of Justice*, June 26 1945, 33 UNTS 933 at art 38(1)(c); Rights of Indigenous Peoples Committee of the International Law Association, *Interim Report for the Hague Conference*, (2010) online: <http://www.ila-hq.org/download.cfm/docid/9E2AEDE9-BB41-42BA-9999F0359E79F62D> at 43 [ILA Report].

[42] Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58 ICLQ 957 at 960 [Barelli].

[43] *R v Hape,* 2007 SCC 26, [2007] 2 SCR 292 at para 39.

provisions of UNDRIP have been identified as embodying existing customary law,[44] the right to FPIC has not yet risen to that status. As the International Law Association concluded, the right to FPIC could be a means of satisfying customary rules of international law such as the right of Indigenous peoples to autonomy or self-government, but the right to FPIC is not yet a customary rule itself.[45]

In light of this, the value of UNDRIP in promoting FPIC is more likely to come from its status as a soft law instrument. Such instruments can vary widely in their legal significance, and factors such as their moral basis, their connection to existing law, and the circumstances of their development and adoption all impact their ability to generate compliance.

The General Assembly can adopt resolutions respecting nearly any matter within the scope of the UN Charter,[46] and UNDRIP is one that carries particularly strong moral force. The preamble identifies the bases for action, namely, concern that "Indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources"[47] and the "urgent need to respect and promote [their] inherent rights."[48] Article 43 further states that the rights

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[44] ILA Report, *supra* note 41 at 51-52.

[45] ILA Report, *supra* note 41 at 51.

[46] *UN Charter, supra* note 41 at art 10 (subject to article 12, which restricts the General Assembly from making recommendations with regard to disputes or situations that the Security Council is addressing).

[47] UNDRIP, *supra* note 36 at preambular para 6.

[48] UNDRIP, *supra* note 36 at preambular para 7.

recognized "constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world."[49] All of this serves to establish that the purpose of UNDRIP is not to raise Indigenous peoples to a place of privilege, but merely to guarantee their basic human rights and ameliorate these past injustices.[50]

With respect to its connection to existing law, UNDRIP "does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of Indigenous peoples."[51] In this way, the impact of UNDRIP is augmented by its connection to established human rights, many of which exist as hard law in various treaties. Used as a tool for interpreting Canada's existing treaty obligations, such as protecting the right to self-determination under the International Covenant on Civil and Political Rights (ICCPR)[52] specifically in relation to

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[49] UNDRIP, *supra* note 36 at art 43.

[50] Barelli, *supra* note 42 at 4.

[51] Human Rights Council, *Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya*, UN Doc. A/ HRC/9/9, (11 August 2008) at para 40 [HRC Anaya].

[52] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) at art 1; HRC Anaya, *supra* note 52 at para 34 ("Indigenous peoples identify the right of free, prior and informed consent as a requirement, prerequisite and manifestation of the exercise of their right to self- determination, as defined in international human rights law").

Indigenous peoples, it can be seen as leveraging the strength of related treaty law to extend its "soft law" power.[53]

Finally, the normative force of a declaration also depends on the circumstances of its adoption. The weight that the UN throws behind an initiative before it even reaches the General Assembly can indicate not only states' respect for the subject matter, but also the quality of the ultimate product. The political and legal processes that culminated in UNDRIP began in the early 1980s, and involved a negotiating process that lasted over ten years and included both states and representatives of Indigenous groups. After decades of work, the draft Declaration received the swift approval of the Human Rights Council and was tabled before the General Assembly.[54]

The breadth of consensus achieved after the lengthy process of merely drafting the Declaration was further reinforced by the degree of support received in the form of votes at the General Assembly. In 2007, UNDRIP was overwhelmingly approved by 143 states voting in favour and only 4 states opposed. Though it was concerning that the 4 states voting against adoption were all colonial states, potentially evidencing a lack of support from those specially affected, this flaw was diminished by the explanations respecting their negative votes. Australia, New Zealand, the United States and Canada all indicated their general support of the core values advanced by the Declaration, but could not accept the wording of certain articles or the process of adoption.[55] At the time, Canada's ambassador to the UN, John McNee, singled out the provisions on FPIC as

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[53] HRC Anaya, *supra* note 52 at para 41.

[54] Barelli, *supra* note 42 at 13-15.

[55] HRC Anaya, *supra* note 52 at para 35.

being unduly restrictive and considered the provisions addressing land and natural resources to be overly broad, concerned that they could lead to the re-opening of settled land claims.[56]

Subsequent to the adoption of UNDRIP by the General Assembly, the vocal opposition of these states began to wane, and by the end of 2010 each of the four had changed their position and expressed support for the Declaration.[57] Was this an instance of four powerful, colonial states capitulating to some overwhelming push for Indigenous rights by the rest of the world? Or rather was it, as Sheryl R. Lightfoot argues in detail, a ploy to maintain their reputation as human rights-advocating states while attempting to "write down" the content of norms that are against their interest?[58] Canada's example provides strong evidence of the latter.

The federal government's official statement of support, released in November 2010, was heavily qualified, referring to UNDRIP as an "aspirational document"—one that is not legally binding and "does not reflect customary international law nor change Canadian laws." Canada explained its change of position by stating that, "We are now

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[56] UN News Service, "United Nations adopts Declaration on Rights of Indigenous Peoples" *UN News Centre* (13 September 2007) online: United Nations <http://www.un.org/apps/news/story.asp?NewsID=23794>.

[57] Brenda Gunn, *Understanding and Implementing the United Nations Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (Winnipeg: Indigenous Bar Association, 2011) at 6.

[58] Sheryl R Lightfoot, "Selective endorsement without intent to implement: indigenous rights and the Anglosphere" (2012) 16:1 Int'l J HR 100 at 102 [Lightfoot].

confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."[59] Such a clear effort to play down the normative impact of the UNDRIP could be a concern if courts wish to interpret Canadian Aboriginal law in light of it, as they may be more reluctant to apply those provisions of the Declaration that Canada identifies as problematic. As Aboriginal Affairs and Northern Development Canada (AANDC) identifies:

> The areas of greatest concern for the Government of Canada are those provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, member States and third parties [Emphasis added.][60]

As discussed, interpreting articles 19 and 32 of UNDRIP in a manner consistent with the test for justifiable infringement may depend on the application of the limiting provision found in article 46(2), but the precise meanings of these provisions are still unsettled. The Canadian government's ostensible belief that the balancing of Indigenous and non-Indigenous interests through our framework of justifiable infringement is

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[59] Aboriginal Affairs and Northern Development Canada, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples* (Ottawa: AANDC, 2010) online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

[60] Aboriginal Affairs and Northern Development Canada, *Frequently Asked Questions: Canada's Endorsement of the United Nations Declaration on the Rights of Indigenous Peoples* (Ottawa: AANDC, 2012) online: <http://www.aadnc-aandc.gc.ca/eng/1309374807748/1309374897928> at Q.8.

consistent with the principles of UNDRIP can be seen as an attempt to capitalize on this uncertainty. By stressing its aspirational, non-binding nature and specifically identifying provisions dealing with lands, resources, and FPIC as problematic, rather than truly endorsing UNDRIP, the Canadian government has made a pre-emptive move against its implementation, aimed at preserving the status quo while relieving political pressure.[61] This strategy could very well weaken the ability of international norms to further the right to withhold consent under Canadian law.

But it remains to be seen whether this strategy will be successful and what the ultimate impact of UNDRIP will be. Article 46 may allow space for the common law test for justifiable infringement to be interpreted as consistent with the Declaration, and its non-binding nature likely precludes any direct and immediate improvement of Indigenous peoples' right to withhold consent under Canadian law. Nevertheless, the Declaration represents "the dynamic development of international legal norms and reflect[s] the commitment of states to move in certain directions, abiding by certain principles."[62]

States are not the only target of the push towards fuller rights to consent under domestic legal systems, however. Other global actors are hearing, and relaying, this message. Industry groups such as the International Council on Mining & Metals and the Boreal Leadership Council are actively encouraging governments to develop FPIC

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[61] Lightfoot, *supra* note 59 at 119.

[62] United Nations Permanent Forum on Indigenous Issues, "Frequently Asked Questions on the United Nations Declaration on the Rights of Indigenous Peoples" online: UN <http://www.un.org/esa/socdev/unpfii/documents/dec_faq.pdf > at 2.

processes, and their members, and others, are increasingly implementing policies of FPIC themselves.[63]

Consent and Business

Aboriginal title is of significant importance to the business community in Canada. The very dispute that led to the Tsilhqot'in title claim involved a forest licence granted to a logging company. Given the extensive unsettled land claims, particularly in British Columbia, and the potential for impacts on treaty rights across Canada, few industries can afford to ignore the Aboriginal groups in whose territory they operate. This imperative is reflected in the common practice of negotiating impact-benefit agreements (IBAs) in the mining industry, for example.[64] Another common form of engagement has been within

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[63] Shawn McCarthy, "Resources firms endorse call for aboriginal veto rights to projects", *The Globe & Mail* (20 September 2015) online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/resources-firms-endorse-call-for-aboriginal-veto-rights-to-projects/article26447800/>; Boreal Leadership Council, *Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada Part I*, (Ottawa: Boreal Leadership Council, 2015) online: <http://borealcouncil.ca/wp-content/uploads/2015/09/BLC_FPIC_Successes_Report_Sept_2015_E.pdf> at 14, 19; International Council on Mining and Metals, *Indigenous Peoples and Mining Position Statement*, (London: ICMM, 2013) online: <http://www.icmm.com/document/5433> at 3-4.

[64] Natural Resources Canada, *Agreements Between Mining Companies and Aboriginal Communities or Governments* (Ottawa: Natural Resources Canada, 2013) online:

the duty to consult. Governments can, and often do, delegate the procedural aspects of consultation to project proponents, and this has been upheld in the courts.[65]

The declaration of Aboriginal title in *Tsilhqot'in Nation* potentially marks the beginning of a new era of industry involvement. In the absence of consent from the title-holders, Aboriginal title puts formerly Crown land out of the reach of industry, subject to the possibility of justifiable infringement. With the precise bounds of justifiable infringement yet unknown, project proponents seeking certainty may be best advised to take it upon themselves to seek the consent of the Aboriginal groups impacted by their proposed activities. In fact, whether for economic, legal, or moral reasons, some corporations in Canada have already adopted policies of obtaining the consent of affected Aboriginal groups before proceeding with their projects, and in the wake of *Tsilhqot'in Nation,* businesses may have more cause than ever to pursue this strategy, given the Court's discussion of the retroactivity of the consent requirement.

As far back as 1999, DeBeers Canada has had a policy requiring the prior consent of any Aboriginal community that may be substantially impacted by proposed mining operations. As part of the planning for a diamond mine on the traditional territory of the Attawapiskat First Nation in Northern Ontario, DeBeers began an engagement and consultation process that, after six years, concluded in an IBA that was voted on in a community referendum and subsequently ratified by a band council resolution in 2005.

<http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/files/pdf/abor-auto/aam-eac-e2013.pdf>.

[65] *Haida Nation, supra* note 10 at para 53; *Wabauskang First Nation v Minister of Northern Development and Mines et al*, 2014 ONSC 4424.

DeBeers understood this IBA to include consent from the community, and operations began in 2008.[66]

Although what may constitute consent from Aboriginal title-holders is still a question for the courts,[67] this example shows that industry does have the capacity to seek and obtain consent from affected Aboriginal groups. In this case, DeBeers spent significant time and effort in consultation, modified project plans to accommodate community concerns about critical species habitat, and even funded the referendum.[68]

These additional costs may be prohibitive for projects that are only marginally economic, but for others this price of certainty may be a bargain, particularly now in light of *Tsilhqot'in Nation.* Projects that go ahead without the consent of affected Aboriginal groups with title claims to the area may be subject to cancellation:

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[66] Boreal Leadership Council, *Free, Prior, and Informed Consent in Canada: A summary of key issues, lessons, and case studies towards practical guidance for developers and Aboriginal communities*, (Ottawa: Boreal Leadership Council, 2012) online: <http://borealcouncil.ca/wp-content/uploads/2013/09/FPICReport-English-web.pdf> at 19-22 [Boreal 2012].

[67] Business Council of British Columbia, *The State of Industry-First Nations Relations in BC—Part II: Recommendations* (Vancouver: Business Council of BC, 2014) online: <http://www.bcbc.com/content/1365/FN_EngagementSeries_No2_FINAL.pdf> at 4 (Industry groups in BC have expressed concern about the lack of certainty regarding what constitutes consent from Aboriginal title-holders); Boreal 2012, *supra* note 67 at 28 (Though not in the context of Aboriginal title, in 2011 the Nisga'a provided their consent to BC Hydro's Northwest Transmission Line through the ratification of an IBA by their legislative body, the Wilp Si'ayuukhl Nisga'a).

[68] Boreal 2012, *supra* note 67 at 20-21.

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.[69]

Tsilhqot'in Nation thus reveals a strong incentive for project proponents to seek the consent of Aboriginal groups, and whether proponents are able obtain this consent themselves, or they need to pressure the Crown to do so, this can be valuable leverage for title holders and claimants.

The extent of this leverage will of course depend on the strength of each title claim, but it will also depend on how certain and how strict the test for justifiable infringement is. The economics and politics of every project will differ, but for some the risks of relying on justification of the infringement will outweigh the cost of obtaining consent. For other projects, obtaining consent may be too costly, or simply impossible, and the proponent will be left to gamble on the Crown's ability to meet the test for justification. A strict test should push industry to work with Aboriginal groups to develop projects that are mutually beneficial. A looser, or more deferential, test may make it easier for industry to ignore the impacted groups and simply let their projects rest on government approval. This mediating role between the interests of Aboriginal groups and the broader public highlights the importance of the test for justifiable infringement as a tool meant to facilitate reconciliation.

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[69] *Tsilhqot'in Nation, supra* note 2 at para 92.

Conclusion

> As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification.[70]

This statement in *Tsilhqot'in Nation* appropriately summarizes what the test for justification is meant to achieve, and thus the importance and centrality of a title-holder's right to withhold consent. In setting out several circumstances under which reconciliation demands the consent of the title-holder in order for an otherwise infringing governmental action to proceed, the Court has provided substantial protection of the title-holder's right to the control and benefit of the lands. The right to withhold consent is not absolute and sometimes Aboriginal interests will need to give way to the interests of the broader public, but *Tsilhqot'in Nation* establishes that this analysis must always begin with a discussion of consent. To justify infringement when the consent of the title-holders is absent, the duty to consult must be discharged, and therefore the adverse effect on the proven right of Aboriginal title cannot be so severe that proceeding without consent would fail to uphold the honour of the Crown. The proposed infringement must be directed at a compelling and substantial objective considered from the perspectives of both the Aboriginal group and the broader public, and must also be consistent with the Crown's fiduciary duty to the title-holder. This means that it cannot deprive future generations of the benefit of the title lands, and any adverse effects on the Aboriginal interest cannot outweigh the benefits of the infringement. Though these conditions will require further interpretation and refinement, *Tsilhqot'in Nation* represents a push

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[70] *Tsilhqot'in Nation, supra* note 2 at para 82.

towards greater respect for the right to withhold consent of Aboriginal title-holders in controlling the uses to which their lands are put.

This right to withhold consent also finds its formulation in international human rights law as the right of Indigenous peoples to free, prior and informed consent, and strong support for these rights can be found in UNDRIP, particularly with respect to legislative and administrative measures and projects on Indigenous lands and territories. Although these rights also may not be absolute, given the limiting language found in article 46, UNDRIP does embody the widespread consensus of states that Indigenous peoples' right to withhold consent should be respected. UNDRIP may not be hard law that can be applied domestically, but it can inform the interpretation of Aboriginal rights in Canada. It serves to solidify the right to withhold consent as an international legal norm, influencing many kinds of international actors and supporting greater consciousness of the right to withhold consent in all interactions with Indigenous peoples.

The pressure on business to respect the right to withhold consent is mounting both internationally and domestically. While this may represent some increased costs, companies like DeBeers Canada are finding that it pays to address issues of consent upfront, with the reward of project certainty. This incentive has only increased in the wake of *Tsilhqot'in Nation*, as the potential consequence of proceeding without the consent of affected Aboriginal title-holders has been clearly identified: cancellation of the project if infringement cannot be justified.

Aside from encouraging industry to engage with Aboriginal groups themselves, this could also engage the business community as allies in pressuring governments to finally take the task of settling land claims seriously. While this first recognition of

Aboriginal title is a victory, it is also a reminder of how embarrassingly and harmfully slow the implementation of section 35 rights has been. Let us hope that the Court in *Tsilhqot'in Nation* has finally communicated this constitutional imperative to governments, and that this new guidance on the right to withhold consent may assist the process of reconciliation.