

**AN ASSESSMENT OF CANADA'S UNDRIP ACT AND JURISPRUDENCE ON THE  
DUTY TO CONSULT IN RELATION TO THE UNITED NATIONS DECLARATION  
ON THE RIGHTS OF INDIGENOUS PEOPLES**

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## ABSTRACT

The United Nations Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples in 2006 due to decades-long international efforts to create a comprehensive instrument safeguarding Indigenous rights. In protecting human rights, under international law, States are obliged to perform their obligations to respect, protect, and fulfil. This paper examined Canada's adherence to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and how it fares compared to other Countries that have also fully supported the Declaration. The primary aim of this research is to delineate Canada's present actions concerning its obligations and commitments to the UNDRIP. This paper utilized a descriptive design to analyze Canada's actions toward reconciliation and recognition of Indigenous rights. The paper employed a systemic analysis of related literature. In 2021, the UNDRIP Act came into force. A notable concern about this Act is its limited and negligible effect on the community. The UNDRIP Act may not have fulfilled its mandate, and its impact is inadequate to fulfill its purpose. The creation of a national legal framework capable of delivering a holistic implementation of the UNDRIP is necessary, and this prevents the piecemeal and band-aid solutions to the current woes of Canadian Indigenous peoples.

*Keywords: UNDRIP, UNDRIP Act*

## INTRODUCTION

### *Brief Description*

The United Nations Human Rights Council adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration) in 2007 due to decades-long international efforts to create a comprehensive instrument safeguarding the rights of Indigenous peoples.<sup>1</sup> The Working Group on Indigenous Populations launched the process in 1982.<sup>2</sup> However, it was hampered by governmental concerns, mainly on the right to self-determination and management of natural resources in Indigenous areas.<sup>3</sup> On September 13, 2007, the UNDRIP was adopted by the General Assembly following a protracted review and amendment process.<sup>4</sup> One hundred forty-four states supported the Declaration, four opposed it, and eleven abstained. Notably, after opposing the Declaration, Australia, Canada, New Zealand, and the United States changed their stances.<sup>5</sup>

At first, Canada was concerned that implementing the UNDRIP might not comply with municipal laws.<sup>6</sup> However, Canada changed its position and endorsed UNDRIP but merely as an aspirational document in November 2010.<sup>7</sup> As such, the endorsement does not legally bind the Canadian government but merely expresses possible guidance on supposed Indigenous rights.<sup>8</sup> Later, in May 2016, Canada publicly announced that it supports UNDRIP.<sup>9</sup> Canada is a dualist state where, in certain situations, non-self-executing international declarations such as the

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<sup>1</sup> United Nations, “Historical Overview | United Nations for Indigenous Peoples,” *United Nations Declaration on the Rights of Indigenous Peoples*, accessed November 29, 2023, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html>.

<sup>2</sup> UNDESA, “Indigenous Peoples at the United Nations,” *Department of Economic and Social Affairs Indigenous Peoples*, n.d, <https://www.un.org/development/desa/indigenouspeoples/about-us.html>.

<sup>3</sup> United Nations, *Supra*, note 1 at para 4.

<sup>4</sup> *Ibid*, at para 10; United Nations, “United Nations Declaration on the Rights of Indigenous Peoples,” *United Nations*, 2007, [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

<sup>5</sup> United Nations, *supra*, note 1.

<sup>6</sup> Karine Duhamel, “The United Nations Declaration on the Rights of Indigenous Peoples” *The United Nations Declaration on the Rights of Indigenous Peoples*, accessed November 29, 2023, <https://humanrights.ca/node/1233>.

<sup>7</sup> *Ibid*, at para 11.

<sup>8</sup> Government of Canada, “Archived - Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples,” event; fact sheet; reference material, June 29, 2011, <https://www.rcaanc-cirnac.gc.ca/eng/1309374239861/1621701138904>.

<sup>9</sup> Karine Duhamel, *supra*, note 6, at para 11.

UNDRIP, a law must be enacted by the Parliament for the Declaration to have any effect domestically.<sup>10</sup> The *UN Declaration on the Rights of Indigenous People Act* (UNDRIP Act) came into force in 2021.<sup>11</sup>

Under international law, States are obliged to perform their obligation to respect, protect, and fulfil human rights.<sup>12</sup> Firstly, the obligation to respect means that States are not to interfere with the enjoyment of the rights of people. Secondly, the obligation to protect means that States are required to defend people from human rights abuses. Lastly, the obligation to fulfil means that States are to take positive steps in ensuring human rights are delivered to individuals and groups.<sup>13</sup> Moreover, the obligation to fulfil entails three essential commitments that must be satisfied for a State to comply with its obligation in the international arena.<sup>14</sup>

The commitments under the obligation to fulfil are facilitate, provide, and promote.<sup>15</sup> States must take positive measures to ensure that individuals and groups enjoy their rights in the obligation to fulfil by facilitating.<sup>16</sup> This commitment to facilitate also requires States to, contingent on resource availability, ensure access to essential services in health, shelter, or any necessary goods vital to achieving the rights of individuals and groups.<sup>17</sup> Additionally, this commitment entails that States realize there are barriers to fulfilling the rights of individuals and groups and actively dismantle such barriers.<sup>18</sup> As for the obligation to fulfil by providing, States must ensure that they proactively deliver the rights of individuals and groups in the event such parties cannot do

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<sup>10</sup> Centre for International Governance Innovation, “UNDRIP Implementation Special Report,” *Special Report Waterloo, ON, Canada: United Nations, 2017*, footnote 18, 14, <https://www.cigionline.org/static/documents/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>.

<sup>11</sup> Government of Canada, “Annual Progress Report on Implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act,” June 2022, 49, <https://www.justice.gc.ca/eng/declaration/report-rapport/2022/index.html>

<sup>12</sup> United Nations Office of the High Commissioner, “Guiding Principles on Business and Human Rights,” OHCHR, 2011, [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>13</sup> United Nations, “The Foundation of International Human Rights Law,” United Nations (United Nations), accessed January 7, 2024, <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law>.

<sup>14</sup> OHCHR, “General Comment No. 14: The Right to the Highest Attainable,” *United Nations*, 2000, 21, <https://www.refworld.org/pdfid/4538838d0.pdf>.

<sup>15</sup> Economic and Social Council, “Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights”, Agenda item 3 (Geneva: United Nations, May 25, 2000).

<sup>16</sup> OHCHR, *supra*, note 14.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

so because of reasons beyond their control.<sup>19</sup> An example is the discrimination and social exclusion of Indigenous people in the healthcare setting due to stereotyping, resulting in receipt of poor service.<sup>20</sup> Lastly, the obligation to fulfill includes the commitment to promote. Involved in this obligation is the creation and restoration of an environment conducive to rights to flourish.<sup>21</sup> This element requires States to disseminate appropriate information in promoting the enjoyment of the rights nationally and internationally.<sup>22</sup>

### ***Problem Description***

The issue highlights the importance of whether Canada has fulfilled its obligations to Canadian Indigenous communities through the implementation of the provisions of the UNDRIP. This paper compares Canada with countries that fully support the Declaration. This paper is limited to comparing Canada to New Zealand and Norway. These countries were chosen based on the considerable similarities in the population of Indigenous peoples, the colonial history, and the level of commitment declared by each respective government. Lastly, this paper is further limited to information and studies obtained publicly.

### ***Research Question***

This paper aims to answer the following:

What is the status of the UNDRIP Act, and to what extent does its enactment and existing Canadian jurisprudence adhere to Canada's commitment to upholding the rights of Indigenous peoples delineated in the provisions of the UNDRIP?

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<sup>19</sup> OHCHR, *supra*, note 14.

<sup>20</sup> Chantelle Bellrichard, CBC News, "Investigation Finds Widespread Racism against Indigenous Peoples in B.C. Health-Care System | CBC News," CBC, November 30, 2020, <https://www.cbc.ca/news/indigenous/bc-health-care-racism-report-1.5820306>.

<sup>21</sup> OHCHR, *supra*, note 14.

<sup>22</sup> *Ibid.*

## ***Methodology***

This paper utilizes a descriptive design. The UNDRIP Act and the decisions of the SCC are assessed against the commitments of the obligation to fulfil – facilitate, provide, and promote. The obligation to fulfil was specifically chosen due to its compatibility with the research purpose. Utilizing the tripartite typology (respect, protect, and fulfil) will be unsuitable for the following reasons. The obligation to respect requires States to not interfere directly or indirectly in the enjoyment of an individual or groups’ rights.<sup>23</sup> In this research, the enactment of the UNDRIP Act cannot necessarily be viewed as interference as the Act’s goals indicate otherwise. As for the obligation to protect, States are required to enact measures or perform actions that prevent outside entities or third parties from interfering with the enjoyment of an individual or groups’ rights; this may include examples such as controlling market prices for medicines to ensure the right to health is delivered.<sup>24</sup>

Considering the scope of the obligation to protect compared with the obligation to fulfil, the obligation to fulfil as a framework is more applicable as it is more encompassing in relation to the enactment of the UNDRIP Act. The phases of the UNDRIP Act may be assessed better using the facilitate, promote, and provide framework due to the nature of the action plan, which involves active participation from the Indigenous communities, facilitation of a more inclusive approach, provision of resources to support initiatives in the action plan, and raising awareness on the Indigenous rights.<sup>25</sup>

## **ANALYSIS OF CANADA'S COMMITMENT**

### ***A. United Nations Declaration on the Rights of Indigenous Peoples Act***

In 2021, fourteen years after the UN adopted the Declaration on the Rights of Indigenous Peoples and five years after Canada expressed its full support, the UNDRIP Act received Royal

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<sup>23</sup> OHCHR, *supra*, note 14.

<sup>24</sup> *Ibid.*

<sup>25</sup> Government of Canada, *supra*, note 11.

Assent and immediately came into force.<sup>26</sup> The UNDRIP Act provides guidance to ensure existing Canadian laws are consistent with UNDRIP.<sup>27</sup> It mandates the Canadian government to consult with the Indigenous communities to determine how to align its laws with the interests and priorities of the Indigenous peoples sanctioned by the UNDRIP.<sup>28</sup> Moreover, the UNDRIP Act emphasizes the need for collaboration between the government of Canada and Indigenous peoples.<sup>29</sup>

However, a notable concern about enacting the UNDRIP Act is that considerable gaps and challenges exist in its implementation.<sup>30</sup> Critics of the UNDRIP Act have labelled it as misleading, vague, and non-committal, and the Canadian government is expected not to follow through on its promises.<sup>31</sup> The UNDRIP Act, being ambiguous as it is, does not explicitly specify which rights of Indigenous peoples it is upholding in relation to the UNDRIP.<sup>32</sup> As established, the Declaration holds no power to bind countries legally,<sup>33</sup> as such legislation is necessary for it to be implemented domestically in Canada.<sup>34</sup> The Parliament has the authority to absorb UNDRIP in its entirety to make it a domestic law, but it has not done so. The UNDRIP Act is not a direct transposition of the provisions found in the UNDRIP.<sup>35</sup> Hence, the UNDRIP Act cannot be considered as UNDRIP's equivalent in the domestic arena.

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<sup>26</sup> Department of Justice, Government of Canada, "Implementing the United Nations Declaration on the Rights of Indigenous People Act," April 12, 2021, <https://www.justice.gc.ca/eng/declaration/index.html>.

<sup>27</sup> Government of Canada; Crown-Indigenous Relations and Northern Affairs, "Canadian Governments and the United Nations Declaration on the Rights of Indigenous Peoples," Government of Canada, April 23, 2018, <https://www.rcaanc-cirnac.gc.ca/eng/1524502914394/1557512757504>.

<sup>28</sup> Department of Justice, Government of Canada, "Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act," April 12, 2021, <https://www.justice.gc.ca/eng/declaration/about-apropos.html>.

<sup>29</sup> *Ibid.*

<sup>30</sup> Julia Nowicki, "Overcoming Challenges to Implementing UNDRIP in Canada," n.d., <https://aspercentre.ca/overcoming-challenges-to-implementing-undrip-in-canada/>.

<sup>31</sup> Lesa Semmler, "Interim Report: What We Heard about the United Nations Declaration on the Rights of Indigenous Peoples and Negotiating Agreements," Special Committee on Reconciliation and Indigenous Affairs, Committee Report 27-19(2) (Northwest Territories, 2022), [https://www.ntassembly.ca/sites/assembly/files/cr\\_27-192\\_scria\\_interim\\_report\\_-\\_what\\_we\\_heard\\_about\\_the\\_undrip\\_and\\_negotiating\\_agreements\\_0.pdf](https://www.ntassembly.ca/sites/assembly/files/cr_27-192_scria_interim_report_-_what_we_heard_about_the_undrip_and_negotiating_agreements_0.pdf).

<sup>32</sup> Legislative Services Branch, "Consolidated Federal Laws of Canada, United Nations Declaration on the Rights of Indigenous Peoples Act," June 21, 2021, <https://laws-lois.justice.gc.ca/eng/acts/u-2.2/FullText.html>.

<sup>33</sup> Fraser Institute "Squaring the Circle: Adopting UNDRIP in Canada," March 10, 2020, <https://bit.ly/3viUv17>.

<sup>34</sup> *Ibid.*

<sup>35</sup> Roger Townshend, Kevin Hille, and Jaclyn McNamara, "Bill C-15 (UNDRIP Act) Commentary," OKT | Olthuis Kleer Townshend LLP, January 28, 2021, <https://www.oktlaw.com/bill-c-15-undrip-act-commentary/>.



The legislative branch is responsible for enacting a law based on the UNDRIP, and several factors may come into play, such as lack of experience in Indigeneity, personal bias,<sup>36</sup> and self-interest,<sup>37</sup> all of which may result in enacting non-comprehensive and ineffective laws. Additionally, the Declaration is not self-executing, meaning a law is required to give life to its provisions.<sup>38</sup> This phenomenon adds another layer to the bureaucracy in safeguarding the rights of Indigenous peoples. The lack of specificity and breadth of the UNDRIP Act may bring about a loophole for the government to renege on its duty to uphold a particular right.<sup>39</sup>

### ***Status of the UNDRIP Act***

In June 2022, Canada released its first annual report. It involves two phases in the engagement process with Indigenous communities.<sup>40</sup> For the first phase, the UNDRIP Act ensures that Canada's existing laws align with the provisions of UNDRIP, where such laws are enacted with the consultation of Canadian Indigenous individuals and groups.<sup>41</sup> As for the second phase, the UNDRIP Act validates the identified priorities, themes, and engagements, resulting in an action plan.<sup>42</sup>

### ***First Phase – Engagement of Indigenous Communities***

Canada initiated the first phase of the engagement process in 2021.<sup>43</sup> One of the goals of the consultation with the Indigenous groups is to involve more diverse perspectives coming from

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<sup>36</sup> Isabel Bilotta et al., “How Subtle Bias Infects the Law,” *Annual Review of Law and Social Science* 15, no. 1 (2019): 227–45, <https://doi.org/10.1146/annurev-lawsocsci-101518-042602>.

<sup>37</sup> Sidney Smith, “Self-Interest in Law,” *Canadian Bar Review* 4, no. 4 (1926): 234, <https://www.canlii.org/en/commentary/doc/1926CanLIIDocs68#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBplTTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA>.

<sup>38</sup> Sara Fryer and Olivier Leblanc-Laurendeau, “Legislative Summary of Bill C-15: An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples,” 1, Library of Parliament, 2021, [https://lop.parl.ca/sites/PublicWebsite/default/en\\_CA/ResearchPublications/LegislativeSummaries/432C15E](https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/432C15E).

<sup>39</sup> Centre for Constitutional Studies, “Interpreting Section 7 of the Charter: Clarity, Vagueness and Overbreadth” constitutional studies, 2008, <https://www.constitutionalstudies.ca/2008/09/interpreting-section-7-of-the-charter-clarity-vagueness-and-overbreadth/?print=print>.

<sup>40</sup> Government of Canada, *supra*, note 11.

<sup>41</sup> Legislative Services Branch, *supra*, note 32.

<sup>42</sup> Government of Canada, *supra*, note 11.

<sup>43</sup> *Ibid.*

women of Indigenous descent, members of the 2SLGBTQIA+, persons with disabilities, and organizations and groups that identify as Indigenous.<sup>44</sup> Canada engaged Indigenous communities through various consultation sessions, virtual engagement sessions, email submissions, receipt of physical mail-in, and development of online submissions.<sup>45</sup>

In the engagement, Canada uses a distinction-based approach to determine Indigenous peoples' priorities and to amend existing laws to be consistent with the UNDRIP. The Canadian government acknowledges the diversity of the stakeholders' characteristics regarding tradition, history, and culture.<sup>46</sup> The distinction-based approach recognizes Indigenous communities' differences and diversity while being sensitive about gender.<sup>47</sup> However, despite the commendable characteristics of this approach, the Canadian government may have to strengthen its strategies while using it cautiously because it may lead to complexities in the engagement process.<sup>48</sup> The process of consultation and collaboration across the board cannot be the same due to the wide range of diversity among Indigenous groups.<sup>49</sup> From an administrative standpoint, developing flexible consultation frameworks can be an effective method. Flexibility also entails that conducting separate consultations with each community is unnecessary. Representative organizations may be engaged to receive input regarding consultation methods and apply the results to communities where appropriate.

The distinction-based approach presents limitations due to its emphasis on land-based recognition, specifically Indigenous peoples who are Status holders.<sup>50</sup> This land-based recognition used as part of the distinction-based approach presents a colonialist perspective that jeopardizes other members of the Indigenous groups.<sup>51</sup> Land-based recognition confines

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<sup>44</sup> *Ibid*, at para 1, 16.

<sup>45</sup> *Ibid* at para 2, 19.

<sup>46</sup> Government of Canada; Indigenous Services, "Visions for Distinctions-Based Indigenous Health Legislation: Executive Summary," report, November 4, 2022, <https://www.sac-isc.gc.ca/eng/1667579335081/1667579367781>.

<sup>47</sup> *Ibid* at para 1, 22

<sup>48</sup> Government of Canada, "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011," guide, January 27, 2010, <https://www.rcaanc-cirnac.gc.ca/eng/1100100014664/1609421824729>.

<sup>49</sup> Native Women's Association of Canada, "Distinctions-Based Approaches Literature Review," n.d., [https://nwac.ca/assets-knowledge-centre/30NOV\\_AppendixD-Distinctions-Based\\_Approaches\\_Literature\\_Review.pdf](https://nwac.ca/assets-knowledge-centre/30NOV_AppendixD-Distinctions-Based_Approaches_Literature_Review.pdf).

<sup>50</sup> *Ibid*.

<sup>51</sup> *Ibid*.

participants into First Nations, Metis, and Inuit.<sup>52</sup> Using the distinction-based approach without adequately understanding the dynamics of Indigenous communities will leave out Indigenous minorities who are women, members of the 2SLGBTQIA+ community and other members of the Indigenous communities that do not fall within the legal concept of what Indigenous is.<sup>53</sup>

As per the annual report, Canada embraces co-development in implementing the UNDRIP Act using a distinction-based approach.<sup>54</sup> In co-development, Canada recognizes the commitment to a meaningful partnership between Indigenous individuals and communities.<sup>55</sup> In this regard, the report states that self-determination is respected when developing the action plan to implement the provisions of the UNDRIP.<sup>56</sup> Co-development consists of two distinct approaches: the rights-based and the consensus-based approach. A rights-based approach is a process where rights are paramount in implementing the Act.<sup>57</sup> In contrast, a consensus-based approach focuses on zeroing in on resolutions that every individual or group supports.<sup>58</sup>

The annual report states that the UNDRIP Act utilizes both rights-based and consensus-based approaches in co-development; however, the report focused more on the rights-based approach.<sup>59</sup> The word “*consensus*” only appeared once in both the first and second annual reports.<sup>60</sup> Focusing solely on a rights-based approach to policymaking and evaluating outcomes presents a multitude of problems. There is a possibility of a narrow focus resulting from different understandings of stakeholders wherein rights are thought to be separate concepts from participation.<sup>61</sup> As a result, narrow perspectives lead to narrow strategies,<sup>62</sup> and understanding it from a legal interpretation point of view, policies enacted using narrow strategies are useless.

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Government of Canada, *supra*, note 11.

<sup>55</sup> Government of Canada, *supra*, note 46.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> Lisa VeneKlasen et al., “Rights-Based Approaches and beyond Linking Rights and Participation: Challenges of Current Thinking and Action,” *Just Associates*, 2004. <https://justassociates.org/wp-content/uploads/2021/09/rights-based-approaches-and-beyond-rights-and-participation.pdf>

<sup>62</sup> *Ibid.*, 18

Furthermore, a limitation of a strict rights-based approach is that it is not focused on service delivery but concentrates on the duty-bearer (States) fulfilling its obligation to deliver the rights at a minimal level.<sup>63</sup> In the context of UNDRIP, using a rights-based approach, Canada must take measures to combat discrimination or prejudice against Indigenous groups.<sup>64</sup> However, terms like “*take measures and to combat discrimination or prejudice*” in the UNDRIP are not specific. Canada has the obligation to interpret the terms and incorporate them into domestic law. Here, the Canadian government can always argue that enacting the UNDRIP Act is a measure that fulfils its obligation in the UNDRIP, and then it stops there, as there is no set standard to what the terms mean.

It is striking that the Canadian government, in its report, indicated that it is also taking other approaches, such as a consensus-based approach; however, the UNDRIP Act focused solely on the rights-based approach.<sup>65</sup> Undertaking a strictly rights-based approach can result in inequalities between the serviced stakeholders; consequently, it may promote conflicts resulting from a perceived preference from the duty-bearer to whom to grant rights. After all, the delivery of rights can be used as a power source.<sup>66</sup>

The complexity of a distinction-based approach will hinder the facilitation of collaborative consultations with the stakeholders.<sup>67</sup> Finite resources can be exposed to being spread thinly to cover all groups and may eventually result in having inadequate resources for each stakeholder.<sup>68</sup> Considering the distinction-based approach in the obligation to fulfil through facilitation, it may be a hindrance rather than facilitation.

As for the rights-based approach, while such an approach has good intentions, this might not always be the best approach to facilitating a collaborative engagement process. This is due to the

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<sup>63</sup> Morten Broberg and Hans-Otto Sano, “Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences,” *The International Journal of Human Rights* 22, no. 5 (May 28, 2018): 664–80, <https://doi.org/10.1080/13642987.2017.1408591>.

<sup>64</sup> United Nations, *supra*, note 4.

<sup>65</sup> Government of Canada, *supra*, note 11.

<sup>66</sup> Broberg and Sano, *supra*, note 63.

<sup>67</sup> Native Women’s Association of Canada, *supra*, note 49.

<sup>68</sup> *Ibid*, 3.

high importance placed on the promotion of legal rights.<sup>69</sup> This may result in a more theoretical emphasis on perceived rights rather than actual rights, impeding actual cooperation between the Canadian government and the Indigenous groups in a practical sense.<sup>70</sup>

In terms of the obligation to fulfill by providing, the distinction-based approach has the potential to tailor resources based on the needs of the target Indigenous individuals or groups, which will allow greater support. However, in the context of the obligation, the distribution of resources is at risk of being inequitable.<sup>71</sup> The chances of having different communities receive different levels of resources are elevated. Other communities might receive greater attention simply by being more known or larger in population than smaller or less known Indigenous communities. Geographical factors also come into play where Indigenous communities in remote areas tend to be overlooked during resource distribution, eventually leading to inequities in realizing rights under the element to provide.<sup>72</sup>

Much like in a rights-based approach, the focus on fulfilling legal rights is emphasized, taking away the concentration on practical aspects of Indigenous empowerment such as capacity building and strengthening support systems.<sup>73</sup> In this approach, the targeted Indigenous groups must be empowered to assert their rights against the State through a court of law, such as the right to health, education, housing, and social services<sup>74</sup> and redirect the State's focus away from fulfilling its duties only for the sake of fulfilling them.

Regarding the obligation to fulfil by promotion, a distinction-based approach inherently has the capacity to promote respect and understanding among different Indigenous groups and communities.<sup>75</sup> The respect fosters collaboration among them and failing to develop a cohesive and reinforced understanding of Indigenous needs might lead to fragmented views on the rights

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<sup>69</sup> Broberg and Sano, *supra*, note 63.

<sup>70</sup> Catrina Denvir, Nigel J. Balmer, and Pascoe Pleasence, "When Legal Rights Are Not a Reality: Do Individuals Know Their Rights and How Can We Tell?", *The Journal of Social Welfare & Family Law* 35, no. 1 (March 2013): 139–60, <https://doi.org/10.1080/09649069.2013.774764>.

<sup>71</sup> Native Women's Association of Canada, *supra*, note 49.

<sup>72</sup> *Ibid.*

<sup>73</sup> Broberg and Sano, *supra*, note 63.

<sup>74</sup> *Ibid.*

<sup>75</sup> Native Women's Association of Canada, *supra*, note 49.

of Indigenous peoples. For example, in International law, Indigenous peoples were denied their collective right to self-determination because they were not considered “peoples” in the context of self-determination.<sup>76</sup> The obligation to promote will not be fulfilled without a solid foundation on what Canadian Indigenous peoples' rights are.

As for a narrower context, the rights-based approach may not be the best avenue to emphasize raising the public's awareness of Indigenous rights. The focus of a rights-based approach is not on garnering support from the general public but on the duty-bearer's responsibility to fulfil its legal obligations.<sup>77</sup> Rights and participation from groups are separate concepts and are considered indirect or uneven as determined by the challenges some International human rights-based groups face.<sup>78</sup> Strict implementation of a rights-based approach without the supplement of consensus-based approach fails to achieve the goals of the obligation to promote Indigenous rights nationally and internationally.

A goal of the UNDRIP Act is to promote and achieve consistency of Canadian laws with the UNDRIP through consultations with Indigenous individuals and groups.<sup>79</sup> Without a careful understanding of how to integrate the said approaches, the collaboration process will fail to engage the Indigenous communities properly and eventually not achieve the Act's goals.

### ***Second Phase – Action Plan***

The Canadian government and Indigenous groups involved in the collaboration validated and refined the measures proposed in the draft action plan.<sup>80</sup> The engagement process included submissions from different provinces.<sup>81</sup> The action plan is about the cooperation of Indigenous

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<sup>76</sup> Rashwet Shrinkhal, “Indigenous Sovereignty’ and Right to Self-Determination in International Law: A Critical Appraisal,” *AlterNative: An International Journal of Indigenous Peoples* 17, no. 1 (March 1, 2021): 71–82, <https://doi.org/10.1177/1177180121994681>.

<sup>77</sup> Broberg and Sano, *supra*, note 63.

<sup>78</sup> VeneKlasen et al, *supra*, note 61.

<sup>79</sup> Department of Justice, “United Nations Declaration on the Rights of Indigenous Peoples Act,” 2023, <https://www.justice.gc.ca/eng/declaration/about-apropos.pdf>.

<sup>80</sup> Government of Canada, *supra*, note 11.

<sup>81</sup> *Ibid.*

groups of Canada.<sup>82</sup> The two phases involved an Indigenous-led consultation process to determine the themes and priorities for the action plan.<sup>83</sup> Nine priorities were identified in the action plan outlining the goals corresponding to each article in the UNDRIP; these include rights to self-determination, resources, and civil and political rights, among others.<sup>84</sup>

According to the second annual report, the success of the consultation and engagement resulted in the development of the action plan,<sup>85</sup> adding new implementation measures and strengthening the language of past treaties, economic reconciliation, self-determination and self-government discussions, and changes in the processes in the Canadian government for strengthened collaborations.<sup>86</sup> However, the goals indicated in the action plan are too broad, and the Canadian government expects all the subgoals to be implemented until 2028.<sup>87</sup>

Delving into the most significant barrier to implementing policies is the clear separation of jurisdiction between the federal and provincial levels, which presents an individualistic approach to tackling issues of transcending concerns of Indigenous peoples.<sup>88</sup> The differences in the approach between the provincial and federal government contribute to inefficiencies in law implementation as the federal government cannot directly compel provinces to comply.<sup>89</sup> These lead to delays in law enforcement, policy-making and service delivery, ultimately affecting Indigenous peoples.

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<sup>82</sup> Government of Canada, “Second Annual Progress Report on Implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act” (Canada: Department of Justice Canada, 2023), [https://www.justice.gc.ca/eng/declaration/report-rapport/2023/docs/2023-unda-ar-final\\_en.pdf](https://www.justice.gc.ca/eng/declaration/report-rapport/2023/docs/2023-unda-ar-final_en.pdf).

<sup>83</sup> Government of Canada. *supra*, note 11.

<sup>84</sup> Government of Canada, “UNDA Action Plan” (United Nations Declaration on the Rights of Indigenous Peoples Act Implementation Secretariat, 2023), <https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf>. United Nations Declaration on the Rights of Indigenous Peoples Act Implementation Secretariat, 2023. <https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf>.

<sup>85</sup> Government of Canada, *supra*, note 82.

<sup>86</sup> *Ibid* at para 1, 21.

<sup>87</sup> Government of Canada, *supra*, note 84.

<sup>88</sup> Alex Neve, “Closing the Implementation Gap: Federalism and Respect for International Human Rights in Canada,” Centre of Excellence on the Canadian Federation, 2023, <https://centre.irpp.org/research-studies/closing-the-implementation-gap/>.

<sup>89</sup> Jack Stilborn, “National Standards and Social Programs: What the Federal Government Can Do (BP379e),” 1997, <https://publications.gc.ca/Collection-R/LoPBdP/BP/bp379-e.htm>.

Additionally, critics attack the UNDRIP Act for its vagueness and its potential for being misinterpreted and wrongly applied.<sup>90</sup> For example, the terms “*to improve fair and equitable access to quality and culturally safe health services.*”<sup>91</sup> Such terms are vague and overly broad. Although the UNDRIP itself does not offer precise wording in the provisions, the Parliament has an obligation to fulfil the principles UNDRIP itself means to convey. Additionally, the Assembly of First Nations also states that there is no hundred percent consensus that the UNDRIP Act is in the First Nations’ best interest.<sup>92</sup>

Another notable challenge is to whom the accountability rests; due to the vagueness and lack of clarity of accountability, the action plan does not provide a point person to be responsible for the failure or success of an action item.<sup>93</sup> It may appear as an advantage since an individual should not be solely responsible for an action item; however, the lack of a specific individual or group to bear the responsibility puts the UNDRIP Act awry. An advisory council within the federal government can take responsibility for an action item in the UNDRIP Act. Additionally, the lack of absolute transparency poses a significant barrier that may result in finger-pointing. Vagueness<sup>94</sup> leads to inconsistent law application that may result in violation of substantive due process and, eventually, the right of Indigenous peoples to self-governance. Furthermore, a lack of accountability leaves room for inaction<sup>95</sup> and a lack of set deadlines may lead to delays in the delivery of the right to self-determination.

As highlighted by the stakeholders, government departments had limited engagement, moved in tight timelines, and the commitments concerning the legislative committees impacted the action plan's goals.<sup>96</sup> The engagement of Indigenous leaders of different levels was hampered by the

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<sup>90</sup> Nick Leeson, “Unravelling Canada’s UN Indigenous Action Plan,” *Indigenous Watchdog*, September 14, 2023, <https://www.indigenouswatchdog.org/update/unravelling-canadas-un-indigenous-action-plan-nick-leeson-and-mariana-gallegos-dupuis/>; Fraser Institute, “Squaring the Circle: Adopting UNDRIP in Canada”, March 10, 2020, <https://www.fraserinstitute.org/studies/squaring-the-circle-adopting-undrip-in-canada>

<sup>91</sup> Government of Canada, *supra*, note 84.

<sup>92</sup> Brett Forester, “Assembly of First Nations Wants Federal UNDRIP Plan Overhauled, Slams Consultation Process,” *CBC*, April 6, 2023, <https://www.cbc.ca/news/indigenous/afn-undrip-draft-plan-delay-1.6803777>.

<sup>93</sup> Leeson, *supra*, note 89.

<sup>94</sup> Raff Donelson, “Legal Inconsistencies,” *Tulsa Law Review* 55 (2019): 31, <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=3174&context=tlr>

<sup>95</sup> Lara Khoury et al., “Governments’ Accountability for Canada’s Pandemic Response,” *Journal of Public Health Policy* 43, no. 2 (June 1, 2022): 222–33, <https://doi.org/10.1057/s41271-022-00350-0>.

<sup>96</sup> Government of Canada, *supra*, note 82.



compressed timelines, limiting co-development.<sup>97</sup> The timelines also determined the proposals that could be included in the action plan; forty-four proposals were not included in the action plan. Such proposals could have contributed to the measures and priorities in the action plan.<sup>98</sup> Indigenous groups have also expressed concerns about the conduct of ceremonies, educating community members, and engaging diverse groups, all of which are hampered due to time constraints.<sup>99</sup> Challenges also include issues in funding distribution, causing more disadvantages to underfunded organizations.<sup>100</sup> Some stakeholders felt the funding and engagement were not flexible enough to meet their needs.<sup>101</sup>

These challenges impact Indigenous rights as they could undermine representation and participation. Though time constraints can be justifiable in a given circumstance, they may also result in burdens. An example is the deadline-driven decision-making resulting from the rushed timeline for creating the Action plan.<sup>102</sup> The exclusion of proposals raises concerns about equity and justice which may lead to the erosion of trust in the government, potentially affecting future collaborations between the Canadian government and the Indigenous groups.

Although the UNDRIP Act can signal to the international community that Canada is taking proactive steps in the realization of the rights of Indigenous groups, enacting a law alone is not sufficient. The UNDRIP Act confers no rights to the Indigenous peoples, as it only serves as a framework to align Canada's laws to UNDRIP.<sup>103</sup> It may appear in the first phase of the UNDRIP Act that the consultation with the Indigenous peoples is extensive. In truth, the level of consultation varies depending on the implementing agency. There must be sincere willpower on the part of the government to deliver and respect the rights of Indigenous peoples. It has taken

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, 21; There is no specific individual or group that sets the timelines. The federal government is mainly responsible for implementing the UNDRIP Act however as different departments are tasked to do so, different timelines are set by each implementing agency (*i.e.* Crown-Indigenous Relations and Northern Affairs Canada and Indigenous Services Canada)

<sup>99</sup> *Ibid.*, 20.

<sup>100</sup> *Ibid.*, 20.

<sup>101</sup> *Ibid.*, 20.

<sup>102</sup> Assembly of First Nations, "Federal Legislation to Implement UN Declaration Major Step Toward Addressing Racism and Discrimination in Canada - Assembly of First Nations," June 17, 2021, <https://afn.ca/all-news/bulletins/federal-legislation-to-implement-un-declaration-major-step-toward-addressing-racism-and-discrimination-in-canada/>.

<sup>103</sup> Government of Canada, *supra*, note 28.

Canada years since the inception of the UNDRIP to enact a law.<sup>104</sup> This action of Canada can bring its commitment to fulfilling Indigenous rights into question.

Additionally, the Canadian government must continuously strengthen its commitment to facilitate a more inclusive process in the engagement of Indigenous groups to understand the complexities in the different subsectors in the Indigenous communities and analyze varying gender and sexuality aspects.<sup>105</sup> An interdisciplinary approach can be proven beneficial to understanding the needs and priorities of Indigenous communities holistically. This means free and meaningful participation among Indigenous groups,<sup>106</sup> empowering them by enhancing their capacity to understand their rights<sup>107</sup> and creating non-discriminatory laws, allowing them to practice their traditions and culture unhampered.

Canada has time and again raised the importance of meaningful consultation and collaboration with the Indigenous communities; from an Indigenous perspective, this may be regarded as the proper procedure respecting the sovereignty and authority of Indigenous groups over their dominion.<sup>108</sup> Yet, Canada can always exercise its power to assert government actions such as military activities on Indigenous lands. Neither the UNDRIP Act nor the UNDRIP itself provides constraints or limits on what military activities can be done in the territories of Indigenous peoples.<sup>109</sup> This unhampered freedom to engage in military activities (i.e. weapons testing)<sup>110</sup> can be surreptitiously reflected in the UNDRIP Act. This example of colonialist power in stealth can be a barrier to the obligation to fulfil. Unhampered freedom may lead to land encroachment on

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<sup>104</sup> Department of Justice, “Implementing United Nations Declaration on the Rights of Indigenous Peoples Act: Next Phase of Co-Development,” news releases, March 20, 2023

<sup>105</sup> Native Women's Association of Canada, “A-Culturally-Relevant-Gender-Based-Analysis.Pdf,” June 2020, <https://www.nwac.ca/assets-knowledge-centre/A-Culturally-Relevant-Gender-Based-Analysis.pdf>.

<sup>106</sup> OHCHR, “Expert Mechanism Advice No. 2 (2011): Indigenous Peoples and the Right to Participate in Decision-Making,” 2011, [https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Advice2\\_Oct2011.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf).

<sup>107</sup> Carolyn Kenny, “A Holistic Framework for Aboriginal Policy Research,” 2004, 29.

<sup>108</sup> Indigenous Corporate Training Inc., “Meaningful Consultation with Indigenous Peoples”, September 24, 2018, <https://www.ictinc.ca/blog/meaningful-consultation-with-indigenous-peoples>, para 3; Amnesty International, “Construction of Pipeline on Indigenous Territory in Canada Endangers Land Defenders,” *Amnesty International*, October 3, 2022, at para 4, <https://www.amnesty.org/en/latest/news/2022/10/canada-pipeline-indigenous-territory-endangers-land-defenders/>.

<sup>109</sup> Thomas Isaac and Arend JA Hoekstra, “Implementing UNDRIP in Canada: Challenges with Bill C-262,” 2018, <https://www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR9776741/br-external/IsaacThomas-e.pdf>

<sup>110</sup> Women’s International League for peace and Freedom Canada, “WILPF-Canada-Submission\_Militarization-of-Indigenous-Land\_2022.Pdf,” WILPF Canada, February 2022, [https://wilpfcanada.ca/wp-content/uploads/2022/08/WILPF-Canada-Submission\\_Militarization-of-Indigenous-land\\_2022.pdf](https://wilpfcanada.ca/wp-content/uploads/2022/08/WILPF-Canada-Submission_Militarization-of-Indigenous-land_2022.pdf).

Indigenous lands without the Indigenous peoples' consent.<sup>111</sup> Although not all, the majority of military activities on Indigenous land will disrupt the social fabric of the Indigenous communities, affecting their culture and spiritual way of life.<sup>112</sup>

Relating the actions of the Canadian Parliament to the international arena, the federal government of Canada has declared its commitment to support UNDRIP, as in New Zealand (NZ) and Norway. Canada shares a foundational commitment with New Zealand and Norway in acknowledging and recognizing the rights of Indigenous peoples. Like the Canadian government, the Government of NZ has expressed its commitment to improving the lives of its Indigenous peoples. While it has taken several years, the Ministry of Maori Development led the creation of a development plan to realize the principles of UNDRIP.<sup>113</sup> The NZ government has also engaged in several settlements to address historical conflicts such as land grabbing and blatant treaty breaches by the European settlers. The settlements included monetary compensation, return of land and resources, and acknowledgement and recognition of the Maori culture.<sup>114</sup> Such actions of the NZ government are explicitly encompassed in Article 10 of the UNDRIP. These actions occurred before the inception of the "Declaration Plan," showing that governments can fulfill the provisions of the UNDRIP if they are willing to do so.<sup>115</sup> Today, at least 6%<sup>116</sup> of NZ land is Maori Land. Meanwhile, in Canada, only 0.2% of Canadian land is reserved land.<sup>117</sup>

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<sup>111</sup> OHCHR, "Report on 'The Militarization of Indigenous Land: A Human Rights Focus'" *OHCHR*, accessed February 7, 2024, <https://www.ohchr.org/en/calls-for-input/2022/report-militarization-indigenous-land-human-rights-focus>.

<sup>112</sup> OECD, "Linking Indigenous Communities with Regional Development in Canada," *Paris: Organization for Economic Co-operation and Development*, 2020, [https://www.oecd-ilibrary.org/urban-rural-and-regional-development/linking-indigenous-communities-with-regional-development-in-canada\\_fa0f60c6-en](https://www.oecd-ilibrary.org/urban-rural-and-regional-development/linking-indigenous-communities-with-regional-development-in-canada_fa0f60c6-en).

<sup>113</sup> Ministry of Maori Development, "UN Declaration on the Rights of Indigenous Peoples," *Te Puni Kōkiri*, 2022, <https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/un-declaration-on-the-rights-of-indigenous-peoples>.

<sup>114</sup> Minister in Charge of Treaty of Waitangi Negotiations, "Crown Proposals for The Settlement of Treaty Of Waitangi Claims: Summary - Digest," *Australian Indigenous Law Reporter*, 1996, <https://www6.austlii.edu.au/cgi-bin/viewdoc/au/journals/AILR/1996/91.html>.

<sup>115</sup> Te Puni Kōkiri, "A Declaration Plan in Aotearoa," 2022, <https://www.tpk.govt.nz/docs/tpk-undrip-a5book-en-feb2022.pdf>

<sup>116</sup> Controller and Auditor General, "Part 2: Māori Land – What Is It and How Is It Administered?" *Office of the Auditor-General New Zealand*, 2004, 2, <https://oag.parliament.nz/2004/maori-land-court/part2.htm>.

<sup>117</sup> Indigenous Corporate Training Inc., "Insight on 10 Myths About Indigenous Peoples," 2018, <https://www.ictinc.ca/blog/insight-on-10-myths-about-indigenous-peoples>.

One of the cornerstones of the “*Declaration Plan*” is upholding self-determination for the Maori.<sup>118</sup> The Government of New Zealand released He Pua Pua, or the report that contains the roadmap to achieve the priorities of the declaration plan.<sup>119</sup> The plan focused on the self-determination and governance of the Maori together with other principles involving equity, fairness, culture, and land and resource management.<sup>120</sup> While in Canada, the Parliament has not enacted a law that directly affirmed the right to self-determination of Indigenous peoples. The UNDRIP Act does not even provide an explicit affirmation of the right to self-determination.

In Norway, the Indigenous group of the Saami have experienced colonization and encroachment on their traditional lands, much like what Canadian Indigenous peoples have historically experienced.<sup>121</sup> The Saami have gained recognition as Indigenous peoples in the Nordic countries over the years. In 1989, Norway inaugurated the Saami parliament to recognize the status of the Saami people in Norway and to represent the Indigenous group in political affairs in the national Parliament.<sup>122</sup> Norway has also engaged the Saami people by recognizing the government's duty to consult the Saami in relation to aspects that will impact or affect their rights with the goal of obtaining the Saami's consent to proceed with the government's actions.<sup>123</sup> Additionally, the Government of Norway has enacted laws recognizing that the Saami people own the land in Finnmark, a vast county in Northern Norway.<sup>124</sup> Norway has also established the Finnmark committee in relation to land ownership.<sup>125</sup> In comparison, Canada fails in this regard. Although there are Indigenous representatives in the Canadian Parliament, it falls short of what Norway has. There is only a small percentage of Parliament members of Indigenous descent. Furthermore, Canada has no national law that requires the return of stolen

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<sup>118</sup> Te Puni Kōkiri, *supra*, note 113.

<sup>119</sup> Te Puni Kōkiri, “*He Pua Pua*,” 2019, <https://natlib.govt.nz/records/45416887>

<sup>120</sup> *Ibid.*

<sup>121</sup> Heaps, “Sami Land Rights and Policy-Driven Recognition Threats,” *The Henry M. Jackson School of International Studies* (blog), June 27, 2019, <https://jsis.washington.edu/news/sami-land-rights-and-policy-driven-recognition-threats/>.

<sup>122</sup> Samediggi, “Background: The State and the Sami Parliament,” *Sametinget*, accessed January 15, 2024, <https://www.sametinget.se/9688>.

<sup>123</sup> Øyvind Ravna, “*The Duty to Consult the Sámi in Norwegian Law*,” *Arctic Review on Law and Politics*, 11 (December 9, 2020): 233–55, <https://doi.org/10.23865/arctic.v11.2582>.

<sup>124</sup> Queens University, “Norway | Multiculturalism Policies in Contemporary Democracies,” accessed January 15, 2024, <https://www.queensu.ca/mcp/indigenous-peoples/resultsbycountry-ip/norway-ip>.

<sup>125</sup> *Ibid.*

land to the First Nations, Metis, and Inuit. Although there were treaties, such treaties never came to fruition.<sup>126</sup>

### ***B. Existing Jurisprudence decided by the Supreme Court of Canada***

The Constitution Act of 1982 acknowledges the rights of Indigenous peoples by having Section 35. Though the section does not expressly enumerate the rights of Aboriginal peoples, it is used by the SCC to affirm treaties and Aboriginal rights.<sup>127</sup> The SCC derives its power as the interpreter of the provisions of the Constitution; at the same time, Section 35 does not expressly mention the right to self-determination. The SCC has expanded the scope of the provision, including the right of Indigenous peoples to govern their lands.<sup>128</sup> Due to the inclusion of Section 35 in the Constitution, Indigenous peoples can anchor legal actions relating to their rights. On the other hand, the Canadian government recognizes the right to self-determination based on this section of the Constitution, and such right is enforceable through the courts of law.<sup>129</sup>

While the decisions of the SCC do not explicitly reference the UNDRIP, the principles of UNDRIP, albeit not totally, have influenced the decisions of the Court, especially in the doctrine of duty to consult. It is evident in its decisions that it aims to align with the principles of UNDRIP. Expanding on Aboriginal rights, the SCC has mainly focused on self-government rights, land and title rights, and cultural rights. In its decision in *R v. Van der Peet*, the right to sell fish on a non-commercial basis falls within the Aboriginal rights encompassed under Section 35. It further held that in order for an activity to fall within the Aboriginal rights, such practice

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<sup>126</sup> Brandi Morin, "Canada and the First Nations: A History of Broken Promises" *Indigenous Rights*, Al Jazeera, 2020, <https://www.aljazeera.com/features/2020/3/17/canada-and-the-first-nations-a-history-of-broken-promises>.

<sup>127</sup> "Section 35 of the Constitution Act, 1982 reads as follows:

35.(1) *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*

*Definition of "aboriginal peoples of Canada"*

(2) *In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada. Land claims agreements,*

(3) *For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired."*

<sup>128</sup> *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44.

<sup>129</sup> Government of Canada; Crown-Indigenous Relations and Northern Affairs, "*The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*," reference material, November 3, 2008, <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#inhrsg>.

must be integral to the distinctive culture of the Indigenous group.<sup>130</sup> As in *R v. Marshall*, the SCC ruled that the treaty signed by the Mi'kmaq and Maliseet peoples must be recognized, and as such, it confers rights to earn a living through fishing under Section 35.<sup>131</sup> Furthermore, to Aboriginal Rights under Section 35, the SCC ruled in the case of *Tsilhqot'in Nation v. British Columbia* that the Tsilhqot'in Nation have the right over the lands they have traditionally occupied, which the British Columbian government eventually sequestered.<sup>132</sup> This case affirmed land rights over territories traditionally occupied by Indigenous groups.

In the case of *Haida Nation v. British Columbia*, the SCC established the duty to consult Indigenous peoples whenever the Canadian government intends to act upon what will impact Indigenous rights.<sup>133</sup> The SCC emphasized that the duty is based on the goals of reconciliation with the Indigenous communities.<sup>134</sup> It is to be noted that the duty to consult arises even before final decisions are taken. The moment the Crown understands that there is a potential impact on the rights of Indigenous peoples, the duty to consult is triggered.<sup>135</sup> The Canadian concept of duty to consult arises from Section 35 of the 1982 Constitution. However, comparing it with the concept of consultation enshrined in the UNDRIP, the consultation mentioned in the UNDRIP talks about an expanded version of the duty to consult. The concept of Free, Prior, and Informed Consent (FPIC) arises. The requirement of the UNDRIP on FPIC imposed upon States is broader. It involves not only the duty to consult Indigenous communities but also to obtain their consent.

In contrast, the SCC discussed in *Ktunaxa Nation v. British Columbia* that the duty to consult involves the accommodation of the interests of the Indigenous peoples, but there is no guarantee that such accommodation will result in a particular result; adding that Section 35 does not grant a

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<sup>130</sup> *R v Van der Peet*, 1996 CanLII 216, [1996] 2 SCR 507.

<sup>131</sup> *R v Marshall*, 1999 CanLII 666 [1999] 3 SCR 533.

<sup>132</sup> *Tsilhqot'in Nation*, *supra*, note 128.

<sup>133</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 BCSC 1243.

<sup>134</sup> *Id.*

<sup>135</sup> Jeffery Callaghan, Lucia Westin-Estaugh, and Vanclieaf, "The Duty to Consult Indigenous Groups: 5 FAQs," McInnes Cooper, June 21, 2021, <https://www.mcinnescooper.com/publications/the-duty-to-consult-indigenous-groups-5-faqs/>.

power to veto for unsatisfied Indigenous claimants.<sup>136</sup> As long as an adequate consultation is held, no consent is necessary for development to proceed.<sup>137</sup>

Likewise, in UNDRIP, the FPIC is explicitly mentioned in Articles 10, 11, 19, and 28, putting a higher emphasis on consent and not just the duty to consult, reflecting a stronger inclination to the right to self-determination. The concept of self-determination in International Human Rights Law (IHRL) in the International Covenant on Civil and Political Rights (ICCPR)<sup>138</sup> and International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>139</sup> aligns with the FPIC concept delineated in the UNDRIP. Self-determination is a core concept arising from customary law, which represents the right of Indigenous people to determine and govern themselves.<sup>140</sup> This involves the rights of Indigenous peoples to decide on their political status and engage in developing their economy, society, and culture.

The main divergence between the concept of duty to consult promulgated by the SCC, the concept of FPIC within UNDRIP, and the self-determination of the IHRL lies in the depth and extent of each concept. The FPIC of the UNDRIP requires a higher standard for States to achieve.<sup>141</sup> The SCC has not always required consent as a prerequisite for governmental actions.<sup>142</sup> As discussed in the previous cases, the duty to consult is distinct from consensus. Consensus is a concept that requires the meeting of the minds, and the participants share a value and goal.<sup>143</sup> In performing its duty to consult, the government does not share the same goal with Indigenous peoples as it appears mainly as a procedural concept that the government must overcome without regard to the consequences that may result from its actions. Being a

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<sup>136</sup> *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, at para 9.

<sup>137</sup> *Id.*

<sup>138</sup> OHCHR, “International Covenant on Civil and Political Rights,” OHCHR, 1966, Article 1, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

<sup>139</sup> OHCHR, “International Covenant on Economic, Social and Cultural Rights,” OHCHR, 1966, Article 1, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

<sup>140</sup> Legal Information Institute, “Self Determination (International Law),” *LII/Legal Information Institute*, n.d., [https://www.law.cornell.edu/wex/self\\_determination\\_\(international\\_law\)](https://www.law.cornell.edu/wex/self_determination_(international_law)).

<sup>141</sup> Coalition for the Human Rights of Indigenous Peoples, “Self-Determination & Free, Prior and Informed Consent Understanding the United Nations Declaration on the Rights of Indigenous Peoples,” 2021, <https://quakerservice.ca/wp-content/uploads/2021/02/Backgrounder-on-self-determination-and-FPIC.pdf>.

<sup>142</sup> *Ktunaxa Nation*, *supra*, note 136.

<sup>143</sup> Black’s Law Dictionary, “Consensus Definition & Meaning” The Law Dictionary, October 18, 2012, <https://thelawdictionary.org/consensus/>.

procedural matter, the duty to consult is akin to box-ticking without meaningful engagement. It is worth noting that the terms free, prior, and informed consent have been consistently mentioned in the action plan of the UNDRIP Act. Indicated in several subsections (lands, territories, and resources; participation in decision-making and institutions), the Canadian government is required to incorporate the FPIC in its actions.<sup>144</sup>

Assessing the decisions of the SCC, using the obligation to fulfil through facilitation, are commendable. The SCC expressed how the Canadian government must fulfil its duty to consult with Indigenous peoples if it necessarily affects their rights. This can be considered facilitation in terms of the obligation to fulfil. However, the SCC may also be regarded as doing a piecemeal application of its principles or narrowing its interpretations depending on each case despite strong evidence of the SCC's judicial activism<sup>145</sup> and the power to expand the interpretation of rights.<sup>146</sup>

According to the SCC, the duty to consult differs from consent.<sup>147</sup> The Canadian government has to fulfil the requirement of consultation even if it does not necessarily concur with the decision of the Indigenous groups.<sup>148</sup> Once the duty has been satisfied, the Crown does not necessarily have to ask the Indigenous community for consent to proceed with their actions.<sup>149</sup> Additionally, in the obligation to fulfil, the SCC can be criticized by the public for its decision that the duty to consult can be achieved even if the Indigenous groups' consent is not obtained. This highlights the need for the SCC's intervention to facilitate upholding and setting a precedent that the duty to consult must be undertaken to obtain consent from the Indigenous communities.

As for the commitment to provide, States must deliver means for individuals or groups to enjoy a specific right if they are unable to do so because of reasons beyond their control.<sup>150</sup> Although the

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<sup>144</sup> Department of Justice, *supra*, note 79.

<sup>145</sup> Robert Sharpe, "The Supreme Court of Canada in Changing Times," *Ontario Justice Education Network*, August 26, 2003, 3, <https://ojen.ca/wp-content/uploads/Supreme-Court-of-Canada-in-Changing-Times.pdf>.

<sup>146</sup> *Ibid*, 4.

<sup>147</sup> *Ktunaxa Nation*, *supra*, note 122, at [83]; Shreya Shah, "Indigenous Consultation and Consent in Canadian Law," *The Indigenous Foundation*, n.d., <https://www.theindigenousfoundation.org/articles/consultation-and-consent-in-canadian-law>.

<sup>148</sup> *Ktunaxa Nation*, *supra*, note 122, at para 9.

<sup>149</sup> *Id*.

<sup>150</sup> OHCHR, *supra*, note 14.



SCC provides an avenue for Indigenous peoples to enforce their rights, reiterating the decision in *Ktunaxa*, the SCC itself had failed to satisfy the requirement of the obligation to fulfil – provide when it clarified that the duty to consult did not entail consent.

The power of the SCC to require consent may be drawn from a broader interpretation of Section 35 of the 1982 Constitution. The SCC has proven that it can promulgate decisions that reflect the dynamic characteristic of the Constitution and that such a document is a living one which can adapt to the nuances of the present times. Indigenous people have limited power hampered by the intergenerational trauma resulting from colonialism.<sup>151</sup> This limit may result in Indigenous peoples possibly being taken advantage of since Canada has no duty to agree after a consultation has been undertaken.<sup>152</sup>

As for the obligation to fulfil via promotion, the SCC's decision on the case of Mikisew Cree First Nation affirms the responsibility of the Canadian government to always consult with the Indigenous communities.<sup>153</sup> In the commitment to promote, States are responsible for creating a conducive environment for the rights to flourish. In the event that it is the State that causes rights to be trampled, the obligation to fulfil is already hampered. The SCC, to successfully satisfy this commitment, with the help of other branches of the government, must be able to provide a more permanent solution to determine what is considered a meaningful consultation that will foster genuine reconciliation with the Indigenous peoples of Canada.

## SUMMARY AND CONCLUSION

The UNDRIP is an excellent milestone in advancing the rights of Indigenous peoples. The UNDRIP Act, as a legislative enactment to fulfil the provisions of the UNDRIP, can be said to be a testament to Canada's commitment to ensuring the rights of Indigenous peoples. Although some have praised the UNDRIP Act, it has also been criticized. Considering international

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<sup>151</sup> Terry Mitchell, "Colonial Trauma: Complex, Continuous, Collective, Cumulative and Compounding Effects on the Health of Indigenous Peoples in Canada and Beyond," *International Journal of Indigenous Health* 14, no. 2 (2019), <https://doi.org/10.32799/ijih.v14i2.32251>.

<sup>152</sup> Alejandro Gonzalez, "The Evolution of the Duty to Consult," *Western Journal of Legal Studies* 10, no. 1 (2020): 1, 2, <https://ojs.lib.uwo.ca/index.php/uwojls/article/view/10229>.

<sup>153</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

commitments on human rights, Canada's obligation to fulfil is a crucial responsibility to ensure that it is a nation that champions human rights. The obligation to fulfil as a concept that must be respected entails commitments that States must satisfy. This obligation involves facilitating, providing, and promoting.

Canada, New Zealand and Norway share the same context in terms of their treatment of Indigenous communities. However, the approach taken by each nation differs. Notable differences that put Canada behind New Zealand and Norway are the focus on Maori self-determination and the Saami parliament's development, respectively. These differences may be a result of strong political will in their respective governments. Still, such political will can also come from genuine leaders who truly embody the goals for Indigenous rights to be achieved. However, it cannot be said that Norway and New Zealand's approaches are perfect. Challenges will constantly hound each government, but it would be better for Canada to listen to the experts, learn from the best practices of NZ and Norway and adapt on its own, understand Indigenous perspectives, and be truly sincere in its goals to give the rights to Indigenous peoples.

The SCC has repeatedly shown that it can be a beacon of the rule of law and that its decisions are sound and just. However, such decisions are not unflawed and can be subject to criticism and improvement. The SCC has emphasized the need for the duty to consult. It has reiterated the importance of respecting the right of self-determination of Indigenous peoples. Yet, the same institution has also delineated that the requirement of duty to consult does not mean consent. This brings the idea that such duty is merely procedural and not substantive. Lastly, it is recommended that the Parliament adopt UNDRIP in its entirety through a continuous amendment of the UNDRIP Act after meaningful monitoring and evaluation of what has failed and what has been successful and achieved as of date by the UNDRIP Act. This commitment should persist until such a time that the rights of our Indigenous brothers and sisters are achieved.

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