

Indigenous collective property: comparative study of the Canadian and the Inter-American systems



International Human Rights Internship Working Paper Series



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Introduction

The object of this paper is to compare the origins and the strength of the protection of Indigenous¹ collective property across the continent, drawing from the Canadian and the Inter-American experiences. It will reflect on the interactions between Indigenous rights and natural resources extraction projects in Latin America and Canada, through the lens of human rights. It will argue that although Canadian Aboriginal title and the Inter-American Indigenous communal property draw their origins from very different sources, they both convey considerable potential to protect Indigenous culture, identity and autonomy. Our further thesis will be that Inter-American law provides a better opportunity for Indigenous peoples to raise their voices and have effective decision-making over natural resources projects on their territory.

Starting from the theoretical debate of individual versus collective rights to property (Part I), it will discuss how Indigenous collective property, considered as a group right under Vasak' third generation of human rights, can open the door to a broader discussion on culture, identity and autonomy (Part II). How does this proposition fit into international and domestic law and case law? To answer this question, two very different experiences² will be examined. Despite an absence of formal protection, the creative Inter-American court extracted from the right to private property the protection of Indigenous communal property and other collective rights (Part III). Although Canada overlooked the Inter-American case law and excluded private property from the formal constitutional shield, the Supreme Court recognized the existence of collective Aboriginal title in an innovative yet imperfect manner (Part IV). To address our initial concern, the Indigenous' relations with natural resources on their territories, their right to consent and be consulted about

¹ In international and Inter-American law, the term "Indigenous" was chosen to encompass a wide diversity of long settlement and connection to the land. In Canada, the term "Indian" was historically used in different legislations, but it is considered offensive by many. "Aboriginal" was finally adopted in art.35 of the *Canadian Charter*. Some prefer the terms "native" or "original" people. We choose to use "Indigenous" when we refer to Inter-American law or comparative law and "Aboriginal" in the Canadian context. On the debate in the Canadian context, see University of Manitoba, "Campus Cast: What do I say?" online: <<http://umanitoba.ca/news/blogs/blog/2011/10/12/campus-cast-what-do-i-say/>>. On the inexistence of a clear definition of "indigenous", see Lindsay Short, "Tradition versus Power: When Indigenous Customs and State Laws Conflict" *Chicago Journal of International Law*, 15 (2014) p 380 [Short].

² The length of this paper doesn't allow us to situate both experiences in their historical, political and economic context to explain these differences. Obviously, the historic construction of the welfare state model of Canada is different from the modern history of dictatorship and military juntas in Latin America.

natural resources exploitation on their territory and the possibility for the State to infringe collective property will be compared in the Canadian and Inter-American models (Part V). We will conclude on a reflection of the accessibility of courts and their use as a vehicle towards sovereignty.

Part I. Property as a human right: from the individual to the collective

Can the effective recognition and enforcement of private property be an effective tool to further human rights and reduce poverty? This question has been the subject of an extensive socio-economic debate.³ Considering private property as a human right is highly controversial, both under international and domestic law. The *Universal Declaration of Human Rights*⁴ guarantees the right to private property, yet both the *International Covenant on Civil and Political Rights*⁵ and the *International Covenant on Economic, Social and Cultural Rights*⁶ are silent on this subject. On the other hand, several other treaties protect the right to property of migrant workers⁷ or persons with disability,⁸ as well as the equality of men and women in accessing property⁹.

In domestic law, several States chose to protect this right under their Constitutions,¹⁰ while others chose not to. Placing private property as a core constitutional value can be conceived as a philosophical tool that “provides justification for the modern Western state”¹¹ or as “a privilege of

³ For example, Hernando de Soto argues that the western property right system imposed in the third world is one of the major obstacles to reduce poverty. See Hernando de Soto, *The Mystery of Capital: Why capitalism triumphs in the West and fails everywhere else*, (Black Swan: London, 2001) at 171 [Hernando de Soto].

⁴ See article 17 of the *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess. Supp No 13, UN Doc A/810 (1948) 71.

⁵ GA Res. 2200A (XXI), UN Doc A/6316 (1966).

⁶ GA Res. 2200A (XXI), UN Doc A/993 (1976).

⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, A/RES/45/158 (entry into force 1 July 2003), art 15.

⁸ Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES/61/106, art.5(3) and 30(3)

⁹ *International Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Treaty Series, Vol.1249 (entry into force 3 September 1981), art 16.1h).

¹⁰ Among others, United States, Romania, South Africa, China, Mexico, Switzerland, Brazil, Ireland and Germany. For a discussion of the different models of protection of private property, see Christophe Golay and Ioana Cismas, “Legal Opinion: The Right to Property from a Human Rights perspective” *Académie de droit international humanitaire et de droits humains à Genève*, p.7 [Golay&Cismas].

¹¹ Gordon Cristie, “Aboriginal Title and Private Property” in Maria Morellato, *Aboriginal Law since Delgamuukw*, (Canada Law Book, 2009) at 177 [Cristie].

the few... as a means of excluding the large mass".¹² While it is undeniable that "property confers power",¹³ we acknowledge also that property law "can render relationships within communities either exploitive and humiliating or liberating and ennobling".¹⁴ As Hernando de Soto suggests, this could largely depend on how property is defined, protected and enforced. While the imposition of western mandatory property law has generally failed in developing countries, property could be reconceptualised into a social contract based on the law of the peoples.¹⁵ If one accepts that human rights are interdependent, indivisible and interrelated, this right cannot be assessed in a vacuum. The effective protection of property rights can be a means to advance various economic and social rights, such as the rights to housing, to food and to social security.¹⁶

Beyond the debate of private property as a human right, we suggest that there is a further way to challenge the western liberal conception of private property. Claiming collective property to the land challenges the liberal conception of human rights as a bundle of rights to which only individuals are entitled. It rather calls into consideration the third generation of human rights characterized by Karel Vasak as "solidarity rights" or "group rights".¹⁷ Vasak introduced the idea of three generations of human rights based on the three slogans of the 1789 French Revolution "liberty, equality and fraternity". The first generation, civil and political rights, is based on the principle of liberty and is essentially of a negative nature, while the second generation of economic, social and cultural rights rather produce positive obligations. The third generation, based on fraternity or solidarity, are group rights such as the rights to a healthy environment, to self-determination or to development.¹⁸ Although controversial,¹⁹ the proposition of a third generation of group human rights had the effect of shifting the focus from the individual to the needs of groups that are often marginalized or vulnerable.

¹² *Golay & Cismas, supra* note 10 at 2.

¹³ Gregory S. Alexander & al, "A statement of progressive property" *Cornell Law Review*, Vol 94:743 at 744.

¹⁴ *Ibid.*

¹⁵ Hernando de Soto, *supra* note 3 at p 171.

¹⁶ *Golay & Cismas, supra* note 10 at p 23.

¹⁷ See Karel Vasak, "Les différentes catégories des droits de l'homme" in Lapeyre, de Tinguy and Vasak (eds), *Les dimensions universelles des droits de l'homme*, Vol.1 (Buxelles: Bruylant, 1990) at 303.

¹⁸ The *African Charter on Human and People's Rights (Banjul Charter)*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58, 1982 protect many rights that would be considered as under this third generation.

¹⁹ For example, some first generation rights can only be exercised in association with others, such as the right to freedom of association and the right of peaceful assembly. See e.g. Bülent Algan, "Rethinking 'Third Generation' Human Rights" (2004) 1:1 *Ankara Law Review* at 121-155.

The proposition that “only individuals can have human rights”²⁰ has already been challenged by many, yet the distinction between individual and collective rights can seem blurred. Yoram Dinstein draws the following division: the former are “bestowed upon every single human being personally”, while the latter are “afforded to human beings communally, that is to say, in conjunction with one another or as a group”.²¹ For example, the United Nations (UN) Human Rights Commission, analyzing the differences between the rights of Indigenous peoples and of national, ethnic, religious or linguistic minorities, classified the former as being collective, owned by the group itself, while the latter as being individual.²² Whereas minorities rights “aim at ensuring a space for pluralism in togetherness”, Indigenous peoples rights in international law instruments seek to ensure autonomous development and authority.²³ The Indigenous claims to rights as a group will be studied in Part II.

Peter Jones presents two conceptions of group rights. Under the first, individuals have separate yet identical interests from the others in the group, but it “ascribes moral standing only to the individuals”.²⁴ In the second one, which he calls the “corporate conception”, the group as such has moral and legal standing.²⁵ Thus, they consist together of “an irreducible right-bearing entity”²⁶ and they hold jointly a right that none of them possesses individually. We consider Jones’ corporate conception to be the most adequate to discuss the reach of the group right that we study in the present essay, namely Indigenous collective property. We will consider under this umbrella term Inter-American Indigenous communal property and Canadian Aboriginal title in Parts III and IV.

²⁰ Such claim was made by Jack Donnelly, “The Universal Declaration Model” from *Universal Human Rights in Theory and Practices*, 3rd edition (Ithaca: Cornell University Press, 2013) at 25 [Donnelly].

²¹ Yoram Dinstein, “Collective Human Rights of Peoples and Minorities” (1976) 25 *International and Comparative Law Quarterly* at 102-103.

²² Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, UN ECOSOC/E/CN.4/Sub.2/2000/10 (2000).

²³ *Ibid* para 8.

²⁴ Peter Jones, “Human Rights, Group Rights and Peoples’ Rights” (1999) 21:1 *Human Rights Quarterly*, p.85 [Jones].

²⁵ Jones, *supra* note 24 at 86.

²⁶ *Ibid* at 86.

Part II. Indigenous collective property as an impetus for a broader discussion

We will discuss in this section how i) Indigenous peoples are entitled to group rights under international law, ii) the recognition of collective rights to the land can be a catalyst for a broader discussion on culture, identity and autonomy, and iii) how the Tsilhqot'in legal and political struggle in Canada illustrate those propositions.

A. Indigenous peoples as rights beneficiaries

Indigenous peoples have been at the forefront of social and human rights mobilization to claim recognition of being “capable collective subjects who are identified as legitimate beneficiaries of distinct rights”.²⁷ Jones suggests under the corporate conception that to bear rights as and of itself, the group “must possess a morally significant identity”.²⁸ We suggest that Indigenous people definitely do so under international law.

Several international instruments undeniably consider these rights as pertaining to the “people” itself, discarding the liberal approach of individual entitlement to human rights. The UN *Declaration on the Rights of Indigenous Peoples*²⁹ (hereinafter “UN Declaration”), supported by Canada only in 2012, recognizes and reaffirms “that Indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples”. Similarly, article 13 of the *Indigenous and Tribal Peoples Convention* (hereinafter “Convention No. 169”)³⁰ of the International Labour Organization (ILO) stresses that governments must respect the collective aspects of the relationship of the Indigenous people with their lands or territories.³¹ Most of the rights guaranteed therein, such as to land and natural resources, are attributed to “Indigenous and tribal peoples”. These examples demonstrate that the recognition in international law of collective rights entitled to Indigenous people contributed to the move from an

²⁷ See e.g. Ronald Niezen, “The Indigenous Claim for recognition in the International public sphere” (2005) 17: 583 *Fla J Int'l L* at 594.

²⁸ Jones, *supra* note 24 at 86.

²⁹ 2 October 2007, UN/AG/RES/61/295, 107th plenary meeting meeting, 61st sess., Suppl. No 49.

³⁰ 27 June 1989, C169 (Entry into force 5 September 1991).

³¹ *Ibid* article 13.

individualistic and liberal human rights approach³² to an increasing empowerment of Indigenous peoples as collective actors.

B. Indigenous property as a catalyst

Although it is essential to acknowledge the diversity of experiences and treatment of Indigenous peoples around the world, it can be posited that they generally share common claims, such as the respect and restoration of their traditional lands, the right to practice their tradition, culture and spirituality and the right to self-determination.³³ Should these collective claims fit into the human rights movement at all? Some object that “the international human rights paradigm channels Western imperialism and has little place in indigenous cultures” and that it “privileges state sovereignty and individualistic philosophies that conflict with, and even directly threaten indigenous concepts and forms of existence”.³⁴ Antkowiak counter-argues that indigenous communities’ claims are not geared towards self-determination in the sense of claiming independent statehood, but are rather more “focused on their lands, cultural integrity, and political empowerment”.³⁵

We find this argument persuasive. We would push it further and suggest that Indigenous peoples’ battle to defend and restore their relationship with the land is the reflection of a broader struggle for political, economic, cultural and spiritual preservation and autonomy.³⁶ Both the Inter-American Court of Human Rights (hereinafter “IACtHR”) and the Supreme Court of Canada (hereinafter “SCC”) seem to support such a proposition. In *Awas Tingni*, the IACtHR stated that “the close ties of indigenous peoples with the land must be recognized and understood as the *fundamental basis* for their cultures, their spiritual life and their integrity.”³⁷ Just as private property

³² An example of such a “liberal discourse” can be found in Donnelly, *supra* note 20 at 25.

³³ Short, *supra* note 1 at 381.

³⁴ Thomas M. Antkowiak, “Rights, Resources and Rhetoric: Indigenous Peoples and the Inter-American Court” (2013) 35:1 *U of Pen J of Int L*, p.135 [Antkowiak].

³⁵ *Ibid* at 136.

³⁶ Aoife Duffy, “Indigenous Peoples’ Land Rights: Developing a *Sui Generis* Approach to Ownership and Restitution”, *International Journal on Minority and Group Rights* 15 (2008) at 510ff.

³⁷ See *Mayagna (Sumo) AwasTingni Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. HR (Ser C) No. 79 (2001) at para 149 [Mayagna].

can further the right to food,³⁸ its corollary collective expression, the right to Indigenous communal property, can guarantee traditional practices of subsistence. As stated by the IACtHR, the “lack of access to the territories may prevent Indigenous communities from using and enjoying the natural resources required to provide their subsistence through their traditional activities, and to practice their traditional health care systems, and other socio-cultural functions.”³⁹

In the SCC approach to Aboriginal title, the role of Aboriginal culture in relation to the land comes into play in two different ways. The SCC concluded that when a tribunal assess if occupation is sufficient to constitute Aboriginal title, Aboriginal culture and point of view must be taken into account.⁴⁰ Then, if the land has been so occupied, the SCC recognizes that there is “a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture.”⁴¹ Aboriginal culture is thus part of the SCC’s equation in recognizing occupation, as well as an integral aspect of Aboriginal title.

It is however crucial to avoid imposing on Indigenous peoples “an uncompromising cultural script (of) strict observer of customary practices, guardian of nature, and even steward of non-capitalist economies”,⁴² as we will discuss in Part V. There is a wide diversity of ways to protect, interact and enjoy the land and its natural resources, as diverse as the Indigenous peoples around the globe.

C. A Canadian example: the Tsilhqot’in struggle

In August 2014, the SCC pronounced a landmark judgment: *Tsilhqot’in Nation v. British Columbia*, where it recognized the existence of an Aboriginal title for the first time in Canadian history. While different parts of this judgment will be examined in Parts IV and V, its historical context and its subsequent impacts show precisely how Aboriginal relationship with the land goes beyond mere property rights to embrace identity, as well as political and cultural preservation and autonomy.

³⁸ *Golay & Cismas*, *supra* note 10 at 23.

³⁹ Case of the Afro-descendant communities displaced from the River Basin (Operation Genesis) v. Colombia, Judgment of November 20, 2013, Inter-Am Ct HR (Ser C) No.270 (2013) at para 354.

⁴⁰ *Nation Tsilhqot’in v British Columbia*, 2014 SCC 44 at para 50 [Tsilhqot’in].

⁴¹ *Delgamuukw v. British Columbia* (1997) 3 SCR 1010 at para 128 [Delgamuukw].

⁴² Antkowiak, *supra* note 34 at 161.

The semi-nomadic Tsilhqot'in First Nation had few contacts with European settlers until the middle of the 19th century, when the construction of a road started throughout a part of their traditional territory.⁴³ This project became the triggering of the 1864 Tsilhqot'in uprising against settlers and construction workers in British-Columbia. It has complex causes that cannot be fully discussed here.⁴⁴ Suffice to say that following the uprising, six Tsilhqot'in chiefs showed up unarmed to the settlers authority to hold peace talks, yet they were hanged for the killings of nearly 20 construction workers and vigilantes. This injustice has remained until today a profound wound for the six actual Tsilhqot'in communities, whom created in 1989 a National Government to "continue the fight for (their) six war Chiefs of 1864".⁴⁵

Following the recognition of their Aboriginal title by the SCC, a *Letter of Understanding* was signed in September 2014 by the Tsilhqot'in and the Prime Minister of British-Columbia, Christina Joan Clark, in order to open negotiation on the implementation of the judgment.⁴⁶ The *Tsilhqot'in* required first and foremost that the illegality of the hangings of the six Tsilhqot'in chiefs be acknowledged by the government as a prelude for negotiations. Premier Clark officially apologized for the hangings on October 23rd 2014. Chief Joe Alphonse considered this recognition as a starting point for a "healing that must occur around a difficult history of mistreatment, misrepresentation and lack of recognition of First Nations people within the Tsilhqot'in territory and rest of British Columbia".⁴⁷ Since the SCC judgment, the Tsilhqot'in National Government asserted its new sovereignty in different ways; it opposed Taseko Mining project on their hunting territory, it released its own mining policy and announced the creation of a Tribal Park.⁴⁸

⁴³ See Edward Sleigh Hewlett, "The Chilcotin Uprising of 1864" *BC Studies* 19, autumn 1973 at 53.

⁴⁴ *Ibid* at 51.

⁴⁵ Tsilhqot'in National Government "Our National Government" (page consultée le 15 novembre 2014), online: <<http://www.tsilhqotin.ca/>>.

⁴⁶ British Columbia, « Letter of Understanding », September 10 2014, online :<http://www2.gov.bc.ca/gov/DownloadAsset?assetId=9E9CC1D831664BF6AA8DEF4BE412FADE&filename=ou_tsilhqotin_xenigwetin.pdf>, point 2.

⁴⁷ Tsilhqot'in National Government, News release: "B.C. redresses wrongful hangings of Tsilhqot'in war chiefs" 23 October 2014, online: <http://www.tsilhqotin.ca/PDFs/Press%20Releases/2014_10_23_Redress_JNR.pdf>.

⁴⁸ Tsilhqot'in National Government "Our National Government" (page consultée le 15 novembre 2014), online: <<http://www.tsilhqotin.ca/>>.

What seems at first glance to be simply a legal battle for property of the land uncovers a broader intent of historic reconciliation and constitutes a trigger for the assertion of sovereignty over not only resources, but also autonomous Aboriginal laws. The legal recognition of Aboriginal title could therefore open a decisive and fruitful conversation on identity, culture, spirituality and autonomy. In Parts III and IV, we will examine the Inter-American and Canadian experiences in relation, respectively, to Indigenous communal property and Aboriginal title.

Part III. The IACtHR experience and Indigenous communal property

In the face of the i) lack of Inter-American legal protection of Indigenous rights, the IACtHR instigated a major judicial innovation of the creation of rights ii) to Indigenous communal property and iii) to collective cultural identity and juridical personality.

A. An absence of legal protection

The Inter-American approach and case law regarding the right to property is a great example of a shift away from an individualistic and Eurocentric vision of human rights.⁴⁹ Throughout both the *Inter-American Declaration of the Rights and Duties of Man*⁵⁰ (hereinafter “*American Declaration*”) and the *American Convention of Human Rights*⁵¹ (hereinafter “*Convention*”), one can notice that all provisions protect the rights of “every person” and “every human” or guarantee them for “anyone”, “everyone” and “all persons”. The language endorsed by those instruments reveals their approach of providing individualized entitlement of human rights. The only provision going beyond the individual is article 17 of the Convention, which provides that the family is “entitled to protection by society and the State”.

None of those two instruments mentioned Indigenous people and their rights. Similarly to what has happened in the UN, Indigenous rights will not be protected by a binding treaty, but rather by a Declaration. The General Assembly of the Organization of the American States (OAS) tasked in

⁴⁹ For a reflection on the objections to the application of the discourse of individual rights to Indigenous concepts and relation to the land, see Antkowiak, *supra* note 34 at 135.

⁵⁰ Res. XXX.Final Act, Ninth International Conference of OAS, 1948, OR OAS/Ser.L/VII.23/Doc21 rev.6, 1979.

⁵¹1999 OASTS No.36 1114 UNTS 123.

1989 the Inter-American Commission on Human Rights (hereinafter “IACHR”) to draft a legal instrument on the rights of Indigenous Peoples. A Working Group of the Permanent Council was created in 1999 to consider the IACHR Declaration draft, which has not yet been adopted by the OAS General Assembly.⁵² Although it would appear that Inter-American law did not endorse the UN and ILO recognition of collective rights of Indigenous people, a careful analysis will reveal that the IACtHR bridged this gap.

B. A judicial construction

Both the Commission and the Court interpreted the right to private property⁵³ in the light of the ILO *Covenant No.169* and the UN *Declaration*, to create a right to Indigenous communal property in 2001.⁵⁴ The IACtHR thus used in a creative and unrivalled way⁵⁵ the right to private property in article 21 of the *Convention* to protect one of America’s most vulnerable groups: Indigenous peoples.

The IACtHR hesitated before fully recognizing the collective nature of Indigenous property. In its first judgments, the Court recognized the right to collective property, but it found only violations “to the detriment of the members” of the Indigenous communities.⁵⁶ Although the Court had created the entitlement of the whole community to this right, it found that the State’s obligations under article 1 of the *Convention* were directed only at the individuals subject to its jurisdiction. The right thus seemed to be tied only to the present members of these communities. In doing so, it did not fully endorse Jone’s corporate conception of group rights,⁵⁷ where the group as such has legal standing.

⁵² See Departamento de Derecho Internacional, OAS, “Pueblos Indigenas”, online: <http://www.oas.org/dil/esp/indigenas_Elaboracion_del_Proyecto_de_Declaracion.htm>.

⁵³ Article 23 of the *Declaration* and article 21 of the *Convention*.

⁵⁴ *Mayagna*, *supra* note 37.

⁵⁵ Neither the European Court of Human Rights nor the African Court on Human and People’s Rights undertook such an extrapolation.

⁵⁶ See *Mayagna*, *supra* note 37. ; *Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am. Ct. HR (Ser C) No. 124 (2005) and *Saramaka People v. Suriname*, Judgment of November 28, 2007, Inter-Am. Ct. HR (Ser C) No.172 (2007) [*Saramaka*].

⁵⁷ See Part I

It is only in 2012 that the IACtHR fully applied Jones' corporate conception of group rights. It unanimously found a violation of the right to communal property "to the detriment of the Kichwa Indigenous People of Sarayaku".⁵⁸ This "sharp break with the past"⁵⁹ confirmed the collective nature of the right itself, but also of the obligations of the State to the Indigenous people as a collective subject, a legitimate beneficiary of this right. This is in our opinion crucial, as it renders Indigenous communal property permanent, meaning that it will be attached to the community itself in the future, no matter if its members change over time.

C. Indigenous communal property as a catalyst for other rights

Since the collectivization of property in 2001,⁶⁰ the IACtHR operated similar interpretations regarding other individual human rights contained in the *American Convention*. The right to property, private or communal, is interrelated with various economic and social rights. As such, the recognition of the right to Indigenous communal property indirectly protects a range of political, economic, social and cultural rights. As pointed out by the Court, "the protection of their right to property is necessary to guarantee their physical and cultural survival and that their cultural identity, social structure, economic system, customs, beliefs and distinctive traditions be respected, guaranteed and protected by States".⁶¹

The Court in *Sarayaku*, again inspired by the ILO *Convention No. 169* and the *UN Declaration*, extended the right to communal property to a fundamental and collective right to cultural identity⁶². It found that the destruction of sites of spiritual importance, of forests, water sources, caves and underground rivers by an oil company entailed "a violation of their worldview and cultural beliefs".⁶³ It declared that the State is responsible for the violation of the right to cultural identity "to the detriment of the Kichwa Indigenous People of Sarayaku". As it did with the

⁵⁸ *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27 2012, Inter-Am. Ct. HR (Ser C) No.245 (2012), p.91 [*Sarayaku*].

⁵⁹ Antkowiak, *supra* note 34 at 156.

⁶⁰ *Mayagna*, *supra* note 37.

⁶¹ *Sarayaku*, *supra* note 58.

⁶² *Ibid* at para 217.

⁶³ *Ibid* at para 218.

right to communal property, the IACtHR applied a corporate conception of the collective right to cultural identity.

The Court recognized in *Saramaka* the collective juridical personality of Indigenous people based on article 3 of the Convention, which traditionally protected individual juridical personality, in order to “ensure that the community, as a whole, will be able to fully enjoy and exercise their right to property, in accordance with their communal property system, and the right to equal access to judicial protection against violations of such right”.⁶⁴ However, it concluded that the state violated article 3 “to the detriment of the members of the Saramaka people”⁶⁵, and not of the community as a whole. It remains to be seen if the Court will bridge the gap between the entitlement of the right to the community and the correlative obligation of the State towards the collective, and not only towards its individual members.

PART IV. Canadian Aboriginal title as “pre-existing” rather than classic property

In Canada, Aboriginal title is the closest right to Indigenous communal property, although it emerged in a completely different legal context. It is relevant to i) understand the place and potential of Inter-American law and case law in Canada, and ii) the absence of constitutional protection of private property, in order to iii) address the emergence and recognition of Aboriginal title and iv) compare it with the Inter-American right of Indigenous communal property.

A. Inter-American law in Canada: from obligations to ignorance

Although Canada has not ratified the *American Convention*⁶⁶ and is thus not subject to the jurisdiction of the IACtHR, it has acceded to the *Charter of the Organization of American State*

⁶⁴ *Saramaka*, *supra* note 56 at para 171.

⁶⁵ *Ibid* at p 61.

⁶⁶ Among the concerns of the Canadian government regarding the ratification of the *American Convention*, the following argument was raised: the individual right to individual property protected by the Convention would be incompatible with the collective nature of Aboriginal rights and title in Canadian law. As this paper argue and as the Canadian Senate recognized, there is not such incompatibility and it should not be conceived as an obstacle to ratification. See the Senate Committee on Human Rights, “Enhancing Canada’s role in the OAS: Canadian adherence

and is a member of the OAS. Canada must therefore respect the human rights provided for by the *American Declaration*, adopted by the General Assembly of the OAS.

Even if the *American Declaration* is not a treaty, it has been considered to be binding on all OAS member states, including Canada. The Inter-American Commission on Human Rights (hereinafter “IACHR”) thus can receive petitions regarding violations of the provisions of the *American Declaration* by Canada⁶⁷, which will be interpreted and applied in the light of the *Convention*. Indeed, the *American Convention*, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the *American Declaration*.⁶⁸ Therefore, the principles set forth by the IACtHR regarding Indigenous collective property would apply to the right to property protected under the *American Declaration*. Its case law is then relevant to understand Canada’s obligations under the *American Declaration* regarding Indigenous collective property. The IACHR also developed an extensive case law on Indigenous communal property.⁶⁹

However, the Inter-American standards were largely unnoticed by Canadian courts. We found only three judgments of the SCC that referred to Inter-American instruments⁷⁰ and two that mentioned decisions of the IACtHR.⁷¹ Although those two cases were unrelated to Aboriginal rights, it is of significant interest that they were rendered in 2014. Would this mean that the SCC is seeing with greater interest the IACtHR case law? This question would surely deserve more attention. Nevertheless, we will see that the protection of Aboriginal title in Canada did not materialize from the collectivization of a private property right.

to the American Convention on Human Rights”, online:

<<http://www.parl.gc.ca/content/sen/committee/372/huma/rep/rep04may03part1-e.htm>>.

⁶⁷ See IACtHR, *Interpretation of the Declaration within the Framework of Article 64*, Advisory Opinion OC-10/89 at paras. 29-47 and IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.1116 Doc 5, 2002 at 39.

⁶⁸ IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004 at para 88; IACHR, Report No. 75/02, Case 11.140 [*Maya*], *Mary and Carrie Dann (United States)*, December 27, 2002, par. 96 [*Marry and Carrie Dann*].

⁶⁹ *Ibid.*

⁷⁰ *Reference re Secession of Quebec* (1998) 2 SCR 217 at para14; *Capital Cities Comm. c CRT* (1978) 2 SCR 141, p.144 and *Mitchell v M.N.R.* (2001) 1 SCR 911 at para 83.

⁷¹ *Kazemi Estate v Islamic Republic of Iran* (2014) CSC 62 at para 129 and *RvQuesnelle*(2014) SCC 46 at para 40.

B. Private property as a constitutional right?

Contrary to the Inter-American context, the concept of Aboriginal title did not arise from the consideration of private property as a constitutional value in Canada. The 1960's *Canadian Bill of Rights* affirmed the right of the individual to the enjoyment of property, but this right was not entrenched in the *Canadian Charter of Rights and Freedom* (hereinafter "*Charter*"). Many attempts at amending the constitution to include it were defeated, both before and after the adoption of the *Charter*. The liberal government proposed in 1978 to guarantee "the right of the individual to the use and enjoyment of property" in Bill C-60. Due to the opposition of most provinces⁷² and the New Democratic Party⁷³, this proposition was not included in the *Charter*. An intent to introduce property rights in S.7 of the Charter in a similar way as the US Constitution Fifth Amendment was defeated in 1983. The provincial legislatures again refused to endorse this amendment in 1991.⁷⁴ The recognition and protection of private property in Canada rather, stem from the common law. The SCC stated that common law protects "the right of the individual to the enjoyment of property and the right not to be deprived thereof, of any interest therein, save by the Due process of law".⁷⁵

Among the arguments against the entrenchment of this right, concerns about unintended consequences on "native land claims" were voiced. Some interveners feared that claims of constitutional private property could negatively impact Aboriginal claims to their lands.⁷⁶ They were thus concerned that protecting private property rights constitutionally would adversely restrict their collective claims, because the former right would prevail over theirs. If Canadian courts overlooked Inter-American standards and the legislator chose not to protect private property under the *Charter* or under normal legislation, how did Aboriginal title materialize in the Canadian legal order?

⁷² They opposed it generally because they saw it as an encroachment upon their jurisdiction on property and civil rights. Alexander Alvaro, "Why Property Rights were excluded from the Canadian Charter of Rights and Freedoms", *Canadian Journal of Political Science*, No.2, Jun.91 at 13 [Alvaro].

⁷³ The NDP refused to protect property rights if no social and economic rights were guaranteed by the Charter.

⁷⁴ Alvaro, *supra* note 72.

⁷⁵ *Harrison v Carswell* (1976) 2 SCR 2000.

⁷⁶ David Johansen, "Property Rights and the Constitution", Library of Parliament (Canada), Law and Government Division, October 1991, online: <<http://publications.gc.ca/Collection-R/LoPBdP/BP/bp268-e.htm>>.

C. The emergence of collective Aboriginal title

Asking this question is in itself problematic, as it seems to suggest that a right can only exist if it is recognized under State-made law. Didn't Aboriginal peoples in Canada exercise their "rights" to the land throughout the history, without the need of any positive laws acknowledging these practices? The SCC partly resolved this debate concluding that Aboriginal title arises from prior occupation of the land by aboriginal peoples "and out of the relationship between the common law and pre-existing systems of aboriginal law"⁷⁷. It is therefore not "a product of modern judicial activity"⁷⁸ because "certain social and political situations pre-date the emergence of the dominant system".⁷⁹ In a similar argument, the IACTHR recognized that the way Indigenous communities exercised land ownership or possession "do not necessarily conform to the classic concept of property".⁸⁰

This explains the vocabulary used in S.35 of the 1982 Constitution Act, which recognizes and affirms the existing Aboriginal and treaty rights of Aboriginal peoples in Canada. Under Aboriginal rights protected by S35, Aboriginal title is located at the far end of the spectrum with respect to the degree of connection with the land, as it is "a right to the land itself".⁸¹ This acknowledges that Aboriginal rights and title pre-existed the European settlement. Doing so, the SCC and the Constitution seem to have recognized that legal pluralism can be helpful to reconcile the existence of multiple legal systems in Canada.⁸²

Recently in *Tsilhqot'in*, the Supreme Court formally clarified that the *terra nullius* doctrine, which sees the land as unoccupied before European assertion of sovereignty, did not apply on Canadian territory⁸³. One could question how the Court can then grant the Crown an underlying title to all the land by the mere assertion of sovereignty in the 1763 *Royal Proclamation*.⁸⁴ This

⁷⁷ *Delgamuukw*, *supra* note 41 at para 114. This was reaffirmed in *Tsilhqot'in*, *supra* note 40 at para 75.

⁷⁸ Brian Slattry, "The Metamorphosis of Aboriginal Title" in Morellato, *Aboriginal Law since Delgamuukw*, (Canada Law Book, 2009), p.167 [Slattry].

⁷⁹ Cristie, *supra* note 11 at 185.

⁸⁰ *Sarayaku*, *supra* note 58 at para 145.

⁸¹ *Delgamuukw*, *supra* note 41 at para 140.

⁸² For a further discussion on the relevance of legal pluralism in the context of Aboriginal rights, see Short, *supra* note 1 at 390.

⁸³ *Tsilhqot'in*, *supra* note 40 at para 69.

⁸⁴ *Ibid* at para 69.

underlying title to all land is burdened by the “pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival”⁸⁵. Is this not an application of the doctrine of *terra nullius*?⁸⁶ Or is it rather a reflection of the *common law* property principle that the Crown is the “fundamental owner of all property”?⁸⁷ Indeed, since its assertion of sovereignty, the Crown has in common law the power to grant estate, with fee simple being the largest estate.⁸⁸ Common law estates exist based on the will of the Crown, which still hold fundamental title to all lands. It could thus be argued that the granting of an underlying title to all land to the Crown drifts from the common law tradition of the Crown being the fundamental owner. Despite a drastically different origin, is the content of Aboriginal title similar to Indigenous communal property in Inter-American law?

D. Aboriginal title compared to Indigenous communal property

To understand what the Supreme Court meant by characterizing Aboriginal title as a *sui generis* interest in the land⁸⁹, it is useful to contrast its scope and limits with Indigenous communal property in Inter-American law and property at common law. As the SCC stated, “analogies to other forms of property ownership may help us to understand aspects”⁹⁰ of Aboriginal title, although it cannot be understood only with reference to traditional property law concepts.

Precisely like Indigenous communal property in Inter-American law, Aboriginal title is a “collective right to land held by all members of an Aboriginal nation.”⁹¹ This reflects the fact that pre-sovereignty occupation occurred collectively.⁹² The title was granted over a specific territory to the Tsilhqot’in Nation itself, not the members of the Nation personally. Therefore, along with the

⁸⁵ *Guerin v the Queen*, (1984) 2 RCS 335, p.379-82 and *Tsilhqot’in*, *supra* note 40 at para 69.

⁸⁶ John Borrows argue that the Supreme Court rejection of the *terra nullius* doctrine is inconsistent with granting an automatic underlying title to the Crown: UVic Law “Aboriginal Title and Provincial Regulation: The Impact of *Tsilhqot’in Nation v BC*”, panel of September 30th 2014, online: <https://www.youtube.com/watch?v=zJyblpM7hEw>.

⁸⁷ Cristie, *supra* note 11, 182-3.

⁸⁸ It is the largest bundle of rights possible under a tenure from the Crown, including exclusive use and occupation, rights to transmission or transferability, and rights to partition. Cristie, *supra* note 11 at 182-3.

⁸⁹ For an analysis of the theory of Aboriginal title as a *sui generis* right rather than a customary right rooted in Indigenous law or a translated right held under English Common Law, see Slattery, *supra* note 78 at p 158.

⁹⁰ *Tsilhqot’in*, *supra* note 40 at para 72.

⁹¹ *Delgamuukw*, *supra* note 41 at para 115.

⁹² *Tsilhqot’in*, *supra* note 40 at para 75.

IACtHR as we have seen, the SCC applied a corporate conception of group rights, recognizing them as “an irreducible right-bearing entity”.⁹³

Aboriginal title is held communally and “not only for the present generation but for all succeeding generations”.⁹⁴ In this statement the Court went even further than the IACtHR. While the latter identified the Indigenous community as the beneficiary of the right, the Supreme Court suggests that their collective nature transcends the present situation of the group to apply to its evolution in the future. The title is thus attached to the land itself and held by the Nation, present and future. Obviously, these collective and permanent features are dramatically different from other types of estates at common law, which are rather held by individuals.⁹⁵

The IACtHR and the Supreme Court seem to confer similar rights to groups who have communal property or aboriginal title recognized, although they frame them in a slightly different language. While the SCC speaks the common law language of the use, occupation and possession of the land,⁹⁶ the IACtHR uses the very civil law terminology of property, use and enjoyment of the land.⁹⁷ The SCC concluded that Aboriginal title encompasses the rights to the economic benefits of the land and to pro-actively use and manage the land.⁹⁸ Similarly, the IACtHR included in *Sarayaku* the right to access natural resources, because the use and enjoyment of the land “would be meaningless for indigenous and tribal communities if (they) were not connected to the protection of natural resources in the territory.”⁹⁹

Nevertheless, this last apparent similarity reveals a decisive difference. The IACtHR examined in *Sarayaku* the right to access natural resources under a factual analysis that considered only traditional use for survival, as well as to ensure worldview, cultural and spiritual identity.¹⁰⁰ By doing so, the IACtHR adopted an approach that seems frozen in traditional

⁹³ Jones, *supra* note 24 at 86.

⁹⁴ *Tsilhqot'in*, *supra* note 40 at para 74.

⁹⁵ *Delgamuukw*, *supra* note 41 at para 115.

⁹⁶ *Ibid* at 77.

⁹⁷ See *Mayagna*, *supra* note 37 at para 153.

⁹⁸ *Tsilhqot'in*, *supra* note 40 at para 73.

⁹⁹ *Sarayaku*, *supra* note 58 at para 146.

¹⁰⁰ *Ibid* at para 155.

practices,¹⁰¹ which was rejected by the SCC. In *Tsilhqot'in*, the SCC clarified that the content of Aboriginal title is “not restricted to those uses which are elements of a practice, custom or tradition integral to (their) distinctive culture”,¹⁰² which means that they should have the latitude to use natural resources for commercial and lucrative purposes. This possibility of recognizing modern uses of natural resources departing from strict traditional practices does not seem to be envisioned by the IACtHR.

The Canadian approach still imposes an “intrinsic limit” on Aboriginal use of the land; it “cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands... that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.”¹⁰³ This could for example prohibit an open-pit mine or clear cut on the territory under Aboriginal title, but how far will this limit go? What exactly that means remains to be seen, but this limit is set to respect the entitlement of the Aboriginal title to the future generations as well as the present one, as discussed previously.

The consequence of the fact that Aboriginal title is held for all succeeding generations is that it is inalienable to all but the Crown.¹⁰⁴ Thus, the rights to transmission or transferability of Aboriginal title are limited; the land cannot be sold to third parties. The IACHR stated that Indigenous communal property can only be achieved if communities hold inalienable titles,¹⁰⁵ but the position of the IACtHR is not clear yet. This consideration is important, as it could allow Indigenous peoples in Americas to sell a piece of their communal property to third parties for natural resources projects.

Part V. Raising voices and asserting control of natural resources

This section will address the potential and limits of the rights of Indigenous peoples to raise their voice and have effective decision-making powers over the extraction of natural resources

¹⁰¹ Antkowiak, *supra* note 34 at para 161.

¹⁰² *Tsilhqot'in*, *supra* note 40 at para 124.

¹⁰³ *Tsilhqot'in*, *supra* note 40 at para 15.

¹⁰⁴ *Delgamuukw*, *supra* note 41 at para 129-131; *Tsilhqot'in*, *supra* note 40 at para 74.

¹⁰⁵ *Marry and Carrie Dann*, *supra* note 68 at para 130.

both in Canada and according to the IACtHR case law. The following aspects will be examined: i) Indigenous relations to natural resources, ii) the general obligation to obtain consent, iii) the possibility to justify infringement on collective Indigenous property rights, and iv) the obligation to consult and accommodate.

A. Natural resources: from traditions to private development projects

As the Inter-American Court frames it, “the right to use and enjoy the territory would not make sense for Indigenous people if this right would not be connected with the protection of natural resources which can be found on this territory.”¹⁰⁶ This inter-connection between the land and its natural resources is necessary for their cultural and physical survival, as well as to protect their cultural identity, social structure, economic system, customs, beliefs and traditions.¹⁰⁷ Natural resources were and are used by Indigenous communities across the Americas through traditional and/or changing practices of hunting, fishing, logging, transport, etc.

Obviously, Indigenous communities are not isolated from market-economy; they are and will be expected to respond to external initiatives to exploit natural resources for profit rather than to fulfill traditional practices.¹⁰⁸ When governments or private corporations talk about natural resources, they are generally seen as a source of wealth and as a business opportunity. Some Indigenous peoples or members accept this narrative and allow the implantation of natural resources extraction projects for monetary compensation,¹⁰⁹ while others might reject it. We recognize that Indigenous peoples should not be expected to be “strict observer of customary practices, guardian of nature or even steward of non-capitalist economies”,¹¹⁰ as this vision would

¹⁰⁶ Our translation from *Sarayaku*, *supra* note 58 at para 146.

¹⁰⁷ This general inter-connection does not intend to paint all the Indigenous communities with the same brush, we recognize the wide diversity of traditional way of living with the land. See for a general overview Daes, Erica-Irene, *Indigenous Peoples and their Relationship to Land – Final Working Paper Prepared by the Special Rapporteur*, UN Sub-Commission for the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2001/21 of 11 June 2001 at para 13.

¹⁰⁸ Many cases brought in Canadian Courts related to limitations of traditional practices of fishing or hunting, such as *Rv Sparrow* (1990) 1 SCR 1075. We will rather focus on cases of external private initiatives of natural resources exploitations, such as the case in *Tsilhqot'in*, *supra* note 40.

¹⁰⁹ We can think of the James Bay and Northern Quebec Agreement, which allowed hydroelectric development against CAN\$225 million direct financial compensation.

¹¹⁰ Antkowiak, *supra* note 34 at 161.

reproduce a paternalistic reformulation of a past stereotype of the “*bon sauvage*”. The question is then rather to what degree their voices and decision-making powers over the land are recognized, considered and respected in the Americas.

The watershed SCC decision *Tsilhqot'in* brought to light the very actual question of Aboriginal rights to control the use of the land natural resources, stemming from the claim and recognition of Aboriginal title. The Tsilhqot'in Nation indeed initiated their claim for title after the province issued commercial logging licences on their traditional land.¹¹¹ The IACtHR decisions *Saramaka* and *Sarayaku* similarly aroused from claims of Indigenous communal property following respectively concessions of logging and mining¹¹² and oil exploration¹¹³ to private companies. It is likely that more claims relating to collective property and arising from natural resources issues will be brought in Canada and in the Inter-American system.

B. The general obligation to obtain consent

The strength of the right to consent to infringement on collective property seems to be at its best under Canadian law, partially protected by the IACtHR case law, to finally receive the lowest protection under the UN *Declaration*.

In 2007, Canada voted against the adoption by the UN General Assembly the *Declaration on the Rights of Indigenous Peoples*, partly because it was worried the notion of “free, prior and informed consent” could be used as a veto against resources extractions.¹¹⁴ In 2012, it finally supported the *Declaration* despite remaining concerns. Canada declared itself “confident that (it) can interpret the principles expressed in the Declaration in a manner that is consistent with (its) Constitution and legal framework.¹¹⁵ Canada ironically sought to keep away from the decision-making afforded by Indigenous peoples in International law, but as we will see, it is in Canadian case law that consent plays the most decisive role.

¹¹¹ *Tsilhqot'in*, *supra* note 40 at para 5.

¹¹² *Saramaka*, *supra* note 56 at para 124.

¹¹³ *Sarayaku*, *supra* note 58 at para 64.

¹¹⁴ See Aboriginal Affairs and Northern Development Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples”, online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>

¹¹⁵ *Ibid.*

Until the recent judgment *Tsilhqot'in*, it was settled in Canadian law that Aboriginal title did not give Aboriginal people a veto over Crown actions,¹¹⁶ such as issuance of logging, mining or oil extraction permits. In *Tsilhqot'in*, the Supreme Court concluded that “governments seeking to use the land must obtain the consent of the Aboriginal title holders.”¹¹⁷ In theory, this is a huge recognition of the right of Aboriginal people to refuse certain projects on their territories, but in practice it has very limited impact because it is applicable only to territories where an Aboriginal title was recognized. So far, only the Tsilhqot'in holds such a title and enjoys this protection. Also, as we will see, the Crown is allowed to justify an infringement on this right without their consent.

The Inter-American case provides for a requirement of consent in certain cases and a detailed obligation to consult actively with the community to seek an agreement in all cases. In *Saramaka*, the Court established the duty to consult, but added that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”¹¹⁸

In the landmark decision *Sarayaku* however, the Court detailed the scope of the “right to consultation”, while ignoring the standard of consent developed in *Saramaka*.¹¹⁹ It cited the Covenant No.169 requirement to gear consultation towards the objective of achieving agreement,¹²⁰ but it avoided using the term consent throughout the judgment. The term agreement seems to water down the requirement of obtaining consent, as there is no clear possibility of simply refusing to consent, saying “no”. The Court’s discussion has therefore shifted from full consent in certain cases to the general right to consultation, but it could be argued that the exception in *Saramaka* is still applicable. Let’s mention that two important judgments, *Comunidad Garifuna Punta Piedra v. Honduras*¹²¹ and *Pueblos Indígenas Kuna de Madungandi*

¹¹⁶ Arthur Pape, « The Duty to consult and accommodate : a judicial innovation intended to promote reconciliation » In Morallato, *Aboriginal Law since Delgamuukw*, (Canada Law Book, 2009) at 318.

¹¹⁷ *Tsilhqot'in*, *supra* note 40 at para 76.

¹¹⁸ *Saramaka*, *supra* note 56 at para 134.

¹¹⁹ Antkowiak, *supra* note 34 at 157.

¹²⁰ *Sarayaku*, *supra* note 58 at para 177.

¹²¹ IACHR, *Case 12.761*, Informe de admisibilidad de la CIDH 63/10, 2010.

*v. Panama*¹²² will soon be delivered by the IACtHR and might hopefully clarify where the line has to be drawn between consent and consultation.

The UN *Declaration* doesn't provide any requirement of consent. It guarantees "the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."¹²³ Before adopting or implementing legislative or administrative measures that might affect them¹²⁴ or approving any project affecting their lands, territories or resources,¹²⁵ states "shall consult and cooperate in good faith with Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent". This threshold does not require obtaining consent, but it is an obligation to hold a process geared towards obtaining consent. The *Convention No.169* also provides that consultation must be in good faith with the objective of achieving agreement or consent to the proposed measure.¹²⁶ This requirement is therefore lower than the threshold established by the SCC and the IACtHR.

However, the analysis does not stop there: if consent is not secured, the Crown or the State can justify infringement on Aboriginal title or Indigenous communal property by legislation or other actions, which we will explore in section c).

C. The possibility to justify infringement on collective Indigenous property rights

Both the Canadian and Inter-American approach clarified that the protection of Indigenous property and Aboriginal title is not absolute.¹²⁷ The tests for the State to justify an infringement on Indigenous communal property or Aboriginal title seem similar, but a careful analysis reveals considerable differences. The Inter-American test seems to protect Indigenous peoples more efficiently.

¹²² IACHR, *Case 12.354*, Informe de Fondo de la CIDH No.125/12, 2010.

¹²³ Art. 26.

¹²⁴ Art. 19.

¹²⁵ Art. 32, alinéa 2.

¹²⁶ Art. 62 de la *Convention No.169*.

¹²⁷ *Saramaka*, *supra* note 56 at para 127 and *Tsilhqot'in*, *supra* note 40 at para 119.

In Canada, because the Crown has an underlying title to all land, including those under an Aboriginal title, it can encroach on this title without the Aboriginal people consent if the government can justify it.¹²⁸ The government must prove: 1) that it discharged its procedural duty to consult and accommodate, 2) that its actions were backed by a compelling and substantial objective,¹²⁹ and 3) that the governmental action is consistent with the Crown's fiduciary obligation to the Aboriginal Nation.¹³⁰ Under this third step, it must show that it would not "deprive future generations of the benefit of the land",¹³¹ as well as proportionality, rationality and minimal impairment to the right at stake.¹³² Although section 35 of the *Constitutional Law of 1982*, which recognizes Aboriginal rights and title, is not part of the *Charter*, the Court seems to have applied the section 1 criteria to the last step of the infringement test.

The *American Convention* has no general provision regarding justified infringement of human rights by States.¹³³ Limitations of particular rights are set out in each disposition, such as freedom of expression, right of assembly, freedom of association, etc.¹³⁴ Article 21(2) provides for a possibility to infringe the rights to property and to natural resources.¹³⁵ The restriction must be in the public utility/social interest, which was interpreted by the IACtHR to include four steps: 1) it must be previously established by law, 2) necessary, 3) proportional, and 4) with the aim of achieving a legitimate objective in a democratic society.¹³⁶ The Court also included in *Saramaka* an additional step; such infringement cannot deny their survival as a tribal people, their traditions and customs.¹³⁷ Under this step, the Court found three requirements that the State must fulfilled:

¹²⁸ *Tsilhqot'in*, *supra* note 40 at para 71.

¹²⁹ This objective can consist of projects of "development of agriculture, forestry, mining, and hydroelectric power. See *Delgamuukw*, *supra* note 41 at para 165.

¹³⁰ We can note that this test was substantially modified and made more stringent in *Tsilhqot'in* as compared to *Delgamuukw*.

¹³¹ *Tsilhqot'in*, *supra* note 40 at para 86.

¹³² *Ibid* at para 87.

¹³³ Article 27 only set out the conditions to suspend guarantees in times of war, public danger or other emergencies.

¹³⁴ Respectively articles 13, 15 and 16.

¹³⁵ It can happen "upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law", article 21(2) of the American Convention.

¹³⁶ *Saramaka*, *supra* note 56 at para 127

¹³⁷ *Ibid* at para 128

1) it must ensure their effective participation 2) it must guarantee they will receive a reasonable benefit, and 3) it must perform a prior environmental and social impact assessment.¹³⁸

Despite the different ordering of the criteria, one can perceive the similarities between the tests developed by the SCC and the IACtHR. It seems that the Canadian steps of compelling and substantial objective coupled with the fiduciary obligations are equivalent to the Inter-American general test, as they both include assessment of necessity and proportionality, as well as insurance of the survival of the following generations. Both tests entail the right of Indigenous peoples to be consulted and/or accommodated, which will be discussed in section d).

Nevertheless, some differences can be underscored and they will reveal that the Inter-American test further protects Indigenous people. Indeed, the IACtHR clearly imposed two requirements on the State that are ignored in *Tsilhqot'in*: fair compensation and environmental and social impact assessment. First, compensation means for the IACtHR “a reasonable share of the benefit produced by the exploitation of natural resources.”¹³⁹ While fair compensation was an established requirement in *Delgamuukw*,¹⁴⁰ it was completely forgotten in *Tsilhqot'in*. It thus seems that it is no longer a requirement at Canadian law. Second, the environmental impact assessment must seek the input of Indigenous peoples and its result must be disseminated so that “the members of the community are aware of the potential risks...so that they can decide whether to accept the proposed”¹⁴¹ project. Under the test established in *Tsilhqot'in*, there is not such a requirement, although lower courts in British-Columbia have found a violation of the duty to consult if no impact study is presented to the community.¹⁴² The Federal Court of Appeal even ruled that the National Energy Board, the main environmental assessment mechanism in Canada, does not have a duty to consult aboriginal communities when making its decision¹⁴³. Although environmental impact assessment could play a role under the duty to consult, it seems that the Supreme Court preferred to keep this criteria separated from the infringement test. Thus, despite

¹³⁸ *Saramaka*, *supra* note 56 at para 129.

¹³⁹ *Ibid* at para 157.

¹⁴⁰ *Delgamuukw*, *supra* note 41 at para 169.

¹⁴¹ *Sarayaku*, *supra* note 58 at para 205.

¹⁴² *George v Marczyk*, 1998 6737 (BC CA) and *West Moberly First Nations v. British Columbia(Chief Inspector of Mines)*, 2011 BCCA 247.

¹⁴³ *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308.

the similarity of the Canadian and Inter-American tests, a few significant differences seem to indicate that the latter is more favourable to Indigenous peoples.

D. Obligations to consult and/or accommodate

Both Canadian and Inter-American case law created a duty to consult Indigenous peoples regarding the use of the natural resources on their lands, but as we will see, the latter provides far more guidelines and protection for Indigenous peoples. The Canadian approach is less demanding on the State. Canada's Supreme Court articulated for the first time a clear duty to consult and accommodate in its *Haida* and *Taku River Tlingit* decisions in 2004. The IACtHR interpreted article 21 of the *American Convention* in the light of the ILO *Convention No. 169* and Latin-American domestic law¹⁴⁴ to find a right to be consulted for Indigenous peoples.

It is established by both institutions that the obligation rests upon the State or the Crown, but they differ on the possibility to delegate it to third parties such as a private company. The SCC clearly stated that the Crown bears the legal responsibility, but it “may delegate procedural aspects of consultation to industry proponents seeking a particular development.”¹⁴⁵ According to the IACtHR, this obligation is the sole responsibility of the State, whom cannot “avoid” it “by delegating it to a private company...much less delegating it to the very company that is interested in exploiting the resources in the territory of the community that must be consulted.”¹⁴⁶ This position makes most sense to us. How can a company who has a strong economic incentive in implementing the project be in a good position to ensure adequate consultation? This difference is major, because in practical terms, the federal and provincial governments in Canada end up delegating important parts of their obligation to the proponent of the project, who inevitably ends up bearing at least some of the costs of the consultation and accommodation. However, if the consultation or accommodation is later asserted insufficient, the Crown will remain legally responsible.

¹⁴⁴ *Sarayaku*, *supra* note 58 at para 161 to 166.

¹⁴⁵ *Haida Nation v. British Columbia (Minister of Forests)*, (2004) 3 SCR 511 at para 53 [*Haida*].

¹⁴⁶ *Sarayaku*, *supra* note 58 at para 187.

The IACtHR conceived this obligation as ongoing throughout all stages of the project, from the planning to the implementation,¹⁴⁷ suggesting that more than one consultation might be needed. The first consultation must be carried out “during the first stages of the development... and not only when it is necessary to obtain the community’s approval.”¹⁴⁸ In Canada, the Court only stated that “the duty to consult must be discharged prior to carrying out the action that could adversely affect the right,”¹⁴⁹ without specifying the exact moment where it should take place. Neither does it specify when the obligation begins and ends. The consultation could therefore be carried out at the very last minute before the implementation of the project, or at the very beginning, notwithstanding the changes that the project might undergo.

An apparent distinctive aspect of Canadian case law can be found in *Haida*, where the SCC concluded that the obligation to consult and accommodate arise even if a title is not recognized by a Court. It found that the Crown must negotiate with Aboriginal claimants as soon as it has a real or constructive knowledge of the potential existence of an Aboriginal or treaty right or interest, and contemplates conduct that might adversely affect it¹⁵⁰. The IACtHR did not state explicitly the same conclusion, but implicitly it seems to apply. In various judgments, the IACtHR observed that the State had not recognized communal property rights to the indigenous peoples, but nevertheless concluded that the obligation to consult applied to the State.¹⁵¹

Both systems impose a few identical characteristics, such as a requirement to consult in good faith¹⁵², but the IACtHR provided specific rules, such as “the absence of coercion by the State or by agents or third parties” or the prohibition of “attempts to undermine the social cohesion of the affected communities, either by bribing community leaders...or by negotiating with individual members of the community”¹⁵³. The SCC was more evasive in explaining this requirement. It stated that “sharp dealing is not permitted” but “mere hard bargaining” is tolerated¹⁵⁴. It imposed good faith also on the Aboriginal peoples, stating that “they must not frustrate the Crown’s

¹⁴⁷ *Sarayaku*, *supra* note 58 at para 167.

¹⁴⁸ *Ibid* at para 180.

¹⁴⁹ *Tsilhqot’in*, *supra* note 40 at para 78.

¹⁵⁰ *Haida*, *supra* note 145 at para 33-34.

¹⁵¹ See for example *Saramaka*, *supra* note 56 at para 97.

¹⁵² *Tsilhqot’in*, *supra* note 40 at para 89 and *Sarayaku*, *supra* note 58 para 186.

¹⁵³ *Sarayaku*, *supra* note 58 at para 186.

¹⁵⁴ *Haida*, *supra* note 145 at para 42.

reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.”¹⁵⁵ It seems odd that the SCC details more specifically what acting in good faith means for Aboriginal peoples, all the while remaining vague about what it means for the Crown.

On all other aspects, the IACtHR provided the States with very detailed guidelines in order to ensure the respect of this right, while the SCC remains silent on many of these questions. The SCC does not specify how the consultation process should be carried out, nor to whom it should be directed to. It stated that the strength of the duty will vary on a spectrum depending on two factors: i) the strength of the Aboriginal groups’ claim to the Aboriginal title and ii) the degree of the potential adverse effect of the Crown’s decision on the title¹⁵⁶. Mere notice will be sufficient if the claim is “dubious or peripheral”,¹⁵⁷ but deep consultation and accommodation might be appropriate in cases of strong claims or adverse effects. This is somehow vague and could be subject to inconsistent application by federal and provincial governments. The SCC case law remains silent on who should be consulted and accommodated. Would it be sufficient to consult the Band Council, which is a governing unit that was imposed by the *Indian Act*¹⁵⁸ in 1876? Or should traditional governance structures, such as Mohawk traditional longhouses or elder councils, be consulted also? Or even further, should all members of the Aboriginal Nation be included in this duty? Canadian law gives us no answer.

The IACtHR provides much clearer guidelines in our opinion, both on how the consultation should be directed and who should be involved. The IACtHR stated that consultation “must not only serve as a mere formality... but a true instrument of participation”.¹⁵⁹ A dialogue must be opened based on “trust and mutual respect”.¹⁶⁰ Offering money and economic benefit is not acceptable during consultation,¹⁶¹ and the government cannot take side with the private company

¹⁵⁵ *Ibid* at para 42.

¹⁵⁶ *Tsilhqot’in*, *supra* note 40 at para 17.

¹⁵⁷ *Ibid* at para 79.

¹⁵⁸ *Indian Act*, RSC 1985, c I-5.

¹⁵⁹ *Sarayaku*, *supra* note 58 at para 186.

¹⁶⁰ *Ibid* at para 186.

¹⁶¹ *Ibid* at para 194.

by promoting the execution of the project.¹⁶² The scope of the State's obligation is also enlarged by the IACtHR requirement of informed consultation. The State must inform the Indigenous peoples of the advantages and disadvantages of the project in the context of this dialogue, including through the dissemination of the environmental impact assessment, to ensure all members are aware of the potential risks of the project.¹⁶³ In Canada, there is no such component of neutral information included in the duty to consult.

Most importantly, the IACtHR specified that consultation must use procedures that are culturally appropriate to Indigenous peoples, "in accordance with (their) customs and traditions".¹⁶⁴ It must "take into account (their) traditional methods of decision-making"¹⁶⁵ which means respecting their "form of political organization".¹⁶⁶ The IACHR went even further, suggesting that members should be able to participate individually.¹⁶⁷ Those assertions entail not only that the mechanisms of consultation respect their customs and traditions, but that the actors that must be consulted also reflect their traditional governance structure. If applicable in Canada for example, this would mean that consulting only the Band Council would be insufficient.

As the SCC cited for the first time a decision of the IACtHR in 2014, we suggest that Canadian courts could be inspired by the Inter-American case law to provide better guidelines for the Crown to ensure the full realization of the right to consultation and accommodation.

Conclusion

Throughout this essay, we reflected on the scope and limits of Aboriginal title and Indigenous collective property respectively in Canadian and Inter-American law. These two rights emerged in a totally different legal context, but both were created by the Courts rather than by legislation or treaty. With the IACtHR, it materialized from private property as a human right, whilst the SCC recognized it through the pre-existing occupation of the land before European

¹⁶² *Ibid* at para 199.

¹⁶³ *Ibid* at para 208-209.

¹⁶⁴ *Ibid* at para 177.

¹⁶⁵ *Ibid* at para 133.

¹⁶⁶ *Ibid* at para 203

¹⁶⁷ *Maya, supra* note 68 at para 142.

settlement. Are the Canadian legislator and the member States of the OAS fearful of losing some sovereignty and control of natural resources to the benefit of Indigenous peoples, both in Canada and in the Inter-American context? This could be an interesting hypothesis to further explore. Although we first found the right to consent to natural resources projects the strongest in Canadian law, we concluded that the IACtHR provided more guidelines and stringent requirements to the State to pursue consultation with Indigenous peoples than the SCC. We also concluded that the Canadian government can more easily justify the infringement of Aboriginal title than the States are able under the Inter-American system.

Beyond the formal legal protection afforded to Indigenous collective property, it would be crucial to assess its effectiveness and accessibility on the ground. As professor Antkowiak puts it, there is a “wide ravine between state practice and supposed legal commitments... in context of extractive industries affecting ancestral lands”.¹⁶⁸ Less than ten cases were brought to the attention of the IACtHR regarding the rights to communal property, cultural identity and to consultation since *Mayagna* in 2001. Similarly, although Aboriginal title had been legally recognized for decades, this recognition “produced no actual results on the ground”¹⁶⁹ until the *Tsilhqot’in* decision. Only one Aboriginal Nation now holds an Aboriginal title in Canada and it had to spend over CAN\$40 million and over 40 years in litigation to obtain this recognition.¹⁷⁰ Therefore, the accessibility of the Inter-American and Canadian courts should be thoroughly assessed, as well as the choice of forum to present claims to Indigenous communal property or Aboriginal title. Some suggest that treaty negotiation is the appropriate platform to engage in a process of reconciliation of sovereignties in Canada.¹⁷¹ However, if we consider that the recognition of collective property to the land came from the Courts, both in Canada and in the Inter-American system, how could we blame Indigenous peoples for putting much of their hope for change in these institutions?

¹⁶⁸ Antkowiak, *supra* note 34, p.135

¹⁶⁹ John J.L. Hunter, « Disappointed Expectations : why Delgamuukw has failed to achieve results on the ground » In Maria Morellato, *Aboriginal Law since Delgamuukw*, (Canada Law Book, 2009), p.17.

¹⁷⁰ See UVic Panel, *supra* note 86 at 1:07:00.

¹⁷¹ Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Houghton Boston: Saskatoon, 2012).

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