There has been a growing focus in Canada on the environmental and social impacts of national extractive companies operating extraterritorially. However, recent disputes concerning the lack of public consultation on proposed large domestic mining projects, as well as disputes surrounding Aboriginal rights in lands subject to mining claims, have highlighted significant human rights concerns associated with Canada's domestic provincial and territorial mining regimes. This article assesses, from the perspective of international human rights law, how both emerging and established international human rights of participation are treated in the Ontario mining sector. It examines the extent to which the general right to participation in environmental decision-making, the right of aboriginal communities to free prior and informed consent, and the right of peaceful assembly have been protected through Ontario's mining regime and by the courts in disputes over mining activity on land subject to Aboriginal rights and/or title claims. Two recent cases, Frontenac Ventures Corporation v. Ardoch Algonquin First Nation and Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation, raise serious concerns as to whether domestic law, as it has been applied in the mining sector, is consistent with Canada's international human rights obligations. Moreover, it is not clear that the new Far North Act and recent amendments to the Ontario Mining Act sufficiently address these concerns.
1. INTRODUCTION

2. ENVIRONMENTAL DEMOCRACY – ASSESSING LEGITIMACY IN THE MINING SECTOR

3. THE ONTARIO MINING ACT (AS AMENDED)

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9. CONCLUSION
“The meek shall inherit the Earth, but not its mineral rights.”

-- John Paul Getty

In November 2006, the Canadian government completed a series of National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Sector in Developing Countries. The roundtables were held pursuant to the recommendations of a report of the Standing Committee on Foreign Affairs and International Trade calling on the federal government to initiate a multistakeholder process with the goal of strengthening existing corporate social responsibility programmes and policies and developing new programmes and policies for Canadian extractive industries operating outside of Canada, in developing countries.¹ The roundtables Advisory Group, composed of members from the private sector, academia, and NGOs, produced a consensus report released in March 2007 that recommended to the Canadian government the adoption of a comprehensive CSR framework, including voluntary standards, reporting guidelines, and an accountability mechanism.² In March 2009, the Canadian government released its response, rejecting the bulk of the Advisory Group’s recommendations and leaving unsettled the question of CSR norms for Canadian companies operat-


² National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Sector in Developing Countries, Advisory Group Report (Ottawa: Foreign Affairs and International Trade Canada, 2007).
ing outside Canada.\footnote{Canada, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector (Ottawa: Foreign Affairs and International Trade Canada, 2009).} In February 2009 the Hon. John McKay tabled a private member’s bill (Bill C-300) which sought to impose accountability on mining, oil, or gas companies that are found to be complicit in violations of human rights or environmental standards in their activities in developing countries.\footnote{Bill C-300, An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries, 2nd Sess, 40th Parl, 2009 (at the time of writing the Bill was beginning its third reading; it has now been defeated).}

These developments signal a growing domestic concern with respect to the environmental and social impacts of Canadian extractive companies operating extraterritorially. In 2008 Canada was the domicile for seventy-five per cent of the world’s largest exploration and mining companies.\footnote{Canada, Building the Canadian Advantage, supra note 3 at 3.} Of these companies, approximately seventy per cent had plans to operate outside Canada.\footnote{André Lemieux, “Canada’s Global Mining Presence,” in Natural Resources Canada, Canadian Minerals Yearbook (Ottawa: Natural Resources Canada, 2005) at 7.7, online: Natural Resources Canada <http://www.nrcan.gc.ca/cms/cmmy/content/2005/08.pdf>.} The Advisory Group Report, the government’s response and Bill C-300 are all based on the policy imperative that Canadian corporations operating abroad should comply with the same environmental and social standards to which they are legally bound in Canada, and that these standards are reflective of Canada’s international legal obligations, including, in particular, its international human rights obligations. This view is expressed in recent Parliamentary debates\footnote{Canada, House of Commons Debates Official Report (Hansard), 39th Parl, 2nd Sess, No 111 (12 June 2008) at 1130 (Hon Peter Milliken).} and in a bill tabled by the New Democratic Party on 16 June 2008.\footnote{Bill C-565, An Act respecting Corporate Social Responsibility for the Activities of Canadian Mining Corporations in Developing Countries, 2nd Sess, 39th Parl, 2007-2008, (reintroduced as Bill C-298, 2nd Sess, 40th Parl, 2009) (The bill seeks to ensure that corporations engaged in mining activities in developing countries comply with Canada’s general international law and international human rights law obligations, at s 3).} Recent disputes concerning the lack of public consultation on proposed large domestic mining projects,\footnote{MiningWatch Canada v Canada (Minister of Fisheries & Oceans), 2008 FCA 209, [2009] 2 FCR 21.} as well as disputes surrounding aboriginal rights in lands subject to mining claims\footnote{See e.g. Frontenac Ventures Corp v Ardoch Algonquin First Nation, [2007] OJ No 3360 (Ont Sup Ct) [Frontenac I 2007]; Frontenac Ventures Corp v Ardoch Algonquin First Nation, [2007] OJ No 3361 (Ont Sup Ct) [Frontenac II 2007]; Frontenac Ventures Corp v Ardoch Algonquin First Nation, [2008] OJ No 792 8247 (Ont Sup Ct) [Frontenac 2008]; Frontenac Ventures Corporation v Ardoch Algonquin First Nation, 2008 ONCA 534, (2008) 910R (3d) 1 [Frontenac 2008 CA]. See also Platinex Inc v Kitchenuhmaykoosib Ininiwuk First Nation [2006] 4 CNLR 152 (Ont Sup Ct) [Platinex 2006]; Platinex Inc v Kitchenuhmaykoosib Ininiwuk First Nation, [2007] 3 CNLR 181, 29 CELR (3d) 116 [Platinex I 2007]; Platinex Inc v Kitchenuhmaykoosib Ininiwuk First Nation, [2007] OJ No 2214, 29 CELR (3d) 191 [Platinex II 2007]; Platinex Inc v Kitchenuhmaykoosib Ininiwuk First Nation, [2008] OJ No 1014, 2 CNLR 301 (Ont Sup Ct) [Platinex 2008]; Platinex Inc v Kitchenuhmaykoosib Ininiwuk First Nation (2008) 91 OR (3d) 1 (Ont CA) [Platinex 2008 CA], and “Deseronto Quarry Blocked by Mohawk Protest” CBC News (10 January 2007), online: CBC <http://www.cbc.ca/canada/ottawa/story/2007/01/10/dese ronto.html>.} have highlighted,
however, significant human rights concerns associated with Canada’s domestic provincial and territorial mining regimes.

Canada has some of the highest mineral exploration activity in the world within its own borders. In 2005, nineteen per cent of total global mineral exploration was planned to take place in Canada.\(^\text{11}\) In addition, Ontario mines produce one third of Canada’s mineral output.\(^\text{12}\) Little academic research has been conducted on the human rights impacts of Canadian provincial and territorial mining regimes and, where it has been undertaken, it has focused primarily on environmental issues.\(^\text{13}\) Thus while the federal government, the industry, and other members of civil society are focusing on non-mandatory regulation of corporate impacts abroad, and the provincial and territorial governments are beginning to revise their mining regimes, it is pertinent and timely to consider the extent to which international human rights (including indigenous peoples’ rights and environmental human rights) are respected and protected in the domestic Canadian mining sector.

This paper will examine participation rights: the general right to participation in environmental decision-making; the right of aboriginal communities to free prior and informed consent; and the right of peaceful assembly. It will consider their relationship to each other and how these rights have been treated in domestic mining legislation and by the courts in current disputes over mining activity on land subject to aboriginal rights and/or title claims. In our assessment of the participation rights of aboriginal peoples and the right to peaceful protest, we will focus on two cases of conflict over natural resource extraction that have recently come before Ontario courts in which these rights were considered: *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*\(^\text{14}\) and *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*.\(^\text{15}\) Both cases concerned the peaceful protest of First Nation communities against mining activity on lands subject to aboriginal rights and title claims. The companies had legal rights under the pre-2009 Ontario *Mining Act*\(^\text{16}\) to conduct mining activity on the disputed lands. In both cases, consultations between the Province, the respective First Nation community and the company failed to resolve the dispute. In both cases, injunctions were ultimately used to put an end to the protests and the companies were permitted to begin their exploration activities. These two decisions raise serious concerns as to whether Canadian law, as it has been applied in the mining sector, is consistent with Canada’s international human rights obligations. The ensuing analysis will evaluate these issues and related questions from the perspective of international human rights law and through the lens of environmental democracy.

**2. ENVIRONMENTAL DEMOCRACY – ASSESSING LEGITIMACY IN THE MINING SECTOR**

\(^{11}\) Lemieux, *supra* note 6 at 7.5.

\(^{12}\) See generally MiningWatch Canada, online: MiningWatch <http://www.miningwatch.ca/en/mining-ontario>.


\(^{16}\) *Mining Act*, RSO 1990, c M.14.
Legitimacy in environmental decision-making, including in the design of legal regimes, may be measured against a range of possible metrics. From the perspective of ecological ethics, the soundness of environmental policy and regulation may be evaluated by reference to ecological outcome.\(^{17}\) To the extent that an environmental statute preserves the quality of basic resources such as air and water, we may describe it as a good law. Conversely, environmental legislation that does not achieve the goals of environmental protection may reasonably be viewed as a failure.\(^{18}\) Beyond ecological outcome, the legitimacy of environmental policy is also tied to the process by which socially important decisions are made.

In contemporary society, decisions concerning the use of land and resources, including the extent to which environmental media will be subjected to toxic discharges, implicate the most fundamental of human interests. The basic vulnerability of all human beings to environmental harm suggests that those likely to be affected by environmental policy ought to be enfranchised in decision-making processes. On the other hand, the decision to refrain from undertaking economic activities that cause environmental harm may have substantial financial impacts on local (and national) communities. Moreover, the question as to whether or not to proceed with an undertaking that may cause environmental harm is frequently complicated by the pervasive presence of scientific uncertainty in the realm of ecology. Ultimately, the decision to cut or preserve a forest, to set a particular standard for contaminant emissions, to mine or not to mine, involves the balancing of complex and sometimes competing social, environmental, political, and economic interests in the context of imperfect knowledge.

As Rachel Carson argued some four decades ago, it is the public that must live with the risks posed by environmentally harmful conduct, and the public should therefore have the opportunity to make informed choices in this area.\(^{19}\) Recognition of this dynamic has given rise to calls for “environmental democracy” in Canada and around the world. The Access Initiative, a global network of non-governmental organisations (NGOs) promoting environmental democracy, encapsulates the basic premise as follows:

> A balance of representative and participatory decision-making, informed by public access, will most likely reflect the will of those with an essential stake in the outcome, and most likely to bring [sic] environmental values into the policy-making process. Greater transparency and public participation increase the accountability and responsiveness of government officials. By allowing for public participation and access to remedy and redress, environmental values are more likely to become part of the policy-making process.\(^{20}\)

\(^{17}\) See generally J. Ronald Engel and Joan Gibb Engel, eds, *Ethics of Environment and Development: Global Challenge, International Response* (London: Bellhaven, 1990). See also Eric T. Freyfogle, “Ethics, Community, and Private Land” (1996) 23 Ecology LQ 631 at 639 (“The realm of ethics is the realm of right and wrong living, as defined by the community. [Ecological] ethics is an indispensable part of that larger realm, dealing with the ways that humans ought to interact with the [natural world].”)


Thus, advocates of environmental democracy assert that the participation of affected citizens in environmental decision-making has the potential to create outcomes that are both more just and more ecologically sound, as well as more likely to respect and protect human rights. As discussed below, the concept of environmental democracy has found expression in a range of international human rights norms concerning the rights of citizens to participate in—and meaningfully affect—environmental decisions. We argue here that Ontario’s mining regime has historically failed to comply with these international human rights norms. Before exploring the relevant body of international law, it is useful to frame the discussion with a brief outline of Ontario’s mining legislation.

3. THE ONTARIO MINING ACT (AS AMENDED)

Ontario’s Mining Act (“the Act”), first passed in 1873 and significantly amended in 1906, reflects a resource-based economic system which viewed the exploitation of natural capital as *sine qua non* for the success of Canada as a nation.\(^{21}\) It is not surprising, then, that the Act was systematically designed to encourage and facilitate mining, and conversely, to avoid and/or preclude any significant opposition to this economic activity.

Although the Act has recently been amended following a public consultation process, it continues to under-emphasize public participation and privilege the rights of mining companies to explore and exploit mineral resources. Most notably, the Act (as amended)\(^{22}\) still allows prospectors to stake claims (in most areas of Ontario) on the minerals underlying traditional aboriginal lands subject to an aboriginal land claim *without notice to or consultation with* aboriginal communities.\(^{23}\)

As noted by Carter-Whitney et al., the free-entry system embodied in the pre-2009 version of the legislation was characterized by “four key features”:

- the right of prospectors to enter lands containing Crown-owned minerals to undertake mineral exploration;
- the right of prospectors to acquire mineral exploration rights by properly staking a claim and having it recorded with the mining recorder;
- the exclusive right of the claim holder to carry out further exploration within the area covered by the claim;

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\(^{22}\) *Mining Act*, RSO 1990, c M.14, as amended by the *Mining Amendment Act*, SO 2009, c 21.

\(^{23}\) See note 125 *infra* and accompanying text (the purpose of the amended Act, as set out in s 2, could be interpreted to impose a duty to consult at the staking stage).
the right of the claim holder to obtain a mining lease—the tenure instrument required to undertake mineral production—provided proper procedures and requirements have been complied with.\textsuperscript{24}

Thus, under the Act, a person holding a prospector’s licence\textsuperscript{25} had the right to stake a mining claim by physically demarcating an area of Crown lands and other lands where “the mines, minerals or mining rights … have been reserved by the Crown,”\textsuperscript{26} and then recording the claim within a prescribed period.\textsuperscript{27} A recorded claim gave the licensee the exclusive right to explore the claim area for minerals and to transfer the claim subject to certain restrictions.\textsuperscript{28} The claim holder was entitled to a renewable\textsuperscript{29} twenty-one year mining lease upon payment of the first year’s rent.\textsuperscript{30} Conspicuously absent from the legislation was any requirement of notice, land-use planning, environmental assessment, or consent before prospecting activities could occur.\textsuperscript{31} In sum, the free-entry system failed utterly to recognize or protect procedural environmental rights that are commonplace in other areas of environmental regulation in Ontario.\textsuperscript{32}

Moreover, mining activities were exempted from Ontario’s \textit{Environmental Assessment Act} which would otherwise provide a mechanism for some public notice and debate of the proposed project.\textsuperscript{33} Although section 140 of the Act allowed the Minister to require a mining company to provide public notice of an advanced exploration project, this power was discretionary. Indeed, even where private property was at issue, participatory rights were minimal. An owner

\begin{itemize}
\item \textit{Mining Act}, supra note 16, s 19(1).
\item Ibid, s 27.
\item Ibid, s 44(1).
\item Ibid, ss 28, 59.
\item Ibid, s 81(6).
\item Ibid, ss 81(1), 81(3).
\item Carter-Whitney & Duncan, supra note 24 at 4.
\item See e.g. \textit{Crown Forest Sustainability Act}, SO 1994, c 25, ss 12 (a person may appeal a decision by the Minister to approve a forest management plan) and 13 (local citizens’ committees to advise the Minister on the preparation and implementation of forest management plans); \textit{Environmental Bill of Rights}, SO 1993, c 28, ss 38(1) (right to seek leave to appeal a decision on an instrument, but note that there is no mention of the “Environmental Review Tribunal”) and 61(1) (application for review to the Environmental Commissioner).
\item The \textit{Environmental Assessment Act}, RSO 1990, c E.18, provides for a tiered system of review depending upon the potential seriousness of a given project’s environmental impacts. (ss 6.3 (public notice of submission), 6.4 (public inspection of environmental assessment), 7(1) (ministry review of environmental assessment – takes into account public comments), 7.2 (public inspection of Ministry Review)). For the most harmful (or potentially harmful) activities, the Act provides for full public hearings. (ss 7.2(3) (persons can request that Minister refer the application to the Tribunal for a hearing), s 19(1) (parties to the hearing include person making request of Minister in s 7.2(3)), 19(2) (Tribunal shall give notice of hearing to the public); note, however, that under s 20 (Tribunal may render a decision without a hearing) hearings are not necessarily based on “seriousness” because the Minister must refer matters to the Tribunal upon request unless the matter is vexatious, unnecessary etc., as per s 9.3(2))
\end{itemize}
of surface rights only was not statutorily entitled to notice before a prospector could enter the land to stake a claim; once a claim had been staked, the prospector had to provide one day’s notice to the surface rights holder that assessment work was to begin.  

The four characterizing features of a free-entry system, described above, remain largely intact under the updated legislation, with a few significant modifications. Although the amended Act has provided for some increased transparency and related participatory rights, opportunities for public participation in the early stages of the process are limited or uncertain. There is therefore real concern that in many cases, “the train will have left the station” by the time participation rights become operative. With respect to Aboriginal peoples specifically, the Act has been amended to require that all mining-related activities be conducted consistent with the Province’s legal obligations under s. 35 of the Constitution, including the duty to consult with Aboriginal peoples who have actual or potential interests in the land in question. In particular, the new legislation sets out consultation duties at various stages in the mining process (e.g. staking a claim, exploration and mine development) and provides for a dispute resolution process to address conflicts that emerge out of the consultation process. With the exception of certain situations in the Far North, however, there is no statutory duty to consult at the staking stage. Moreover, although the amendments provide increased recognition for the participatory rights of aboriginal communities, the legislation fails to provide for joint decision-making or revenue-sharing, and, as discussed in more detail in section 6, does not require the consent of Aboriginal peoples to mining activities in their territories.

Specific procedures for Aboriginal consultation, as well as other public participation measures, may be implemented by virtue of the Act’s expanded regulation-making powers. The Ontario Ministry of Northern Development, Mines and Forestry has indicated that it is taking a “phased approach in implementing regulations” under the Act and anticipates that some of these regulations will be introduced in early 2011. To the extent that the real impact of Ontario’s new mining legislation has yet to be decided, it would be useful for decision-makers to have regard to international human rights norms in fleshing out the details.

34 Mining Act, supra note 16, s 78. Carter-Whitney & Duncan, supra note 24 at 27.
35 See e.g. Mining Act, supra note 22, ss 7(4) (records, abstracts and maps of all mining claims and applications shall be available for public inspection), 35(4.2) (order withdrawing lands from mining shall be made available for public inspection), 46.1 (licensee shall give confirmation of staking of mining claim to surface rights holder within 60 days of application to record mining claim), 78.3 (issuance of exploration permit requiring consideration of Aboriginal consultation and arrangements with surface rights holders), 139.2 (approval for rehabilitation of mine hazard requiring consideration of consultation with affected Aboriginal communities), 140 (advanced exploration requiring Aboriginal consultation and public notice), 141 (mine production requiring Aboriginal consultation), 170.1 (Minister may appoint persons to preside over Aboriginal dispute resolution process).
36 See e.g. ibid, ss 28 (allowing for staking of mining claims with no provision for public participation at this stage), 78.1-78.5 (impose a requirement of exploration plans and permits, the details of which will be prescribed by regulation. Such plans may or may not provide for public participation at this stage).
37 Mining Act, supra note 22, ss 78.2, 78.3, 140 (consultation), 170.1 (dispute resolution mechanism).
38 Email from Leigh Boynton, Ontario Ministry of Northern Development, Mines and Forestry (5 August 2010). See also Ministry of Northern Development, Mines and Forestry, “Modernizing Ontario’s Mining Act” (2009), online: <http://www.mndmf.gov.on.ca/mines/mining_act_e.asp> (setting out a proposed schedule for the introduction of various regulations under the revised Mining Act).
4. THE RIGHT TO PARTICIPATION IN ENVIRONMENTAL DECISION-MAKING

International human rights law has long recognized that individuals have the right to participate in decisions touching on their own fundamental interests. There exist various formulations of the right to participation. In its very basic form, it captures the entitlement of citizens to exercise agency in the making of decisions that affect them. In the environmental arena specifically, human rights scholars recognize a range of “procedural environmental rights,” including access to environmental information, meaningful participation in environmental decision-making, and access to legal redress for environmental wrongs.

The right of affected citizens to participate in environmentally significant decision-making is reflected in a broad range of international law instruments. Principle 10 of the *Rio Declaration on Environment and Development*[^41], for example, provides as follows:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

*Agenda 21*, a document outlining the action plan of the United Nations, similarly recognizes that “one of the fundamental prerequisites for the achievement of Sustainable Development is broad public participation in decision-making.”[^45] At the 1992 United Nations Conference on Environment and Development, at least 178 countries adopted both *Agenda 21* and the *Rio Declaration*; this broad-based endorsement may constitute a sufficiently generalized state prac-


tice to suggest the emergence of a new rule of customary international law. The international community has gone beyond soft law in its recognition of procedural environmental rights, enshrining this category of environmental interests in a number of binding conventions.

In Europe, procedural environmental rights are included in the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters ("the Aarhus Convention"). The Aarhus Convention recognizes the right to promptly receive environmental information held by a public body (and the concomitant state duty to actively disseminate environmental information), the right to meaningfully participate in environmental decision-making (including notification, information, and an opportunity to comment on matters of environmental significance), as well as the right to challenge environmental decisions on procedural or substantive grounds before courts or quasi-judicial bodies. Complainants may bring violations of the Convention before the Aarhus Convention Compliance Committee—the first environmental treaty commission established on a human rights model.

Similarly, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context provides, in Paragraph 8 of Article 3, that the Parties must:

- ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

Forty-four countries have thus far ratified or acceded to the Espoo Convention.

Although Canada is not a party to the Aarhus Convention, as a member of the United Nations Economic Commission for Europe, it has ratified the Espoo Convention. Further, if the

45 See also World Charter for Nature, GA Res 37/7, UN GAOR, 37th Sess, Supp No 51, UN Doc A/RES/37/7, Preamble, paras 3(a), 23 ("All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.").


47 Aarhus Convention, ibid, art 4.

48 Ibid, art 5.

49 Ibid, arts 6, 7, 8.

50 Ibid, art 9.


right to environmental participation has indeed emerged as a principle of customary international law, then this principle is automatically incorporated into Canadian common law. At the domestic level, the right to participate in environmental decision-making is a fundamental premise in environmental regulation reflected in a web of provincial and federal environmental assessment statutes, several provincial/territorial environmental bills of rights, the federal Auditor General Act (allowing for public petitions to the Commissioner for the Environment and Sustainable Development), as well as numerous procedural provisions in substantive environmental statutes. The right to participate in environmental decision-making is further supported by freedom of information legislation at the federal level and in all provinces and

54 See R v Hape, 2007 SCC 26 at para 39, [2007] SCR 292 (“...the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary see also Bouzari v Islamic Republic of Iran (2004), 71 OR (3d) 675 (Ont CA) at para 65 (“customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation”) (leave to appeal refused, [2004] SCCA No 410; Jose Pereira E Hijos, SA v Canada (AG), [1997] 2 FC 84, [1996] FCJ No 1669 (“accepted principles of customary international law are recognized and are applied in Canadian courts, as part of the domestic law unless...they are in conflict with domestic law.”).

55 See e.g. public information and participation rights in environmental assessment provisions: Environmental Protection Act, SN, 2002 c E-14.2 (Newfoundland), s 58; NB Reg 87-83 (under the Clean Environment Act, SNB c C-6 (New Brunswick) ss 7, 9, 10, 13); Environmental Assessment Regulations, NS Reg 26/95 (as amended) (under the Environment Act, SNS 1994-95, c 1) (Nova Scotia), s 10; Regulation respecting environmental impact assessment and review (under the Environment Quality Act, RSQ c Q-2); Environmental Assessment Act, RSO 1990, c E.18 (Ontario), ss 5.1, 6, 6.3, 6.4 c E. 18; Environment Act CCSM c E125 (Manitoba), ss 2(2), 7, 10, 11; Environmental Assessment Act c E-10.1 SS 1979-80, as amended, ss 10-12; Environmental Protection and Enhancement Act, RSA 2000, c E-12, (Alberta) ss 12, 35, 40, 44, 52, 56; Environmental Assessment Act, SBC 2002 c 43, ss 11, 14-18, 52-55. For a North American overview of access to environmental information regimes, see Commission for Environmental Cooperation, Public Access to Government-Held Information, (Montreal: Éditions Yvon Blais, 2003). Note that recent amendments to the Canadian Environmental Assessment Act have substantially undermined federal environmental assessment requirements, likely bringing the federal regime out of compliance with international norms; see Jobs and Economic Growth Act, SC 2010, c 12. See also Adam Driezdic and Laura Bowman, “Federal Budget Bill hides major changes in Environmental Assessment Law” (2010), online: Environmental Law Centre <http://environmentallawcentre.wordpress.com/2010/04/09/now-you-ceaa-it-now-you-dont/>.

56 Environmental Bill of Rights, supra note 32; Environmental Rights Act, RSNWT 1988, c 83 (Supp).

57 Auditor General Act, RSC 1985, c A-17, s 22.

58 See e.g. Airborne Contaminant Discharge Monitoring and Reporting Regulation, O Reg 127/01. This regulation requires reporting companies to make their data publicly available via the Web or inspection at their corporate offices. See also O Reg 459/00, Drinking Water Protection Regulation, which requires owners of water treatment and distribution systems to disclose inter alia lab analyses of water quality. See also Class Environmental Assessment by the Ministry of Natural Resources for Timber Management on Crown Lands in Ontario, 1994, as amended by Declaration Order MNR-71 (2003), which contains a detailed and comprehensive public consultation process for forest management planning in Ontario, including ongoing duties of public disclosure.
territories. Thus, Canada has, to a large extent, recognized and implemented environmental participatory rights at the domestic level.

Mining legislation, however, lags behind other statutes in terms of acknowledging and implementing environmental participation rights. In Ontario, for example, most permitting instruments required to undertake mining activities are not designated under Ontario’s Environmental Bill of Rights (EBR). The EBR provides for listing of designated instruments on a web-paged Environmental Registry which notifies the public when a permit has been issued and allows for public submissions and, in some circumstances, a right of appeal to the Environmental Review Tribunal. Although certain permits that are necessary during active mining (for example, permits to take water) are designated under the EBR, these occur late in the process, precluding early public input into the crucial decision of when, whether and how mining activities (including prospecting and staking) should take place on a given piece of land.

This question of how and whether resource activities should be carried out implicates the basic concept of environmental self-determination. Should communities in general, and Aboriginal communities in particular, have the capacity to decide their own environmental fates? A broad exposition of the concept of environmental self-determination as an independent human right is beyond the scope of this article. The idea that communities should have some control over their own environments and natural resources is, however, a fundamental driver behind the participation rights discussed herein. Moreover, the notions of environmental self-determination (and self-determination writ large) are reflected in the emerging international law doctrine of free, prior and informed consent.

5. THE RIGHT OF FREE PRIOR AND INFORMED CONSENT AND THE DUTY TO CONSULT AT INTERNATIONAL LAW

A significant amount of resource extraction both globally and in Canada occurs on the traditional lands of indigenous peoples and these groups have generally been excluded from participating in government decision-making. The right of free, prior and informed consent (FPIC) is an international legal principle that was developed in response to the serious destructive impacts that international and domestic development projects have had on indigenous popu-


lations, their culture, traditions, spiritual practices, and their capacity to sustain themselves.\textsuperscript{62}

This includes resource extraction, as well as the impacts of laws, administrative regimes and policies of states on indigenous peoples.

The right of FPIC forms part of the State duty to consult indigenous peoples where proposed activities may affect these communities. Anaya is of the opinion that as a result of this emerging international principle, States now have an obligation to consult indigenous peoples in such circumstances as a matter of customary international law. However, the scope and content of this duty remain unclear, including questions such as whether, and if so, in what circumstances, indigenous communities have the right to refuse consent to and consequently prevent State activity on their traditional lands.\textsuperscript{63}

The UN Working Group on Indigenous Populations has defined the substantive and procedural content of the right of FPIC as follows:

\begin{center}
... the right of free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources - a complex of inextricably related and interdependent rights encapsulated in the right to self-determination, to their lands, territories and resources, where applicable, from their treaty-based relationships, and their legitimate authority to require that third parties enter into an equal and respectful relationships [sic] with them based on the principle of informed consent. Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.\textsuperscript{64}
\end{center}

Thus, indigenous populations are entitled to be fully informed about the nature and scope a particular project or activity that may affect them and to have this information provided to them in a culturally appropriate manner that will allow them to make informed decisions.\textsuperscript{65}

Commentators have also argued that the right to FPIC includes the right of indigenous peoples to say “no” to a particular project or to require certain conditions to be fulfilled before consent is granted.\textsuperscript{66}


\textsuperscript{66} \textit{Ibid.}
FPIC is recognized in the legally binding International Labour Organisation’s (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (1989)\(^{67}\) and other international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)\(^{68}\) and the OAS Draft American Declaration on the Rights of Indigenous Peoples.\(^{69}\) Both the UNDRIP and the OAS Draft Declaration link the principle of FPIC to projects involving resource extraction. Under Article 19 of the UNDRIP, States are required “to 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.” Article 32 of the UNDRIP states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.\(^{70}\)

Furthermore, this right, as an aspect of the duty to consult, has been recognized in decisions and comments of international human rights tribunals and bodies.\(^{71}\) Both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights

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\(^{68}\) *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 2007, 61st Sess, UN Doc A/RES/61/295 (2007). The Declaration was adopted by 144 votes with 4 votes against (Australia, Canada, New Zealand and the US) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). For a discussion of Canada’s position, see section 6 below and accompanying notes [UNDRIP].


\(^{70}\) Art XXIV of the Draft American Declaration contains language similar in substance to Article 32 of the UNDRIP, *ibid.*

(IACtHR) have found a State obligation to “obtain the consent of indigenous peoples when contemplating actions affecting indigenous property rights, upon finding such rights to exist on the basis of traditional land tenure.” The content of the duty to consult and the right of FPIC have been considered in a range of cases before both these bodies.

Thus, for example, in the *Maya Indigenous Communities and their Members* case, the IACHR reiterated the requirements of FPIC that emerge from the right to property protected under the *American Declaration of the Rights and Duties of Man*:

As the Commission has previously noted, Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission’s view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.

Similarly, decisions of the IACtHR have found that the right of indigenous peoples to consultation and, in certain situations, to actual FPIC, is grounded in the right to property. Under Article 21 of the *American Convention on Human Rights*, indigenous peoples may own and enjoy the use of their traditional territories. The Court has held that this right extends to the natural resources on and under such territory which are necessary for the physical and cultural survival of such peoples. While this right to property is not absolute, as a matter of international human rights law, any limitations on the rights of indigenous peoples to their traditional...

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72 Anaya, “Participatory Rights,” *ibid* at 13, referring to *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits and Reparations), Inter-Am Ct HR (Ser C) No 79 (2001); *Mary and Carrie Dann v U.S.*, Case no 11.140, Report No 75/02, Inter-Am CHR para 130, OEA/Ser.L/V/II.117, doc.1 rev.1 (2003).

73 For an excellent discussion of earlier decisions on the duty to consult, see *ibid* at 13-16.


76 *American Convention*, supra note 39.

77 *Indigenous Community of Yakye Axa v Paraguay* (Merits, Reparations and Costs), Judgment of 17 June 2005 Series C No 125 IACHR 6 at para 137 [*Indigenous Community Yakye Axa*]. See also *The Indigenous Community of Saaohoyamawa v Paraguay* (Merits, Reparations and Costs), Judgment of 29 March 2006, Series C No 146 IACHR 2 at para 118. The right of States to sovereignty over natural resources is not absolute. States must, inter alia, “respect the rights and interests of indigenous peoples’, as well as a duty to satisfy other conditions of international law.” See Perrault et al, *infra* note 87 at 494.
lands and territories right must be: “a) … established by law; b) … necessary; c) … proportional, and d) their purpose must be to attain a legitimate objective in a democratic society.”78

The scope of the duty to consult, including the right of FPIC, was recently considered by the Court in the Case of the Saramaka People v. Suriname. In that case, members of the Saramaka people, a tribal community from the Upper Suriname River region, made allegations against Suriname regarding the State’s issuance of logging and mining concessions in Saramaka territory. The Saramaka people alleged that Suriname’s granting of concessions to third parties for exploration and extraction of natural resources, without the full and effective consultation of the Saramaka people, violated their right to the use and enjoyment of communal property as guaranteed by Article 21. The IACtHR laid out certain safeguards for any such restriction on the property rights of indigenous peoples. These include: effective consultation on any proposed use of indigenous lands with the indigenous community in a manner respectful of their culture and traditions; a guarantee of reasonable benefit sharing; and a requirement to conduct independent environmental and social impact assessments, under State supervision prior to issuing a licence or concession.79 The Court went on to elaborate the content of the state duty to consult and the circumstances in which the FPIC of an indigenous community would be required:

This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the Saramaka people’s traditional methods of decision-making.80

Moreover, the additional obligation to obtain the FPIC of indigenous peoples is required in situations where “large-scale development or investment projects … would have a major impact within [an indigenous people’s] territory.”81

An increasing number of States now recognize the right of FPIC in some form in their domestic law. For example, the Philippines, Malaysia, Venezuela, Peru, Greenland and certain States in Australia have legislation pertaining to the free, prior and informed consent of indig-

78 Indigenous Community Yakye Axa, ibid at para 144.
79 Case of the Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs), Judgment of 28 November 2007, Series C No 172 IACHR 5 at para129.
80 Ibid at para 133.
81 Ibid at para 134.
enous peoples for “all activities affecting their lands and territories.”82 Bolivia has constitutionally entrenched the UNDRIP.83 New Zealand mining law provides indigenous peoples with a right to veto mining activities on Maori land.84 In Canada, the right has been incorporated into Yukon provincial legislation relating to the extractive industry, “the Nunavut Final Agreement (1993) and certain political agreements such as the Kaska-Yukon Government Bilateral Agreement (2003).”85

Despite the increasing recognition of the right of FPIC both internationally and domestically, it would be difficult to show that there exists sufficiently widespread and consistent state practice coupled with opinio juris in order to assert that a general right of FPIC (requiring actual consent in all cases) is currently entrenched as a rule of customary international law.86 There are some limited circumstances in which free prior and informed consent of indigenous peoples is clearly required by international law. These include: proposals to remove indigenous communities from their lands and territories;87 where the storage and disposal of hazardous waste on indigenous territory is being contemplated;88 and cases where large-scale projects may have a significant impact within indigenous territory.89 In other situations, both international human rights law and domestic jurisprudence from various countries suggest that the right to FPIC does not give indigenous peoples a right to veto investment, development, or extractive projects on their traditional territory. Recent cases in Australia and Canada, for example, have found that the denial of consent will not necessarily result in the termination of the project in

82 UNPFII Paper, supra note 62 at para 23. See also Viviane Weitzner, “Bucking the Wild West – Making Free, Prior and Informed Consent Work” (Speaking Notes delivered at the Free, Prior and Informed Consent Panel, Prospector and Developer’s Association of Canada Annual Convention, 3 March 2009) at 1, online: North-South Institute <http://www.nsiins.ca>.


85 Weitzner, supra note 82 at 2.


88 Perrault et al, ibid at 491. UNDRIP, supra note 87, art 29 (2): “States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.”

89 Saramaka, supra note 79 at para 134.
question. Rather, such peoples “are entitled to say ‘no’ and to have the Tribunal give considerable weight to their view about the use of the land in the context of all the circumstances.”

From the above consideration of international instruments as well as the jurisprudence of, inter alia, the Inter-American human rights bodies, one can conclude that, although actual consent of indigenous peoples is currently only required by international law in a few situations, where development, investment or extractive activity will compromise the property rights of indigenous peoples, there is an emerging obligation on States to seek the actual consent of the affected community. Furthermore, as Anaya notes, where the proposed activity has an indirect but important effect on such rights,

… the state’s consultations with indigenous peoples must at least have the objective of achieving consent. If consent is not achieved, there is a strong presumption that the project should not go forward. If it proceeds, the state bears a heavy burden of justification to ensure the indigenous peoples share in the benefits of the project, and must take measures to mitigate its negative effects. When property rights are attenuated or not involved, consultations should still have the objective of achieving agreement. And, if consent is not achieved the state must show that indigenous concerns were heard and accommodated, though without the heavy burden of mitigation ….

6. FPIC, THE DUTY TO CONSULT AND CANADIAN LAW

As a member of the OAS, Canada is party to the American Declaration of the Rights and Duties of Man, and bound by the Statute and Regulations of the IACHR. It has an obligation, therefore, to bring its laws into compliance with the Declaration as interpreted by the IACHR. The Canadian Parliament has endorsed the UNDRIP. Until recently in international fora, the government of Canada had vociferously maintained its opposition to the Declaration both

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90 Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd., [2009] NNTTA 49 at para 215. The tribunal stated that “the interests, proposals, opinions and wishes of the native title party in relation to the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest in the Project proceeding[;]” (para 216) and as such determined that the grant of the mining lease “must not be done” (para 218). See also Tsilhqot’in Nation v British Columbia, 2007 BCSC 1700, BCJ No 2465, in which the court found that the consultation had not met the standard of consultation required by the Supreme Court of Canada in Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73, [2004] 3 SCR 511 [Haida]. While the BC government had engaged in consultation, that “consultation did not acknowledge Tsilhqot’in Aboriginal rights [e.g. the right to hunt, trap and trade] and ‘could not therefore’ and did not justify the infringements of those rights” (para 1294). See also the discussion of the duty to consult in Canadian law, infra, sec 6.

91 See Anaya, “Participatory Rights,” supra note 63 at 17.

92 Ibid.

93 American Declaration, supra note 74.


95 See House of Commons Debates, 39th Parl, 2nd Sess, No 074 (7 April 2008) at 4561 (Irene Mathyssen) and House of Commons Debates, 39th Parl, 2nd Sess no 074 (8 April 2008) at 4655 to 4657 (Hon Peter Milliken).
prior to and after its adoption by the UN General Assembly in 2007. In November 2010, the government finally endorsed the UNDRIP. In its statement of support, however, the government noted its understanding that the UNDRIP has no legal effect in Canada and does not represent customary international law. Yet, although the UNDRIP is not a legally binding document, to the extent that its provisions reflect the norms in international human rights treaties to which Canada is party or which have attained sufficiently widespread state practice accompanied by opinio juris, Canada will be bound by those obligations. As discussed above the principle of FPIC has not yet attained the status of customary international law except in a few circumstances. These include cases where large-scale projects may have a significant impact within indigenous territory. Therefore, to the extent that a mining project would fall within this definition, the free prior and informed consent of an affected aboriginal community in Canada would be required.

Canadian law generally does not provide Aboriginal peoples with a right to refuse resource extraction and other activity on traditional lands even where their rights or title to such lands have been established. Aboriginal participation in mining decision-making is protected by

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98 Ibid.

99 The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, notes that to the extent that the “Declaration relates to already existing human rights obligations of States, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms, [it] can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law.” Moreover, the UNDRIP represents the most important articulation of “the widely shared understanding about the rights of indigenous peoples that has been building over decades on a foundation of previously existing sources of international human rights law”. James Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN HRCOR, 9th Sess, UN Doc A/HRC/9/9, (2008) at paras 41 and 18 respectively. The widespread support for UNDRIP is reflected in the overwhelming majority of votes in favour of adopting the Declaration (see supra note 68).
s. 35 of the Constitution Act.\textsuperscript{100} The courts have interpreted s. 35 to require the government (both federal and provincial) to consult with aboriginal peoples before authorizing activity which would have an adverse impact on lands or resources where aboriginal title to, or rights associated with, the land or resources remain unresolved,\textsuperscript{101} or where such actions have implications for “rights dealt with in treaties.”\textsuperscript{102} Where modern land claims treaties are concerned, the Crown cannot contract out of this duty, which forms “part of the essential legal framework within which the treaty is to be interpreted and performed.”\textsuperscript{103} This duty emerges from the government’s obligation to conduct itself honourably in its dealings with aboriginal peoples and to reconcile “the pre-existence of aboriginal societies with the sovereignty of the Crown.”\textsuperscript{104} The duty to consult and accommodate is linked to aboriginal or treaty rights and does not exist independent of such rights.\textsuperscript{105} It arises where the Crown has constructive or actual knowledge of the existence of such right or title.\textsuperscript{106} This duty “is not confined to decisions or conduct which have an immediate impact on lands and resources. … [But also] extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights.”\textsuperscript{107}

\begin{thebibliography}{99}
\bibitem{CA} Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
\bibitem{HAIDA} Haida, supra note 90, paras 20ff.
\bibitem{MULLAN} David Mullan, “The Duty to Consult Aboriginal Peoples – The Canadian Example” (2009) 22 CJALP 107 at 111. In Haida, the Supreme Court determined that the duty to consult is “part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution” (Haida, ibid at para 32).
\bibitem{BECKMAN} Beckman v Little Salmon / Carmacks First Nation, 2010 SCC 53 at para 69 [Beckman].
\bibitem{DELGAMUUK} Delgamuukw v British Columbia, [1997] 3 SCR 1010 at para 186 [Delgamuukw]. See also Thomas Isaac & Anthony Knox, “Canadian Aboriginal Law: Creating Certainty in Resource Development” (2004) 53 UNBLJ 3 at 13-14 (where they suggest that the duty to consult also has its source in the procedural and substantive requirements of administrative law and the fiduciary duty of the Crown “to consult and consider the views of its aboriginal beneficiaries in circumstances in which it can be shown that such fiduciary relationship exists”) [Isaac & Knox].
\bibitem{ISACC Knox} Isaac & Knox, ibid at 16. Aboriginal rights are collective rights and are rooted in a people’s occupation and use of land territory and relate to their cultural traditions and practices, such as hunting and fishing rights, for example. “Aboriginal title’ is (a) a sub-category of aboriginal rights, (b) a right to the land itself, and (c) the special legal interest that some aboriginal people may possess in specific lands not covered by treaties or otherwise extinguished. Aboriginal title is an encumbrance on the Crown’s underlying title to land. ‘Treaty rights’ are those rights that are contained in written agreements … between the Crown and aboriginal people.” These rights can relate to hunting, fishing and trapping in specified territories… but do not contemplate any cession of lands. Other [treaties cede lands to the Crown in return for certain rights] such as hunting, fishing and trapping, and the reservation of lands to establish Indian reserves. Modern treaties or ‘land claim agreements’ have been concluded during the last twenty-five years in areas not formally subject to one of the older treaties. … [These agreements] typically provide for some form of cession of aboriginal rights and title or other type of certainty in return for defined rights that include hunting, fishing, and trapping, co-management of resource areas, financial components, land use and regulatory authorities and settlement land, among others. (Ibid at 9-10)
\bibitem{HALFWAY} Haida, supra note 90 at para 35, citing Halfway River First Nation v British Columbia (Ministry of Forests), [1997] 4 CNLR 45 at 71.
\bibitem{RIO} Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43, 325 DLR (4th) 1 at para 44. It should be noted that the Court did not make a determination on whether government conduct that triggers the duty to protect “includes legislative action” (ibid).
\end{thebibliography}
The scope of this duty was elaborated by the Supreme Court of Canada (SCC) in *Delgamuukw v. B.C.*:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.\(^{108}\)

This understanding of the parameters of the duty to consult has been further developed by the SCC in *Haida Nation v. B.C.*, in which the Court found that the duty of consultation and accommodation arises even where an aboriginal right has not been proven.\(^{109}\) The Court determined that the scope of consultation and accommodation is to be “proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.”\(^{110}\) In *Beckman v Little Salmon/Carmacks*, the SCC held that when the rights in question are dealt with within a modern land claim treaty and that treaty deals in its provisions with consultation, “the scope of the duty to consult will be shaped by its provisions.”\(^{111}\)

The duty requires good faith dealing on both sides. It does not impose a duty on the Crown to agree with aboriginal positions, but to engage in “a meaningful consultation.” Aboriginal claimants may not frustrate the process or take unreasonable positions in situations where agreement cannot be reached.\(^{112}\) Meaningful consultation in certain circumstances gives rise to the duty to accommodate aboriginal concerns by “taking steps to avoid irreparable harm or to minimize the effects of the infringement, pending final resolution of the underlying claim,”\(^{113}\) or by trying to reach a negotiated solution.\(^{114}\) Significantly, the Court’s interpretation of the duty to engage in meaningful consultation, even where an aboriginal right or title has been established, does not require the consent of the aboriginal group except in rare cases. The SCC reasoned that:

This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.\(^{115}\)

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\(^{108}\) *Delgamuukw*, supra note 104 at para 168.

\(^{109}\) *Haida*, supra note 90 at paras 31-34. See Isaac & Knox, supra note 104 at 17 (who note: “No aboriginal group has yet judicially proven aboriginal title and they have proven few aboriginal rights”).

\(^{110}\) *Haida*, ibid at para 39.

\(^{111}\) *Beckman*, supra note 103, at para 67.

\(^{112}\) *Haida*, supra note 90 at para 42.

\(^{113}\) Ibid at para 47.

\(^{114}\) Isaac & Knox, supra note 104 at 16.

\(^{115}\) *Haida*, supra note 90 at para 48.
This understanding of consent falls short of the emerging right of FPIC and the obligation of consultation as developed in the jurisprudence of the IACHR and the IACtHR which, as discussed in the previous section, require much more than a balancing of interests.

In situations of mineral extraction under the pre-2009 Ontario Mining Act, consultation often had to be enforced through the courts. While aboriginal concerns would be aired and heard through this process, the mining activity, such as staking, exploration or mine development, would still be allowed to continue, albeit potentially with certain required accommodations. For example, Platinex Inc v Kitchenumaykoosib Inninuwug First Nation concerned proposed mining exploration on the KI Nation’s traditional lands, which were subject to a Treaty Land Entitlement Claim. In that case, the motions judge initially awarded an interim injunction against the mining exploration company, Platinex Inc., where there had been a clear failure on the part of the Crown and the company to engage in meaningful consultation with the KI Nation. However, the injunction was conditional on, inter alia, the KI Nation establishing a consultation committee with the authority to negotiate with the Province and Platinex, “with the objective of developing an agreement to allow Platinex to conduct its two-phase drilling project [although] not necessarily on land that may form part of KI’s Treaty Land Entitlement Claim” [emphasis added].

When the parties failed to reach an agreement, the company made another application for an injunction to end the blockade. In enjoining the protesters, the court noted that, since aboriginal title and interest had been ceded (in Treaty No. 9, 1906), only the right to consultation remained. In the court’s view, the consultation had been sufficient to satisfy the s. 35 obligation. While recognizing the cultural and spiritual link of the KI Nation to the land, the court found that there was insufficient evidence to show that the proposed 80 two-inch drill holes would harm the land, the harvesting rights of the community, its culture, or the TLE claim. Since the company would be put out of business if unable to proceed with exploration, and the evidence of the harm to the KI people was found to be inconclusive, the balance of convenience tipped in favour of Platinex.

The KI Nation members continued their protest and were eventually found to be in contempt of court, arrested and sentenced to six months incarceration.

While the courts may recognize the perspective of aboriginal concerns with mining activity, it is clear that the private rights created under the pre-2009 Mining Act, override aboriginal concerns. The motions judge noted the court’s understanding of the aboriginal perspective:

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116 See Platinex 2006, supra note 10 at para 139. In that case, the KI Nation was not opposed to mining development on their traditional lands. Rather, they wanted to be partners in any development, to be fully consulted and to participate in decision-making throughout the process. In addition, the KI Nation did not want the project to adversely affect their ongoing land claim. When the company terminated the consultation process in which the Province had played almost no role, KI imposed a moratorium on mining activity. Despite the moratorium, the company sent in a drill team and the KI Nation peacefully protested by partially ploughing the airport strip and blocking access to the road. The parties were unable to reach agreement in the consultation mandated by the court. The KI Nation rejected a proposal for a memorandum of understanding with Platinex which included a commitment to have KI participate in the company and a process to deal with and accommodate impacts of drilling. KI argued that since it did not trust the Province or company, the first step was to develop agreement on a consultation protocol. The court eventually awarded an injunction against the KI Nation members prohibiting them from impeding access of the company to the lands and allowing the company to begin the first phase of exploration.

117 See Platinex I 2007, supra note 10 at paras 157, 162, 169.
Irreparable harm may be caused to KI not only because it may lose a valuable tract of land in the resolution of its TLE Claim, but also, and more importantly, because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss.

It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, the relationship that Aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.\(^{118}\)

The judge went on to state that, while “[a]boriginal rights deserve the full respect of Canadian society and the judicial system,” such rights do not “automatically trump competing rights, whether they be government, corporate or private in nature.”\(^{119}\) Given that the duty to consult does not include the right to refuse consent to a project and thereby prevent the project from going forward (except where aboriginal title or rights are established and even then only in rare cases), one could say that aboriginal rights will only rarely, if ever, trump other competing rights. The rights of corporations, the Crown, and individual private rights will usually prevail, although they may be somewhat limited by required accommodations.\(^{120}\)

As discussed above, Ontario Mining Act (as amended)\(^{121}\) incorporates the duty to consult affected aboriginal communities. Claim holders will now be required to submit an exploration plan and apply for an exploration permit. In both cases, aboriginal consultation may be required to be undertaken if prescribed by the regulations.\(^{122}\) In addition, claim holders may not commence advanced exploration or mine production unless, among other things,


\(^{119}\) Platixen I 2007, ibid at para 171.


\(^{121}\) Mining Act, supra note 22.

\(^{122}\) Ibid, ss 78.2, 78.3.
“Aboriginal consultation has been conducted in accordance with the regulations.” It also provides for a dispute settlement process. The Minister has the power to appoint persons or establish a body to hear disputes that arise under the Act “relating to consultation with Aboriginal communities, Aboriginal or treaty rights or to the assertion of Aboriginal or treaty rights, including disputes that may occur” in relation to the exploration permitting process, advanced exploration or mine production. These amendments represent significant steps forward in terms of reconciling the private rights created under the mining regime with aboriginal rights by creating a statutory participation right in mining decision-making. At the same time, they raise a number of concerns.

First, as noted above, the right to consultation does not appear to arise until the exploration stage of a proposed mining project. Although all new staking will be virtual rather than actual, and will therefore remove any environmental impact, claims can still be staked on aboriginal lands without prior consultation. While not all claims result in exploration and mine development, by staking and recording a claim a licensee acquires powerful rights under the Act in relation to such lands and the mining process is set in motion, giving the claim holder a right to a 21 year mining lease. In the Platinex case, the motions judge, in initially granting KI an injunction, stated: “The objective of the consultation process is to foster negotiated settlements and avoid litigation. For this process to have any real meaning it must occur before any activity begins and not afterwards or at a stage where it is rendered meaningless.” The Act should include at least some level of consultation with affected aboriginal communities at all stages of the mining process.

Second, the criteria for the required consultation is left to be determined in the regulations. As discussed above, there is widespread international support for the UNDRIP and growing state practice in support of the principle of FPIC. In addition, the jurisprudence of the Inter-American Human Rights bodies requires that consultation must, as a minimum, have the goal of achieving consent and where consent is not attained there is a strong presumption that the project should not go forward. In cases where it does, the government must justify this and take steps to both mitigate the impact and ensure that the affected indigenous community shares in the benefits of the project. The development of the Mining Act regulations provides another opportunity for Ontario to meet these emerging international requirements. At a minimum, the regulations should comply with domestic law. The duty to consult under domestic law includes, in certain circumstances, the duty to accommodate. This aspect

123 Ibid, ss 140(1)(c), 141(1)(c).
124 Ibid, s 170.1(1).
125 Ibid, ss 27 and 28.
126 Ibid, s 81(1).
127 Platinex 2006, supra note 10 at para 89.
128 See Mining Act, supra note 22, ss 78.2, 140. At the time of writing, these provisions were not yet in force.
129 Joffe, supra note 83 at paras 16-27.
of the duty to consult is not mentioned in the Act\textsuperscript{130} and therefore should be included in the regulations.

Third, the disputes that have arisen in the courts have shown that the Crown has not always fulfilled its duty to consult in relation to mining activity under the Mining Act.\textsuperscript{131} Until the regulations are introduced it remains unclear whether the amendments to the mining regime will, in practice, improve Crown compliance with its duty to consult and provide for meaningful consultation at the exploration planning and permitting, as well as mine development stages. In particular, it is not clear from the wording of the new consultation provisions whether the obligation to consult with aboriginal communities has been delegated to private parties. Sections 140 and 141, which require among other things that consultation be conducted in accordance with the regulations, do not mention the Crown’s role (apart from the Director’s role in determining whether “appropriate consultation has been carried out”).\textsuperscript{132}

The SCC in Haida clearly states that while “[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development … the ultimate legal responsibility for consultation and accommodation rests with the Crown.”\textsuperscript{133} In Platinex the Court initially found that the Ontario government had failed in its duty to consult with the Ki Nation, having, “abdicated its responsibility and delegated its duty to consult to Platinex.”\textsuperscript{134} At a minimum, the regulations should clarify the role of the Crown consistent with its constitutional obligations.

Fourth, the amended Act now offers some protection for private property surface rights holders from having their property staked. The amendments remove Southern Ontario private property from staking\textsuperscript{135} and residents of Northern Ontario will now have the opportunity to request that their properties be withdrawn from staking.\textsuperscript{136} In addition, the Mining Act removes from staking land “that is located in the Far North, if a community based land use plan has designated the lands for a use inconsistent with mineral exploration and development.”\textsuperscript{137} Companion legislation, the Far North Act 2010 (Bill 191),\textsuperscript{138} requires the Minister of Natural Resources, among other things, to work with First Nations which have indicated an interest in developing a land use plan, to prepare terms of reference,\textsuperscript{139} create a joint planning team, and develop such a plan.\textsuperscript{140} Both First Nations and the Minister must approve the terms


\textsuperscript{131} Platinex 2006, supra note 10 at para 92.

\textsuperscript{132} Mining Act, supra note 22, ss 140, 141. At the time of writing, these provisions were not yet in force.

\textsuperscript{133} Haida, supra note 90 at para 53.

\textsuperscript{134} Platinex 2006, supra note 10 at para 92.

\textsuperscript{135} Mining Act, supra note 22, s 35.1(2) (the Crown however still holds the mining rights, see ss 35.1(3) and 35.1(4)).

\textsuperscript{136} Ibid, s 35.1(8). At the time of writing, this provision had not entered into force.

\textsuperscript{137} Mining Act, supra note 22, s 30(g). At the time of writing, this provision had not entered into force.

\textsuperscript{138} Far North Act, SO 2010 c 18, s 4.

\textsuperscript{139} The terms of reference to guide the designation of land and preparation of the land use plan.

\textsuperscript{140} Far North Act, supra note 138, s 9.
of reference and the land use plan. The legislation also contemplates the establishment of a joint body composed of equal numbers of First Nations persons and government officials. The joint body will make recommendations to the Minister on the Far North land use strategy and policy, and advise the Minister on various matters including “the allocation of funding to support First Nations working with [the government] on … land use planning” and a dispute resolution mechanism.

According to the Ontario Ministry of Natural Resources, the aim of the Act is to provide for the protection of 225,000 square kilometres of boreal landscape as well as for the development of natural resources while giving affected First Nations a “leadership role” in decision-making on such land use through the community-based land use planning process. When fully implemented, the Act will provide for landmark aboriginal participation in decision-making on land use. While this will be an important step towards the entrenchment of the right of FPIC in law, the Act could have gone much further. First Nations in the Far North argue that the Far North Act violates their aboriginal and treaty rights. Following the passing of the legislation in late September 2010, the Nishnawbe Aski Nation’s (NAN) Deputy Grand Chief, Mike Metatawabin, reiterated NAN’s continued opposition to the legislation and stated that the “NAN First Nations and Tribal Councils do not and will not recognize this legislation on our homelands. We will continue to uphold our Aboriginal and Treaty rights and jurisdiction over our land.” Other commentators have noted that the legislation “gives the Minister and Cabinet significant more decision making authority than the First Nations who are actually living on the land and who have government-to-government treaty relationships with the

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141 Ibid.
142 Ibid, ss 7(1), (2), (5) and (6)
143 Ibid, s 7(4).
145 The NAN “represents 49 First Nation Communities with the territory of James Bay Treaty No. 9 and the Ontario portions of Treaty No. 5”, online: Nishnawbe Aski Nation <http://www.nan.on.ca/article/nan-history-116.asp>.
Crown”. For example, Cabinet has the power to override a land use plan where a proposed development is deemed to be in the social and economic interest of Ontario. In addition, existing mining rights are not affected by a land use plan provided they are in good standing on the day before the plan comes into effect. The Act will also prevent mine development on lands where there is no land use plan in place. Yet, in these situations, prospecting, staking, exploration, and the obtention of a mining lease still may go ahead, subject to a decision by the Minister to designate the land in question as an area of provisional protection. Moreover, Cabinet may allow a new mine to be opened on such land, where it is deemed to be in the social and economic interests of the province.

At the time of writing, the Far North Act had not yet entered into force. As noted above, existing mining rights will not be affected. In the meantime, the rush to establish mining claims in this area continues. “Mining claims have more than doubled in the Far North over the last [three] years” along with other development activity. The Environmental Commissioner of Ontario has noted that until the legislation comes into force and land use plans are put in place, it is “possible under the auspices of the Mining Act for a [company] with sufficient resources to ‘plan’ or pre-determine many land uses in the Far North” by staking claims for mines, and rail corridors (as was done by one company), among other things.

In any event, although the Far North Act does allow First Nations a much more significant role in decision-making over activity on their traditional lands than has previously been the case, it will only apply to the Far North. The amended Mining Act contains no provisions to allow aboriginal groups in the near North and Southern Ontario, which do not hold their lands in fee simple, to apply to have their traditional lands withdrawn from staking.

Finally, as with a number of the other provisions discussed above, the specifics of the amended Mining Act’s dispute settlement process have been left to be determined in the regulations. It therefore remains unclear how the mechanism will operate, what qualifications will be required of those appointed to hear disputes, whether there will be an appeal process, and

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149 Ibid, s 14(3). These are mining claims, mining leases, patents or licences of occupation for mining purposes.
150 Ibid, s 12.
151 Ibid, s 12(5)(e). At the request of a First Nation, the Minister has the discretion to make an order designating the land as an area of provisional protection. If the Minister makes such an order, he or she is then required to make an order withdrawing the area from staking (ibid, s 13(1)-(4)).
152 Ibid, s 12(4).
whether bringing a dispute before the body or individual will exclude the jurisdiction of the Courts. In addition, because staking under the amended Act does not require consultation with aboriginal communities and therefore is not included in the jurisdiction of the proposed dispute settlement body, disputes that arise around staking will still have to be resolved in the Courts.

It is not possible to undertake a comprehensive analysis of the new provisions until all the regulations are introduced. The preceding discussion suggests, however, that more radical changes, both to the Ontario mining regime and to the law on the duty to consult, are needed to ensure that Canada is complying with its international human rights obligations by providing for meaningful and effective aboriginal participation in mining decision-making for proposed projects on the traditional territories of aboriginal peoples.

7. THE RIGHT OF PEACEFUL ASSEMBLY AT INTERNATIONAL LAW

In the context of resource extraction, peaceful assembly is another participatory right which plays a fundamental role, not only as a protected means for voicing dissent, but also in underpinning other participatory rights such as environmental rights and the right of aboriginal peoples to FPIC (or, at the very least, to meaningful consultation). Peaceful protest operates to bring important public interest issues to the attention of the government and of the public at large. Such issues include environmental concerns, the encroachment on aboriginal rights, adverse impacts on Aboriginal ways of life, and the need for public participation in decisions surrounding natural resource extraction. The Canadian courts have noted the importance of the right of peaceful assembly in allowing for those without money, power, or access to the media to voice their concerns publicly. In addition, the courts have recognized the public benefit of the protection of peaceful assembly where such concerns are brought to the attention of the government and relief is granted.

The right to peaceful protest (or freedom of assembly) is an internationally recognized human right protected under the Universal Declaration of Human Rights (UDHR), the American Declaration of the Rights and Duties of Man, and a number of international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples Rights (ACHPR). Peaceful protest is considered fundamental to the proper and effective functioning of a democracy.

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155 _Ontario (Attorney General) v Dieleman_ (1994) 20 OR (3d) 229 at para 698, 117 DLR (4th) 449 (Ont Sup Ct – Gen Div) [Dieleman].

156 Ibid.

157 See the UDHR, supra note 39, art 20; _International Covenant on Civil and Political Rights_, 16 December 1966, 999 UNTS 171, art 21, 6 ILM 368 (entered into force 23 March 1976; accession by Canada 19 May 1976) [ICCPR]; _American Declaration_, supra note 74, art XXI, _European Convention_, supra note 39, art 11, the _American Convention_, supra note 39, art 15 and the _African Charter_, supra note 39, art 11.

158 Thus, although in the ICCPR it is not listed as a non-derogable right under art 4(2), the Human Rights Committee notes in its _General Comment No. 29_ that that the limitation provisions in art 21 provide sufficient means to restrict the right of peaceful assembly in times of emergency and that there should be “no derogation from the [Article 21] would be justified by the exigencies of the situation.” See UN Human Rights Committee, _General Comment No. 29: States of Emergency (Article 4)_ , 1950th Mtg, UN Doc CCPR/ C/21/Rev.1/Add.11 (2001) at para 5.
linked to the right to freedom of expression. The European Court of Human Rights has noted that “[t]he protection of opinions and the freedom to express them is one of the objectives of freedom of assembly and association enshrined in Article 11 [of the ECHR].”

Canada has international obligations under the ICCPR and, as noted above, the American Declaration. Article 21 of the ICCPR states:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

As with all human rights duties, State parties have a three-part obligation not only to respect the right to peaceful protest, but also to protect and fulfil this right. Thus, States must not only refrain from breaches, but must take positive steps both to ensure that private actors do not interfere with or violate this right, and to fulfil it. The obligation to protect is an obligation of due diligence. States have a duty to exercise control over, regulate, investigate, and prosecute non-state actors whose acts violate the human rights of individuals subject to their jurisdiction. The obligation to fulfil the right includes the duty to take measures to encourage and allow public demonstrations to take place. Such protection extends to the organization of the protest and to the individuals who participate.

The right of peaceful assembly only protects peaceful demonstrations. The European Court of Human Rights has stated that “freedom to take part in a peaceful assembly … is of such importance that it cannot be restricted in any way … so long as the person concerned does not himself commit any reprehensible act on such occasion.” According to Mowbray, this observation probably refers to the use of violence and other acts that constitute non-peaceful forms of public protest. Joseph et al. note that “[c]ivil disobedience manifested...

159 See Case of United Communist Party of Turkey and Others v Turkey, [1998] I ECHR at para 42, 26 EHRR 121.

160 ICCPR, supra note 157.

161 This obligation to protect the right of peaceful assembly from interference by private parties is confirmed by the travaux préparatoires, see Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2d ed (Arlington, VA: NP Engel, 2005) at 487-488 [Nowak].


164 Nowak, ibid at 483.

165 Ibid at 486.


without force is likely to be protected under [Article 21]." Thus, blockades where force is not used or where the demonstrators do not engage in active opposition are considered peaceful and are therefore protected under the right. The Human Rights Committee (HRC), in its Concluding Observations on Canada's 2005 report to the Committee, noted that the right of peaceful protest should be respected and that “only those committing criminal offences during demonstrations” may be arrested. Even where arrests are lawful, a violation of the right not to be arbitrarily detained may “occur when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by the Covenant,” in particular, among others, the right to peaceful assembly.

Restrictions on the right of peaceful assembly are permitted under Article 21 and, as with certain other ICCPR rights, such restrictions must satisfy a three-part test. Limitations of the right of peaceful assembly must be in “conformity with the law,” “necessary in a democratic society,” and enacted pursuant to a listed aim, namely national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. The European Court of Human Rights has held that restrictions on the right of assembly include “punitive measures – taken not before or during but after a meeting.” The requirement that any such limitation be “in conformity with the law” is broader than the requirement of being “prescribed by law” which is associated with other ICCPR rights. The former allows the imposition of restrictions on the right of peaceful protest “by administrative authorities on the basis of general statutory authorization,” and would likely cover injunctions and other court orders.

The phrase “necessary in a democratic society” requires that the restriction be both necessary for and proportionate to the end it is required to meet. Hence, limitations imposed on freedom of assembly cannot be such as to completely undermine the right. A complete ban of a peaceful assembly or the use of force to break up a demonstration must be measures of last

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169 Nowak, *supra* note 161 at 487 (Nowak points out, however, that these forms of peaceful protest may be restricted in line with the legitimate restriction test set out in the second sentence of Article 21).


171 ICCPR, art 21.


173 See e.g. art 18(3) (Freedom of Religion), art 19 (Freedom of Expression) and art 22 (Freedom of Association).

174 Nowak, *supra* note 161 at 489.


resort after alternative, less restrictive measures have been exhausted. It would seem, therefore, that an injunction prohibiting a peaceful blockade and a contempt order for violation of such an injunction should be measures of last resort.

With respect to the proportionality test, the HRC has noted that, since States have undertaken in Article 2(3) of the ICCPR to provide an effective remedy for a violation of a protected right, “whenever a right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation of his rights.” In addition, according to Nowak, any measures taken must

… correspond to a common, minimum democratic standard. … the criteria of pluralism, tolerance and broadmindedness mentioned by the European Court of Human Rights in the Handside case may be deemed valid as a general standard for democratic societies. This is accompanied by the principle of peoples’ sovereignty, i.e., popular participation in the political decision-making process, and by respect for and active protection of human rights, in particular the requirement of democratic equality.

As noted above, State limitations on the right of peaceful protest must be for one of the listed aims set out in Article 21. For the purposes of this paper, the relevant legitimate aim is the protection of the “rights of others.” This involves a balancing of rights by the State. Joseph et al. note, in relation to freedom of expression, that this

… is a catchall limitation, and is potentially very broad. The HRC has never commented on its outer limits. It is hoped that ‘rights’ refers to other human rights, though not necessarily those in the ICCPR. A human right to freedom of expression should not be subject to qualification by a lesser right, such as a bare municipal legal right.

The requirement that, in the balancing process, a protected human right should prevail over other non-treaty rights is supported by the jurisprudence of the ECtHR. In Chassagnou v France, the Court stated:

Where these ‘rights and freedoms’ are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a ‘democratic society’ … It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect ‘rights and freedoms’ not, as such, enunciated

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177 See Nowak, supra note 161 at 491 (“[t]he principle of proportionality requires that the type and intensity of an interference be absolutely necessary to attain a purpose. The prohibition and forceful breaking up of an assembly may therefore ultima ratio come under consideration only when all milder means have failed” [emphasis in original]).


179 Nowak, supra note 161 at 491.

180 Joseph et al, supra note 168 at 18.41.
therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right.\textsuperscript{181}

Peaceful protest is considered to be fundamental to the proper and effective functioning of a democracy. Thus, Nowak argues, “States are under a stronger obligation to ensure the right [to assembly] with positive measures than with civil rights, which are exclusively exercised for private interests.”\textsuperscript{182}

The right of freedom of expression (of which peaceful assembly is a form), for example, can potentially be limited by laws whose aim is to protect such things as privacy, reputation as well as contempt of court orders where such orders are aimed ensuring “the fair administration of justice.”\textsuperscript{183} In the case of contempt orders which restrict freedom of expression, however, the court must “be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case.”\textsuperscript{184} In addition, although the right to property is not explicitly protected in the ICCPR, the Covenant has been interpreted such that the right of assembly can be limited by the need to protect private property, in the sense that a demonstration may only take place on private property with the consent of the property owner.\textsuperscript{185} It is not clear however, whether other private rights associated with land can legitimately restrict the right of protest where the nature of the property on which the protest takes place is not strictly private. In balancing rights, the HRC has suggested that a key element of the proportionality test is minimum impairment of the right in question.\textsuperscript{186}

The foregoing survey suggests that where domestic laws allow private actors to seek injunctions that may affect the right to peaceful assembly, the State must ensure that the relevant legal procedures provide for adequate consideration of these rights according the international human rights law tests for legitimate restrictions. In addition, where the protesters are indigenous peoples, States must ensure their rights are protected throughout. In the context of natural resource extraction in Canada, it is not clear that the international human rights of the protesters have been adequately protected, be it in the process of awarding injunctions to quell a protest or in the issuance of contempt orders where the protest continues.

\section*{8. THE RIGHT TO PEACEFUL PROTEST IN THE CANADIAN MINING SECTOR}

The right to peacefully demonstrate is protected under section 2(c) of the \textit{Canadian Charter of Rights and Freedoms}.\textsuperscript{187} Canada is obligated under international law not only to respect the

\begin{footnotesize}
\begin{enumerate}
\item Chassagnou v France, No. 25088/94, 28331/95, 28443/95, [1995] III ECHR, 29 EHRR 615 at para 113.
\item Nowak, \textit{supra} note 161 at 481-482.
\item Joseph et al, \textit{supra} note 168 at 18.40.
\item \textit{Sunday Times v UK}, Series A No 30 (1979-80) 2 EHRR 245, 26 April 1979 at para 65 [\textit{Sunday Times}].
\item Nowak, \textit{supra} note 161 at 494.
\item \textit{Canadian Charter of Rights and Freedoms}, s 2(c), Part I of the \textit{Constitution Act, 1982}, being Schedule B to the \textit{Canada Act 1982 (UK)} 1982, c 11 [\textit{Charter}].
\end{enumerate}
\end{footnotesize}
right to peaceful assembly but to take positive steps to both protect and facilitate this right. While international law does not appear to have been directly applied by Canadian courts in their consideration of section 2(c), the domestic test for restricting the right to peaceful protest tracks some of the language of the ICCPR. Thus, the right of peaceful assembly may only be subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Problems arise in situations where injunctions are sought to put an end to public protest. Where the protest takes place on purely public property, the courts have shown a general willingness to tailor injunctions and other means of restricting protest so as to effectively protect the right to peaceful assembly. Where activity takes place on private property, however, or on public lands lawfully closed to the public, or interferes with economic activity, the courts have tended to favour the protection of private property rights over human rights and other public interest concerns. As Heather McLeod-Kilmurray remarks, the case law demonstrates the “readiness with which the courts grant injunctions to quell environmental protest in cases of natural resource exploitation” which is illustrative of the “judicial inclination to protect private property, as well as development goals (of both the private and public sectors), above other interests ….” In the natural resource sector it has become more common for companies to deal with situations of protest by initiating a lawsuit against the protesters, and seeking a pre-trial injunction to suppress public opposition or criticism.

Although it does not appear that the right to freedom of assembly was argued by the First Nations groups in either the Platinex or the Frontenac cases, the granting of injunctions in both cases to put an end to the blockades, the subsequent contempt orders and harsh sentences raise serious concerns regarding the protection of the right of peaceful protest in these types of cases.

The test for injunctive relief as applied by courts in cases concerning resource extraction does not appear to be amenable to adequately assessing whether the injunction—as a restriction on the right of peaceful protest—would satisfy the three-part test required by international human rights law to legitimately limit a protected right. Under international human rights law such a restriction must be in conformity with the law, imposed pursuant to a legitimate aim, as well as necessary and proportionate to the aim of the restriction. The test for injunctive relief used by the majority of Canadian courts was established by the UK House of Lords in

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188 Schabas & Beaulac, supra note 94 at 312.
189 Charter, supra note 187 at s 1. In contrast to art 21 of the ICCPR, section 1 of the Charter does not set out an exhaustive list of legitimate aims for such restrictions. The Oakes test, however, articulates a framework for determining the legitimacy of restrictions of Charter rights. See R v Oakes [1986] 1 SCR 103, 26 DLR (4th) 200. See also Schabas & Beaulac, ibid at 277ff, on the international origins of the Oakes test.
190 See e.g. R v Behrens, [2001] OJ No 245 (Ont CJ) and Dieleman, supra note 165.
192 These are also known as Strategic Lawsuits Against Public Participation, or SLAPPs - see Graham Mayeda, “Protesting Mining in Ontario: Legal Aspects of Resistance by Environmental Groups and First Nations” 2010 6:2 JSDLP 142 at 146 (at note 7), 160-165.
It has been adopted and adapted by the SCC and is laid out in *RJR-Macdonald Inc. v. Canada (Attorney General)*. Applicants seeking interlocutory relief from the court by way of an injunction must satisfy a three-stage test. First, the applicant must show that there is a serious case to be tried. This is a low threshold test in which the motions judge makes a preliminary assessment of the merits of the case and must satisfy himself or herself that the claim is not frivolous or vexatious. The SCC notes that there are two exceptions to the rule that the court should not engage in an extensive assessment of the merits of the case. One exception relevant to the discussion here is where

… the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or refusal is complete and of a kind for which money cannot constitute any worthwhile recompense.

At the second stage of the test the applicant must show that he or she (or it) will suffer irreparable harm, should the injunction not be granted. “‘Irreparable’ refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured ….” The third stage of the test is the “balance of (in)convenience,” in which the court will have to weigh the potential harm to each of the parties and determine which of the parties would endure greater harm should the injunction be granted. The SCC notes in *RJR-MacDonald* that there are a range of factors to be considered at this stage and the determination of which matters should be taken into account will vary with each case. In “constitutional cases, the public interest is a ‘special factor’ that must be considered in assessing where the balance of convenience lies.” Even in private litigation, however, the public interest (as it is interpreted by the motions judge) plays an important role at this stage of the test.

The Canadian courts have held that it is the balance of (in)convenience stage of the test that “will often determine the result in applications involving Charter rights.” Similarly, in injunction applications in private lawsuits, the right to protest or other human rights will be weighed in the determination of the balance of convenience. Yet, the other stages of the test are also crucial in this regard, in particular the determination of what constitutes irreparable harm. In natural resource cases, in their consideration of what constitutes irreparable harm, the courts tend to prioritize harm to private economic activity over other public interest concerns.

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193 McLeod-Kilmurray, supra note 191 at 299-300.
194 Ibid.
195 *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*].
197 *RJR-MacDonald*, Ibid at para 64.
198 Ibid at para 68.
199 Ibid at para 69.
200 McLeod-Kilmurray, supra note 191 at 307-311.
201 *RJR-Macdonald*, supra note 195 at para 85.
including aboriginal rights, environmental concerns, and human rights.\textsuperscript{203} This prioritizing of private economic activity is exemplified in the \textit{Frontenac} and \textit{Platinex} cases.

In \textit{Frontenac}, members of the Ardoch Algonquin First Nation (AAFN), the Shabot Obaadjiwan First Nation (Shabot) as well as non-aboriginal landowners engaged in peaceful protests and eventually a blockade to prevent a prospecting company's uranium exploration program on lands that are currently subject to an Algonquin land claim.\textsuperscript{204} The company initiated $77 million lawsuit against the protestors. It sought, and was granted, a number of injunction orders to quell the protests. The protestors did not comply with the injunction orders and attempts to come to a negotiated agreement between the company, the AAFN, the Shabot and the Crown failed. Contempt proceedings were initiated and eventually, certain members of the Ardoch and Sharbot communities and the Ardoch community itself were found to be in contempt of court. Harsh monetary and custodial sentences were imposed on the community and two of its members.

In considering \textit{Frontenac}'s application for an injunction, Cunningham J. found that the company would suffer irreparable harm if injunctive relief were denied. He stated that “[t]he interference with property rights such as the current blockade and associated trespass … by its very nature, gives rise to irreparable harm … without injunctive relief the plaintiff will be out of business.”\textsuperscript{205} Nowhere in his judgment does Cunningham consider the potential irreparable damage that could be caused by uranium exploration. Nor does he consider the legitimacy of the protest in the context of the dispute as a whole.

In \textit{Platinex}, once consultation between the KI Nation, the Province and the company had taken place, the irreparable harm to the company was found to outweigh the potential harm to the KI Nation. Smith, J. found that:

\begin{quote}
The harm that KI will suffer as a result of the damage to the land itself will relate to a maximum of 80 drill holes, of approximately 2 inches in diameter, in 12,080 square acres of wilderness. I have already commented that the evidence of harm to treaty and harvesting rights, culture, Aboriginal tradition and the community is inconclusive.
\end{quote}

Yet, at an earlier stage of the \textit{Platinex} proceedings the court had decided that granting an injunction to prevent protest and allow the company to proceed with exploration activity would cause irreparable harm to the KI Nation “not only because it may lose a valuable tract of land in the resolution of its TLE Claim, \textit{but also, and more importantly, because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly}

\textsuperscript{203} See e.g. McLeod-Kilmurray, \textit{supra} note 191 at 321.

\textsuperscript{204} The territory in question was subject to claims by the Ardoch Algonquin First Nation (AAFN) and the Shabot. Negotiations regarding Algonquin land in the Ottawa and Mattawa watersheds were initiated in 1991 between Ontario and the Algonquin Golden Lake First Nation (AGLFN). In 1994, the AGLFN and the provincial and federal governments signed an agreement on shared objectives regarding the consultations. In 2006, the negotiations were expanded to include the Shabot and 15 other Algonquin First Nation representatives. The AAFN was not part of these negotiations and has not initiated an independent land claim (see \textit{Frontenac I 2007, supra} note 10 at paras 24-30). For further discussion of the Algonquin land claim, see Mayeda, \textit{supra} note 192 at 148-150.

\textsuperscript{205} \textit{Frontenac 2008, supra} note 10 at para 12.

\textsuperscript{206} \textit{Platinex I 2007, supra} note 10 at para 170.
compensate KI for this loss” [emphasis added]. This prioritizing of private property and private economic rights has an impact on how other rights, such as human rights, will be balanced in the third stage of the test.

The balance of convenience stage of the test does not clearly require a determination of the necessity and proportionality of the injunction for the purposes of determining the legitimacy of the restriction on the right to protest. At this stage, the alleged harm to each party, the rights of each party, and the public interest are weighed. First, from the perspective of international human rights law any balancing between rights should generally favour the protected human right over any lesser civil right. As noted above, however, the right to peaceful protest can be restricted in order to protect private property. Yet, in the Frontenac and Platinex cases, the property rights were mainly “rights of entry” and mining leases on Crown land which was and remains subject to aboriginal rights and title claims. The nature of the property therefore falls into a category that is not purely private and, in fact, has a significant public component. It is arguable that the judge in deciding whether to award injunctive relief should have taken into account the entire context of the dispute, including the human rights of the protesters. Had the right to protest been pleaded or considered in these cases, however, it is likely that the protection of property rights would still have prevailed in the balancing of rights and respective harm to each party. In the Frontenac case, for example, the court treated the mining rights as sacrosanct. Cunningham J. stated: “I cannot imagine any situation where the illegal blockading of access to someone who has a legal right of entry would ever be justified.”

Second, since an injunction can—and in these cases under consideration—did (following contempt proceedings) end the protest, it should be a measure of last resort, after less restrictive measures have been employed. In these two cases, where consultation between the First Nation, the company and the Province was determined to have failed but to have been sufficient, it is not clear that an injunction was the only option for the court. This is particularly true given the reasons for the First Nations protest. In Platinex, the KI Nation wanted to be full partners in any development and to be fully consulted. In Frontenac, the AAFN and the Shabot wanted to prevent uranium mining rather than mining per se on their traditional lands. In commuting the sentences of the protesters in Frontenac, the Court of Appeal affirmed the following:

Where a requested injunction is intended to create a “protest-free zone” for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations. … The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it.

In addition, as a matter of international human rights law, in issuing a contempt order the court must “be satisfied that the interference [with a human right] was necessary having regard

207 Platinex 2006, supra note 10 at para 79.
208 RJR-Macdonald, supra note 195 at para 85.
209 Frontenac 2008, supra note 10 at para 39. See also the discussion of irreparable harm, para 12.
to the facts and circumstances prevailing in the specific case.” In *Frontenac*, the Court of Appeal noted two key background factors that were relevant to the sentencing for contempt: the legality under the Mining Act of the staking and exploration by the company; and that the AAFN and Shabot peoples’ “response, although in contempt of two court orders, [was] grounded, at a minimum, in a respectable interpretation of s. 35 of the Constitution Act, 1982 and several recent decisions of the Supreme Court of Canada.” Under international human rights law these two factors were also relevant to the issuing of the contempt order and should have been carefully considered by the judge.

Moreover, given that the protesters in both cases were ultimately found to be in contempt of court, arrested, and incarcerated, this could constitute a forceful break up of an assembly. Under international human rights law, peaceful civil disobedience is likely protected. Only those committing a criminal offence should be arrested. Although the arrests in these cases were pursuant to a lawful court order, under international human rights law, if the blockades were protected, then the arrests would constitute a violation of the right not to be arbitrarily detained.

Finally, the sentences given to the contemnors would clearly fail the proportionality test. In the first place, they do not take into account the fact that the actions of First Nations groups in continuing their blockades were not directed against the court order, but were rather taken in protest of the mining activity on disputed land. As the Court of Appeal in *Frontenac* observed, the AAFN members’ purpose in continuing their blockade

… was not a ‘no entry’ purpose, whereby non-Algonquins could not set foot on the disputed property. Rather, the purpose was to prevent mining exploration on lands which were, and still are, subject to land claim negotiations with the Governments of Canada and Ontario.

The sentences imposed in both *Frontenac* and *Platinex* involving six months of incarceration (as well as, in *Frontenac*, fines ranging from $10,000 to $25,000), were “considerably more severe than the sentences imposed in other protest/blockade cases.” In reducing these penalties, the Court of Appeal noted that in these types of cases the courts generally impose “nominal fines or

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211 *Sunday Times*, supra note 194.
213 There is a fine line between civil and criminal contempt. In civil contempt proceedings the judge may make a finding that the defendant is in criminal contempt. See the discussion of civil and criminal contempt in *Frontenac 2008 CA*, supra note 10 at paras 34ff. In that case, the defendants were found to be in civil contempt.
214 The blockades in both cases were peaceful, and in the *Platinex* case the evidence did not clearly indicate that there was active opposition to the company.
215 *Frontenac 2008 CA*, supra note 10 at para 53. As Macpherson JA remarked: “In summary, the appellants’ character and circumstances, their actual conduct, and the difficult legal context within which it occurred, should have counted as significant mitigation when sentences were imposed on them.” (*ibid* at para 62). See also, Lambert JA’s dissent in *MacMillan Bloedel Ltd v Brown* [1994] BCJ No 268, 7 WWR 259 (BCCA) at paras 122-127. He notes that, where the contemnors were continuing their protest against the logging of Clayquot Sound, “their acts of criminal contempt of court were not so much deliberate acts of defiance as political acts incidental to political protest.”
216 *Frontenac 2008 CA*, *ibid* at paras 63-64. See *Platinex 2008*, supra note 10 at para 54.
short terms of imprisonment.” Thus, under international human rights law, they were clearly disproportionate to the aim they were seeking to achieve.

It remains to be seen whether the changes to the Ontario Mining Act that require consultation and provide a dispute settlement process will effectively deal with the issues raised by this conflict of private rights, aboriginal rights, and other human rights. Given that the legislation does not, among other things, require consultation with aboriginal communities at the staking stage, provide a right or a process through which aboriginal groups may prevent mining activity on their traditional lands, or ban uranium mining, protests are likely to continue. The proposed dispute settlement process will likely prevent some of these cases from being brought in the courts, at least those dealing with aboriginal consultation. The dispute settlement body will need to ensure that in cases where there has been a public protest by aboriginal communities against mining exploration or mine development, the right to peaceful assembly is appropriately taken into account in the determination the disputes. When disputes are brought in the courts, it is hoped that the direction given by the Ontario Court of Appeal in *Frontenac* will ensure a more careful weighing of the rights of, and harms to, those involved in the injunction proceedings, and that it will push the courts to reconsider their prioritizing of economic harm over all other harm including environmental damage and the compromising of aboriginal rights. At the very least, it may ease the sentences given to protestors who, concerned about the protection of aboriginal rights, the environment, and the manner of natural resource extraction, continue to protest contrary to a court order.

9. CONCLUSION

This paper has sought to assess how both emerging and established international human rights of participation are protected in the Canadian mining sector. As the provincial and territorial governments continue or begin the process of reforming mining laws, they should be mindful of these international human rights obligations. There is particularly a need to ensure public participation in all stages of decision-making on mining activity dealing with environmental impacts. In addition, changes to the mining regimes should ensure that Aboriginal groups are also included in decision-making with respect to proposed mining projects on their traditional lands by giving them significant and enforceable rights. A duty to consult that does not include a right on the part of Aboriginal societies to say “no” to harmful activity on their traditional lands can hardly be considered “meaningful.” Canada’s recent endorsement of, and commitment to implement, the UNDRIP in a manner consistent with Canadian law is a welcome development. The further measure of incorporating of the principle of FPIC into the current provincial and territorial mining regimes would be a significant step towards reconciliation with Canada’s Aboriginal peoples.

Finally, the use of injunctions to suppress public protest needs to be re-examined. The courts have, from time to time, questioned the appropriateness of this equitable remedy as a
means for dealing with public order issues. At the very least, the common law needs further development in order to provide a test for injunctive relief in line with the international human rights law test for the legitimate restriction of the right to peaceful assembly. Incorporating effective public participation into decision-making with respect to mining, would likely reduce the incidence of protest, since the ultimate aim of peaceful protest is to change outcomes. Enfranchising would-be protestors by giving them real input into decisions on land use that affect them is in keeping with domestic and international human rights law and should become a priority in Canadian law and policy.

219 See Everywoman’s Health Centre Society (1988) v Bridges (1990), 54 BCLR (2d) 273 at para 34, 78 DLR (4th) 529 (BC CA) per Southin JA. See also Frontenac 2008 CA, supra note 10, where Macpherson JA refers to the injunction creating a “protest free zone” (at para 48) and further states that “[t]he use of incarceration as the first response to breach of the injunction dramatically marginalizes the significance of aboriginal law and aboriginal rights” (at para 58).