

## Recent Developments on Transboundary Indigenous Consultation Issues

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Consultation with Indigenous peoples is an important part of the legal regime pertinent in the context of choices about development initiatives across the Arctic<sup>1</sup>. Domestic legal rules on Indigenous consultation have developed differently in different Arctic states. One significant contrast is between developments in Canada under a judicially developed “duty to consult” doctrine and developments in the Nordic states guided specifically by their distinctive treaty commitments and also prominently by international law

developments more generally<sup>2</sup>. However, all Arctic states will ultimately be influenced by international norms on consultation, which will increase the role of Indigenous peoples – as well as Northern populations generally – in decision-making on issues affecting the Arctic<sup>3</sup>.

Even for those states more engaged already with international norms, consultation issues have usually been thought of as relating to consultation with Indigenous peoples within the state. However, international norms refer simply to Indigenous peoples, and they do not necessarily distinguish between Indigenous peoples inside or outside a particular state<sup>4</sup>. Two recent developments involving claims to transboundary Indigenous consultation

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<sup>1</sup> See generally Dwight Newman, Michelle Biddulph & Lorelle Binnion, “Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples” (2014) 32 *Boston University International Law Journal* 101.

<sup>2</sup> See Christina Allard, “The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts” (2018) 9 *Arctic Review on Law and Politics* 25.

<sup>3</sup> See Dwight Newman, “International Indigenous Rights Law and Contextualized Decolonization of the Arctic”, in Ken Coates & Carin Holroyd, eds., *The Palgrave Handbook of Arctic Policy and Politics* (Palgrave Macmillan 2020). One interesting recent development in Canada is the adoption by the province of British Columbia in late November 2019 of legislation committing itself to implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)—progress on this legislation will be a worthy subject for attention in future volumes.

<sup>4</sup> For example, article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), specifies only that “States shall consult and cooperate in good faith with the indigenous peoples concerned...in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources...”. The “indigenous peoples concerned” might include Indigenous peoples outside the state in question.

illustrate well the potential for such issues.

While they could arise on any Arctic border, these particular developments involve the border between Canada and Alaska, and recent developments have gone in both directions. First, in the context of moves toward opening Alaska's Arctic National Wildlife Refuge to oil drilling, Canadian federal and territorial governments and the Government of Vuntut Gwich'in First Nation ended up voicing their concerns with a Draft Environmental Impact Statement (EIS) from the Alaska Bureau of Land Management (BLM), with these concerns involving a lack of consultation with the Vuntut Gwich'in as an Indigenous people on the Canadian side of the border potentially impacted by the Alaskan decision at issue<sup>5</sup>. Second, in the context of mining activity in the northern part of the Canadian province of British Columbia, Alaskan Indigenous

tribes have raised objections and, indeed, sought to launch a human rights complaint, again partly about lack of transboundary consultation<sup>6</sup>.

### **Canadian Objections to Lack of Consultation from Alaska**

In 2017, the United States, under President Trump, signed a budget provision approving 800,000 acres of the 1002 Lands in the Arctic National Wildlife Refuge for oil and gas development<sup>7</sup>. This became law under the Tax Act and is referred as Public Law 115-97<sup>8</sup>. The 1002 Lands are 1.5 million acres within the approximately 19.3 million acres Arctic National Wildlife Refuge<sup>9</sup>. In 2018, the Alaskan Bureau of Land Management (BLM) began the process of implementing an oil and gas program within these lands<sup>10</sup>. The Vuntut Gwich'in First Nation Government and the Yukon Government are concerned with the

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<sup>5</sup> Rosa Brown, Lands Manager, Vuntut Gwich'in Government, "Comments of the Vuntut Gwich'in Government on the Draft Environmental Impact Statement for the Coastal Plain Oil and Gas leasing Program and Announcement of Public Subsistence- related hearings" (June 19 2018), online: *The Porcupine Caribou Management Board* <<https://www.pcmb.ca/PDF/1002/Vuntut%20Gwichin%20Government.pdf>> at 2 [Vuntut Gwich'in Government].

<sup>6</sup> The Southeast Alaska Indigenous Transboundary Commission, "Petition to the Inter-American Commission on human rights seeking relief from violations of the rights of the members of the Southeast Alaska Indigenous Transboundary Commission resulting from hard-rock mining in British Columbia" (Dec 5 2018), online: *The Southeast Alaska Indigenous Transboundary Commission* <[www.seitc.org/petitions](http://www.seitc.org/petitions)> [SEITC Petition].

<sup>7</sup> Porcupine Caribou Management Board, "Arctic Refuge Calving and Post-Calving Grounds" (2019), online: *The Porcupine Caribou Management Board* <[www.pcmb.ca/1002](http://www.pcmb.ca/1002)> [PCMB 1002].

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> PCMB 1002, supra note 7.

Draft Environmental Impact Statement (EIS) for the Coastal Plain Oil and Gas Leasing Program within the 1002 Lands and requested that full consideration be given to environmental impacts as required by international agreements<sup>11</sup>. Both entities are trying to make transboundary claims regarding the Porcupine Caribou population and other environmental effects. According to the Vuntut Gwich'in First Nation, the BLM failed to acknowledge, consult, or provide reasonable opportunities for Canadian First Nations to participate in the draft EIS processes<sup>12</sup>. In their submission, they requested not only that the BLM correct the deficiencies of the draft EIS but also that BLM acknowledge and engage the Vuntut Gwich'in First Nation and other Canadian users' groups of the Porcupine caribou herd<sup>13</sup>.

The Government of Yukon, together with the governments of Canada, the United States, Alaska, and the Northwest Territories have been working on Porcupine Caribou herd matters since 1987 through the

International Porcupine Caribou Management Board (PCMB). The PCMB has been monitoring and gathering data on the herd. The PCMB claims that the 1002 Lands are a caribou birthing and rearing area and therefore critical for the welfare of the herd<sup>14</sup>. PCMB asked that a review be provided, as per the 1987 *Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd*.<sup>15</sup>

The Porcupine Caribou is at the heart of the Vuntut Gwich'in culture. The Porcupine Caribou serve additionally an important role in the subsistence economy<sup>16</sup>. The Porcupine Caribou has occupied the Traditional Territory of the First Nation for thousands of years and has been an important sustenance for its peoples<sup>17</sup>. The Vuntut Gwich'in First Nation fears that the proposed oil and gas leasing program in the Coastal Plain will result in environmental pollution, and habitat disturbance that would lead to long-term instability in the Porcupine

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<sup>11</sup> Pauline Frost - Department of Environment, Government of Yukon, "Scoping Phase Comments-Coastal Plain Oil and Gas Leasing Program Environmental Impact Statement" (June 18 2018) online: *The Government of Yukon* <<https://yukon.ca/sites/yukon.ca/files/env/env-anwr-scoping-phase-comments.pdf>> at 2, 6 [Government of Yukon - 2018].

<sup>12</sup> *Vuntut Gwich'in Government*, *supra* note 5 at 2.

<sup>13</sup> *Vuntut Gwich'in Government*, *supra* note 5 at 2.

<sup>14</sup> *PCMB 1002*, *supra* note 7.

<sup>15</sup> Government of Canada, "Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd" (July 17 1987), online: *Government of Canada, Global Affairs Canada* <[www.treaty-accord.gc.ca/text-texte.aspx?id=100687](http://www.treaty-accord.gc.ca/text-texte.aspx?id=100687)>.

<sup>16</sup> *Vuntut Gwich'in Government*, *supra* note 5 at 4.

<sup>17</sup> *Ibid* at 1.

caribou herd<sup>18</sup>. They claimed that a threat to the Porcupine caribou herd's health would be a threat to the Vuntut Gwich'in's physical, cultural, and spiritual survival. In their review of the draft EIS, they observed that the BLM did not address adequately the issues that the First Nation has previously raised<sup>19</sup>. Furthermore, they claimed that the format and delivery of the draft EIS had barriers to effective inclusion of the Vuntut Gwich'in First Nation and that accessible materials that could be understood by Elders and citizens were not made available<sup>20</sup>.

In March 2019, the Government of Yukon claimed that "given the long history of cooperative management for the Porcupine caribou herd, the Government of Yukon is concerned that impacts to Canadian subsistence users are not fully concerned"<sup>21</sup>. The Government of Yukon stated that the

draft EIS also failed to provide quantitative data of the impact on the Porcupine caribou herds and that this needed to be corrected<sup>22</sup>. Since Canadian First Nations are the primary users of the Porcupine caribou herd, they will be the most affected. By not providing a quantitative data analysis of the impact to Porcupine Caribou of the project alternatives, the BLM failed to account for the transboundary impacts<sup>23</sup>.

The Alaskan Bureau of Land Management released its final EIS in September 2019<sup>24</sup>. That EIS does not engage with impacts on the Vuntut Gwich'in. Thus, while developments saw significant claims to transboundary Indigenous consultation, such consultation has effectively not occurred or even received full consideration as a further step in aligning policy development with respect for Indigenous rights.

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<sup>18</sup> *Ibid* at 12, 13.

<sup>19</sup> *Ibid* at 2.

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

<sup>21</sup> Government of Yukon, "Appendix 1: The Government of Yukon's comments on the Coastal Plain Oil and Gas Leasing Program draft EIS" (March 12 2019, online: *Government of Yukon* <<https://yukon.ca/sites/yukon.ca/files/env/env-appendix-1-yg-comments-cpoglp-draft-environmental-impact-statement.pdf>> at 4 [Government of Yukon – 2019].

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

<sup>23</sup> Joe Tetlich, "Porcupine Caribou Management Board Comments on Coastal Plain Oil and Gas Leasing Program Draft Environmental Impact Statement" (March 13 2019), online; *Porcupine Caribou Management Board* <[www.pcmb.ca/PDF/EIS/PCMB%20response%20to%20BLM%20re%20EIS%20w%20Appendix.pdf](http://www.pcmb.ca/PDF/EIS/PCMB%20response%20to%20BLM%20re%20EIS%20w%20Appendix.pdf)> at 1, 2.

<sup>24</sup> US Department of the Interior Bureau of Land Management, "Coastal Plain Oil and Gas Leasing Program Environmental Impact Statement: Final" (September 2019), online: *U.S. Department of the Interior Bureau of Land Management* <[https://eplanning.blm.gov/epl-front-office/projects/nepa/102555/20003762/250004418/Volume\\_1\\_ExecSummary\\_Ch1-3\\_References\\_Glossary.pdf](https://eplanning.blm.gov/epl-front-office/projects/nepa/102555/20003762/250004418/Volume_1_ExecSummary_Ch1-3_References_Glossary.pdf)>.

## Alaska Indigenous Tribes Raise Human Rights Issues Concerning Developments in Canada

On the other side of the border, the Southeast Alaska Indigenous Transboundary Commission (SEITC) filed a human rights petition with the Inter-American Commission on Human Rights (IACHR) in December 2018<sup>25</sup>. SEITC is an association of fifteen tribal nations located in Southeast Alaska. SEITC claims that both Canada and the province of British Columbia have failed to consult with them during the approval or permitting of mine development in British Columbia<sup>26</sup>. SEITC also claimed that the governments in Canada have not conducted or requested environmental assessment of the mines' transboundary impacts of the watersheds<sup>27</sup>.

The mines that concerns the SEITC are hard-rock mining and large-scale industrial projects. Of those mines, four are proposed in the upper sections of the watersheds in British Columbia and two are already operating<sup>28</sup>. The SEITC claims that the mines will produce great quantities of toxic waste products that

cause a pollution threat to downstream ecosystems<sup>29</sup>. Those ecosystems are significant for fish populations that the SEITC communities relied upon for their subsistence and cultural identities<sup>30</sup>.

The SEITC are asking that the IACHR "1) [conduct] an ongoing visit to investigate and confirm the threats to the Southeast Alaskan Native communities from the B.C. Mines; 2) hold a hearing to investigate the claims raised in this petition; and 3) prepare a report setting forth all the facts and applicable law, declaring that Canada's failure to implement adequate measures to prevent the harms to Petitioners from the British Columbia mines violates rights affirmed in the American Declaration of the Rights and Duties of Man"<sup>31</sup>.

Southeast Alaska Native Communities depend on the Taku, Stikine, and Unuk watersheds<sup>32</sup>. These watersheds are biodiverse and contained many species of fishes that have been "historical staple commodities" for Native communities<sup>33</sup>. The tribes' traditions, food supplies, subsistence, and survivals are tied to the fish populations, and the watersheds are

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<sup>25</sup> SEITC Petition, *supra* note 6.

<sup>26</sup> *Ibid* at 3.

<sup>27</sup> *Ibid* at 1-4.

<sup>28</sup> *Ibid* at 1.

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

<sup>30</sup> *Ibid* at 2.

<sup>31</sup> *Ibid* at 3-4.

<sup>32</sup> *Ibid* at 1, 2, 5.

<sup>33</sup> *Ibid* at 1, 2, 5.

sacred for those communities<sup>34</sup>. Salmon and eulachon support subsistence among the Southeast Alaska Native communities<sup>35</sup>. These species are also central to the maintenance of their cultural identity<sup>36</sup>. The sharing of the fish harvests with elders and others is an important part of strengthening cultural and social connections<sup>37</sup>.

Canada has not been subject to many petitions before the Inter-American human rights system<sup>38</sup>. However, it is subject to receiving recommendations from the Inter-American Commission. This petition has not yet been addressed, so it remains to be seen if the southeast Alaskan tribal nations have found an effective route to a remedy. In any event, though, the filing of the petition illustrates further calls concerning transboundary consultation.

### **Paths Forward on Transboundary Indigenous Consultation**

These recent developments illustrate the call for transboundary Indigenous consultation where the actions of one state may affect Indigenous peoples located across an imposed state boundary. Such issues are of particular

salience in the Arctic, with certain Indigenous peoples themselves spanning the multiple states – notably, the Sami and the Inuit, each of which is an Indigenous people reaching across four states. As development continues on Indigenous consultation generally, it will be necessary to consider approaches to transboundary Indigenous consultation.

A case accepted for hearing at the Supreme Court of Canada in the coming year illustrates one way in which such issues might come to be considered, but in potentially unstructured ways. This is the *Desautel* case on which the Court granted leave to appeal from the lower court decision in October 2019<sup>39</sup>. The case concerns an American citizen who claimed hunting rights in British Columbia protected by the Canadian constitutional provision on Indigenous rights, with his claim based on membership in an American tribal community that had a prior presence in Canada but that had gradually been excluded from Canada in the late nineteenth and earlier twentieth centuries. At one level, the case will be a determination simply about the hunting rights of a particular community.

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<sup>34</sup> *Ibid* at 2.

<sup>35</sup> *Ibid* at 8.

<sup>36</sup> *Ibid* at 10, 41, 42, 44.

<sup>37</sup> *Ibid* at 10.

<sup>38</sup> See Bernard Duhaime, “Canada and the Inter-American Human Rights System: Time to Become a Full Player” (2012) 67 [Canadian International Council] *International Journal* 639.

<sup>39</sup> *R. v. Desautel*, S.C.C. Docket No. 38734.

However, at a broader level, it speaks to whether Indigenous persons and peoples resident outside of Canada can claim rights protected under the Canadian constitution for the “Aboriginal peoples of Canada”. Implicitly, if there can be such claims, the Canadian legal doctrine on duty to consult would then seem to extend consultation obligations routinely into various transboundary contexts, requiring Canadian federal and provincial governments to carry out formal duty to consult activities with Indigenous communities located outside Canada that might have rights claims in Canada. The practical consequences are substantial, but any judicial pronouncement would face severe challenges in structuring those consequences coherently and in ways not posing complex foreign relations issues.

A surely preferable alternative would be to see Arctic states and Indigenous peoples engage in meaningful discussion and negotiations about various transboundary Indigenous rights issues, including protocols for transboundary consultation. The *Nordic Sami Convention*, with a recently reached final text and thus now subject only to final ratification, powerfully illustrates the possibility of reaching appropriate approaches on Indigenous issues that reach across state boundaries. However, such negotiations do require political will and the allocation of agenda time and political capital. There must be an ongoing call on Arctic states to live up to their responsibilities on Indigenous rights, and a recognition that these Indigenous rights issues may have transboundary dimensions as powerfully illustrated in some recent developments.

