

Setting out Canada's Obligations to Inuit
in respect of the Extended Continental Shelf in the Arctic Ocean

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Introduction

- This paper examines Canada's obligations with regard to Inuit rights in their homeland, known as Inuit *Nunangat*, in those areas that Canada will likely claim as part of its extended continental shelf in the Arctic Ocean. The rights of Inuit peoples and their interaction with the claims of the Arctic countries, or States, to the continental shelf in the Arctic Ocean under the United Nations Convention on the Law of the Sea (UNCLOS)¹ have been the subject of two previous papers presented to Senator Charlie Watt.² This paper draws on those studies to focus on Canada's obligations to respect Inuit rights in the Arctic Ocean as Canada attempts to cement its sovereignty over a large portion of the Arctic Ocean sea bed.
- The extended continental shelf is an area of the sea bed that is *beyond* the continental shelf within a State's 200 nautical mile Exclusive Economic Zone (EEZ), which is why it is often referred to as the "extended" continental shelf. If a State can establish sovereignty over an extended continental shelf, this gives it the right to explore and develop the natural resources within a much larger area of the sea bed.
- The Arctic States are moving quickly to solidify their rights to an extended continental shelf, based on the promise of vast deposits of oil and gas in the Arctic Ocean and the possibility that the changing Arctic climate and advances in technology will place these previously inaccessible resources within reach in the near future.
- Canada is in the process of using the UNCLOS system to have international confirmation of the limits to an extended continental shelf in the Arctic Ocean. All States who have ratified UNCLOS must submit the area they claim to be within their extended continental shelf to the UN Commission on the Limits of the Continental Shelf (the UN

¹ *United Nations Convention on the Law of the Sea*, (1982), 1833 UN Treaty Ser 3, 387 (1994) [UNCLOS]

² Peter W. Hutchins, Monique Caron and Robin Campbell, Inuit: *Canada's Treaty Partners or Free Agents? An Argument for an Inuit-Canada Joint Approach to Addressing Sovereignty Disputes in the Arctic* (2012), the executive summary is available online at: <http://liberalsenateforum.ca/wp-content/uploads/2014/02/Hutchins-Executive-Summary.pdf> ; Hutchins Legal Inc., *Canada's Submission to the Commission on the Limits of the Continental Shelf and the Legal Protections for Inuit Rights to the Arctic Ocean* (2014), available online at: http://liberalsenateforum.ca/wp-content/uploads/2014/07/Watt_Canadas-Claim-to-the-Continental-Shelf-2014.pdf.

Commission). This technical body will examine each State's submission, looking at the maps of the ocean floor and other material that the State submits as support for its claim, to determine if the boundaries of the extended continental shelf claimed by the State meet the rules of UNCLOS.³

- The focus of this paper is to look at Canada's obligations to Inuit, both as Indigenous peoples⁴ of the Arctic and as Canada's Treaty partner, when Canada engages in the UNCLOS system and takes steps to exercise sovereignty over the extended continental shelf off of Canada's Arctic coast. Canada's obligations at the domestic level, as well as under international law are examined and various avenues that are available to Inuit to ensure protection of their rights to the Arctic Ocean and its resources will be discussed.
- Vast portions of the Arctic Ocean fall within Inuit *Nunangat*, the pan-Inuit homeland that covers areas of Russia, the United States (Alaska), Denmark (Greenland) and the Canadian north, as well as the water and ice of the Arctic Ocean lying between these lands. Inuit have a profound connection to the Arctic lands, ice, waters. As large portions of the Arctic Ocean have, until recently, been covered by ice year round, historically Inuit were able to make the ocean their home, living and traveling on their frozen territory. Inuit survival long depended on hunting and fishing the wildlife that lives in the Arctic Ocean. The connection with the Arctic land, water and ice, and the relationship with the Arctic Ocean wildlife is integral to Inuit as people and are essential aspects of Inuit culture and society.
- Both domestic and international law provides support for Inuit having jurisdiction not only over the land, water, ice in these areas of the Arctic Ocean, but also over the resources within the Arctic Ocean. Legal protection also extends to Inuit traditional

³ Details of how the outer limits of the extended continental shelf is determined under the UNCLOS system rules are explained in the earlier papers commissioned by Senator Watt. See: Peter W. Hutchins, Monique Caron and Robin Campbell, *Inuit: Canada's Treaty Partners or Free Agents? An Argument for an Inuit-Canada Joint Approach to Addressing Sovereignty Disputes in the Arctic* (2012), the executive summary is available online at: <http://liberalsenateforum.ca/wp-content/uploads/2014/02/Hutchins-Executive-Summary.pdf>; Hutchins Legal Inc., *Canada's Submission to the Commission on the Limits of the Continental Shelf and the Legal Protections for Inuit Rights to the Arctic Ocean* (2014), available online at: http://liberalsenateforum.ca/wp-content/uploads/2014/07/Watt_Canadas-Claim-to-the-Continental-Shelf-2014.pdf

⁴ In this paper the terms Aboriginal peoples and Aboriginal rights and title are intended to be interchangeable with Indigenous peoples and Indigenous peoples' rights and title Please note that the Canadian Constitution and case law adopts the terms Aboriginal peoples and Aboriginal rights and title.

livelihood and their cultural heritage. This recognition brings about corollary obligations on the part of Canada to respect, protect and fulfill Inuit peoples' rights to the Arctic.

- Further, Canada also has Treaty partnerships with Inuit, premised on the recognition of Inuit rights to the Arctic. Within Canada, portions of Inuit *Nunangat* are covered by Comprehensive Land Claims Agreements, which are Treaties between Canada and Inuit. Within the areas that Canada will claim as its extended continental shelf in the Arctic, there are portions that are already covered by Treaties and other areas that are part of Inuit *Nunangat* but have not been included in a Treaty. Within the areas covered by Treaties, Canada has Treaty obligations to keep. The areas of Inuit *Nunangat* that are not covered by Treaties can be seen as being subject to Inuit rights, such as Indigenous title and rights and, correspondingly, Canada would be required to respect these rights.
- In light of Inuit rights to the Arctic, Canada has not only the opportunity, but also an obligation to engage meaningfully Inuit in the process and work together with them and regional governments to develop strategies to protect Inuit communities and Northern ecosystems.⁵
- This relation of partnership also requires Inuit leadership to recognize their responsibility to work with government and engage with their own constituencies in order to advance the common goals and aspirations of the Inuit peoples that they represent.
- The specific obligations that Canada owes to Inuit in the process of obtaining validation for an extended continental shelf and the development within this area are as follows:
 - A. Canada's General Obligations with respect to Inuit in the Arctic Ocean
 1. Canada must engage and consult Inuit in relation to the UNCLOS process.
 2. Canada must protect the traditional way of life of Inuit in the Arctic.
 3. Canada must ensure that Inuit benefit from the natural resources located in and on their territories.

⁵ Canada, Parliament, Senate. Standing Senate Committee on Fisheries and Oceans. (2010). *Report on the Management of Fisheries and Oceans in Canada's Western Arctic*, 40th Parl., 4th sess., retrieved from: www.parl.gc.ca, [Committee on Fisheries and Oceans (2010)].

4. Canada must protect Inuit rights to sustainable development and the protection of the environment.
- B. Canada's Obligations under Treaties with Inuit
1. Canada must respect Treaty rights.
 2. Canada must implement Treaty obligations in good faith and consult and accommodate Inuit.
 3. Canada must implement the principle of co-management and an Inuit-Canada partnership.

Canada's Domestic, Treaty and International Obligations: Obligations to Respect, Protect, and Fulfill the Rights of Inuit in the Arctic

- Developments over the last decades have brought the rights of Indigenous peoples to the forefront and has clarified States' obligations vis-à-vis their Indigenous populations. The broad acceptance of these rights and obligations by the international community has meant that many of them have become customary international law, which is binding on States.⁶
- International law, Canadian constitutional guarantees, as well as specific Inuit-Canada Treaty obligations require Canada to respect, protect, and fulfill the rights of Inuit in the Arctic. This means that Canada must not only refrain from actions that interfere with the enjoyment of Inuit rights to their traditional lands and resources, it must also protect Inuit from such interference from private or State actors, and must adopt measures to ensure that Inuit rights can be effectively exercised and enjoyed.

A. Canada's General Obligations with respect to Inuit in the Arctic Ocean

1. Canada must engage and consult Inuit in relation to the UNCLOS process

- The current process by Canada to extend its sovereignty over the continental shelf in the Arctic Ocean under UNCLOS, and the resulting implications for Canadian Inuit, as

⁶ James Anaya and Robert Williams, *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources*, 14 Harv. Hum. Rts. J. 33 (2001) at p. 54; Tara Ward, *The Right to Free Prior and Informed Consent*, 10 Nw. U.J. Int'l Hum. Rts 54 (2011-2012), p.58; *Mayagna (Sumo) Awas Tingni Community. v. Nicaragua*, Judgement, Inter-A. Ct. H.R. (ser. C) No. 79, para 140(d).

explored in the prior papers would require Canada to consult with Inuit with the objective of obtaining their free, prior and informed consent.⁷

- Canada must respect its obligations toward Inuit when it pursues its claim to the continental shelf, namely to obtain Inuit free, prior and informed consent To this effect, the UN Permanent Forum on Indigenous Peoples' Rights, the UN's central coordinating body on matters relating to the world's Indigenous peoples, has recently stressed that:

*“all Governments, including the Government of Canada, and the bodies established under the United Nations Convention on the Law of the Sea [must] ensure respect for and recognition of the provisions of the United Nations Declaration on the Rights of Indigenous Peoples [...] in particular in the context of Arctic indigenous peoples. In this regard, these parties must pay immediate and special attention to the right of indigenous peoples to participate in decision-making in all matters that affect their rights; the right of indigenous peoples to their lands, territories and resources; and the right of indigenous peoples to free, prior and informed consent.”*⁸

- Canada is under international obligations to consult with Inuit whenever their rights are at stake. These obligations arise from Canada's adherence to various international human rights Treaties and Declarations.⁹ These obligations are expressly set out in the *United*

⁷ Canada is a party to the following international instruments that recognize - in express terms or implicitly through interpretations of the relevant UN Treaty bodies or of the Inter-American Commission and Inter-American Court on Human Rights - Indigenous peoples' participatory rights: the *International Covenant on Civil and Political Rights* (1976); the *International Convention on the Elimination of Racial Discrimination* (1969); the *International Convention on Economic, Social and Cultural Rights* (1976); the *Charter of the Organization of American States* (1951); the *United Nations Declaration on the Rights of Indigenous Peoples* (2007); the *American Declaration of the Rights and Duties of Man* (1948); see also United Nations Declaration on the Rights of Indigenous Peoples, G.A. res. 61/295, U.N. Doc. A/RES/47/1 (2007). The obligation to consult Indigenous peoples when their interests are at stake is also firmly established in Canadian law, see for example *Haida v. British Columbia (Minister of Forests)*, 2004 SCC 73; ⁷ *Rio Tino Alcan v. Carrier Sekani Tribal Council*, (2010) SCC 43; *Mikisew Cree First Nation v. Canada*, 2005 SCC 69.

⁸ Permanent Forum on Indigenous Issues, Report of the twelfth session, E/2013/43-E/C.19/2013/25, (May 2013), para 51.

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*Nations Declaration on the Rights of Indigenous Peoples*¹⁰ (the “Declaration”) and have been consistently upheld by the UN and Inter-American human rights systems¹¹.

- Article 19 of the Declaration has articulated the overarching obligation for States to obtain Indigenous peoples’ free, prior and informed consent where their particular rights may be impacted, as follows:

[s]tates 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.

- With respect to natural resources, Article 32(2) of the *Declaration* further provides that States must obtain Indigenous peoples’ “*free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources*”.¹²
- As expressed by the UN Special Rapporteur on the Rights of Indigenous Peoples, Indigenous peoples’ participatory rights, articulated through the principle of free prior and informed consent are “*aimed at reversing the historical pattern of exclusion from decision-making and to avoid the future imposition of important decisions on indigenous peoples.*”¹³
- Similarly, in Canada, the constitutional recognition of Indigenous peoples’ rights to their traditional territories imposes strict consultation obligations on the part of the government. A foundational principle in Canadian jurisprudence requires that the

¹⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. res. 61/295, U.N. Doc. A/RES/47/1 (2007) [Declaration].

¹¹ UN Committee on the Elimination of Racial Discrimination, CERD General Comment No. 23 (1997), para 4(c) and 5, A/52/18, Annex V, p. 122-123; UN Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, CCPR/C/21/Rev.1/Add.5, available at: <http://www.refworld.org/docid/453883fc0.html>, *Kickwa Indigenous People of Sarayaku v. Ecuador* (2012), Inter-Am. Ct. H.R. Report no. 245, Series C, para 177; *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (set.C) No. 174 (2007) para 134.

¹² See also Articles 10, 11, 15, 17, 19, 28, 29, 30, 36, 37 and 38.

¹³ James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, UN Doc. A/HRC/12/34 (2009), para. 41; *Haida, supra*, para 14; *Mikisew supra*, para 1.

government always act honourably in its dealings with Indigenous peoples, with the view to advancing the objective of reconciliation.¹⁴ This entails that the government must consult Indigenous peoples whenever a governmental decision or action has the potential of negatively impacting their rights as Indigenous peoples or their treaty rights, and, in most cases, it must accommodate those rights.

- Canadian Courts have clarified that the obligation to consult arises not only when a right has been established or is subject to a treaty, but also in the case of asserted or unproven claims.¹⁵ This protection is necessary to prevent irreversible harm to asserted interests of Indigenous peoples that have not yet been claimed through the courts, treaties or agreements. This signifies that the part of Inuit *Nunangat* that is outside the purview of existing Treaties would also be subject to the government's duty to consult and accommodate Inuit.

2. Canada has a duty to help protect the traditional way of life of Inuit in the Arctic

- Constitutional protection in Canada extends not only to Indigenous peoples' title but also to practices, customs and traditions associated with the land that are integral to the culture of an Indigenous group.¹⁶ In *Delgamuukw*, the Supreme Court ruled that Indigenous peoples' title is not the same as common land ownership, in that it is a constitutional communal right intrinsically linked to Indigenous peoples' culture.¹⁷
- The deeply felt spiritual and emotional relationship of Indigenous peoples to their lands and its fruits has been recognized as the cornerstone for Indigenous peoples' economic, political and social self-determination and for maintaining Indigenous peoples' cultural identity and their very survival.¹⁸
- Inuit have been inhabiting and using the Arctic territories for countless generations. Inuit art, carvings, songs, ceremonies and storytelling bear testimony to the distinctive relationship that Inuit have developed with the Arctic land, water, ice and its resources.

¹⁴ Chris W Sanderson, *The Crown's Duty to consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose and Limits of the Duty*, (2012) 49:4 Alta L Rev 821-853, p 6.

¹⁵ *Rio Tino Alcan*, *supra*; *Haida*, *supra* (first decision confirming this point).

¹⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

¹⁷ *Delgamuukw*, *ibid.*, p. 7.

¹⁸ *Saramaka People v. Suriname*, Inetr-Am. Ct. H.R. (set.C) No. 174 (2007), paras 121-122.

International law protects Indigenous peoples' spiritual attachment to their territories and their right to develop and transmit their cultural heritage to their children.

- The *Declaration* specifically provides this in Article 25:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

- Therefore, any commercial or resource development situated in areas in Inuit *Nunangat*, over which Canada seeks to extend its sovereignty through the UNCLOS process, would require prior consultation and possibly the consent of the peoples concerned, especially where those activities threaten the way of life of Inuit communities and their cultural and spiritual connection to the land.
- Mineral resources and hydrocarbons are abundant throughout the Arctic. Increasing demand for energy and other resources, the shrinking of the polar ice and the opening up of shipping lanes are making this region very attractive for public and private investors. Scientists have begun a second phase of mapping Canada's North to locate onshore and offshore areas with high resource exploration potential.¹⁹
- Emerging development opportunities will have consequences for the environment and local communities. The Arctic's ecologically fragile landscape is slow to recover from the impact of industrial or human activity.²⁰ It is anticipated that Inuit will be most directly affected by increased marine and extraction activity, which is likely to have far-reaching consequences for their culture, well-being and traditional way of life.²¹

¹⁹ Natural resources Canada, Geo-mapping Canada's North (February 2014), available at: <http://www.nrcan.gc.ca/science/story/15360>

²⁰ Report of the Standing Senate Committee on Fisheries and Oceans (2010), *supra*, p. viii.

²¹ Canada Parliament, Senate, Standing Senate Committee on Fisheries and Oceans. (2009). *Rising the Arctic Challenge: Report on the Canadian Coast Guard*, 40th Parl., 2nd sess., retrieved from: <http://www.parl.gc.ca/Content/SEN/Committee/402/fish/rep/rep02may09-e.pdf>, p 4. [Committee on Fisheries and Oceans (2009)]; *Qikiqtani Inuit Association v Canada (Minister of Natural Resources)*, 2010 NUCJ 12, para 48.

- For Inuit, the Arctic sea environment and the use of ice are vital components of their definition of home, Inuit culture, identity, and survival as a people are influenced by the use of the ice and marine related activities. Hunting of sea mammals and fishing are the basis of Inuit economy and a source of subsistence for Inuit communities, providing Inuit with an income, food, clothing, fuel and shelter. The high protein content of marine mammals is essential to Inuit health. There is general recognition of the importance of traditional or country foods, to Indigenous peoples' health and culture.²² Finally, marine-related activities and the traditional knowledge associated with them, which has been passed on from generation to generation, has substantially influenced the foundations of Inuit way of life and their sustainable use of land and ocean biodiversity.²³
- The UN Human Rights Committee has established that a particular way of life, which may include hunting or fishing, associated with the use of land resources, especially in the case of Indigenous peoples, is protected under the right to culture in article 27 of the International Covenant on Civil and Political Rights (ICCPR).²⁴ The ICCPR further provides that “[i]n no case may a people be deprived of its own means of subsistence”.²⁵ Cultural rights guarantees under article 27 of the ICCPR extend not only to social, but also economic activities.²⁶
- The enjoyment of those rights requires active measures of protection. For example, Canada would need to ensure that Inuit have the opportunity to effectively participate in any decisions which may have an impact on their cultural rights.²⁷ This would require broad disclosure of information about a proposed activity, in a way that can be fully understood by them, so that Inuit communities can weigh the risks involved and present an informed position on the matter.

²² David Vanderzwaag and Donat Pharand, *Inuit and the Ice: implications for Canadian Arctic Waters*, 21 Can Y.B. Int'l L. 53 1983, pp. 66, 68, 69.

²³ Natalia Loukacheva, *Inuit Perspectives on Arctic Ocean Governance: The Case of Nunavut*, Ocean Yearbook 28 348-379, p 351.

²⁴ *International Covenant on Civil and Political Rights*, Dec. 16, 1966, G.A. Res. 2200 (XXI), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [ICCPR]

²⁵ ICCPR, *ibid.* at Art. 1(2).

²⁶ *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984), Views adopted 26 March 1990, Report of the Human Rights Committee, GAOR, Thirty-eighth session, Suppl. No. 40 (A/38/40).

²⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, available at: <http://www.refworld.org/docid/453883fc0.html>.

- Any legal, administrative, or economic arrangements taken by Canada that pose a threat to the traditional way of life and culture of Inuit in the Arctic must therefore be influenced by these principles.
- There are very limited circumstances under which the Canadian government could infringe Inuit Indigenous title or rights, including their right to maintain their traditional way of life. In such cases, it is necessary to show that a compelling and substantial public objective justifies the infringement and that the government has taken measures to ensure that the infringement is minimal.²⁸
- There is need for baselines studies in the event that it is determined in the future that Inuit be restored in their situation prior to a breach of fiduciary duty.
- Although *Delgamuukw* indicates that general economic development is a sufficient purpose to justify infringement of Indigenous peoples' title or rights,²⁹ it must be ensured that an infringement of those rights is minimal.³⁰ Therefore, development projects must involve the meaningful participation of the Indigenous peoples impacted by the development and the accommodation of their interests. Accommodation would require that the concerns and interests of the concerned Inuit communities are heard and taken into account and measures are implemented or adjustments made to minimize the impact of the proposed action on their rights. In some cases, it may be necessary to obtain Inuit's consent before proceeding with an action.³¹
- For example, the Nunavut Inuit successfully opposed geological seismic testing in the waters of North Baffin Island. In its Order granting an injunction against the testing, the Nunavut Court of Justice concluded that:

[i]f the testing proceeds as planned and marine mammals are impacted as Inuit say they will be, the harm to Inuit in the affected communities will be significant and

²⁸ *R. v. Sparrow*, (1990) 1SCR 1075; *Delgamuukw*, *supra*.

²⁹ *Delgamuukw*, *supra*.

³⁰ *Mikisiew*, *supra*, para. 64.

³¹ *Haida*, *supra*; *Delgamuukw*, *supra*.

irreversible. The loss extends not just to the loss of a food source, but to a loss of culture. No amount of money can compensate for such a loss.³²

- As expressed by the Special Rapporteur on the Rights of Indigenous Peoples:

The human rights of indigenous peoples and communities must be considered of the utmost priority when development projects are undertaken in indigenous areas. Governments should account the human rights of indigenous peoples a crucial factor when considering the objectives, costs and benefits of any development project in such areas, particularly when major private or public investments are intended. The potential long-term economic, social and cultural effects of major development projects on the livelihood, identity, social organization and well-being of indigenous communities must be taken into account in the assessment of their expected outcomes, and must be closely monitored on an ongoing basis. Such effects would include health and nutrition status, migration and resettlement, changes in economic activities, levels of living, as well as cultural transformations and socio-psychological conditions, with special attention given to women and children.³³

3. *Canada must ensure that Inuit benefit from the natural resources located in and on their territories*

- Moreover, whatever future economic activities Canada may undertake on Inuit traditional territories in the Arctic, the allocation of resources must reflect the prior Indigenous interest and compensation for infringements of Indigenous title and rights will normally be required.³⁴ Canada must also ensure that Inuit are adequately consulted and have the opportunity to meaningfully influence decisions regarding economic development on their traditional territories. The Supreme Court of Canada has specified that Indigenous peoples' title includes natural resources and, therefore, the rights to oil, gas and minerals located within Indigenous peoples' traditional territories.³⁵

³² *Qikiqtani Inuit, supra*, para 48.

³³ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, E/CN.4/2003/90 (2003), p 3.

³⁴ *Delgaamukw, supra*, para 165-169.

³⁵ *Delgaamukw, supra*, para 122.

- This is in line with the Declaration which provides that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources”³⁶ and to “determine and develop priorities and strategies for the development or use of their lands or territories and other resource”³⁷.
- The Inter-American Court for Human Rights has clearly upheld in the *Saramaka* case the right of Indigenous peoples to share the benefits from development or extractive projects taking place on their traditional territories. In the Court’s terms:

a safeguard the State must ensure when considering development or investment plans within [indigenous] territory is that of reasonably sharing the benefits of the project with the [respective] people.³⁸

- The Court emphasized that participation in the benefits is inherent to the right to fair compensation which can be found in various international instruments regarding Indigenous peoples’ rights, including in article 32(2) of the *Declaration*.³⁹
- In light of this, Canada has an obligation to meaningfully engage with Inuit and guarantee that they have a voice in economic decisions that take place in their Arctic homeland and the extended continental shelf over which Canada is seeking to extend its sovereignty, and that they benefit economically from the use of their resources in that territory as partners.

4. Canada must protect Inuit rights to sustainable development and the protection of the environment

- In order to protect the Arctic environment and Northern communities, economic activities must be conducted in a sustainable manner. There are clear advantages for Canada in working in partnership with Indigenous communities in a way that involves them in the development of Arctic science to ensure effective environmental

³⁶ *Declaration, supra*, Article 26(2).

³⁷ *Ibid.*, Article 32(1)

³⁸ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. I/A Court H.R., Series C No. 172, par. 138.

³⁹ *Ibid.*

stewardship in the Arctic, as well as, in the management and monitoring of development projects.

- As inhabitants of the Arctic for centuries, Inuit have developed sophisticated traditional knowledge and systems of governance which remain central to dealing with present-day marine environment and the use of resources of ocean ecosystems in a sustainable manner. For instance, the Department of Fisheries and Oceans considers Inuit traditional ecological knowledge (“TEK”) as fundamental in the proper management of fisheries in the North.⁴⁰ An important objective for co-management boards under the modern treaties is to combine traditional ecological knowledge and the experience of Indigenous peoples with western scientist research.⁴¹
- Indigenous peoples’ traditional expertise and practices for sustainable low-carbon development, biodiversity conservation and climate change provide important resources not only for Indigenous communities, but also for Canadians and the global community at large.⁴² As stated by the UN Special Rapporteur on the Rights of Indigenous Peoples *“strengthening indigenous peoples’ own strategies for sustainable development is not only key to achieving their economic, social and cultural rights, it is also an indispensable element in global efforts to achieve sustainable development.”*⁴³
- The *1992 Rio Declaration on Environment and Development* recognizes Indigenous peoples’ *“vital role in environmental management and development because of their*

⁴⁰ Committee on Fisheries and Oceans (2010), *supra*, p 15; see also Loukacheva, *supra*, p. 351, 352.

⁴¹ *Committee on Fisheries and Oceans (2010), supra, p 15; Loukacheva, supra, p. 360*; the importance of Inuit traditional knowledge is recognized throughout the modern Treaties, see for example: Article 5.13 (f) of the *Nunavik Inuit Land Claims Agreement* which provides that the wildlife management system for the Nunavik Marine Region must integrate Nunavik Inuit knowledge of wildlife and wildlife habitat with the knowledge gained through scientific research; Article 8.7.1 (c) of the *Labrador Inuit Land Claims Agreement* which states that Inuit knowledge, scientific information and the precautionary principle must be taken into account in the environmental management of the Voisey’s Bay Project; Article 5 of the *Nunavut Land Claims Agreement* which underlines the importance of Inuit Bowhead knowledge in the efforts to preserve the bowhead whale population; Part 6.4.3 of the *Nunavut Land Claims Agreement* which states that Inuit knowledge of wildlife and environment must be taken into account in hearings before the Surface Rights Tribunal (to this effect, see also Article 14.12 of the *Nunavik Inuit Land Claims Agreement*).

⁴² Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, A/69/267 (2014), para 38.

⁴³ *Ibid.*, para 38.

knowledge and traditional practices”⁴⁴ and calls on States to enable their effective participation in the achievement of sustainable development. Similarly, the Declaration underlines Indigenous peoples’ right to the conservation and protection of the environment and their right to determine their own priorities and strategies for the development and use of their lands and resources.⁴⁵

- Institutions such as co-management boards under the various Inuit Treaties already provide for Inuit participation in decision-making and the integration of TEK to better respond to the various Arctic challenges, such as development, marine and wildlife conservation. However, the Senate’s Standing Committee on Fisheries and Oceans has identified that a more encompassing strategy and better coordination is needed for the management of marine-related activity in the Canadian Arctic. Existing institutions, such as the Nunavut Marine Council for example, could act as organizations for priorities setting and planning in marine areas, in coordination with other federal departments and agencies with a mandate in the Arctic.⁴⁶
- This would ensure Inuit participation in matters directly relevant to their lives in Inuit *Nunangat* and extend their jurisdiction in areas outside of those covered by existing Treaties. As noted by Mary Simon, former President of the Inuit Circumpolar Conference “*[a]ny Arctic strategy worth pursuing must put working with Inuit at its heart, not at the periphery*”.⁴⁷
- This would also create a practical means to enhance Canada’s sovereignty in marine areas.⁴⁸ Inuit continued use and stewardship of the Arctic resources has helped and can help Canada in its claims in the Arctic. Although it is internationally accepted that the islands in the Arctic Archipelago are exclusively under Canada’s jurisdiction, such is not the case with respect to the surrounding waters.⁴⁹ As Inuit leaders remain supportive of Canada’s Arctic sovereignty,⁵⁰ Canada should pay attention to its obligations toward

⁴⁴ Rio Declaration on Environment and Development (1992), Principle 22.

⁴⁵ *Declaration, supra*, Art. 29 and 32.

⁴⁶ Committee on Fisheries and Oceans (2010)

⁴⁷ Mary Simon, *Canadian Inuit: where we have been and where we are going*, 66 *Int’l J.* 879 2010-2011, p. 887.

⁴⁸ Committee on Fisheries and Oceans (2009), *supra*, recommendation no 4, p. iv, 36 and 44.

⁴⁹ *Ibid*, at 42.

⁵⁰ Terry Fenge, *Inuit and the Nunavut Land Claims Agreement: Supporting Canada’s Arctic Sovereignty*, (December 2007-January 2008) *Policy Options* 85, available online at: <http://www.irpp.org/po/archive/dec07/fenge.pdf>.

Inuit, as well as to the mutual benefits and opportunities that an inclusive approach would provide with respect to the delimitation of Canada's extended continental shelf in the Arctic.

B. Canada's obligations under Treaties with Inuit

- Inuit and Canada have concluded Treaties that cover all four Inuit regions in Northern Canada, namely: the *James Bay and Northern Quebec Agreement* (1975), the *Inuvialuit Final Agreement* (1984), the *Nunavut Land Claims Agreement* (1993), the *Labrador Inuit Land Claims Agreement* (2005), and the *Nunavik Inuit Land Claim Agreement* (2006).
- These Treaties are constitutionally recognized and the rights they contain for Inuit are, therefore, constitutionally protected under section 35 of the *Constitution Act, 1982*, which provides as follows:

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

[...]

(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.

- These Treaties constitute Canada's express recognition of Inuit rights to land, ocean areas, and resources in the Arctic, as well as of the inextricable right to culture associated with them.

1. Canada must respect Treaty rights

- Generally speaking, under the Treaties, Inuit agreed to allow non-Inuit access to their lands and various non-Inuit activities, subject to the terms of the Treaties, while ensuring the continued exercise of specific rights they hold as Indigenous peoples. The Treaties include vast areas of land within Inuit traditional territories (mostly to the surface only but also to smaller areas of the subsurface) that Inuit hold in fee simple, economic benefits, including, resource revenue-sharing, as well as, preferential or exclusive harvesting rights to fish and wildlife.⁵¹

⁵¹ Committee on Fisheries and Oceans (2010), *supra*, p 7.

- These Treaties set out the structures for shared governance with respects to the management of lands and resources. Together, these Treaties make Inuit the largest non-crown landowners in Canada.⁵² Inuit can directly influence decision-making, through their participation in co-managed economic and environmental regimes for lands, waters, wildlife, and the assessment of development project proposals on land and offshore.⁵³ Inuit participation rights and consultation are therefore expressly guaranteed under these Treaties. The complementarity of jurisdictional and proprietary features of the modern Treaties is rebalancing the governance and distribution of power between Inuit and Canada and is ensuring a cooperative relationship.⁵⁴
- These Treaties also include Inuit rights to the offshore. The regions included within the Treaties cover sea areas and define the rights and obligations of the parties with respect to those areas.⁵⁵ A detailed review of the rights contained in each of the Treaties is beyond the scope of this paper. The discussion below provides a review of the type of rights that are set out in the Treaties.
 - The *Labrador Inuit Land Claims Agreement* protects Inuit rights to 18,800 square miles of tidal waters and 6,100 square miles of the seabed in the Treaty area.⁵⁶ Tidal waters are located within the territorial sea and are referred to in the treaty as the Zone.⁵⁷ The seabed in the Zone is Crown owned, but Inuit are entitled to benefits from subsurface resources.⁵⁸
 - Inuit also enjoy consultation rights with respect to the development of marine conservation strategies, marine shipping, as well as, development and exploration in the marine Zone covered by the *Labrador Inuit Land Claims Agreement*.⁵⁹ Development or related marine transportation in the Zone is conditional to the conclusion of an impact and benefit- sharing agreement to

⁵² Simon, *supra*, p 882.

⁵³ Aboriginal Affairs and Northern Development Canada, adnc-aandc.gc.ca/eng/1100100014187/1100100014191.

⁵⁴ Simon, *supra*, p 882.

⁵⁵ The *Nunavik Inuit Land Claims Agreement* covers the offshore areas of Nunavik, which were not included in *James Bay and Northern Quebec Agreement* that Inuit of Nunavik signed in 1975.

⁵⁶ This excludes subsurface resource: *Labrador Inuit Land Claims Agreement* (2005), ch. 4, article 4.4.

⁵⁷ Tidal waters are waters located within the territorial sea, see Duhaime Legal Dictionary available at: <http://www.duhaime.org/LegalDictionary/T/TidalWaters.aspx>

⁵⁸ Part 6.6 *Labrador Inuit Land Claims Agreement* (2005); as per Art. 4.4.3 of the *Labrador Inuit Land Claims Agreement*, Inuit estate extends only to the sea bed within the boundaries of Water lots, as illustrated in Schedule 4D.

⁵⁹ *Labrador Inuit Land Claims Agreement* (2005), Chap. 6.

provide for mitigation measures and compensation for any negative impacts on the environment, Inuit or Inuit rights under the Treaty.⁶⁰

- Similarly, Inuit enjoy in the marine areas comprised in the settlement region of the *Nunavut Land Claims Agreement*, hunting and fishing rights, rights in relation to the operation of various co-management boards, and the right to resource benefits. These rights also coincide geographically with the seaward extent of Canada's 12-mile limit (the extent of its territorial sea).⁶¹ A number of these rights extend further to the outer land fast ice-zone in the Eastern Baffin Coast. In addition, the Treaty recognizes the principle of adjacency and that Inuit should continue to use and benefit from the ocean around the Nunavut settlement area and have a voice in what happens there.⁶²
- The *Nunavik Land Claims Agreement* covers the offshore areas of Nunavik, adjacent to Quebec and Northern Labrador, which were not included in the first Treaty that Inuit of Nunavik signed in 1975 (the *James Bay and Northern Quebec Agreement*). The agreement provides Inuit of Nunavik with land title to offshore islands, hunting fishing and trapping rights, and rights to resource development, as well as, financial compensation.⁶³
- The *Inuvialuit Final Agreement*, which protects similar rights, covers a more extensive sea area. In fact, the Inuvialuit settlement region extends all the way through Canada's exclusive economic zone and overlaps with a portion of the extended continental shelf that Canada is intending to claim in the Arctic.
- Importantly, these Treaties also recognize Inuit rights to their cultural integrity. In fact, the very basic principles upon which these Treaties are premised include the preservation and protection of the cultural identity and values of Inuit.⁶⁴ Inuit rights to culture are intrinsically linked to the use of their lands and resources. Various provisions across the Treaties refer specifically to the protection of Inuit culture, such as in relation to harvesting practices, the development of land planning policies and priorities, the

⁶⁰ *Ibid.*, Part 6.7.

⁶¹ Committee on Fisheries and Oceans (2009), *supra*, p.33.

⁶² *Nunavut Land Claims Agreement* (1993), Article 15.3.7.

⁶³ Press release, Inuit Tapiriit Kanatami, 1 December 2006 available at <https://www.itk.ca/media/media-release/nunavik-inuit-sign-offshore-claims-agreement>.

⁶⁴ See for example Section 1.1a) of the *Inuvialuit Final Agreement*; the *Preamble of the Nunavut Land Claims Agreement* and Part 23.1b) of the *Nunavik Inuit Land Claim Agreement*; and the *Philosophy of the James Bay and Northern Quebec Agreement*, 5 November, 1975 by John Ciaccia setting out the overarching principles and goals underlying the Treaty.

management of wildlife, the protection of the environment, the negotiation of benefits agreements, as well as the development of educational programs.⁶⁵

2. Canada must implement Treaty obligations in good faith and consult and accommodate Inuit

- As shown above, these Treaties have established a complex legal framework governing land and water areas, with specific rights and responsibilities that benefit from constitutional protection.
- Canada is obliged to implement these Treaties carefully and in good faith. As the Supreme Court stated in *Mikisew* (2005), “the honour of the Crown infuses every treaty and the performance of every treaty obligation”.⁶⁶ This means that before the government makes any decisions that stand to negatively affect Inuit Treaty rights on land and the offshore, it must consult and seek to reasonably accommodate those rights in order to fulfil its promises under the Treaties.⁶⁷
- The duty to consult and accommodate has been the subject of considerable litigation which has assisted in crystalizing the nature and the content of this obligation.⁶⁸ This duty stems from the Honour of the Crown and the Crown’s unique relationship with Indigenous peoples.
- The Supreme Court has explained that the duty to consult and accommodate is a constitutional duty which applies in the context of Indigenous peoples’ rights, as well as, their Treaty rights. Where a Treaty exists, officials must look at the Treaty provisions first. Where Treaty consultation provisions do not apply to a proposed activity, a

⁶⁵ See for example the *Nunavik Inuit Land Claim Agreement*, Articles 5.1.3, 5.3.1, 6.2.3c); the *Labrador Inuit Land Claims Agreement (2005)*, Section 1.1.1; 2.4.1, 5.6.5d). 6.7.4; the *Nunavut Land Claims Agreement*, Article 5.13b)iii), 5.6.1, 5.6.7, 11.2.1a), 11.2.3c); *James Bay and Northern Quebec Agreement*, Section 17.0.64, 23.2.2 d), 24.1.5, 24.3.14, 24.6.5f).

⁶⁶ *Mikisew*, *supra*, at para 57.

⁶⁷ The government’s obligation to consult its Treaty partners whenever it is necessary to resolve a procedural gap in a modern or historical Treaty, unless this obligation has been expressly limited or excluded by the terms of the Treaty. To this effect see: *Mikisew Cree First Nation*, *supra*; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para 45.

⁶⁸ See for example *Haida*, *supra*; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74; *Little Salmon/Carmacks First Nation*, *supra*; *Nunatsiavut v. Canada (department of Fisheries and Oceans)*, 2015 FCJ No 592; *Rio Tino Alcan*, *supra*; *Mikisew*, *supra*.

“parallel” duty to consult exists.⁶⁹Therefore, the government must consult Inuit, even in the absence of a clearly delineated duty in a Treaty, if its actions risk to negatively affect Inuit Treaty rights, because the duty to consult “*applies independently of the expressed or implied intention of the parties*” in a Treaty.⁷⁰

- The content of the obligation to consult and accommodate varies along a continuum, depending on the strength of the rights claim and the severity of the proposed action’s impact on the right. At the upper end of the spectrum, where rights have been substantiated through the Courts or are contained in a Treaty, the government must undertake deep consultation and protect the rights through accommodation measures that give due regard to the concerns and interests of the Indigenous peoples.⁷¹
- Given the interconnectivity of ecosystems and the particularly vulnerable Arctic biodiversity, it is not difficult to imagine that potential development and commercial activities in the Arctic offshore may threaten a whole range of Inuit rights protected under the existing Treaties. Canada must be cognisant of this as it expands its jurisdiction over the continental shelf and involve Inuit communities in the development of maritime management and governance strategies which impact them directly and are relevant to their survival as a people.
- Many of the Treaties also contain a specific obligation for Canada to consult with or include its Inuit Treaty partners in the development of Canada’s position in relation to international agreements relating to Inuit rights to wildlife, wildlife management and harvesting within the Treaty areas.
 - The 1975 *James Bay and Northern Quebec Agreement* created a consultation process whereby the Coordinating Committee, composed of Inuit, Cree, Canada and Quebec members, could make recommendations to the Federal Minister on the positions to be adopted in international negotiations relating to wildlife management within the Treaty Territory.⁷²

⁶⁹ *Little Salmon/Carmacks First Nation, supra*; *Nunatsiavut v. Canada (Department of Fisheries and Oceans)*, 2015 FCJ No 592

⁷⁰ *Little Salmon/Carmacks First Nation, supra*, para 61;

⁷¹ *Haida, supra*; *Delgamuukw, supra*.

⁷² *James Bay and Northern Quebec Agreement* (1975), paragraph 24.4.27(i).

- In the 1984 *Inuvialuit Final Agreement*, Canada undertook to “endeavour to obtain changes to other international conventions and arrangements and to explore other alternatives to achieve greater flexibility in the use of wildlife resources by the Inuvialuit” and further undertook “to consult with the Inuvialuit Game Council prior to any new international agreements that might affect the harvesting of wildlife in the Inuvialuit Settlement Region.”⁷³
- The later Treaties include similar language. The *Nunavik Inuit Land Claims Agreement* states: “The Government of Canada shall include Nunavik Inuit representation in discussions leading to the formulation of Government positions in relation to an international agreement dealing with wildlife harvested in the NMR [Nunavik Marine Region], which discussions shall extend beyond those discussions generally available to non-governmental organizations.”⁷⁴
- Seen broadly, these Treaty obligations could be applied in the context of Canada developing its extended continental shelf submission and its international policy on the use of the extended continental shelf. This is because any resource extraction that occurs in the extended continental shelf has the potential to impact the marine wildlife in the Arctic Ocean, not only in the immediate area but throughout the Arctic ocean due to the migration of various species through the Arctic Ocean and also due to ocean currents and hydrological cycles that would spread any oil spill, or other environmental contaminants beyond the immediate area of the resource extraction.
- Resource extraction in areas outside of the Treaty territory and any environmental impacts that such extraction may cause would have the potential to negatively affect the wildlife that lives in or migrates to the Treaty areas. If such were the case, Inuit would be entitled to judicial remedies.⁷⁵

⁷³ *Inuvialuit Final Agreement*, (1984), article 14.(38).

⁷⁴ *Nunavik Inuit Land Claims Agreement* (2006), Section 5.8.2; see also the *Nunavut Land Claims Agreement*, (1993), article 5.9.2 and the *Labrador Inuit Land Claims Agreement* (2005), section 12.14.

⁷⁵ *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA (TGS)*, [2015] F.C.J. No. 991, clarified that an obligation to consult exists where a project taking place outside of Treaty territory may impact Treaty rights.

- These Treaty terms could therefore be interpreted to require Canada to involve Inuit in developing its position with respect to the environmental management of the extended continental shelf areas.

3. Canada must implement the principle of co-management and an Inuit-Canada partnership

- At their core, the Treaties establish a Treaty partnership between Canada and Inuit. The Treaties were motivated by a desire by both Canada and Inuit to work together in the Treaty territories. For Canada, the Treaties were a means to solidify Canada's sovereignty over the Arctic relative to the other Arctic States, by basing its sovereignty on Inuit's historic use and occupation of these areas of their homeland. For Inuit, the Treaties were a means to have Canada respect their rights and to put in place institutions that would ensure their role in governing the north.
- The signing of Treaties was a step within a continuing relationship, with each Treaty setting out a framework for future collaboration between the Treaty partners. Rather than spelling the end of Inuit governance rights in the North, the Treaties were the start of a joint governance arrangement. The Treaties confirmed that Canada and Inuit would engage in an on-going relationship and would collaborate in the governance of the Canadian Arctic. This partnership is an essential principle of the Treaties and must be borne in mind whenever the Treaties are interpreted.
- The co-management regimes set up under the Treaties are one of the key aspects of the Treaty partnership. Through co-management, Inuit can influence decision-making with respect to Treaty lands and waters, as well as, the wildlife living in these areas.
 - a. Within all of the Treaties are co-management regimes for wildlife management. The 1975 *James Bay and Northern Quebec Agreement* established the first fish and wildlife co-management regime between Indigenous and non-Indigenous governments in Canada. Since its establishment, most subsequent co-management systems either have been

modelled after the James Bay arrangement or have adopted its specific characteristics.⁷⁶

- b. For instance, in the *Nunavut Land Claims Agreement*, a wildlife management system was created that was based on the recognition by Canada and Inuit “that there is a need for an effective role for Inuit in all aspects of wildlife management.”⁷⁷ The Nunavut Wildlife Management Board (NWMB) was established to manage a wildlife system that reflects the primary role of Inuit in wildlife harvesting and promotes the long-term economic, social and cultural interests of Inuit harvesters. The NWMB is composed of four members appointed by Inuit Organizations and four members appointed by the Governor in Council and the Government of Nunavut, with the final member being the chairman who is appointed by the Governor in Council from nominations provided by the NWMB.⁷⁸
 - c. Also under the *Nunavut Land Claims Agreement*, Canada agreed to recommend the creation of Nunavut and to negotiate a political accord with Inuit to establish a Nunavut government.⁷⁹ This led to the creation of Nunavut, a Territory governed by a majority Inuit population. Arguably, the Nunavut government is one of the most in-depth co-management regimes in the Canadian Arctic.
- The co-management regimes established by the modern Treaties require the government to fulfil their duties not only as a treaty partner, but also associated with the honour of the Crown, particularly the duty to consult. This constitutional obligation is not merely a formality. It must always be implemented in good faith and in a way that is meaningful to the Indigenous peoples concerned and gives due regard to their concerns. Regrettably, this has not always been the case in practice and Courts are

⁷⁶ *Report of the Royal Commission on Aboriginal Peoples*, Ottawa 1996, vol. 2, p. 825.

⁷⁷ *Nunavut Land Claims Agreement*, Article 5.1.6.

⁷⁸ *Ibid.*, Articles 5.1.2-5.2.11.

⁷⁹ *Ibid.*, Article 4.

increasingly called upon to deal with disputes to clarify the government's obligations under the various co-management institutions.⁸⁰

- In a recent decision, the Honourable Pierre J. Dagher has stated in the context of the wildlife co-management regime under the *James Bay and Northern Quebec Agreement*:

[i]ts being joint prompts the Aboriginal and government parties to discuss, reconcile and compromise. Furthermore, the obligation to consult again if the Minister decides not to comply with the advice given by the Coordinating Committee clearly shows a duty to consider the interests of the Aboriginal peoples and to respond to them, rather than the Minister's imposing his view of things ...

[...]

[h]ence, the duty to consult in matters of Aboriginal [and Treaty] rights cannot boil down to a procedure to follow; it also requires a sufficiently open mindset to render it meaningful.⁸¹

- While various Treaties' provisions regarding co-management may assign the final decision on an issue to the Government, Courts have made it clear that there are both procedural and substantive requirements which affect the manner in which the decision-making process is to be exercised by the government.⁸² In cases where Canada does not comply with its obligations under the co-management regimes and ignores Indigenous peoples' rights to meaningful participation in joint decision-making, it risks having the Courts render the law, regulation or government policy adopted in violation of Treaty rights without effect; having a licence, permit or authorisation issued for a proposed development set aside; as well as being found liable for compensation for any prejudice suffered by the concerned peoples in light of those violations.⁸³

⁸⁰ See for example, *Makivik Corporation v. Attorney General of Quebec*, [2014] Q.J. No. 7944; *Qikiqtani Inuit*, *supra*; *Ka'a'Gee Tu First Nation v Canada (Minister of Indian and Northern Affairs)*, [2008] 2 FCR 473; *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)*, [1998] 4 F.C. 405 (FCA); *Nunavut Wildlife Management Board v. Canada (Minister of Fisheries and Oceans)* [2009] 4 F.C.R. 544.

⁸¹ *Makivik Corporation*, *supra*

⁸² See for example *Nunavut Tunngavik Inc.*, *supra*, paras 16, 17; *Makivik Corporation*, *supra*.

⁸³ See *Makivik Corporation*, *supra*; *Ka'a'Gee Tu First Nation*, *supra* and *Qikiqtani Inuit*, *supra*,

- Canada has the obligation to respect the Treaty partnership and its Treaty partners in all its actions within the Treaty territories, including when it claims areas of the continental shelf covered by Treaties with Inuit. The principles that lead to the co-management regimes under the current Treaties should guide Canada to engage with its Treaty partners, so that Inuit have the opportunity to participate in decisions that affect the areas covered by the Treaties. As part of this partnership, Canada should be engaging in in-depth consultations with its Inuit Treaty partners over its claims to the Arctic Ocean seabed and continental shelf within the Treaty areas.
- A partnership between Canada and Inuit in the extended continental shelf could be mutually beneficial. For Canada, it would be able to ground its claim to contested areas of the Arctic Ocean extended continental shelf on Inuit historical title to the Arctic Ocean ice and waters and the Treaty arrangements in place. This could strengthen its claims relative to other States also claiming these areas. This is already the case in the Beaufort Sea, where Canada and the United States have overlapping claims. Canada has protected its claim against the United States by including the disputed area in the 1984 *Inuvialuit Final Agreement*. As the Inuvialuit Inuit historically used the sea ice and waters of the Beaufort Sea, the Treaty allows Canada to ground its rights to the area on Inuit's historic title (or Indigenous title) of these portions of the Beaufort Sea.

C. Obligations in areas not covered by the Treaties

- An important question that arises is what rights do Inuit enjoy in the Canadian Arctic, outside the purview of the Treaties they have negotiated, and what is Canada's obligations vis-à-vis those rights?
- International law supports the view that Indigenous peoples' rights and title to their traditional territories, water and resources continue to exist in the areas outside Treaty territories. This means that Canada must respect its general obligations toward Inuit in those parts of the Canadian Arctic Ocean, as set out in Section A of this paper.
- It remains to be seen how Canadian Courts will interpret the impact of the Treaties with respect to the enforcement of Inuit rights in the Arctic offshore areas that are not covered under existing Treaties. Two things are certain, Inuit consider the Arctic waters, lands and ice as their home and that Arctic Ocean governance must include the recognition of their offshore rights and their full participation in marine-related

development, marine and wildlife management and the protection of the environment. These views have been expressed by Inuit through global declarations and arrangements, including in the precedent-setting *Circumpolar Inuit Declaration on Sovereignty in the Arctic* and *Circumpolar Inuit Declaration on Resource Development*.⁸⁴

- Inuit leaders in Canada have viewed land claims negotiations as a means of translating pre-existing but unspecified legal rights into a more modern context. To Inuit, this process was not about abolishing or extinguishing either party's rights, but rather clarifying them and creating the framework for an on-going relationship.
- The *Nunavut Land Claims Agreement*, for example, points to the continuation of Inuit rights outside the settlement area defined under the specific Treaty. Article 2.7.2 of the Treaty provides that:

Nothing in the Agreement constitutes an admission or denial by Canada that Inuit have any aboriginal claims, rights, title or interests in and to lands and waters as described in Sub-section 2.7.1(a) outside the Nunavut Settlement Area.

- The policy of the federal government has also evolved from the approach of including in the treaties a “cede, release and surrender” clause to a “certainty” approach that allows for the continuation of any pre-existing Indigenous peoples’ rights to lands and resources, subject to the Indigenous party’s agreement to only assert rights that are set out in the Treaty.⁸⁵ However, criticism remains as to the lack of meaningful difference between “cease, release and surrender” and Canada’s current approach, as evidenced by the UN Human Rights Committee who has called on Canada to align its certainty policy with its international human rights obligations, as dictated by international law.⁸⁶

⁸⁴ Inuit Circumpolar Council. *A Circumpolar Inuit Declaration on Sovereignty in the Arctic*, adopted April 28, 2009, retrieved from: <http://www.inuitcircumpolar.com/sovereignty-in-the-arctic.html>; Inuit Circumpolar Council. *A Circumpolar Inuit Declaration on Resource Development principles in Inuit Nunaat*, adopted May 11, 2011, retrieved from: <http://www.inuitcircumpolar.com/resource-development-principles-in-inuit-nunaat.html>; Loukacheva, *supra*, p 349.

⁸⁵ Doulgas R. Eyford (2015). *A New Direction: advancing aboriginal and treaty rights*, p. 70, 74 retrieved from: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/eyford_newDirection-report_april2015_1427810490332_eng.pdf [Eyford Report]

⁸⁶ Concluding observations of the Human Rights Committee - Canada, CCPR/C/CAN/CO/5, April 2006, para 8; Concluding observations on the sixth periodic report of Canada, Human Rights Committee, CCPR/C/CAN/CO

- In an alternative report regarding Canada’s periodic reporting to the United Nations Committee on the Elimination of Racial Discrimination, a number of Indigenous peoples’ representatives have expressed their concerns with respect to the continuing policy of extinguishment of Indigenous peoples’ rights pursued by the Canadian government through the treaties as follows: “*Aboriginal People are either forced to negotiate under the current policy with all its limitations that violate human rights or they stay out of the process, with no alternative venue open to deal with their land issues.*”⁸⁷ This conflicts with the “coexistence of rights” approach, dictated by international law and the interpretations of the UN Treaty Bodies of the various human rights conventions on the rights of Indigenous peoples.⁸⁸
- Rapidly changing circumstances in the circumpolar region, including the melting of the sea ice and technological advances, are making the Arctic more accessible to resource exploration activities, commercial shipping and tourism. This will expose Canada to increased maritime management and marine pollution threats, as well as border disputes with circumpolar neighbours.
- The effect of these major changes may require Canada to revisit and seek amendment to existing Treaties or conclude new treaties or other types of agreements. The purpose of such agreements would be to clarify Inuit rights and governance, including rights to resources, in the Arctic offshore areas under Canada’s jurisdiction that are not covered by current Treaties and to reflect the rapidly evolving domestic and international law.⁸⁹

August 2015 para 16; Concluding Observations of the Economic and Social Council – Canada, E/C.12/CAN/CO/5, May 2006, para 16; Eyford Report, *supra*, p. 74.

⁸⁷ Shadow Report in Response to Canada’s 19th and 20th Periodic Report to the United Nations Committee on the Elimination of Racial Discrimination (CERD), January 30, 2012, para.8, retrieved from: http://www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=OCB0QFjAAahUKEwijqoXI64rIAhUMOj4KHfQPbBY&url=http%3A%2F%2Finternet.ohchr.org%2FTreaties%2FCERD%2FShared%2520Documents%2FCAN%2FINT_CERD_NGO_CAN_80_8299_E.pdf&usg=AFQjCNE7e0Wmu723qN2X8Ib9p9mYZvnMVg.

⁸⁸ Concluding observations of the Human Rights Committee - Canada, CCPR/C/CAN/CO/5, April 2006, para 8; Concluding observations on the sixth periodic report of Canada, Human Rights Committee, CCPR/C/CAN/CO August 2015 para 16; Concluding Observations of the Economic and Social Council – Canada, E/C.12/CAN/CO/5, May 2006, para 16.

⁸⁹ The existing Inuit Treaties provide for the possibility to amend the terms of the treaties upon consent of both parties, *see for example* the *Nunavut Inuit Land Claims Agreement*, Part 13; *Labrador Inuit Land Claims Agreement* (2005), Part 2.16; *Inuvialuit Final Agreement*, Section 3(13); *James Bay and Northern Quebec Agreement* (1975), Section 2.15; Eyford Report, *supra*, p. 74.

- *Canada's Interim Comprehensive Land Claims Policy* contemplates the possibility of negotiating non-treaty agreements in areas of federal jurisdiction. The Policy identifies a number of topics that could be addressed in this way "including fisheries, marine issues and offshore development" among others.⁹⁰ For example, the management and development of oil and gas resources on Canada's federal lands in the Arctic offshore areas is a federal responsibility, overseen by the Northern Oil and Gas Directorate of the Department of Indian Affairs and Northern Development.⁹¹
- A new agreement could provide for specific Inuit involvement in development operations and resource benefit sharing, as an extension of those rights already negotiated under the Treaties. A treaty between Canada and all Canadian Inuit would provide the opportunity for Canada to implement its obligations toward Inuit in a more holistic way in areas of the Arctic Ocean beyond existing Treaties. Such a Treaty would be based on the recognition of Inuit rights in the Arctic Ocean and would make clear the rights and obligations of the parties within the extended continental shelf.
- Such an approach would be consistent with the international recognition of the rights of Inuit to their traditional territories and resources in the Arctic and Canada's obligation to obtain Inuit free, prior and informed consent in relation to Arctic-related matters that are not already covered by existing Treaties.

D. The special regime governing the "Area"

- A portion of Inuit *Nunangat* falls within what UNCLOS has designated as the "Area".⁹² The Area is identified as that portion of the Arctic Ocean which is beyond any of the Arctic Nations' continental shelves and sovereignty. Under UNCLOS, the waters, ice and resources that are part of the Area may not be claimed by any one State and are determined to be vested in mankind as a whole, subject to the governance of the

⁹⁰ Aboriginal Affairs and Northern Development Canada. (2014). *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, p. 17.

⁹¹ See Aboriginal Affairs and Northern Development Canada website: <http://www.aadnc-aandc.gc.ca/eng/1427468219975/1427469139930>.

⁹² Part XI of UNCLOS governs the Area.

International Seabed Authority.⁹³ The International Seabed Authority must act on behalf of humankind to govern the use of the resources in the Area and provide for the equitable sharing of financial and other benefits derived therefrom.

- Based on their use of the ice and waters within the Area, Inuit could claim rights to that portion of the Arctic waters that is beyond States' sovereignty. Establishing Inuit jurisdiction in the Area may provide Inuit with a strong foothold in insisting that their rights to the protection of the environment and their traditional way of life and to benefit from the natural resources in the Area be respected. Inuit should be afforded a voice in the management of the Area and decision-making regarding resource use.
- This would include allowing for Inuit involvement and participation within the International Seabed Authority, the body in charge of regulating activities in the Area. This would bring UNCLOS in compliance with the internationally recognized rights of Indigenous peoples with respect to the Area, as urged by the UN Permanent Forum on the rights of Indigenous Peoples.⁹⁴ Canada could play an active role in lobbying and rallying the support of other States in amending the Convention in a way that integrates the interests of Indigenous peoples and the principles of the UN Declaration on the rights of Indigenous Peoples within the work of UNCLOS.

Canada-Inuit cooperation at the international level

- Finally, there is no doubt that Inuit rights are alive in their traditional Arctic territories that are outside Canada's borders. This much is evident from the language included in the various Treaties, which limit the effect of the "cease, release and surrender" clauses to lands and waters within Canada or within the sovereignty or jurisdiction of Canada.⁹⁵

⁹³ Art. 140 UNCLOS : "Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolutions."

⁹⁴ Permanent Forum on Indigenous Issues, Report of the twelfth session, E/2013/43-E/C.19/2013/25, (May 2013), para 51.

⁹⁵ See for example the *Nunavut Land Claims Agreement*, Art. 2.7.1.a; *Labrador Inuit Land Claims Agreement* (2005), Part. 2.11.2.

- Additionally, as expressed in the previous papers, Inuit are international actors in their own right, with a right to self-determination. As such, Inuit must not only be included at the table, but must host the table, when the international community, including UN bodies such as UNCLOS, adopt measures that may affect the rights of Inuit peoples in Canada and globally. In other words, Inuit interests must not be just a peripheral consideration, if at all, before international bodies. They ought to be placed at the center of any decision-making process where Inuit have a direct stake, and Inuit must be afforded a real and meaningful way of shaping and influencing decisions that concern them as a people.
- To this effect, the adoption in July of this year by the five Arctic coastal states (Canada, Russia, United States, Denmark and Norway) of a Declaration imposing a moratorium on commercial fishing in the Central Arctic Ocean is a step in the right direction.⁹⁶ Inuit had the opportunity to provide their perspective on the matter and were represented by the ICC in the discussions leading up to the adoption of the moratorium.⁹⁷
- The moratorium concerns commercial fishing in international waters beyond the coastal states' 200-mile Exclusive Economic Zones. The moratorium was imposed until more scientific research can give a clearer picture on the sustainability of the region and a management regime that includes Inuit traditional knowledge is developed. In implementing these interim measures, the five States concerned have agreed to *"continue to engage with Arctic residents, particularly the Arctic indigenous peoples."*⁹⁸
- The cooperation and engagement of Inuit in international decisions that affect their rights is fundamental in ensuring the development of policies and programmes that give due consideration to Inuit interests and priorities in the Arctic in a way that ensures that

⁹⁶ *Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean*, adopted in Oslo, on 16 July 2015. The moratorium only applies to the five signatories and does not prevent other nations from fishing in Arctic international waters.

⁹⁷ Inuit Circumpolar Conference.(2015). ICC applauds adoption of Central Ocean Fishing Moratorium. [Press release], retrieved from: http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/cao_fisheries_press_release_july_17_2015_ver_2.pdf.

⁹⁸ *Declaration Concerning the Prevention of Unregulated High Seas Fishing in the Central Arctic Ocean*, adopted in Oslo, on 16 July 2015, para 8.

their rights as Indigenous peoples, including their right to pursue their traditional livelihood, are safeguarded.

- To this effect, the cooperation at the international level between Canada and Indigenous peoples to amend the 1916 Migratory Birds Convention is a welcome precedent. In that case, Canada partnered with Inuit, Cree, and Métis peoples to influence negotiations with the United States to amend the Convention in a way that took into account the Indigenous peoples' rights to hunt migratory birds the year round and removed barriers to those rights from the Convention.

Is Canada Meeting its Obligations?

- As shown above, Inuit rights are highly relevant in Canada's current delimitation of sovereignty over the extended continental shelf, as well as in the creation of international regimes to protect Arctic resources and to mitigate damage to the fragile and changing Arctic environment. Canada is presently ignoring its domestic and international obligations by denying Inuit a voice in these processes, despite its obligation to consult with Inuit communities with the objective of obtaining their free, prior and informed consent, whenever their rights are at stake.
- Furthermore, despite clearly identified rights protected under the Treaties, there are indications that Canada is falling behind in its Treaty obligations towards Inuit. Complaints in the context of the UN Periodic Review of Canada and litigation show a disconnect in the cooperative relationships between the government of Canada and Inuit that modern treaties are premised upon.⁹⁹ Canada cannot ignore its duty towards its Treaty partners to implement those Treaty obligations in good faith and in a spirit of reconciliation.

⁹⁹ Dalee Sambo Dorough (2011), "Reflections on the UN Declaration on the rights of Indigenous Peoples: An Arctic Perspective", in Stephan Allen and Alexandra Xanthaki (Eds), Reflections on the UN Declaration on the rights of Indigenous Peoples. Oxford and Portland, p. 522.

Consequences of Canada Failing to Meet its Obligations

A. Canada's ability to resolve overlapping claims

- At the international level, Canada's failure to respect the rights of Inuit in the Arctic, especially within the framework of extending its sovereignty over large portions of the Arctic seabed may prove problematic in various aspects. For example, of particular importance to Canada's national security and economic interests is Canada's ability to resolve its border dispute with the US in the overlap area within the Beaufort Sea and to claim the Northern Passage as Canada's internal waters.
- Canada has been relying on Inuit and their historic title to bolster its sovereignty claims in these portions of the Arctic. The Treaties that Canada has signed with Inuit go a long way in cementing Canada's position in this respect. Canada should therefore move forward in a way that honours Inuit historic presence and rights in the Arctic, and their status as modern Treaty partners with Canada, as these matters are inextricably linked to its ability to resolve existing and future sovereignty claims in the Arctic.

B. Avenues available to Inuit to ensure respect of their rights

1. Court remedies

- Domestically, Inuit can enforce their rights through the courts when the government fails to implement its Treaty obligations.
- For example, in *Nunavut Tunngavik v. Canada (Attorney General)*,¹⁰⁰ the Court found that the government of Canada was in breach of its Treaty obligations because it failed to implement the promises made in the *Nunavut Land Claims Agreement* in a reasonable time, namely the promise to establish an environmental monitoring program for the Nunavut Settlement Area.

¹⁰⁰ *Nunavut Tunngavik v. Canada (attorney General)*, 2014 NUCA 02

- Inuit are also entitled to remedies with respect to development projects that may pose a threat to Inuit rights recognized and affirmed in a Treaty, even if the project takes place outside of Inuit settlement areas as defined under the respective Treaties.
- In *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA (TGS)*, evidence showed that the offshore seismic survey program in Baffin Bay and the Davis Strait had the potential to negatively affect the environment and disturb migration routes of marine mammals or fish harvested by Inuit in the Nunavut settlement area. Despite the fact that the seismic testing took place outside the boundaries of the *Nunavut Land Claims Agreement*, the Court concluded that the duty to consult was triggered (and in this case, it was at the high end of the consultative spectrum), in light of the direct impact of the project on Inuit Treaty rights.¹⁰¹
- In addition, Inuit could seek a Judicial Review in Federal Court in connection to Canada's submission to the UN Commission to delimit its continental shelf in the Arctic. A Judicial Review is a process by which the courts oversee administrative decisions to ensure that they are legal and are taken within conferred powers.
- It is unlikely that the goal of a Judicial Review would be to stop Canada's submission or prevent Canada from asserting its sovereignty vis-à-vis other States over the areas concerned. Courts have recognized that compelling and substantial public objectives may provide valid justification for limiting the exercise of Indigenous people's rights, but only to the extent that is absolutely necessary.¹⁰² Canada has already indicated that its current sovereignty claims in the Arctic, are a matter of foreign and national security interests.¹⁰³
- The request for Judicial Review could seek the Court's recognition that Inuit have rights as Indigenous peoples and Treaty rights in the areas falling within the limits of the

¹⁰¹ *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA (TGS)*, [2015] F.C.J. No. 991, para 74. Although Inuit were ultimately not successful in their appeal, this case clearly establishes an obligation to consult outside of their Treaty territory.

¹⁰² *Delgaamuukw*, *supra* para. 161; *Sparrow*, *supra*, *Mikisew*, *supra*.

¹⁰³ For a general discussion on Arctic sovereignty and Canada's national security interests see: Canada, Parliament, Senate. Standing Senate Committee on National Defence. (2010). *Canada's Arctic Sovereignty*, 40th Parl., 3rd sess., retrieved from:

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Parl=40&Ses=3&DocId=4486644&File=0>

extended continental shelf. It could seek a Declaration from the Court that, in exercising its jurisdiction over those parts of the Arctic, Canada must consult Inuit and include them in the relevant processes regarding the management of those areas and resources found therein, which are relevant to their economic wellbeing and survival as a people.

- In order to meet the threshold for a duty to consult case, it must be shown that the proposed government action would actually impact Inuit, at least to some degree. In other words, there must be a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on the Indigenous peoples' rights or their Treaty rights.¹⁰⁴
- Such causal relationship may arise for example, upon a concrete possibility of development or resource extraction activities in the extended continental shelf, involving the application and approvals of development permits by governments and their agencies. A causal relationship could also be established in other areas where material measures or policies are adopted by the government in relation to the continental shelf, such as for example, with respect to the management of the environment, natural resources, sharing of benefits, without engaging Inuit and adequately consulting them.

2. International remedies

- At the international level, Inuit may consider objecting to Canada's submission before the UN Commission on the Limits of the Continental Shelf. The purpose of such action would be to take a formal diplomatic stance that Inuit oppose Canada's sovereignty claims to the Arctic, where such claims are made without Inuit participation and notwithstanding Inuit presence and their rights to their traditional lands, waters and resources.

¹⁰⁴ *Hupacasath First Nation v. Canada (Foreign Affairs)*, FCA (2015 FCA 4), para 84. In this case for judicial review, the Hupacasath First Nation (HFN) argued that Canada ratifying a foreign investment protection agreement with China gave rise to the duty to consult and accommodate them. Both in first instance and at the appeal level, the courts found that the HFN had not proved that the agreement would actually impact their rights and therefore they did not meet the threshold of a duty to consult case. In particular, the Court concluded that there was no evidence that simply by entering into such agreement it would cause Canada to make decisions that do not respect Indigenous peoples' rights.

- An objection before the UN Commission would provide a high level forum for re-asserting Inuit's rights globally to their traditional territory in Inuit *Nunangat*.
- However, because UNCLOS regulates States and only States can formally make submissions and objections to claims on the limits of continental shelves, such intervention is unlikely to be given legal effect with respect to Canada's partial and on-going submission.
- This does not mean, however, that the rights of Inuit in the Arctic, as Indigenous people and as Canada's Treaty partners can be ignored or overridden. There is an extensive body of international law that has developed over the last decades and since the adoption of UNCLOS that clearly upholds the rights of Indigenous people to their territories, waters, and resources, including their participatory rights, and sets out States' international obligations *vis-à-vis* those rights.
- An objection before the UN Commission can serve to bring international attention to the fact that in its present state, the UNCLOS system and member States can bypass their international obligations towards Indigenous peoples in the Arctic in the context of State sovereignty claims.

Conclusion

- Canada can avoid breaching its international and domestic obligations and the consequences this entails by working in partnership with Inuit and Inuit governance structures. This would ensure that Inuit have a voice and can exercise their rights in the Arctic, including in their traditional territories that are to be incorporated within the jurisdiction of Canada in the extended continental shelf.
- Failure to do so, may subject Canada to litigation and will discredit its engagements towards its Treaty partners to work together in a spirit of reconciliation. Canadian Inuit fully support Canada's sovereignty claims as against other Arctic State claims, as long as those sovereign claims are subject to Inuit interests. An inclusive approach is the only alternative to ensure mutual benefits and opportunities in the extended continental shelf in the Arctic.

- As with colonial claims to sovereignty by European settlers that did not extinguish the Indigenous peoples' rights in the new world without a clear intention to do so¹⁰⁵, neither can Canada override the rights of Inuit in their homeland, Inuit *Nunangat*, which they have inhabited since time immemorial, through the process of claiming sovereignty over the extended continental shelf in the Arctic.

¹⁰⁵ *Delgamuukw, supra; Van der Peet, supra.*