Indigenous Treaties with Canada: Obstacles or Opportunities to Realizing the Sustainable Development Goals in Light of the United Nations Declaration on the Rights of Indigenous Peoples across Canada

Abstract

The 2015 United Nations Sustainable Development Goals (SDGs) set a global agenda for development towards 2030. Additionally, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) sets standards affirming the rights of Indigenous Peoples as the world progresses along the sustainable development framework. Canada, as an internationally respected country for its inclusive and often progressive policies, however, demonstrates conflicting results when it comes to implementing and respecting the SDGs and UNDRIP. This article analyzes and dissects how Canada is either fostering or frustrating its SDG and UNDRIP obligations through the lens of its modern treaties with Indigenous Peoples across the nation. We argue that Canada currently falls short of its legally binding obligations with respect to these agreements. This article additionally acts as a preliminary summary of findings within a broader research framework of understanding treaty implications when achieving the SDGs. It also provides a case study of the Indigenous Peoples Economic and Trade Cooperation Agreement (IPETCA) as an example of how SDGs and UNDRIP are fostered through an innovative and ground-breaking treaty that is still in development.

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Introduction

In 2015, the United Nations adopted a new set of Sustainable Development Goals (SDGs) as part of a global agenda for development towards 2030.[1] The 17 codified goals address key sectors of social, economic and environmental policy and action, with specific time-bound targets to end poverty and hunger, secure health, education, gender equality, clean energy, fresh water and sanitation, employment, innovation, sustainable consumption and production, climate change, biodiversity and land conservation, marine ecosystems and fisheries, and foster and enshrine justice.[2] The SDGs arrived in Canada at a time when the public demanded change regarding the long-standing marginalization and persistent disadvantage faced by Indigenous Peoples as a result of colonization. Through the lens of the SDGs, and revealed through the Truth and Reconciliation Commission's Final Report,[3] Indigenous Peoples are experiencing disproportionate challenges across the 17 goals that are comprised of 169 targets.[4] Subsequently, the Government of Canada in 2016 fully endorsed, without qualifications, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a step towards sustainable development and reconciliation for Indigenous Peoples in the country.

As these internationally and domestically endorsed developments progressed, Indigenous involvement in international and domestic Canadian law generation continue to advance and allow for greater integration of Indigenous governance and legal traditions in sustainable development.[5] In the Canadian context Comprehensive Land Claims Agreements (CLCAs), often called modern treaties, are prime examples of the codification and assertion of Indigenous rights, which includes Aboriginal rights and title, within the contemporary era of law. They further serve as a means for Indigenous Peoples to use legal recourse to codify rights and obligations for the First Nations, Inuit, and Métis, as well as the federal, provincial and territorial governments involved.[6] Under this legal regime, stipulations for natural resources, land governance, rights to wildlife, language and culture provide unique opportunities for Canada to not only advance reconciliation, but foster greater momentum towards achieving the SDGs.[7]

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[1] See *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 1 (I), UNGAOR 70th Sess, UN Doc A/RES/70/1 (2015) [*Transforming our world*].

[2] Sustainability at its core seeks to simultaneously address poverty eradication, economic growth and environmental protection. See for example Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practice and Prospects* (Oxford: Oxford University Press, 2004) [*Sustainable Development Law*].

[3] See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015) [*TRC Summary*].

[4] See Martin Cooke & Christopher Penney, "Indigenous Migration in Canada, 2006–2011" (2019) 46:2 Can Studies in Population.

[5] For example, the Arctic Council, founded in 1996, became an innovative soft law body that enabled Arctic Indigenous participation in high-level policy decision-making processes which gravely impact the interests and wellbeing of northern nations and peoples. The Arctic Council has since served as an example of international consensus building that brings nation states and Indigenous Permanent Participants to the table as collaborators, rather than regulators. See Michael Byers and James Baker. *International Law and the Arctic*, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2013) at page 2.

[6] See Crown-Indigenous Relations and Northern Affairs Canada. "Treaties and agreements", (2022), online: rcaanc-cirnacgcca <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>.

[7] See Canada, Environment and Climate Change Canada, *2015 – 2016 Report on Plans and Priorities* (Ottawa: 2016).

However, disjunctures on many levels are leading to further marginalization and exclusion of Indigenous Peoples, whereby Canadian governments[8] circumnavigates, or blatantly disregards, these binding legal instruments and frustrates efforts to implement the SDGs and respect Aboriginal rights and title.

Moving forward, policies and programs should be informed by robust research to help bridge these opportunities towards a framework that places the global SDG commitments firmly within the unique circumstances of Indigenous Peoples in Canada. A combined consideration of the SDGs, the UNDRIP, and modern treaty obligations are required since fulfilling the obligations of each of the three forms of agreements enables progress in achieving their two counterparts. In this sense, modern treaties can also act as tools for jointly achieving the SDGs and the UNDRIP. As such, any framework can and should understand, respect and recognize Aboriginal rights and title as reflected in the special treaties that define and defend current Canadian relationships with Indigenous Peoples. For this to be possible, new research approaches and knowledge are needed.

In this article we argue that Canada currently falls short of its legally binding obligations with respect to these agreements. We report on the first phases of a research project that scopes modern and historical treaties between Canada and Indigenous Peoples, using comparative legal research methods to uncover whether and how these accords respond to the SDGs across key social, environmental and economic challenges, specifically through SDGs 1 No Poverty, 2 Zero Hunger, 13 Climate Action and 15 Life on Land. We shall begin with a background on the UN SDGs and UNDRIP both internationally and in Canada, offer preliminary findings on the above analysis for the role of modern treaties in realizing rights and obligations relating to the SDGs. The research then undertakes in-depth case studies of selected modern treaties, specifically the James Bay & Northern Quebec Agreement, the Kluane First Nation Agreement and the Labrador Inuit Land Claims Agreement, to gain a deeper, pluralistic understanding of the rights and obligations related to the SDGs while experimenting with new combined customary and treaty law analysis approaches. After critical analyses of existing research, we provide results that enable the development of new research questions on law and governance measures that can support the realization of key rights and obligations related to the SDGs in Canada's treaties with Indigenous Peoples, with the aim to benefit marginalized and disadvantaged Indigenous communities. Finally, we provide outcomes for applying this understanding through the Indigenous Peoples Economic and Trade Cooperation Agreement (IPETCA) to best achieve SDGs and UNDRIP collaboratively and effectively in a decolonial manner.

I. SDGs in Canada - Sustainable Development for All?

A. Understanding the UN Sustainable Development Goals

The concept of sustainable development became part of international law and policy at the United Nations Conference on the Environment and Development (UNCED) in 1992.

[8] In the context of this article, the use of the phrase "Canadian governments" generally provides for the federal, provincial and territorial governments that are party to modern treaties and have obligations to the Indigenous land claim beneficiaries.

Subsequently over the next two decades, sustainable development evolved from a 'soft' principle of international environmental law to an essential part of the negotiation, interpretation and implementation of international law. Commitments to sustainable development are now being included as part of the object and purpose of global accords ranging from health to human rights to trade and investment.[9] In 2015, the UN SDGs were officially adopted to crystallize the policy consensus through an agenda for 2030 and beyond, acting as a coordinating governance framework for sustainable development that bridges international, national, regional and sub-national governance domains.[10]

However, while there has been progress in analyzing and tracking efforts to achieve the SDGs at the international level, there remains very important gaps in ensuring that domestic governance systems can respect and support achievement of the SDGs in Canada. This is a fundamental challenge, as without national and local regimes that understand and support the achievement of the SDG commitments, there is no chance for promises of sustainable development to become a reality, especially for the poorest and most marginalized peoples.[11]

Furthermore for Indigenous Peoples, the possible synergies between advancing sustainable development and realizing rights are subject to significant discussion in scholarly literature, including through public policy theories and practices.[12] It is important to recognize that, historically, state-supported environmental, economic and social policies have perversely served to alienate Indigenous groups by seizing control of resources which are of essential importance to Indigenous communities and, more often than not, mismanaging them.[13] While today there may be more positive examples of Indigenous groups using laws and policies on sustainable development to improve their well-being,[14] there exists great opportunity for governments to improve the efficacy for legislation and policy to advance Indigenous rights.

B. Canada's SDG Strategy

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[9] See *Sustainable Development Law*, *supra* note 3.

[10] See *Transforming our world*, *supra* note 1 and Louis Meuleman & Ingeborg Niestroy, "Common But Differentiated Governance: A Metagovernance Approach to Make the SDGs Work" (2015) 7:9 Sustainability.

[11] See Martin Visbeck et al, "A Sustainable Development Goal for the Ocean and Coasts: Global ocean challenges benefit from regional initiatives supporting globally coordinated solutions" (2014) 49 Marine Policy at page 88.

[12] See for example M Brugnach, M Craps & A Dewulf, "Including indigenous peoples in climate change mitigation: addressing issues of scale, knowledge and power" (2014) 140:1 Climatic Change; Thomas F Thornton & Claudia Comberti, "Synergies and trade-offs between adaptation, mitigation and development" (2013) 140:1 Climatic Change; Ameyali Ramos-Castillo, Edwin J Castellanos & Kirsty Galloway McLean, "Indigenous peoples, local communities and climate change mitigation" (2017) 140:1 Climatic Change; and James Ford et al, "Adaptation and Indigenous peoples in the United Nations Framework Convention on Climate Change" (2016) 139:3-4 Climatic Change; and Yolanda Terán Maigua & Cathy Gutierrez-Gomez, "Responding to Cultural Loss: Providing an Integral Indigenous Perspective of a "Kichwa Child"" (2015) 92:1 Childhood Education.

[13] See Christopher Nowlin, "Indigenous Capitalism and Resource Development in an Age of Climate Change: A Timely Dance with the Devil?" (2020) 17:1 JSDLP 71 at 75-76.

[14] See S Prakash Sethi, et al, "Freeport-McMoRan Copper & Gold, Inc.: An Innovative Voluntary Code of Conduct to Protect Human Rights, Create Employment Opportunities, and Economic Development of the Indigenous People" (2011) 103:1 J Bus Ethics; and Lily Gadamus et al, "Building an indigenous evidence-base for tribally-led habitat conservation policies" (2015) 62 Marine Policy.

The first piece of Canadian legislation for implementing sustainable development began in the late 2000's. Prior to the adoption of international commitments to implement the SDGs, Canada passed the *Federal Sustainable Development Act* (2008) which provides a "legal framework for developing and implementing a Federal Sustainable Development Strategy [FSDS] that will make environmental decision-making[15] more transparent and accountable to Parliament."[16] The *Act* currently requires the cooperation of twenty-six federal organizations whose mandates align with one or more of the SDGs on a domestic or international level and the preparation of departmental strategies that reinforce the FSDS.[17] Led by Environment and Climate Change Canada (ECCC), the FSDS is Canada's plan to support its 2030 sustainable development agenda, and the latest draft remains strongly supportive of the 17 UN SDGs.[18]

In addition to the FSDS, in July 2018 Canada presented its first Voluntary National Review (VNR) to the United Nations High-Level Political Forum on Sustainable Development to take stock of national actions, achievements and challenges in implementing the 2030 Agenda.[19] Five key areas of focus for the Government of Canada's 2018 VNR included the elimination of poverty, advancing gender equality and empowering women and girls, growing the economy and narrowing socio-economic gaps between different groups, advancing self-determination and improving relations with Indigenous Peoples, fostering inclusion, advancing action on climate change and clean growth.[20] The document articulated however detailed and specific gaps in the progress implementing the SDGs as related to Indigenous Peoples, and acknowledged that "for Indigenous Peoples, the Canadian reality is not, and never has been, equitable or fair,"[21] pledging to "better align Canada's laws and policies with the United Nations Declaration on the Rights of Indigenous Peoples."[22] This is reflective of comments made by the United Nations Special Rapporteur on the rights of Indigenous Peoples, James Anaya, in his 2013 visit to Canada, when he remarked that "Canada consistently ranks near the top among countries with respect to human development standards, and yet amidst this wealth and prosperity, Aboriginal people live in conditions akin to those in countries that rank much lower and in which poverty abounds."[23] Table 1 captures some of these disparities in the status of Indigenous Peoples in

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[15] After the development of the SDGs, the Government of Canada broadened its policy scope from an environmental focus to include social and economic issues in Canadian society that are highlighted in the SDGs and are often overlooked in such relatively prosperous countries. See Canada, Environment and Climate Change Canada, *2016-2019 Federal Sustainable Development Strategy* (Gatineau: 2016).

[16] See *Federal Sustainable Development Act*, S.C. 2008, c 33 s 3.

[17] See Canada, Employment and Social Development Canada, *2017-20 Departmental Sustainable Development Strategy* (Gatineau: 2017).

[18] See Canada, Environment and Climate Change Canada, *2022-2026 Federal Sustainable Development Strategy* (Gatineau: 2022).

[19] See Canada, Global Affairs Canada, *Canada's Implementation of the 2030 Agenda for Sustainable Development – Voluntary National Review* (Ottawa: 2018) [*VNR*].

[20] *Ibid*.

[21] See *VNR*, *supra* note 21 at page 4.

[22] See Section II, below, Indigenous Rights, United Nations Declaration on the Rights of Indigenous Peoples & Canada.

[23] See James Anaya, United Nations Human Rights Office of the High Commissioner, *Statement upon conclusion of the visit to Canada by the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya* (15 October 2013).

Canada across selected SDGs, including data from the VNR, in comparison to non-Indigenous Peoples in the country.

Table 1: *Disparities in access to Sustainable Development for Indigenous across Canada* [24]

SDG	**Status of conditions faced by Indigenous Peoples in Canada[25]**	**Status of conditions faced by non-Indigenous Canadians**
SDG 1: No Poverty.	There is disproportionately high representation of Indigenous Peoples in low-income groups: estimated to be at least twice the rate of representation compared to Canada overall, with child poverty rates for status First Nations at 60%.[26] Indigenous Peoples are 'over-represented' across the populations of Canadians identified as homeless.	13% of non-Indigenous, non-racialized and non-immigrant Canadian children.[27]
SDG 2: Zero Hunger	First Nations living on-reserve experiencing food insecurity: 44.9% of children aged 0-11 years experienced any type of food insecurity, and between 40.1% and 14.1% of adults aged 18 and over experienced moderate and severe food insecurity respectively. This is reinforced by the 66% of Inuit adults aged 25 and older living with food insecurity.	Only 8% of non-Indigenous Canadians were food insecure.[28]

[24] Data is an essential element of the SDGs and is equally necessary for assessing the achievement of the modern treaties in Canada. However, a lack of data could lead to a misunderstanding as to why and how the Indigenous experience can be so markedly different from the non-Indigenous experience, and further suggest that simple comparisons of Indigenous populations to non-Indigenous populations are not sufficient. To get at the heart of barriers to Indigenous development, data that collects qualitative insights relating to Indigenous rights is also needed. This is of particular importance in the context of Indigenous communities that have experienced a sustained lack of rights-based equality throughout history. See Jérémie Gilbert & Corinne Lennox, "Towards new development paradigms: the United Nations Declaration on the Rights of Indigenous Peoples as a tool to support self-determined development" (2019) 23:1-2 Intl JHR.

[25] See *VNR, supra* note 21 at page 4.

[26] The VNR provided actual rates of representation in low-income groups for Indigenous Peoples living 'off-reserve,' illustrated as approximately twice that of the Canadian population overall, and qualitatively described the rates for those living on-reserve as being 'higher,' hence the summary description in Table 1 of "estimated to be at least twice the rate." See *VNR, supra* note 21 at pages 22-23.

[27] See David Macdonald & Daniel Wilson, *Shameful Neglect: Indigenous Child Poverty in Canada* (Ottawa: Canadian Centre for Policy Alternatives, 2016) at page 24.

[28] See *VNR, supra* note 21.

SDG	Status of conditions faced by Indigenous Peoples in Canada[25]	Status of conditions faced by non-Indigenous Canadians
SDG 4: Quality Education	Only 11% of the Indigenous population obtained university degrees,[29] and only 48% of Indigenous Peoples aged 25-64 held post-secondary degrees.[30] Indigenous Peoples are also more likely than non-Indigenous graduates to complete programs below a bachelor's level (i.e. trades or college programs).[31]	Similarly, 29% of the total Canadian population obtained university degrees. 65% of Canadians aged 25-64 held post-secondary degrees.[32]
SDG 5: Gender Equality	220 Indigenous women per 1,000, aged 15-years and older, experienced violent victimization.[33]	81 non-Indigenous women per 1,000 from the same period experienced violent victimization, nearly one third the rate of non-Indigenous women.[34]
SDG 6: Clean Water and Sanitation	There remain over 70 long-term drinking water advisories in effect for 12 months or longer on First Nations reserves.[35] These advisories do not include those not on reserve, for instance in communities across Inuit Nunangat, where water and sanitation concerns remain critical.	Similar data is hard to find for non-Indigenous Canadians, though most non-Indigenous Canadians have access to safe and clean water. Additionally, the fact that there are little to no statistics on this front itself indicates a divide in how access to water and sanitation is approached between the two demographics.

[29] Poverty and inequality are closely tied to education. Increasing access to quality education equitably across Canada is key to address other connected SDGs and to break the cycles of inequality. See generally Elaine Unterhalter & Amy North, *Education, poverty and global goals for gender equality: how people make policy happen* (New York: Routledge, 2018).

[30] See Canada, Statistics Canada, by Karen Kelly-Scott & Kristina Smith, *Aboriginal Peoples Fact Sheet for Canada* (Ottawa, 2015) at page 6.

[31] *Ibid.*

[32] *Ibid.*

[33] Several reports, such as the *National Inquiry into Missing and Murdered Indigenous Women and Girls* and the TRC Report, document the violence and discrimination against Indigenous Peoples, particularly women and girls, that is rooted in the impacts of colonization. See National Inquiry into Missing and Murdered Indigenous Women and Girls. Reclaiming Power and Place: Executive Summary of the Final Report. See generally National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place" (2019), online: <http://www.mmiwg-ffada.ca/final-report/> [*MMIWG Final Report*] and *TRC Summary*, *supra* note 4.

[34] See *VNR*, *supra* note 21 at page 50.

[35] A drinking water advisory is considered long-term when it has been in place for more than a year. While a drinking water advisory is in effect residents must either purchase water, boil water or otherwise ensure their drinking water is purified. Although the Government of Canada has pledged to end long-term drinking water advisories on-reserve by March 2021 and having lifted 88 advisories since 2015, 61 advisories remain in effect and new advisories continue to be added since this pledge was made. This lack of access to clean water and sanitation further contributes to health issues related to the lack of access to adequate infrastructure and services which are further addressed in other SDGs. See Government of Canada, 'Ending long-term drinking water advisories' (22 July 2022), online: *Water in First Nations communities* <https://www.sac-isc.gc.ca/eng/1506514143353/1533317130660>.

SDG	Status of conditions faced by Indigenous Peoples in Canada[25]	Status of conditions faced by non-Indigenous Canadians
SDG 11: Sustainable Cities and Communities	In 2016, 37% of persons identified as registered Indians living on-reserve lived in dwellings deemed unsuitable.[36] Even more drastically, 52% of Inuit living in Inuit Nunangat and 11% of Inuit living outside Inuit Nunangat lived in unsuitable housing.[37]	8% of non-Indigenous Canadians overall lived in dwellings deemed unsuitable in the same period.[38]

Furthermore, Employment and Social Development Canada (ESDC) developed a National Strategy, *Towards Canada's 2030 Agenda National Strategy interim document*, to create a shared vision of implementing the SDGs based on engagement with "all levels of government, Indigenous Peoples, municipalities, civil society, the private sector and all Canadians."[39] When adopted, the National Strategy will seek to foster synergies across economic, social and environmental policy areas, with assistance and input from the provinces, local governments and Indigenous communities.[40]

Although Canada has implemented several programs and strategies towards the achievement of the SDGs,[41] a large focus should be placed on addressing the many discrepancies Indigenous Peoples face. Because of colonization, neglected government responsibilities, systemic discrimination and sidelined treaty obligations, Indigenous Peoples have largely been left with limited opportunities for sustainable development and adequate care in comparison to the broader Canadian population.[42]

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[36] It should be emphasized that the impacts of growing up in a disadvantaged home constitute not only a public health issue but can have intergenerational effects that contribute to a cycle of poverty. See Diane M Purvin, "Weaving a Tangled Safety Net: The Intergenerational Legacy of Domestic Violence and Poverty" (2003) 9 Violence against Women 1263 at pages 1263-64.

[37] See *VNR*, *supra* note 21 at page 85.

[38] *Ibid.*

[39] See Canada, Employment and Social Development Canada, by Sustainable Development Goals Unit, *Towards Canada's 2030 Agenda National Strategy Interim Document* (Gatineau, 2019) at page 4.

[40] *Supra* note 19.

[41] Some of these programs have included benefits for low-income Canadians, affordable housing strategies, support for infrastructure in Indigenous communities, carbon pricing measures to reduce emissions and support for vulnerable populations affected by climate change. Steps forward will also include support from provincial, territorial and municipal governments, Indigenous Peoples, civil society and the private sector to develop the aforementioned National Strategy and, we argue, should address the systemic issues that lead to such discrepancies between Indigenous and non-Indigenous Canadians. See generally *VNR*, *supra* note 21.

[42] The stark reality of these disparities has been further brought into focus by the Covid-19 pandemic in which Indigenous communities became more vulnerable given their already reduced rates of access to quality health care systems in many communities. In many cases, communities are forced to prevent people from outside their communities to enter their regions in an effort to contain the virus, but are left with the downstream impacts of further isolation impacting everything from economy to education and exacerbating the already critical disparities. See Diane Selkirk, "Why Indigenous communities are uninviting visitors", BBC (26 May 2020), online: <https://www.bbc.com/travel/article/20200525-why-first-nations-communities-are-uninviting-visitors>.

II. Indigenous Rights, United Nations Declaration on the Rights of Indigenous Peoples & Canada

A. United Nations Declaration on the Rights of Indigenous Peoples

Secretary-General of the UN, António Guterres, stated in the foreword to the Sustainable Development Goals Report 2022 that: "We must deliver on our commitments to support the world's most vulnerable people, communities and nations."[43] As part of achieving these commitments to all people, communities and nations, an analysis carried out by the United Nations Permanent Forum on Indigenous Issues (UNPFII) identified a very strong relationship between the language and aims of the SDG targets[44] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[45]

UNDRIP is a non-binding international agreement and is the product of almost 25 years of deliberation between U.N. member states and Indigenous Groups around the globe.[46] The deliberation began with a study released by the UN Economic and Social Council Special Rapporteur José R. Martinez Cobo regarding the systemic discrimination faced by Indigenous Peoples worldwide.[47] The Declaration was created to protect the collective and individual rights of Indigenous Peoples internationally consisting of 46 Articles, setting guidelines that "constitute the minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world."[48] Additionally, it expands on the concept of free, prior and informed consent (FPIC)[49] which was introduced in the *International Labour Organization Indigenous and Tribal Peoples*

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[43] See UN Department of Economic and Social Affairs, "Sustainable Development Goals Report 2022" (2022), online: <https://digitallibrary.un.org/record/3980029?ln=en> at page 2.

[44] The SDGs explicitly mention "Indigenous Peoples" only in Target 2.3 related to Zero Hunger, and Target 4.5 related to Quality Education (see *Transforming our world*, *supra* note 2 at pages 19 and 21). However as demonstrated in the previous section, SDGs still remain an important measure for supporting and advancing Indigenous rights.

[45] See Permanent Forum on Indigenous Issues, *Report of the Expert Group Meeting on Indigenous Peopels and the 2030 Agenda*, UNDESCA, 2016, Supp No 10, UN Doc E/C.19/2016/2 at article 16 and UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: <www.refworld.org/ docid/471355a82.html> [accessed 12 August 2022] [*UNDRIP*].

[46] See Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10:2 NW J Intl Human Rights 54 at pages 59-61 [*Ward, "Right to FPIC"*].

[47] See Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, José R Martínez Cobo, Study of the Problem of Discrimination Against Indigenous Populations: Conclusions, Proposals and Recommendations, vol 5, UN Doc E/CN.4/Sub.2/1986/7/Add.4, 1987.

[48] See *UNDRIP*, *supra* note 45.

[49] FPIC is integral to upholding the rights of Indigenous Peoples and ensuring effective participation in decision-making that effects Indigenous Peoples and their culture, communities and territories. The concept describes processes that are free from manipulation and coercion, are informed by sufficient and timely information and most importantly occur prior to a decision that effects Indigenous Peoples' rights and interests. Through FPIC, Indigenous Peoples can effectively be a part of the decision-making process. See *Ward, "Right to FPIC"*, *supra* note 46 at page 56 and Boreal Leadership Council, *Understanding Successful Approaches to Free Prior and Informed Consent in Canada*, Part I: Recent Development and Effective Roles for Government, Industry, and Indigenous Communities by Ginger Gibson McDonald and Gaby Zezulka (Ottawa: Boreal Leadership Council, 2015) at page 8.

Convention (also known as *ILO C169*) which is a legally binding treaty for the countries that ratify the Convention.[50]

Though not legally binding in the same way as *ILO C169*, UNDRIP does however set out norms and expectations for the international community related to the rights of Indigenous Peoples. Courts still look to human rights instruments like UNDRIP for principles upon which to base legal interpretations, and they likewise look across jurisdictions at prior decisions and their associated interpretations of the human rights instruments. In a sense, "the whole of UNDRIP could be seen to codify customary international law, simply because many human rights treaty monitoring bodies have started to use UNDRIP as a guide to interpret their respective human rights instruments that are legally binding on most States of the world."[51] In Canada, UNDRIP opens a route through which Indigenous rights can be interpreted and affirmed through the courts.[52]

B. UNDRIP in Canada

For many Indigenous Peoples, UNDRIP is a crucial step for reconciliation and advancement of rights in Canada. UNDRIP is integrated throughout the 2015 TRC Calls to Action, [53] and in particular is invoked as central to both self-governance and land rights.[54] Similarly, the 2019 National Inquiry into Missing and Murdered Indigenous Women and Girls states in its Call for Justice requiring the "immediate and full implementation of the United Nations Declaration on the Rights of Indigenous Peoples."[55] For Indigenous Peoples demanding reconciliation and a future of sustainable development, and for Canada to truly align its SDG outcomes to the FSDS, UNDRIP remains as a central baseline for the country to achieve its SDG targets.

Canada's relationship with UNDRIP however has been a volatile one. First Canada voted against its adoption as a United Nations resolution in 2007, then in 2010 endorsed it yet qualifying it as 'aspirational'.[56] In 2016 Canada finally retracted the country's United Nations-defined 'objector' status to UNDRIP and only recently announced that "Our government has committed to co-

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[50] See *International Labour Organization Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991) [*ILO C169*] and *Ward, "Right to FPIC", supra* note 46 at pages 59-61.

[51] See Aldo Chircop, Timo Koivurova & Krittika Singh, "Is There a Relationship between UNDRIP and UNCLOS?" (2019) 33:1 Ocean YB Online.

[52] For example, see *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 B.C.S.C. 15 at para 205. Though in this case the Supreme Court of British Columbia reached its decision without directly relying on UNDRIP, the Court considered the potential implications of how UNDRIP legislation can supplement, refine and alter existing laws and jurisprudence to address Aboriginal rights.

[53] See *TRC Summary*, *supra* note 4.

[54] See *Ward, "Right to FPIC", supra* note 46 at page 56 and *TRC Summary, supra* note 4 at 42, 45, 46, 47, 49, 50 and 92.

[55] See *MMIWG Final Report, supra* note 35 at 1.2 (v).

[56] See Sasha Boutilier, "Free, prior, and informed consent and reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples", (2017) 7:1 online: UWO J Leg Stud 4.

develop legislation to implement the Declaration by the end of 2020."[57] Progress, however, has been slow,[58] with the principles behind FPIC lying at the heart of many of the debates surrounding UNDRIP.

Canada has long cited the implications of Indigenous self-governance as one of the country's main concerns for FPIC,[59] which is one of the most widely challenged elements of UNDRIP more broadly. Even though our analysis shows that all the modern treaties explicitly contain language surrounding the "duty to consult," the question relates in the difference between the duty to consult and FPIC in more practical terms. Referencing *Haida Nation v British Columbia (Minister of Forests)*,[60] professor Sarah Morales stated unequivocally that the duty to consult does not give Aboriginal groups a veto, and elaborated that there is no legal assurance that consultation must lead to agreement.[61] Morales further asserted that the duty to consult propagates an unequal balance of power favouring the Crown and suggested that its lack of enablement of a truly meaningful consultation process has contributed to the limited extent of reconciliation in Canada thus far.[62] Professors Gonzalo Bustamante and Thibault Martin similarly recommend that "a more comprehensive governance framework should include an interrelation of consultation and consent," to protect against any abuse of power due to the presumption of consent.[63]

In this vein, professor Terry Mitchell's work sought to better define consent in the context of FPIC and in comparison to the duty to consult, concluding that inherent in the definition of consent must be the right to 'say no' to the project for which consent is being sought.[64] Mitchell's conclusion implies that the gap between the rights that exist in Canada's modern treaties and section 35(1) of the *Charter of Rights and Freedoms*, and the incremental rights that

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[57] See David Lametti, *Speech: Assembly of First Nations: Special Chiefs Assembly*, (Ottawa: Department of Justice Canada, 4 December 2019), online: <https://www.canada.ca/en/department-justice/news/2019/12/supporting-first-nations-priorities-on-Indigenous-justice-systems-and-reconciliation.html>.

[58] Currently, there are only two pieces of legislation incorporating UNDRIP into law. The first, passed in 2019 in British Columbia, is an Act requiring the government to "prepare and implement an action plan to achieve the objectives of the Declaration." The second, passed in 2021 by the federal government, "affirms the Declaration as a universal international human rights instrument with application in Canadian law." *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 at 4(1) and *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 at 6(1) respectively.

[59] See Roberta Rice, "The Internationalization of Indigenous Rights: UNDRIP in the Canadian Context" in Terry Mitchell, *UNDRIP and the 2009 Bolivian Constitution: Lessons for Canada* (Centre for International Governance Innovation, 2014), ch 14 at pages 59-64.

[60] [2004] 3 SCR 511.

[61] See Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in John Borrows et. al, *Braiding legal orders: implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Centre for International Governance Innovation, 2019), ch 7 at page 70 [*Morales, "Braiding the Incommensurable"*].

[62] See *Morales, "Braiding the Incommensurable", supra* note 61 at page 72.

[63] See Gonzalo Bustamante and Thibault Martin, "Benefit Sharing and the Mobilization of ILO Convention 169" in Terry Mitchell, *UNDRIP and the 2009 Bolivian Constitution: Lessons for Canada* (Centre for International Governance Innovation, 2014), ch 14 at page 57.

[64] See Terry Mitchell, "International Gaze Brings Critical Focus to Questions about Aboriginal Governance in Canada" in Terry Mitchell, *UNDRIP and the 2009 Bolivian Constitution: Lessons for Canada* (Centre for International Governance Innovation, 2014), ch 14 at pages 43-48 [*Mitchell, "Aboriginal Governance"*].

UNDRIP enacts, is precisely the right of Indigenous Peoples to permit an activity to proceed or not, regardless of the prospect of compensation or redress. However, at present there is no unanimous conclusion in Canada about whether the duty to consult that is already in place, or FPIC as included in UNDRIP, or both, empower Indigenous Peoples to truly say 'no' in absolute terms to any project they deem to be harmful to their land or their livelihood.[65] When the Government of Canada changed their stance and endorsed UNDRIP in 2010, they caveated that UNDRIP "does not reflect customary international law nor change Canadian laws" and emphasized Canada's objection to many rights outlined in UNDRIP, including the right to FPIC when used as a veto.[66] As such, even though UNDRIP is the foundation for calls to action demanded by Indigenous Peoples, Canada's history as a natural-resource economy requiring the freedom of land and resource exploitation ultimately biases political willpower when endorsing and implementing UNDRIP.

UNDRIP remains necessary for Canada to achieve its commitments to SDGs and reconciliation, but its contention and slow implementation continues to frustrate the principles and progress of sustainable development at its core. Although textually there are very few references to Indigenous Peoples per se within the SDGs, UNDRIP and the SDGs demonstrate significant overlap when it comes to creating structurally robust mechanisms for achieving a sustainable future. Furthermore, highlighting the challenges and needs of vulnerable communities throughout the SDGs would bring Indigenous communities closer to achieving their rights and vision set out by the Declaration.[67]

III. Treaties and the Legal Protection of Indigenous Rights and Title in Canada

In addition to the SDGs and UNDRIP advancing sustainable development, Canada adheres to treaties, which are constitutionally protected, mutually binding agreements.[68] However, there is ambiguity in the success of how treaties practically respect Indigenous rights and title within Canada based on implementation and adherence to their stipulated obligations. We propose that, though at surface level these agreements seek to outline rights and obligations for both Indigenous and government parties, the mixed observance of the articles on the part of the Government of Canada and the territorial or provincial governments at times leave a heavily knotted legal tapestry for Indigenous rights and the relationship between Indigenous Peoples and the Crown.

A. Historic Treaties – The Predecessors to Canada's Modern Treaties

[65] See *Morales, "Braiding the Incommensurable", supra* note 61 at page 70.

[66] See Indigenous and Northern Affairs Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

[67] See *UNDRIP*, *supra* note 45.

[68] See *Canadian Charter of Rights and Freedoms*, s 35(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, which "recognized and affirmed" both past and future treaty rights.

From 1701 through 1923, 70 'historic treaties,' which included the 11 numbered treaties, were marked between the Crown and Indigenous groups,[69] so defined by the fact that the majority of these treaties consisted of land-use agreements in exchange for relinquishing the right to land title.[70] These treaties were mainly unsigned but rather "marked," reflective of the oral society persistent across Indigenous cultures that honour verbal commitments. Representatives for Indigenous Peoples also negotiated in good faith for the survival of their people. They recognized the changes that were occurring due to increasing European settlement. However, they were ultimately voluntarily or coercively transitioned from their formerly expansive self-determining and self-governing ways of living to one that depended on reserves and the government.[71]

The Government of Canada, conversely, has not always looked out for the best interests of Indigenous Peoples during the negotiation processes, which was extensively reiterated by the Truth and Reconciliation Commission.[72] Many numbered treaties, for instance, were negotiated when the federal government wanted access to Indigenous lands for uses such as resource exploitation or railroad development. In Treaty 6, First Nations parties felt pressure to sign an agreement with threats of starvation on the horizon, largely stemming from buffalo disappearing due to settlement and increased non-Indigenous activities in the region.[73] Similarly in Treaty 11, government representatives made false promises and forced symbolic elections of chiefs to fulfil the minimum technical requirements of treaty negotiation, all just to exploit the oil-rich Mackenzie District and expand Canadian territory.[74]

Furthermore, despite many amendments and attempts at reform, the *Indian Act of 1876*, which was founded on a premise of assimilation and control of First Nations peoples by the Crown, "remains the principal vehicle for the exercise of federal jurisdiction over 'status Indians,'" and governs most aspects of their lives.[75] The *Act* defines who is or is not an Indian and regulates band membership, government, taxation, lands, resources and money management, among other matters.[76] The *Act* also created the boarding school system, and was designed with the intention of legislating Indians out of existence while specifically targeting Indian women and children to

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[69] See Government of Canada, "Treaties and agreements" (14 August 2022), online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231#chp3>.

[70] See Ghislain Otis, "Constitutional recognition of Aboriginal and Treaty Rights: A new framework for managing legal pluralism in Canada?" (2014) 46:3 J Leg Pluralism & Unofficial L 320 [*Otis, "Treaty Rights and Legal Pluralism"*].

[71] See Meno Boldt, *Surviving as Indians the challenge of self-government* (Toronto: University of Toronto Press, 1993) at page 4.

[72] See *TRC Summary, supra* note 3.

[73] See *Letters from Charlie N. Bell to Morris, from the Laird Papers* (23 March, 1874) from the National Archives of Canada; and Ken Koates, "The Indian Act and the Future of Aboriginal Governance in Canada" (2008) National Paper for First Nations Governance at pages 2-4.

[74] See René Fumoleau & Arctic Institute of North America, *As long as this land shall last: a history of Treaty 8 and Treaty 11, 1870-1939* (Calgary, Alta.: University of Calgary Press, 2004) at pages 265-269.

[75] See *Indian Act*, RSC 1985, c I-5.

[76] See Library of Parliament, Social Affairs Division, *The Indian Act*, by M Hurley, Catalogue No PRB 09-12E (Ottawa: Library of Parliament 2009), online: *Parliamentary Information and Research Service* <http://publications.gc.ca/site/eng/361663/publication.html> at page 1.

remove them from their First Nations.[77] However, First Nations also rely on the *Indian Act* as a legislative tool that holds the federal government accountable for their legal responsibilities, such as tax exemptions for property on reserves and protecting reserve land from seizure. It also protects from interference by the provinces, and should the *Indian Act* be abolished and no other legal protections be put in place, their lands could be under provincial jurisdiction and vulnerable to those political interests.[78]

Canadian courts have however embraced the concept of existing Aboriginal rights as a legal tenet, particularly in terms of natural resources access and land use interests. Furthermore, constitutional protections through s. 35(1) of the *Charter of Rights and Freedoms* bring clarity to issues such as when an Aboriginal right is infringed,[79] if a right falls under s. 35(1),[80] and what constitutes Aboriginal title.[81] In *R. v Sparrow*, the Court furthermore emphasized that there must be a generous and flexible interpretation of Aboriginal rights, and when in doubt, interpretation should favour the Indigenous party.[82] Nonetheless, there is still a gap in the outcomes of these rights which still leave Indigenous Peoples disadvantaged within the broader Canadian society. Achieving the vision of UNDRIP and the SDG goals require additional legal mechanisms to bridge these inequalities.

B. The Story Behind Canada's Modern Treaties with Indigenous Peoples

Modern treaties, also referred to as Comprehensive Land Claims Agreements (CLCAs), unlike historical treaties, are agreements negotiated through a common language and allow Indigenous negotiators to have access to lawyers, which was previously prohibited under the *Indian Act*.[83] These agreements, spurred by *Calder et al. v. Attorney-General of British Columbia* [*Calder*][84] in 1973 which first recognized Aboriginal rights and Indigenous title to land in Canada, and beginning with the James Bay and Northern Quebec Agreement (JBNQA)[85] in 1975, provide jurisdiction and resolve ambiguities over land ownership and use that were not addressed under the previous Numbered Treaty regime. The claims are based on traditional use and occupancy of land by peoples who have signed no prior treaties. Some of these treaties relate to self-governance, some to land rights and, most often, both of these issues are combined into one comprehensive treaty system.[86] Settlements under land claims agreements generally also include

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[77] See Frankie Young, "A Trojan Horse: Can Indian Self-Government Be Promoted through the Indian Act" (2019) 97:3 Can B Rev 697 at page 699 [*Young, "Trojan Horse"*].

[78] See *Young, "Trojan Horse"*, *supra* note 75 at page 700.

[79] See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

[80] See *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

[81] See *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 [*Tsilhqot'in*].

[82] See *Sparrow*, *supra* note 77 at page 1093.

[83] See Government of Canada, "Treaties and agreements" (30 July, 2020), online: *Treaties, agreements and negotiations* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231> [*GoC, "Modern Treaties"*].

[84] [1973] S.C.R. 313.

[85] See *James Bay and Northern Québec Agreement and Complementary Agreements*, 1975, online: Government of Canada <https://www.rcaanc-cirnac.gc.ca/eng/1100100030604/1542740089024#BJ> [*JBNQA*]. This agreement was first enacted through *An Act Approving the Agreement Concerning James Bay and Northern Québec*, SQ 1976, c 46, RSQ c C-67, and the *James Bay and Northern Québec Native Claims Settlement Act*, SC 1976–77, c 32, RS c J-o3.

[86] See *GoC, "Modern Treaties"*, *supra* note 81.

terms for money, land, local governance, management of land and resources, and rights to wildlife, language and culture. This enables Indigenous groups to own and manage land and resources, then have a share in any revenue generated through resource development.[87] Modern treaties also have a greater emphasis on the wellbeing of the people governed through these treaties. The Community Well-Being (CWB) index for example showed that wellbeing under modern treaties First Nations not only were on average higher than historic treaty First Nations, but also improved at twice the pace.[88] At present, there are twenty-six modern treaties between Indigenous communities and Canada, and more continue to be negotiated.[89]

IV. Treaties as Opportunities to Frustrate or Foster Indigenous Achievement of the SDGs

For the purposes of the research project this article discusses, all modern treaties were evaluated and, from this group of twenty-six, fifteen were selected for review in the project at large and noted throughout our analysis.[90] These treaties were selected to be representative of the geographic and cultural distribution that is spanned by modern treaties, thus allowing the evaluation to take into the various unique concerns presented by each of the Indigenous nations and peoples who are party to the agreements. Three treaties were then analyzed in greater depth through this interim article. These CLCAs include the James Bay & Northern Quebec Agreement, the Kluane First Nation Agreement and the Labrador Inuit Land Claims Agreement. For each of these treaties, we will look at what Canada has committed to accomplish as part of the treaty agreement, how those commitments link to the SDGs and whether or not those commitments have been fulfilled, thereby fostering or frustrating the SDGs.

A. The James Bay & Northern Quebec Agreement: Fostering SDGs 1 No Poverty and 2 Zero Hunger

The James Bay & Northern Quebec Agreement of 1975 is a treaty seen as "an epic achievement in the ongoing effort to reconcile the rights and interests of Aboriginal peoples and those of non-Aboriginal peoples in Northern Québec."[91] It was the first modern treaty to be negotiated following the *Calder* decision, and sets out a series of land category definitions while documenting rules of administration for economic, social services and land development that were hard fought for by the Cree and Inuit rights holders and their negotiators. The JBNQA covers extensive territory throughout the province of Quebec, particularly in the northern areas

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[87] *Ibid.*

[88] The Community Well-Being index measures socio-economic well-being primarily through education, labour force activity, income and housing for Indigenous communities across Canada over time. Based on census data from 1981 to 2016, the CWB index offers a summary measure of wellbeing that can be compared across First Nations and Inuit communities. See Government of Canada, Indigenous Services Canada, *National overview of the Community Well-Being index, 1981 to 2016* (12 November, 2019), online: *The Community Well-being index* <https://www.sac-isc.gc.ca/eng/1419864229405/1557324163264>.

[89] See *GoC, "Modern Treaties", supra* note 81.

[90] See Appendix A: *Selected Modern Treaty Summary*.

[91] See *Quebec (Attorney General) v Moses*, [2010] 1 S.C.R. 557 at para 14.

of the province. The populations of these areas are relatively small but remains the home to a number of vital First Nations and Inuit communities.[92]
The JBNQA opens with a lengthy 'Philosophy of the Agreement' section, authored by John Ciacca who was, at the time, a member of Quebec's National Assembly negotiating on behalf of the Quebec government. He states: "I mention all these various provisions to emphasize two things, namely that the native peoples will have land that to all intents and purposes they can call theirs, and that Quebec's presence on that land will be reality."[93] This 'presence' is evident, for example in the three categories of land described in the JBNQA, whose key features are:

- *Category I lands* (approximately 1% of the total land area) are those "allocated to the native peoples for their exclusive use", set aside for 'self-administration.'[94] Inuit and Cree beneficiaries possess the exclusive right to hunt, fish and trap, while non-beneficiaries may obtain permission to hunt and fish from Cree, Inuit or Naskapi authorities but do not have the right to trap. Natural resource rights remain the property of the Quebec government in Category I lands. Category I lands however cover a relatively small geographical area and are "of minimal importance in relation to the total economy of Quebec."[95] Environmental protection of Category I lands is the stated responsibility of the aboriginal peoples.[96]
- *Category II lands* (approximately 14% of the total land area) entail land-use rights for Aboriginal peoples, however mining exploration and other related activities are permitted to occur without any requirement of consent, as authorized by the government of Quebec. Inuit and Cree beneficiaries, and non-beneficiaries, follow the same rights to hunt, fish and trap as for Category 1 lands.[97]
- *Category III lands* (approximately 85% of the total land area) cover the largest geographical area, where no exclusive rights are provided for Aboriginal peoples; Category III are public lands, but Inuit, Cree and non-beneficiaries have the right to hunt and fish, but only beneficiaries have the right to trap.[98]

With Cree and Inuit being Indigenous Peoples whose cultures stem from subsistence hunting and gathering on the land, be it through trap lines or through marine harvesting, access to land is vital for self-reliance and cultural survival post-JBNQA. Furthermore, details of income security programs for Aboriginal peoples relying on hunting, fishing and trapping are provided at an in-depth level to ensure that these forms of private and commercial activity remain viable.[99] As well, industries such as the seal skin fur trade are direct by-products of subsistence lifestyles, and provide crucial income for hunters and trappers in the JBNQA settlement area and beyond.[100] In this context, the JBNQA can be seen as furthering SDG targets in relation to reducing hunger,

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[92] See Christa Scholtz & Maryna Polataiko, "Transgressing the Division of Powers: The Case of the James Bay and Northern Quebec Agreement" (2019) 34:3 Can JL & Soc 393.
[93] See *JBNQA*, *supra* note 83 at page 8.
[94] See *JBNQA*, *supra* note 83 at page 8 and section 5.1, *Category I Lands*.
[95] See *JBNQA*, *supra* note 83 at page 7.
[96] See *JBNQA*, *supra* note 83 at page 8 and section 5.1, *Category I Lands*.
[97] See *JBNQA*, *supra* note 83 at section 5.2, *Category II Lands.*
[98] See *JBNQA*, *supra* note 83 at section 5.3, *Category III Lands.*
[99] See *JBNQA*, *supra* note 83 at section 30, *Income Security Program for Cree Hunters and Trappers.*
[100] See Alethea Arnaquq-Baril, "Angry Inuk," Documentary (Montreal: National Film Board, 2016), online: <https://www.nfb.ca/film/angry_inuk/>.

including targets 2.1[101] and 2.2,[102] while having an indirect but equally crucial method of using income generated from subsistence lifestyles to reduce poverty in SDG 1 through targets 1.2[103] and 1.4.[104]

Through this designation system, the JBNQA begins to promote the terms of SDGs 1 and 2 generally by ensuring that there is community access to, and governance of, lands for each category. The provisions of the JBNQA provide for the transfer of approximately $150 million Canadian to the James Bay Crees and the Inuit of Quebec in order to serve as compensation from the Canadian and provincial governments for the hydroelectric energy and associated facilities.[105] This amount was meant to serve as a method of providing economic resources to these communities and recognizing that these payments were the result of the transfer of ownership rights to natural resources as recognized in SDG 1.4.

To ensure that all members of these communities are included in the economic benefits generated by the compensation, the JBNQA administered the settlements for Cree beneficiaries through the Cree Regional Authority and Inuit by creating the non-profit Makivik Corporation.[106] The Corporation is unique in being a hybrid entity: a private body with a public mission.[107] It stands out as a major step in advancing Indigenous rights and interests, particularly as an organization that protects the rights, interests and financial compensation of JBNQA and more recently the offshore Nunavik Inuit Land Claims Agreement that came into effect in 2008. The Corporation also owns and operates large profitable business enterprises in the area, generates jobs for the region, improves housing conditions and protects the Inuit language and culture.[108]

Makivik in such a sense has a direct impact on SDG 1 for poverty reduction, both from its inception in the JBNQA to its execution and operations today. Furthermore, the Corporation viewed the settling of the land claims as a "'new beginning' for developing and implementing a

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[101] Target 2.1 states, "By 2030, end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round." See *Transforming our world*, *supra* note 2 at page 19.

[102] Target 2.2 states, "By 2030, end all forms of malnutrition, including achieving, by 2025, the internationally agreed targets on stunting and wasting in children under 5 years of age, and address the nutritional needs of adolescent girls, pregnant and lactating women and older persons." See *Transforming our world*, *supra* note 2 at page 19.

[103] Target 1.2 states, "By 2030, reduce at least by half the proportion of men, women and children of all ages living in poverty in all its dimensions according to national definitions." See *Transforming our world*, *supra* note 2 at page 19.

[104] Target 1.4 states "By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance." See *Transforming our world*, *supra* note 2 at page 19.

[105] See *JBNQA*, *supra* note 83 at section 25.2.

[106] See *JBNQA*, *supra* note 83 at sections 26 and 27.

[107] See Richard Janda, "Why Does Form Matter - The Hybrid Governance Structure of Makivik Corporation" (2006) 30:3 Vt L Rev 785 at page 788 [*Janda, "Makivik Corporation"*].

[108] See *Janda, "Makivik Corporation"*, *supra* note 105 at pages 789-790.

new relationship and way of doing business with the governments of Quebec and Canada."[109] These settlements helped pave the way for other land claims corporations, such as Nunavut Tunngavik Inc. for the Nunavut Land Claims Agreement, the Inuvialuit Regional Corporation for the Inuvialuit Final Agreement, the Carcross/Tagish Management Corporation (C/TMC) for Carcross/Tagish First Nation Final Agreement and many others. C/TMC in particular has been strong in enabling SDG 1 through its stipulation that both the Governments of Canada and Yukon must work with the First Nations to create jobs, which need to be filled by an Indigenous workforce grown out of the collaboration of the three parties.[110]

It is our conclusion that JBNQA ultimately enabled advancements for SDG targets 1.2 and 1.4, but also enabled pride and resilience in the newly recognized as self-governed peoples. In such a sense, creating the rights and space for Indigenous self-governance as the first modern treaty, which Canada has honoured, has greatly advanced SDG 1 and 2 for both the Cree and Inuit of JBNQA, and created the legal movement for other Indigenous Peoples across Canada.

B. The Kluane First Nation Agreement: Fostering SDGs 2 Zero Hunger and 15 Life on Land

The Kluane First Nation Agreement (KFNA), signed between Kluane First Nation and the Government of Canada and the Government of Yukon in 2003, contains a detailed focus on land rights similar to the JBNQA. The majority of this modern treaty deals with the definition, provisions of use and the management or dispute resolution for land, water, forestry and fishing resources. The Nation's rights to use and manage natural resources in and on its territory, particularly those relating to fish and game catching and taking for consumption, are set out in detail.[111] Much like the JBNQA, this enables strong fostering of SDG 2 through targets 2.1, 2.2 and 2.4[112] by allowing for food sovereignty and autonomy when it comes to harvesting from and maintaining traditional practices on the land.

Another component that sets the KFNA as a treaty that created a new standard for Indigenous rights and title is land management and co-governance. Specifically, this concerns the designation of Special Management Areas as stipulated in the agreement, where protections are implemented in order to preserve and protect natural resources and associated areas of environmental and cultural significance.[113] A direct outcome of this is Kluane National Park and Reserve. Though established in 1943 for gaming, this park is now under the joint responsibility of Kluane First Nation, the Champagne and Aishihik First Nations which are party to the

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[109] See Makivik Corporation, "Corporate" (18 November 2021), online: <https://www.makivik.org/corporate/>.

[110] See *The Carcross/Tagish First Nation Final Agreement*, 22 October 2005, online: <https://www.rcaanc-cirnac.gc.ca/eng/1293118961162/1559910795261>.

[111] See *2003 Kluane First Nation Final Agreement*, 18 October 2003, online: <https://www.rcaanc-cirnac.gc.ca/eng/1294426831933/1542815137147> [*KFNA*].

[112] Target 2.4 states, "By 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality." See *Transforming our world*, *supra* note 2 at page 19.

[113] See *KFNA*, *supra* note 109 at *Chapter 10 – Special Management Areas*.

Champagne and Aishihik First Nations Final Agreement of 1992,[114] and Parks Canada, the government agency responsible for managing national parks and historic sites across the country. When it was first established, the Kluane Game Sanctuary, as it was once called, denied the First Nations of their right to hunt, fish and trap in a significant portion of the Southern Tutchone traditional territory. Not only did this affect food security, access to land and prevented the First Nations from managing life on said land, it also inflicted great cultural and personal losses that have affected over five generations. The land claims agreement that helped establish Kluane National Park reaffirms these First Nations' abilities to assert their rights to carry out their traditional activities in the national park.[115] Renewing this connection to the land and enabling the First Nations, who have vast knowledge of the ways of life in this territory, to set management priorities for the natural resources in Kluane National Park and Reserve fosters strong outcomes for conserving the region. Thus far, this has been a successful collaboration between Indigenous and Canadian governments. As such, parties in the KFNA, and by extension the Champagne and Aishihik First Nations Final Agreement, have strong records of fostering SDG targets 15.2,[116] 15.6[117] and 15.9.[118]

This form of land management is not unique to KFNA, though it sets a strong standard for collaborative land management, both through government agencies like Parks Canada, but also as standards that can be seen in other modern treaties later negotiated. For example, the 2016 Tla'amin Final Agreement allows the Tla'amin Nation to make laws in accordance with natural resource management on traditional lands and harvest areas in partnership with provincial and federal governing bodies.[119] This agreement takes governance to a level that was not afforded to KFNA, where the Tla'amin First Nation has exclusive ownership over all forest resources within their lands as stated in the Agreement.[120] This directly correlates with SDG target 15.2 to grant private property rights to the Tla'amin and maximizes community access and benefit to these lands. The Tla'amin Nation, furthermore, retains leadership over harvesting and conservation decision-making within their forest areas, thus allowing for forest practices that align with

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[114] See *Champagne and Aishihik First Nations Final Agreement*, 19 June 1992, online: <https://www.rcaanc-cirnac.gc.ca/eng/1294331836730/1542812214590>.

[115] See Parks Canada, "Dän Keyi (Our people's land)" (02 May 2019), online: *Kluane National Park and Reserve* <https://www.pc.gc.ca/en/pn-np/yt/kluane/culture/autochtone-indigenous>.

[116] Target 15.2 states, "By 2020, promote the implementation of sustainable management of all types of forests, halt deforestation, restore degraded forests and substantially increase afforestation and reforestation globally." See *Transforming our world*, *supra* note 2 at page 29.

[117] Target 15.6 states, "Promote fair and equitable sharing of the benefits arising from the utilization of genetic resources and promote appropriate access to such resources, as internationally agreed." See *Transforming our world*, *supra* note 2 at page 29.

[118] Target 15.9 states, "By 2020, integrate ecosystem and biodiversity values into national and local planning, development processes, poverty reduction strategies and accounts." See *Transforming our world*, *supra* note 2 at page 29.

[119] See *Tla'amin Final Agreement*, 5 April 2016, online: <https://www.rcaanc-cirnac.gc.ca/eng/1397152724601/1542999321074> [*TFA*] at *Chapter 15 – Governance*, section 1 stating, "The Tla'amin Nation has the right to self-government, and the authority to make laws, as set out in this Agreement."

[120] See *TFA*, *supra* note 117 at *Chapter 8 – Forest Resources*, section 1 stating "On the Effective Date, the Tla'amin Nation owns all Forest Resources on Tla'amin Lands."

community and cultural values while providing sustainable economic opportunities within traditional territories.[121]

Overall, KFNA and its related modern treaties address various dimensions of SDGs 2 and 15, and do well in addressing targets 15.2, 15.6 and 15.9. Specific to KFNA however, self-determination when it comes to SDG 15 still remains as a point of possible concern. Though no issues and disagreement have been presented officially to date, there may be FPIC concern for the portion of the agreement addressing land expropriation for proposed development on settlement land. Stipulated in the treaty, the Government of Yukon or any other entity deemed an 'authority' by virtue of legislation is legally bound to consult[122] with the affected First Nation for the purpose of reaching an agreement.[123] However, there is no explicit provision for a First Nation to have the ability to put a stop to development under the terms of the KFNA. Rather the agreement only requires that consultation occurs and complies with the outlined procedures.[124] In the future, this opens a door for industry and/or the Governments of Canada and Yukon to potentially override the nature of recognizing the ownership rights and interests of the Kluane First Nations community if natural resources found on their lands are deemed more valuable than obtaining true free, prior and informed consent as outlined in UNDRIP. This can additionally inhibit the ability for communities like KFNA to have the power to determine the course of development in their region, thus potentially inhibiting the progress towards achieving the sustainable development goals.

C. Labrador Inuit Land Claims Agreement: Frustrating SDGs 13 Climate Action and 15 Life on Land

The Labrador Inuit Land Claims Agreement (LILCA) was signed between the Inuit of Labrador, the Government of Canada and the Government of Newfoundland and Labrador in 2005.[125] The treaty terms cover resource management, land use planning, environmental and ecological decision-making procedures, harvesting rights, and powers for self-government. Furthermore, it created the autonomous region now known as Nunatsiavut. With concerns about future extractive activities in mind, the Labrador Inuit included terms in the Agreement explicitly giving the Indigenous representative body the power to require an Environmental Assessment, as under the *Canadian Environmental Assessment Act*,[126] and approvals by the Crown Authority and the Nunatsiavut Government,[127] before a resource use project may commence in Labrador

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[121] See *TFA*, *supra* note 117 at *Chapter 8 – Forest Resources*.

[122] Refer to the contentions around "duty to consult" and FPIC that we raised in *Section II. Indigenous Rights, United Nations Declaration on the Rights of Indigenous Peoples & Canada* for context.

[123] See *KFNA*, *supra* note 109 at *Chapter 7 – Expropriation*.

[124] *Ibid.*

[125] See *Labrador Inuit Land Claims Agreement*, 22 January 2005, online: <https://www.rcaanc-cirnac.gc.ca/eng/1293647179208/1542904949105> [*LILCA*].

[126] S.C. 1992, c. 37 [*CEAA*]. And see *LILCA*, *supra* note 123 at *Chapter 11 Environmental Assessment*, specifically at article 11.3.2 stating, "The Nunatsiavut Government may require an assessment of the Environmental Effects of an undertaking, project, work or activity related to Exploration in Labrador Inuit Lands under Inuit Laws only if the undertaking, project, work or activity is subject to Environmental Assessment under the *Canadian Environmental Assessment Act* or the *Environmental Protection Act*."

[127] This is the self-government body created through the self-government clauses for the Nunatsiavut region.

Inuit lands.[128] The Environmental Assessment is to consider, among other criteria, the scope of the project and how it may impact the environment. The EA will consider the project's cumulative environmental effects (e.g. short- and long-term effects to natural resources and the integrity of ecosystems); impacts to Labrador Inuit communities (e.g. noise and other forms of pollution or habitat destruction that can negatively impact harvesting); measures to mitigate significant adverse environmental effects (e.g. choice of different sites or conducting additional research for mitigation measures prior to starting the project); and alternative approaches to achieving project goals.[129] The Crown Authority and Nunatsiavut Government are required to consult each other on how the Environmental Assessment process is to be applied and harmonized between Canadian law and Labrador Inuit rights.[130][131]

At face value, these provisions promote SDG 13 Climate Action and SDG 15 Life on Land generally by assessing the environmental impacts of proposed projects while considering measures that reduce land degradation.[132] The important role of biodiversity in climate change mitigation and adaptation is highlighted in the Environmental Assessment for the protection of adverse environmental impacts and increases the resilience of Labrador Inuit communities, thereby promoting SDG 13.1.[133] The provisions also integrate a national climate change policy (i.e. the *Canadian Environmental Assessment Act*[134]) to guide planning and decision-making,[135] thereby promoting SDG 13.2.[136] In contrast, recent events in Labrador offer a very different understanding of how government commitments are fulfilling the legal obligation of this binding treaty.

The issue in question relates to the Muskrat Falls hydroelectric project, for which Labrador Inuit argue the Government of Canada, as represented by the Department of Fisheries and Oceans (DFO), did not carry out their duty to consult with Labrador Inuit.[137] Located on the Grand River flowing into the Lake Melville ecosystem,[138] the project could cause catastrophic downstream

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[128] See *LILCA*, *supra* note 123 at article 11.2.1.

[129] See *LILCA*, *supra* note 123 at article 11.2.10.

[130] See *LILCA*, *supra* note 123 at article 11.2.9.

[131] It is important to note that Inuit "law" follows a very different regime and accountability structure compared to First Nations Indigenous law. "Law," in an Inuit sense, is closer to community values than regimented rules. As such, harmony is required between the Canadian perception of law and Inuit values when it comes to making decisions on resource projects that can affect Inuit. See generally Jarich Oosten, Frederic Laugrand & Willem Rasing, *Inuit Laws – Tirigusuusiit, Piqujait, and Maligait*, 2nd ed (Iqaluit: Nunavut Arctic College, 2017), and Natalia Loukacheva, "Indigenous Inuit Law, "Western" Law and Northern Issues" (2012) 3:2 Arctic Rev on L & Politics 200.

[132] See Katherine Lofts et al, "Feature—Brief on Sustainable Development Goal 13 on Taking Action on Climate Change and Its Impacts: Contributions of International Law, Policy and Governance" (2017) 13:1 JSDLP 183.

[133] Target 13.1 stating, "Strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries." See *Transforming our world*, *supra* note 2 at page 27.

[134] See *CEAA*, *supra* note 124.

[135] See *LILCA*, *supra* note 123 at article 11.2.9.

[136] Target 13.2 stating, "Integrate climate change measures into national policies, strategies and planning." See *Transforming our world*, *supra* note 2 at page 27.

[137] See *Nunatsiavut v. Canada (Attorney General)*, 2015 F.C. 492 [*Nunatsiavut v. Canada*].

[138] Also known as Churchill River, the Grand River or Mishtashipu is spiritually, culturally and socio-economically important to Indigenous Peoples through fishing, trapping, ceremony and travel. See Yellowhead Institute, "

impacts[139] to not only the Inuit in the region, but also the Innu, Natuashish and NunatuKavut communities in the area more broadly.[140] All parties have voiced their concerns and grief that land claim rights were not respected and FPIC was not obtained from all parties for the project.[141] Critics further assert that Nalcor,[142] the provincial Crown corporation developing Muskrat Falls, did not study Lake Melville during its Environmental Impact Assessment because "it predicted that the Muskrat Falls dam would have no measurable impacts on the estuary, a traditional Inuit hunting and fishing ground," a decision which was based on assumptions and not science.[143]

The inquiry conducted for the project, called the Commission of Inquiry Respecting the Muskrat Falls Project, ultimately found that the government failed to safeguard the best interests of the province's population. The project's failure to adequately research alternatives, investigate negative impacts and present the public about the risks of the project further validated Labrador Inuit.[144] Even then, the Nunatsiavut Government lost in both the Newfoundland Supreme Court

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Not So Grand Plans: The Continued Erasure of Indigenous Rights in Newfoundland and Labrador's Hydroelectric 'Development'", by Jessica Penney and Patricia Johnson-Castle (10 June 2021), online: *Treaties, rights and title* <https://yellowheadinstitute.org/2021/06/10/not-so-grand-plans-hydro/> [*Yellowhead Institute*].

[139] Methylmercury is one of the primary concerns stemming from this project. Exposure long-term to methylmercury can cause a host of different neurocognitive delays in children and impact cardiovascular health in adults. Residents in this area already face more exposure to methylmercury compared to the average Canadian, and will only be further impacted once the contamination reaches critical country food sources, such as seals, salmon, char, mussels, clams and bird eggs, that subsidize diets amidst the food insecurity crisis in northern Inuit communities. See *ibid*. and Ryan S. Calder et al.. "Future impacts of hydroelectric power development on methylmercury exposures of Canadian Indigenous communities" (2016) 50:23 Environmental Science & Technology 13115 at pages 49-50.

[140] See generally *Nunatsiavut v. Canada*, *supra* note 135.

[141] See *Yellowhead Institute, supra* note 136.

[142] Muskrat Falls is also not the first time that Nalcor did not properly consult Indigenous Peoples and generate public outcry. In the 1960s and 70s, the Churchill Falls project, also on the Grand River, included no consultation with Innu Nation, who traditionally travelled and trapped along the river which was flooded by the project. The Upper Churchill Redress Agreement now retroactively compensates the Innu by paying out $2 million dollars a year from Nalcor. See Government of Newfoundland and Labrador, "Lower Churchill Project" (26 Feb 2018), online: <https://www.gov.nl.ca/lowerchurchillproject/default.htm>. In a way, these incredibly damaging environmental projects are partly due to the Government of Newfoundland and Labrador's mismanagement of public contracts, the price of which are being shifted to the Indigenous Peoples of the province. The government is now incentivized to push forward with contentious projects despite outcry because it negotiated an unfavourable power purchasing agreement with Hydro Quebec, which sells electricity to Quebec at a rate that is "barely distinguishable from being free," until 2041. This is costing the Government of Newfoundland and Labrador losses of billions of dollars of revenue each year, which they are desperately trying to recuperate through any means necessary. See generally *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, [2018] 3 S.C.R. 101 [*Churchill Falls*] and Feehan, James P, and Melvin Baker. "The Origins of a Coming Crisis: Renewal of the Churchill Falls Contract" (2007) 30:1 Dal LJ 207 at page 209.

[143] See Sarah Cox, "Mercury rising: how the Muskrat Falls dam threatens Inuit way of life", *The Narwhal* (22 May 2019), online: <https://thenarwhal.ca/mercury-rising-muskrat-falls-dam-threatens-inuit-way-of-life/> and Michelle Kamula and Zou Zou Kuzyk, "Sediment and Organic Carbon" in Nunatsiavut Government, *Lake Melville: Avativut, Kanuittailinnivut (Our Environment, Our Health) Scientific Report* (Nain: Nunatsiavut Government, 2016) at pages 41-47.

[144] Commission of Inquiry Respecting the Muskrat Falls Project, *Muskrat Falls: A Misguided Project – Volume 1: Executive Summary, Key Findings and Recommendations* by The Honourable Richard D. LeBlanc, Commissioner

and the Federal Court of Canada when challenging the Government of Newfoundland and Labrador's duty to consult. The Nunatsiavut Government focused on the downstream effects of the project, including increased methylmercury levels. This argument was not accepted as a legally binding requirement to consult Labrador Inuit through *Nunatsiavut v. Canada (Attorney General)*,[145] although public opinion amongst Labrador's Indigenous Peoples still believes that the Government should have operated in good faith and respected the fundamental principles behind the rights they were promised through the LILCA.[146] For now, all parties have agreed to establish an Independent Expert Advisory Committee (IEAC) that includes the Nunatsiavut Government, Innu Nation, the NunatuKavut Community Council and federal, provincial and municipal governments to mitigate concerns where possible.[147]

From an SDG perspective, the poor execution of fulfilling treaty obligations by the government parties through Muskrat Falls ultimately do not support SDG 13 and its targets. Not only are there significant climate change impacts based on the environmental degradation caused by this project, but any renewable energy generated, which also applies to production from the Churchill Falls project,[148] do not get used by any Nunatsiavut communities.[149] Subsequently, Indigenous Peoples also pay the price when it comes to SDGs 6 Clean Water and Sanitation, 7 Affordable and Clean Energy, 11 Sustainable Cities and Communities, 14 Life Below Water and 15 Life on Land. Overall, Muskrat Falls is a clear example of how the Governments of Canada and Newfoundland and Labrador not only frustrated the SDG progress, but blatantly disregarded Indigenous rights fought for and won by the Nunatsiavut peoples through the LILCA.

V. Challenges for Achieving the SDGs through Canada's Treaties with Indigenous Peoples – Limits on Indigenous Rights through Modern Treaties

In Section IV we see that, if properly operationalized and respected, modern treaties between Canada and Indigenous Peoples have the capacity to offer a variety of innovations which can help Canada achieve the SDGs. At the same time, modern treaties offer the possibility of incorporating Indigenous communities into broader Canadian society in a way that respects and implements the recommendations of UNDRIP and the TRC Final Report. However, SDGs remain limited in their abilities to use modern treaties in a full and holistic manner. Additionally, there are inherent political and social issues to support for SDG achievement.

(St. John's: Queen's Printer for Newfoundland and Labrador, 2020), online: *Muskrat Falls Inquiry* <https://www.gov.nl.ca/iet/files/Volume-1-Executive-Summary-Key-Findings-and-Recommendations.pdf>.

[145] See generally *Nunatsiavut v. Canada*, *supra* note 135.

[146] See Bill Flowers, "Inadequate consultation on the Muskrat Falls project", *Institut de recherche en politiques publiques* (13 December 2016), online: <https://policyoptions.irpp.org/fr/magazines/decembre-2016/inadequate-consultation-on-the-muskrat-falls-project/>.

[147] See Nunatsiavut Government, News Release, "Make Muskrat Right" (13 July 2017), online: *Update to Beneficiaries* <https://www.nunatsiavut.com/wp-content/uploads/2017/07/Make-Muskrat-Right-Update-July-2017.pdf>.

[148] See *Churchill Falls*, *supra* note 140.

[149] These six fly-in-only communities on Labrador's North Coast remain reliant on carbon-heavy diesel generators for electricity and heating, which is counter-intuitive in an era that so desperately requires decarbonization. See *Yellowhead Institute*, *supra* note 136.

The first limitation we find is the emphasis on procedural compliance that has been observed in both the JBNQA and the KFNA, which characterize the modern treaties overall.[150] This calls into question the efficacy of the modern treaties in enabling Indigenous rights in the first place, and whether the emphasis on procedural compliance has instead served to reinforce a subordinate Indigenous-Crown relationship. Over the course of time the legal interpretation of section 35(1) the *Charter of Rights and Freedoms* has yielded judicial decisions that reinforce this effect. Terry Mitchell has opined that this development is in part due to a trend that "the increasing focus on extractive industries generates ever-greater tensions between the development objectives of government and industry on the one side, and Indigenous Peoples' efforts to protect their cultures and advance territorial and political autonomy and survival on the other side."[151] Contentious decisions have also arisen in disputes related to land title, particularly regarding land development by Crown or private interests. For example, *Delgamuukw v. British Columbia*[152] and *Tsilhqot'in Nation v. British Columbia* [*Tsilhqot'in*] have clarified Aboriginal title as a vehicle to achieving the "goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights."[153] However, the benefits for and limitations on title remain uncertain. Justified infringement, according to *Tsilhqot'in*, poses a conflict for the practical application of rights to land title, whereby the government retains the ability to limit title in cases of "compelling and substantial public purpose."[154] They are not inconsistent with the Crown's fiduciary duty to the Aboriginal group and their future generations. The terms of the *Tsilhqot'in* judgment could be seen as conflicting with themselves in the practical application of rights to land title, thereby reinforcing the subordinate Indigenous-Crown relationship. This is of special concern during a period of national and international transition, with many critical natural resources in high demand for clean transitions, and may pit substantial public and industry interest against the rights conferred to Indigenous Peoples for determining how resource extraction and exploitation should proceed on their lands.

The potential of a subordinate Indigenous-Crown relationship has ostensibly challenged the ability for pluralism to flourish in the Canadian legal framework. In this context, legal pluralism is characterized by the acknowledgement and empowerment of Indigenous systems of law for Indigenous Peoples which are supported and applied inside the Canadian legal system. It is foundational to self-governance, a key pathway to agency in a rights-based approach to development. The expression and fulfilment of legal pluralism in Canada has been the subject of much dispute between the Crown and Indigenous Peoples, as evidenced in a particularly paradoxical case relating to the Nisga'a of British Columbia Final Agreement with the Crown.[155]

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[150] See generally *Otis, "Treaty Rights and Legal Pluralism", supra* note 69 at page 330.

[151] See *Mitchell, "Aboriginal Governance", supra* note 64 at page 46.

[152] [1997] 3 S.C.R. 1010.

[153] See *Tsilhqot'in, supra* note 79 at para 32.

[154] Though infringements cannot be "inconsistent with the Crown's fiduciary duty to the Aboriginal group," the power held by governments still poses a systemic concern for the limits on Indigenous self-government. See *Tsilhqot'in, supra* note 79 at para 88.

[155] See *Campbell et al v. AG BC/AG Cda & Nisga'a Nation et al*, 2000 B.C.S.C. 1123. This case affirms that the self-government provisions and provisions giving the Nisga'a Nation the authority to make laws under the Nisga'a Final Agreement (see *Nisga'a of British Columbia Final Agreement*, 27 April 1999, online: <http://www.nnkn.ca/files/u28/nis-eng.pdf>) are constitutionally valid under section 35(1) of the *Charter of Rights and Freedoms*.

During negotiations, the Nisga'a took steps to explicitly limit the state-acknowledged effect of their own Indigenous laws with specific treaty language, in order to "insulate their traditional laws and institutions from direct interference by state institutions, including non-Indigenous judges."[156]

The Nisga'a example is just one of many examples of what is often an incompatibility between Indigenous rights and the legal framework in Canada. This has led scholars to conclude that Canada entails "a founding constitutional act that enumerates Indigenous Peoples and their lands as the sole jurisdiction of the federal government, when the highest court has propagated the power to infringe Indigenous rights and title to all the provinces and territories as well."[157] This has contributed to structural barriers to sustainable development for Indigenous Peoples in Canada.

However, the present Canadian federal government has stated a commitment to legislation as the next step in implementing UNDRIP is a strong and important signal for instigating change for said legal barriers and advancing progress for achieving the SDGs.[158] Mitchell summarized this important work that the federal government must undertake as follows, a fitting end to the exploration of UNDRIP and the SDGs:

> Working toward the harmonization of UNDRIP and domestic law would serve to recognize Aboriginal self-determination and advance productive, mutually beneficial business partnerships. Sustainable development practices grounded in an international Indigenous rights framework, such as UNDRIP, will promote the co-generation and redistribution of wealth, addressing, in part, the unacceptable gaps between Aboriginal peoples and settler populations.[159]

UNDRIP can act as a foundation for marginalized Indigenous communities to assert their agency, seize their human rights and live lives recognized and experienced as equal and free from discrimination matters deeply. Building on this framework, domestic and international agreements (including treaties) continue to push the boundaries of what is possible for Indigenous rights and self-governance. In the following section, we provide an example of one such treaty redefining the relationship between Indigenous and Western forms of government through international trade.

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[156] See *Otis, "Treaty Rights and Legal Pluralism", supra* note 69 at page 330.

[157] See Jeremy Patzer, "Indigenous rights and the legal politics of Canadian coloniality: What is happening to free, prior and informed consent in Canada?" (2019) 23:1-2 Intl JHR 214 at page 221.

[158] Furthermore, the future will see Canada and Indigenous communities facing many legal, policy and economic challenges as a result of the global Covid-19 pandemic and the impacts of closing borders, economies and commerce. This will put additional pressure on communities and people across Canada and especially on Indigenous communities which were already experiencing significant inequalities and the inability to fully partake of their legal rights. However, as this article has demonstrated, the confluence of the modern treaties, the SDGs and UNDRIP's terms and increasing adoption by Canada offers the opportunity for a recovery that meets the short and long-term needs of Indigenous communities. At the same time, the article has mapped the ways in which existing modern treaties correlate with the terms of the SDGs and how, when fully implemented these treaties can assist Canada in meeting its commitments under the SDGs as well as fulfilling the terms of the legal commitments undertaken to the Indigenous communities with which they were concluded.

[159] See *Mitchell, "Aboriginal Governance", supra* note 64 at page 47.

VI. Options for a Path Forward – Indigenous Trade as a Nexus and Hope for a New Approach

The Indigenous Peoples Economic and Trade Cooperation Agreement (IPETCA)[160] is a strong example of how a treaty mechanism can advance SDGs and UNDRIP in the Canadian context. This agreement is the first modern comprehensive international Indigenous trade agreement in history.[161] IPETCA is revolutionary for both its content and philosophy, as well as for the international Indigenous inclusiveness in its negotiations and its eventual implementation and governance. The agreement, much like a memorandum of understanding (MOU), is founded on cooperation and good faith while providing flexibility and voluntary participation in its terms. It is a major step in protecting Indigenous rights and the environment while bringing to the forefront the nexus of Indigenous philosophy, economics, trade and environmental stewardship. Largely inspired and informed by UNDRIP, IPETCA's text also ensures that all parties to the agreement acknowledge the importance of significant international environmental agreements to bring sustainability and Indigenous rights to the core tenets of international Indigenous trade.[162] The four nation-states directly involved in IPETCA's formation, specifically New Zealand, Canada, Australia and Taiwan,[163] actively worked in a collaborative manner with their own domestic Indigenous Peoples during the negotiations. As such, each of the four principal nation-states confirmed internal consultation mechanisms that opened the doors for a new level of domestic confidential interactions among their designated Indigenous representatives.

The SDGs, throughout the negotiation and drafting of IPETCA, have furthermore played a significant part in the development of an inclusive Indigenous trade policy. For example, the MOU signed by Canada, New Zealand and Chile in 2019 concerning the development of the

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[160] Co-author Wayne Garnons-Williams, the founding President of International Inter-tribal Trade and Investment Organization (IITIO), is Canada's Indigenous lead for negotiating IPETCA and presents up-to-date, as of publication of this article, information regarding this agreement through the following section.

[161] The origins of Canada's Indigenous participation in modern international trade through IPETCA began with the North American Free Trade Agreement (NAFTA) renegotiations of 2016, for which the IITO made a formal submission to Global Affairs Canada on the topic of the re-opened NAFTA negotiations. Of the 2,500 submissions to the Government of Canada on NAFTA issues for re-negotiation, IITIO's was the only submission to be devoted to the specific topic of Indigenous trade. The IITIO submission of July 2017 was a catalyst that started the collaborative development of Canada Indigenous trade policy. Although it was not fully implemented in the Canada United States Mexico Agreement (CUSMA, also referred to as USMCA) as a result of the policies of the Trump administration, the IITIO submission's concepts for Indigenous trade were successfully applied in the subsequent trade agreements of Mercosur, the Inclusive Trade Action Group, and, which became, IPETCA. See International Inter-tribal Trade and Investment Organization, "NAFTA Submission to Global Affairs Canada from IITIO" (16 July 2017), online: <http://iitio.org/nafta/>.

[162] These agreements include but are not limited to the UN SDGs, UN Financing for Development Addis Ababa Action Agenda, the UN Framework Convention on Climate Change and the UN Convention on Biological Diversity. See *Indigenous Peoples Economic and Trade Cooperation Agreement, Final Version*, New Zealand, Canada, Australia and Taiwan, February 2022, online: <https://www.mfat.govt.nz/assets/Indigenous-Peoples-Economic-and-Trade-Cooperation-Arrangement-IPETCA-FINAL-VERSION.pdf> at section 3 *International Instruments*, article (e) [*IPETCA*].

[163] Observer states to IPETCA include the United States, Peru and Chile, and the agreement aims to serve as a vehicle that can for bring in more nation states to be part of this agreement or agreements of this sort.

Inclusive Trade Action Group made specific reference to SDG provisions.[164] The preamble of the IPETCA also recognizes that historically the SDGs were exclusionary in relation to Indigenous Peoples, in which Indigenous environmental concerns have for the most part been ignored by nation-states in larger international environmental agreements.[165] Article 3, "International Instruments" reaffirms that applying SDGs and international environmental accords to the trade agreement remain important. It does so for the sake of clarity and to avoid a possible argument that the statements found in the preamble have little impact on application or obligation to signatories.

Highlighting the importance of SDGs in Article 3 is largely a result of priorities voiced specifically by representatives of Indigenous Peoples from every participant nation-state. Each found that their cultural philosophies held the shared understanding that there is a causal connection between the role of steward and guardian to the ecosystem and the benefit that international Indigenous trade will bring to the Indigenous Peoples who are party to or affected by the agreement. This is especially crucial, since for Indigenous Peoples, business and economic growth are inextricably linked to maintaining balance and protecting the environment, and differs largely from the western Keynesian and Adam Smith economic models of maximizing profit through unsustainable exploitation.[166] The principles underlying the SDGs are thus embedded in the cultural philosophies of each of the Indigenous Peoples in all the IPETCA endorsing nation-states.[167] It is set out within IPETCA enabling it to act as a mechanism for Indigenous Peoples to lead in demonstrating best practices for environmental stewardship and successful trade. Incorporating these measures to advance SDGs is necessary in a trade and

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[164] The SDG references in the MOU can be seen in clauses such as "…New Zealand, Canada and Chile will work together to: Uphold our respective commitments for an ambitious and effective implementation of the Paris Agreement *and support the achievement of Sustainable Development Goal 13 (Climate Action)*;" See *Joint Declaration on Fostering Progressive and Inclusive Trade*, New Zealand, Canada and Chile, March 2018, online: <https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/CPTPP-Joint-Declaration-Progressive-and-Inclusive-Trade-Final.pdf > and New Zealand Foreign Affairs and Trade, "Aotearoa New Zealand, Canada, Chile and Mexico are driving a more inclusive and sustainable trade agenda through the Inclusive Trade Action Group (ITAG)." (13 June 2022), online: *Inclusive Trade Action Group* <https://www.mfat.govt.nz/jp/trade/nz-trade-policy/inclusive-trade-action-group/>.

[165] The preamble text states specifically that "the participating economies: Acknowledge the disproportionate inequality and marginalisation of Indigenous Peoples on key indicators of the Sustainable Development Goals (SDG's) and the contribution that enhanced Indigenous trade and investment can make to addressing those realities." Furthermore, the text states that the member states, "Acknowledge that the Addis Ababa Action Agenda on Financing for Development, which supports implementation of the SDG's, acknowledges that Indigenous Peoples continue to be excluded from participating fully in the economy." See *IPETCA*, *supra* note 160 at section 1 *General Understandings*, articles (a)(xvi) and (a)(xvii).

[166] See generally John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (London: Palgrave Macmillan Cham, 1936) and Adam Smith, *The Wealth of Nations* (London: W. Strahan and T. Cadell, 1776).

[167] For example, Indigenous values such as the seventh-generation principle to not adversely affecting the rights and entitlements of the future generations that you will never know are embedded within Indigenous trade and economic activities. See John Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act, Research Paper for the National Centre for First Nations Governance" (May 2008), online: *National Centre for First Nations Governance* <http://fngovernance.org>.

policy climate where disregard for negative social and environmental impacts of economic neoliberalism that fall disproportionately on the most vulnerable is no longer realistic.[168]

In addition to the SDGs, Indigenous rights are featured as a key concept that is crucial when conducting international Indigenous trade. The first subsection of Article 3 reinforces for clarity the tone that was already set in the preamble, that of the interconnectedness of IPETCA to human rights and environmental protection. This section states:

> The participating economies recognize that existing international human rights obligations are interrelated, interdependent, and mutually reinforcing, and should be considered alongside each other when advancing the rights of Indigenous Peoples and their participation in international trade.[169]

Such sections within IPETCA secure a clear and unmistakable symmetry between the Indigenous culture, philosophy and way of life in the context of Indigenous trade and commerce. In such a way, nation-state governments that are parties in IPETCA are expected to carry out their fiduciary obligations in relation to domestic Indigenous Peoples and trade in the context of support for these traditional Indigenous philosophies.[170] This concept of intertwining IPETCA with human rights and environmental protection ensures that IPETCA is not applied in isolation. However, for IPETCA to really succeed, the various signatory nation-states will have to go beyond developing meaningful trade arrangements amongst themselves: they will also have to vigorously apply the spirit and intent of the document to actuate the empowerment of Indigenous Peoples to apply their own Indigenous philosophies for the use of land, water and resources.

We hope that the environmental agreements, protocols and tools that have been expressly and intentionally incorporated into IPETCA will assist Indigenous nations in their quest to protect Indigenous cultures and uphold their Indigenous laws and values,[171] rather than binding or restricting Indigenous trade to a rigorous and non-Indigenous application of foreign environmental covenants and restrictive trade practices. Engaging with and creating law through Indigenous legal frameworks and stories further serve to ignite debate and combat threats to

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[168] See Marie-Claire Cordonier Segger, *Crafting Trade and Investment Accords for Sustainable Development Athena's Treaties* (Oxford: Oxford University Press, 2021) at Chapter 9 *Policy and 'Soft Law' Rationales for Addressing Social and Environmental Concerns in Trade and Investment Treaties*, page 101.

[169] See *IPETCA*, *supra* note 160 at section 3 *International Instruments*, article (i).

[170] Preamble article 1(a)(xiii) underscores this theme, stating that the "United Nations Declaration expressly places the responsibility on States to take, in conjunction with Indigenous people, effective measures to recognize and protect the exercise of Indigenous people' right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures." See *IPETCA*, *supra* note 160 at section 1 *General Understandings*.

[171] This is especially important given that Indigenous laws within the colonial state remains limited, regardless of recent expansion and acknowledgements. IPETCA as an agreement with Indigenous laws and values incorporated directly into text seeks to break from contemporary western methods of simply acknowledging Indigenous legal traditions as nothing more than "values" or "worldviews". See Val Napoleon & Hadley Friedland, "Indige- nous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 225 at pages 235–36.

cultural survival as Indigenous Peoples.[172] In such a way, IPETCA sets out not only the theme of cooperation for international Indigenous trade, but also upholds the highest ideals of Indigenous culture and philosophy that is consistent and in keeping with the environmental goals found in both UNDRIP and the SDGs.

Conclusion

As Canada faces an era of change, where public demand for reconciliation and de-marginalization of vulnerable populations continues to grow, evaluating the fulfilment of our obligations towards Indigenous beneficiaries remains crucial. This is both for fostering progress to achieving SDG targets and UNDRIP implementation and for actualizing our duties towards the first residents of the land we have come to share. In this article, the first report on a broader study of Canada's progress to achieving the SDGs through modern treaties, we see that there is strong movement to fulfil treaty obligations overall. However there remains a need to critically assess whether the government's party to the land claims truly respect these agreements as legally binding instruments as many obligations remain unfulfilled for many First Nations, Inuit and Métis who rely on the benefits conferred to them as rights holders via these treaties. Future policies and programs must be informed by robust analyses of how Aboriginal rights and title are defended through the implementation of modern land claims agreements, and how these lessons can be translated into frameworks at national and international levels to uplift Indigenous law-making and ensure commitments to reconciliation are attained. Agreements such as IPETCA that integrate UNDRIP and SDGs not only at its core through development and content, but through to implementation, offer a pathway and methodology for governments to collaboratively advance their progress towards achieving the SDG targets and UNDRIP implementation. Only in a collaborative and decolonial manner can we seek to achieve the sustainable future that we all need.

[172] See Christine Zuni Cruz, "Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law" (2000) 1 Tribal LJ 1 at the end of Part V *Of Cultural Integrity and Self-Determination*, online: <lawschool.unm.edu/tlj/tribal-law-journal/articles/volume_1/zuni_cruz/index.php>.

Appendix A: Selected Modern Treaty Summary

The selection methodology for this process sought to ensure that there was an inclusion of geographical territories and different periods of time during which the treaties were promulgated, as well as the particular type of issues faced by Indigenous communities, in order to capture a cross section of modern treaties.

Modern Treaty	Date Signed	Province or Territory	Spoken Language	SDG Analysis Applied
The Carcross/Tagish First Nation Final Agreement	22 October, 2005	Yukon	Tagish	SDG1 No Poverty, SDG 2 Zero Hunger, SDG 6 Clean Water, SDG 7 Energy
Champagne and Aishihik First Nations Final Agreement	19 June, 1992	Yukon	Southern Tutchone, Tlingit	SDG 3 Health, SDG 4 Education
Gwich'in Comprehensive Land Claim Agreement	22 April, 1992	Yukon	Vuntut Gwich'in, Tetlit Gwich'in, Tukudh Gwich'in, Alaskan Switchin	SDG 1 No Poverty
Labrador Inuit Land Claims Agreement	22 January, 2005	Newfoundland and Labrador	Inuktitut	SDG 13 Climate Action
Inuvialuit Final Agreement	05 June, 1984	Northwest Territories	Inuktitut (Inuvialuktun dialects)	SDG 14 Life Below Water, SDG 15 Life on Land
The James Bay and Northern Quebec Agreement	11 November, 1975	Quebec	East Cree and Inuktitut	SDG 1 No Poverty, SDG 2 Zero Hunger
Kluane First Nation Final Agreement	18 October, 2003	Yukon	Dan K'e, Southern Tutchone	SDG 1 No Poverty, SDG 2 Zero Hunger
The Kwanlin Dun First Nation Final Agreement	19 February, 2005	Yukon	Southern Tutchone	SDG 6 Clean Water, SDG 7 Energy
Little Salmon/Carmacks First Nation Final Agreement	21 July, 1997	Yukon	Northern Tutchone	SDG 13 Climate Action
Maa-nulth First Nations Final Agreement	09 April, 2009	British Columbia	Nuu-chah-nulth	SDG 6 Clean Water, SDG 7 Energy

Modern Treaty	Date Signed	Province or Territory	Spoken Language	SDG Analysis Applied
Sioux Valley Dakota Nation Governance Agreement	30 August, 2013	Manitoba	Dakota	SDG 4 Education, SDG 10 Reduced Inequalities
The Ta'an Kwach'an Council Final Agreement	13 January, 2002	Yukon	Southern Tutchone, Tagish, Tlingit	SDG 9 Industry, Innovation and Infrastructure
Tla'amin Final Agreement	05 April, 2016	British Columbia	Dogrib	SDG 14 Life Below Water, SDG 15 Life on Land
Tlicho Land Claims and Self Government Agreement	25 August, 2003	Northwest Territories	Dogrib	SDG 3 Health, SDG 4 Education
Tsawwassen First Nation Final Agreement	06 December, 2007	British Columbia	Hul'q'umin'um'	SDG 3 Health, SDG 4 Education, SDG 13 Climate Action