THE BEAUFORT SEA BOUNDARY DISPUTE: A CONSIDERATION OF RIGHTS OF INUIT IN CANADA AND THE UNITED STATES

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Canada and the United States are involved in a long-standing dispute concerning the maritime boundary of the Beaufort Sea, located north of Canada and the State of Alaska. With rising global temperatures and the resulting interest in the potential newly accessible resources in the Beaufort Sea, there is increased political pressure to resolve the dispute within the next few years. A likely resolution of this dispute is that the two countries "agree to disagree" and enter into various co-management agreements governing the Beaufort Sea region. This article maintains that if an "agreement to disagree" is reached between Canada and the US regarding the Beaufort Sea boundary dispute and the result is various joint management of the region governing the protection and exploitation of its natural resources, then Inuit in Canada and the US have a right to negotiate such agreements as affected parties. This article considers the rights and entitlements of Inuit in Canada and the US to meaningfully participate in international negotiations regarding agreements governing the Beaufort Sea and its resources. This article analyzes the comparative legal rights of Inuit in Canada and US to share in the Beaufort Sea's resources, protection, and management. The author discusses the relevant land claim agreements and legislative schemes, common law and constitutional rights in judicial precedents, international legal norms, and policy arguments that support Inuit communities' right to sit at the table with Canada and the US to negotiate international agreements to resolve this dispute. The Arctic, including the Beaufort Sea, is the home of Inuit, and they possess legal rights to participate in shaping Arctic governance policy.

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I. INTRODUCTION

In early 2016, record-breaking high temperatures caused the Beaufort Sea ice in the Arctic Ocean to breakup earlier than it had historically.[1] With the Arctic ice permanently melting, more natural resources are becoming available for extraction in the Beaufort Sea region.[2] Subsequently, in 2020, Russia passed legislation that created billions of dollars of incentives to invest in the Arctic Ocean, including building ports, factories, and creating offshore oil and gas developments.[3] It has been reported that "[p]rojects in the east Arctic, closer to Canada's Beaufort Sea, receive an even greater incentive."[4] This move has placed increasing pressure on the federal governments of Canada and the United States to reach a bilateral agreement in their unresolved maritime boundary dispute of the Beaufort Sea. The stakes are high as the maritime boundary will determine which government will have fishing, shipping, and oil rights in the disputed region. It will also determine which government's environmental protection policies will govern the disputed region. An international agreement bringing clarity to the boundary dispute must be reached in order to increase efficiency in the current patchwork of Arctic management and protection.

As scholars have noted, one option for resolution would be a "managed disagreement" that would see Canada and the US agree to a boundary of the Beaufort Sea based on certain established rules.[5] Alternatively, and in this author's opinion more likely to occur in the near future, Canada and the US could "agree-to-disagree" about the boundary and enter into "provisional arrangements of a practical nature."[6] As scholars have envisaged, these arrangements could include joint development of natural resources in the disputed portion of the Beaufort Sea.[7] The goal of these arrangements is to encourage co-operation and allow for mutually beneficial "exploration and exploitation of the natural resources" in the disputed portion of the Beaufort Sea.[8] An example of such an arrangement is the *1988 Agreement Between the Government of Canada and the Government of the United States of America on Arctic Cooperation*.[9] While Canada asserts that the Northwest Passage is made up of its internal waters, the US claims these waters are an international straight.[10] The *Agreement on Arctic Cooperation* is said to have increased Canada and US co-operation in the Arctic while permitting both countries to maintain their legal positions.[11] For example, pursuant to the *Agreement on Arctic Cooperation*, the two countries must "affirm that navigation and

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1 National Aeronautics and Space Administration, "Early Breakup of the Beaufort Sea Ice" (20 May 2016), online: <earthobservatory.nasa.gov/images/88065/early-breakup-of-the-beaufort-seaice>.

2 Thomas Au et al, "The Arctic Ice Melt: Emerging Resources, Emerging Issues" (2013) 38:1 Can-USLJ 195 at 195, 206.

3 John Last, "What Russia's $300B Investment in Arctic Oil and Gas Means for Canada," *CBC News* (15 February 2020), online: <www.cbc.ca/news/canada/north/russian-arctic-oil-and-gas-explained-1.5462754>.

4 *Ibid*.

5 Pieter Bekker & Robert van de Poll, "Unlocking the Arctic's Resources Equitably: Using a Law-and-Science Approach to Fix the Beaufort Sea Boundary" (2020) 35:2 Intl J Mar & Coast L 163 at 200.

6 *Ibid*.

7 *Ibid*.

8 *Ibid*.

9 *Agreement Between the Government of Canada and the Government of the United States of America on Arctic Cooperation*, 11 January 1988, E101701 – CTS No 1988/29 [*Agreement on Arctic Cooperation*].

10 Levon Sevunts, "U.S. Coast Guard to Send Icebreaker Through Northwest Passage with Canada's Consent," *CBC News* (13 March 2021), online: <www.cbc.ca/news/politics/icebreaker-northwest-passage-1.5948475>.

11 *Ibid*.

resource development in the Arctic must not adversely affect the unique environment of the region and the well-being of its inhabitants."[12]

This article maintains that if an "agreement to disagree" is reached between Canada and the US regarding the Beaufort Sea boundary dispute and the result is various joint management of the region governing the protection and exploitation of natural resources; then Inuit in Canada and the US have a right to negotiate such agreements as effected parties. In examining Inuit rights and entitlements, this article also compares how such rights and entitlements differ in each country. Nonetheless, Inuit living in the Beaufort Sea region in Canada and the US are entitled to sit at the negotiating tables of all international agreements regarding the management and protection of their environment.

This article begins with a background of the Beaufort Sea and the boundary dispute in Part II. Part III examines the public policy considerations legislatures in Canada and the US must consider when developing laws regarding the Beaufort Sea that may affect Inuit communities living in that region. Part IV examines Inuit rights and interests in the Beaufort Sea through land claim agreements and statutes in the respective regions. Part V explores key Indigenous rights developed by the courts. The article recognizes that the US judicial principles are not as comprehensive and consistent in their judicial application as compared to Canada. The final section, Part VI, discusses the pertinent international legal norms that support Indigenous participation in decision-making processes that impact their rights. Taken together, Inuit communities affected by laws governing the Beaufort Sea region have the right to share in the management and control of the Beaufort Sea and its resources. This means that Inuit, as stakeholders in the region, have a right to participate in negotiations for any binational governance regime.

II. BACKGROUND

A. HISTORICAL, GEOGRAPHICAL, AND POLITICAL CONTEXT

The Beaufort Sea, located in the Arctic Ocean, is north of Alaska and Canada (the Northwest Territories and Yukon Territory), west of the Arctic Archipelago, extends to the Chukchi Sea, and is home to several Inuit communities.[13] Inuit are the Indigenous peoples who have long inhabited the Arctic regions of what is now Canada, Alaska, and Greenland. Inuit are coastal peoples that rely on the marine habitat of the Arctic Ocean to provide options for hunting and fishing. For Inuit living along the Arctic Ocean, including the Beaufort Sea, the ocean fulfills important social, cultural, and economic needs.

Inuit in "Alaska, Canada, Greenland, and Russia are connected by common descent."[14] Inuit populations across Canada, Alaska, and Greenland have been found to share

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12 *Agreement on Arctic Cooperation*, *supra* note 9, s 2.

13 For a map of the Beaufort Sea, see Diptarka Ghosh, "Beaufort Sea" (18 March 2021), online: <www.worldatlas.com/seas/beaufort-sea.html>.

14 Isabelle Solberg, *The Inuit Population Across National Borders: Policy and Governance at the Crossroad of Tradition and Modernity* (Joint Master Degree Thesis, Institut européen Centre International de Formation Européenne, 2020) [unpublished] at 11.

mitochondrial lineages.[15] Archaeological evidence also suggests that Inuit in modern-day Alaska migrated eastward into Canada and Greenland.[16] Today, Inuit in the US primarily inhabit Alaska in the west, southwest, the far north, and northwest of Alaska. In Canada, there are four Inuit regions (known as Inuit Nunangat): the Inuvialuit Settlement Region (northern Northwest Territories); Nunavut; Nunavik (northern Quebec); and Nunatsiavut (northern Labrador).[17] Inuit Nunangat is the Inuit homeland, with the majority of Inuit living in 51 communities spread across Inuit Nunangat.[18] Inuit Nunangat "includes land, water and ice. Inuit consider the land, water and ice of their homeland to be integral to their culture and way of life."[19] The Inuvialuit Settlement Region is closest to the Beaufort Sea and the Inuit of this region are known as Inuvialuit.[20]

The importance of the Arctic Ocean to Inuit communities can be best summarized by a Press Release by the Inuit Circumpolar Council (ICC) in Canada.[21] Founded in 1977, the ICC is a non-profit organization and represents approximately 180,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia).[22] In Canada, the ICC's elected leaders come from the land claims settlement regions of Inuvialuit, Nunatsiavut, Nunavik, and Nunavut.[23]

In June 2017, the ICC delivered a Press Release entitled "ICC Calls on the Global Community to Work with Inuit for the Future of the Arctic Ocean."[24] It stated, in part:

> Climate change is a major threat to the Arctic Ocean, but so is seismic testing, ship noise and traffic, marine pollution, new chemical contaminants, ocean acidification and significant concerns about microplastics that are showing up in Arctic marine mammals. Inuit can offer solutions for the management of the marine environment, for example through the recommendations of the ICC led Pikialasorsuaq Commission.[25]

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15 Jennifer A Raff et al, "Mitochondrial Diversity of Iñupiat People From the Alaskan North Slope Provides Evidence for the Origins of the Paleo- and Neo-Eskimo Peoples" (2015) 157:4 American J Physical Anthropology 603 at 610.

16 *Ibid* at 603. For a map of the Inuit Homeland, see Inuit Circumpolar Council Alaska, "Food Sovereignty and Self-Governance: Inuit Role in Managing Arctic Marine Resources" (2020) at 15, online: <secureservercdn.net/45.40.145.201/hh3.0e7.myftpupload.com/wp-content/uploads/20200914-FSSG-Report_LR-1.pdf>.

17 Inuit Tapiriit Kanatami, "About Canadian Inuit," online: <www.itk.ca/about-canadian-inuit>.

18 *Ibid*.

19 Canadian Geographic, "Indigenous Peoples Atlas of Canada," online: <indigenous peoplesatlasofcanada.ca/article/itk-faqs>.

20 Inuit Tapiriit Kanatami, "About Canadian Inuit," *supra* note 17.

21 Inuit Circumpolar Council Canada, Press Release, "ICC Calls on the Global Community to Work with Inuit for the Future of the Arctic Ocean" (7 June 2017), online: <www.inuitcircumpolar.com/press-releases/icc-calls-on-the-global-community-to-work-with-inuit-for-the-future-of-the-arctic-ocean/> [ICC, "ICC Calls on the Global Community"].

22 Inuit Circumpolar Council Canada, "About ICC: Uniting Inuit Since 1977," online: <www.inuitcircumpolar.com/about-icc>.

23 Inuit Circumpolar Council Canada, "ICC Canada: Representing Canadian Inuit on the International Stage," online: <www.inuitcircumpolar.com/icc-canada>.

24 ICC, "ICC Calls on the Global Community," *supra* note 21.

25 *Ibid*.

The Press Release also quoted Herb Angik Nakimayak, Vice President of the ICC, describing the significance of the Mackenzie Delta and Beaufort Sea in particular, stating:

> I grew up on the Mackenzie Delta and Beaufort Sea. Since I was a child I have travelled on and over the sea ice. I have hunted the marine mammals that help provide our food security and sustain our communities.
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> …
>
> For Inuit, the sustainable use of Arctic marine resources and the future of the Arctic Ocean and sea ice is not a luxury — it is life itself, it is about protecting our culture. Inuit are adapting to the changes and we will continue to thrive in the changing Arctic — we have much to learn and much to teach the world.[26]

B. THE BEAUFORT SEA INTERNATIONAL BOUNDARY DISPUTE

To fully understand the Beaufort Sea boundary dispute, one must first understand that the federal governments of both Canada and the US, and not the provinces or states, own the offshore waters surrounding the countries' respective lands, including the Beaufort Sea. The highest courts of both countries have confirmed this legal principle. The United States Supreme Court in *United States v. California* held that "California is not the owner of the three-mile marginal belt along its coast, and that the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."[27] Similarly, the Supreme Court of Canada in *Reference re Offshore Mineral Rights of British Columbia* held that the Federal Government of Canada, and not the Province of British Columbia, has the property in the bed of the territorial sea adjacent to British Columbia and the Federal Government can explore and exploit the natural resources of its continental shelf.[28] The Supreme Court ruled that the Federal Government held the right to the territorial sea in part because "[t]he mineral resources of [these lands] are of concern to Canada as a whole and go beyond local or provincial concern or interests."[29] Accordingly, the power to negotiate an international agreement resolving the Beaufort Sea boundary dispute lays with the federal governments of Canada and the US, and not with the bordering states and provinces.

The federal governments of Canada and the US have an ongoing maritime boundary delimitation dispute concerning the maritime boundary of the Beaufort Sea.[30] The disputed region is described as "a wedge-shaped, 21,000-square-kilometre area."[31] Both governments claim jurisdiction over the disputed region by way of differing legal interpretations of the 1825 Treaty between Russia and Great Britain, the nations that controlled the region at the time.[32] The US rejects the argument that the 1825 Treaty created a boundary in the Beaufort

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26 *Ibid*.
27 332 US 19 at 38–39 (1947).
28 [1967] SCR 792 at 793–94.
29 *Ibid* at 817.
30 For a map of the Beaufort Sea disputed boundary, see Bekker & van de Poll, *supra* note 5 at 176.
31 Chris Windeyer, "Proposed U.S. Beaufort Sea Drilling Leases Infringe on Canada's Sovereignty, Says Yukon," *CBC News* (19 March 2016), online: <www.cbc.ca/news/canada/north/proposed-beaufort-licences-infringe-arctic-sovereignty-1.3498469>.
32 Jeanne L Amy, "Historically Iced Out: Calling on the United States to Resolve Its International Law Disputes in the Arctic Ocean" (2015) 40:1 Tul Mar LJ 137 at 146.

Sea.[33] Canada has taken the position that the "maritime boundary runs along the 141st meridian as an extension of the territorial boundary agreed with the United States."[34] The US rejects Canada's position and asserts that the equidistance principle must be used to establish the boundary.[35] The equidistance principle is "a recognized mode of maritime delimitation that traces a line at equal distance from the closest land point of each state."[36]

Unlike the Antarctic, the Arctic does not have a "treaty system" that governs the region.[37] Instead, the Arctic region has been subject to standard rules of territorial sovereignty (such as the obligation not to use territory in a manner that causes significant harm to another nation beyond national jurisdiction), the law of the sea, and other international laws.[38] The law of the sea is set forth in the *United Nations Convention on the Law of the Sea*.[39]

UNCLOS provides a legal framework for all activities of exploration and exploitation of the resources in oceans and seas, such as navigation, fisheries, scientific research, and conservation. Article 15 of *UNCLOS* stipulates:

> Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured.[40]

Despite Article 15, it would only apply in situations where both States have ratified the *UNCLOS*, which the US has not done.[41] Article 15 is therefore not binding on the US. Having said that, some scholars have noted that Article 15 "probably reflects contemporary customary international law and is binding on the United States as such, unless the United States were on record for consistently opposing the customary status of the rules embodied in Article 15."[42] If the US ratified *UNCLOS*, the dispute could potentially be resolved at the International Court of Justice or the International Tribunal for the Law of the Sea.[43] Moreover, if the US becomes a party to *UNCLOS*, it could make a declaration similar to the one Canada made under Article 298(1)(a) of *UNCLOS*[44] to reject the procedures provided for with respect to, among other things, "[d]isputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations."[45]

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33 Karin L Lawson, "Delimiting Continental Shelf Boundaries in the Arctic: The United States-Canada Beaufort Sea Boundary" (1981) 22:1 Va J Intl L 221.

34 Library of Parliament, *The Arctic: Canada's legal claims*, by François Côté & Robert Dufresne, Catalogue No YM32-9/08-05E-PDF (Ottawa: Parliamentary Information and Research Service, 2008) at 4.

35 *Ibid*.

36 *Ibid*.

37 Nigel Bankes, "Arctic Ocean Management and Indigenous Peoples: Recent Legal Developments" (2020) 11:1 YB Polar L 81 at 84.

38 *Ibid*.

39 *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) [*UNCLOS*].

40 *Ibid*, art 15.

41 Bekker & van de Poll, *supra* note 5 at 181.

42 *Ibid*.

43 *Ibid* at 182–83.

44 *UNCLOS*, *supra* note 39, art 298(1)(a).

45 *Ibid*, ch XXI.6 at 10.

Historically, diplomatic talks to resolve the Beaufort Sea boundary dispute have occurred between the federal governments of Canada and the US.[46] In 2010, negotiations between Canada and the US began in an effort to resolve the dispute.[47] These negotiations stalled after Canada's Foreign Minister at the time did not win re-election in 2011.[48]

Before the recent significant ice melting in the region, the danger of drilling offshore in harsh winter conditions caused resolution to remain a low priority for the two countries.[49] However, this situation has been changing. In March 2016, the US Bureau of Ocean Energy Management announced its oil and gas leasing program for 2017 to 2022, which included potential lease sales off the Alaskan coast, with one in the Beaufort Sea.[50] In response, the Yukon Government declared that the plan to offer oil and gas drilling leases in the Beaufort Sea "violates Canada's Arctic sovereignty."[51] In the past, the Yukon Government has pressed Ottawa to resolve the disagreement, writing a letter to former Prime Minister Stephen Harper to that affect and indicating it would also send "a similar letter" to Prime Minister Justin Trudeau after the US Bureau of Ocean Energy Management announced its recent leasing program.[52] Accordingly, diplomatic talks to resolve the Beaufort Sea dispute are once again a high priority for all governments and communities affected.

Another factor causing this boundary dispute to gain increased attention recently is the urgency with which Arctic communities are demanding a policy for the protection and management of Arctic resources. An international agreement resolving the Beaufort Sea boundary dispute must be reached in order to avoid delays in proper development and implementation of Arctic policies. Areas of the Beaufort Sea have become more easily accessible as temperatures have recently risen and ice sheets have receded. Melting ice allows access to valuable resources and transportation routes, including Arctic fish stocks, shipping lanes, and oil and gas reserves.[53] The National Research Council of Canada has found that the "sedimentary rock below its seabed contains significant petroleum and natural gas reserves."[54] In the 1980s, the value of the Beaufort Sea region became evident as several oil and gas discoveries were made.[55] However, in recent years, an Arctic moratorium stalled resource exploration.

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46 Ted L McDorman, "Canada-United States Bilateral Ocean Law Relations in the Arctic" (2009) 15:2 Sw J Intl L 283 at 293–94.

47 Gregor Sharp, "An Old Problem, A New Opportunity: A Case for Solving the Beaufort Sea Boundary Dispute" (17 June 2016), online: <www.thearcticinstitute.org/an-old-problem-a-new-opportunity-a-case-for-solving-the-beaufort-sea-boundary-dispute>.

48 *Ibid*.

49 Windeyer, *supra* note 31.

50 Maura Forrest, "Pasloski Says Beaufort Sea Drilling Lease Violates Canada's Arctic Sovereignty," *Yukon News* (23 March 2016), online: <www.yukon-news.com/news/pasloski-says-beaufort-sea-drilling-lease-violates-canadas-arctic-sovereignty>.

51 *Ibid*.

52 *Ibid*.

53 Jessica S Lefevre, "A Pioneering Effort in the Design of Process and Law Supporting Integrated Arctic Ocean Management" (2013) 43:10 Environmental L Reporter 10893 at 10894.

54 National Research Council Canada, Innovation success stories, "NRC Helps the Oil and Gas Industry Chart New Frontiers in the Beaufort Sea" (2 December 2013).

55 LTLC Consulting & Salmo Consulting Inc, "Beaufort Regional Environmental Assessment: Oil and Gas Exploration & Development Activity Forecast, Canadian Beaufort Sea 2013–2028" (March 2013) at 13, online: <beaufortrea.ca/wp-content/uploads/2012/03/NCR-5358624-v4-BREA_-_FINAL_UPDATE_-_EXPLORATION_AND_ACTIVITY_FORECAST-__MAY_2013.pdf>.

In 2016, Canada placed a five-year moratorium on oil and gas exploration and drilling in Arctic waters, which expired on 31 December 2021.[56] In 2019, Canada returned $430 million to oil and gas companies that had put down security deposits for offshore exploration projects in the Beaufort Sea.[57] As Canada approached the end of its moratorium, it restarted negotiations with the Inuvialuit Regional Corporation (IRC), Government of the Northwest Territories, and the Government of Yukon regarding potential drilling in the Beaufort Sea.[58] Estimates are that the Beaufort Sea contains "2.9 billion barrels of oil and 25 trillion cubic feet of natural gas."[59]

The IRC, the Inuvialuit Game Council, and Crown-Indigenous Relations and Northern Affairs Canada retained a consulting firm to prepare a report that would assess the potential consequences and effects (both positive and negative) of oil and gas activities and "other industrial activities and human use" in the Beaufort Sea study area.[60] The Report concluded that a potential large oil spill in the area studied in the Beaufort Sea, whether due to oil and gas development, shipping, or other human activities, "would be a major threat to the physical, biological and human systems of the region."[61] The Report recommended that

> the Inuvialuit and the Government of Canada should co-lead initiatives on mitigation and management of environmental effects, addressing important knowledge gaps, planning and undertaking research, ongoing monitoring, and adaptive management, as well as planning and readiness for accidents and malfunctions.[62]

In that regard, resolving the Beaufort Sea boundary dispute is a priority international issue that must be resolved in order to avoid future delays in Arctic management, including resource extraction, ongoing monitoring, planning, and readiness for accidents and malfunctions.

Similarly in the US, active leases in the Beaufort Sea "dropped from 77 at the end of 2015 to 19 in August 2021."[63] This was, in part, due to the US Secretary of the Interior Deb Haaland suspending oil and gas drilling leases on 1 June 2021, reversing the previous administration's program in the Arctic National Wildlife Refuge.[64] Both countries have an interest in protecting the region for ecosystem conservation.[65] The Government of Canada

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56 *Order Prohibiting Certain Activities in Arctic Offshore Waters,* SOR/2019-280.

57 Kate Kyle, "Feds Return $430M to Oil and Gas Companies Ahead of Arctic Offshore Exploration Ban," *CBC News* (18 December 2019), online: <www.cbc.ca/news/canada/north/beaufort-sea-moratorium-deposits-nwt-1.5399157>.

58 Eric Bowling, "IRC, GNWT and Yukon in Talks with Ottawa to Establish Beaufort Drilling Accord," *NNSL Media* (29 June 2021), online: <www.nnsl.com/news/irc-gnwt-and-yukon-in-talks-with-ottawa-to-establish-beaufort-drilling-accord/>.

59 *Ibid*.

60 KAVIK-Stantec Inc, "Beaufort Region Strategic Environmental Assessment Data Synthesis and Assessment Report" (31 July 2020) at 1-2, online: *Inuvialuit Regional Corporation* <rsea.inuvialuit.com/docs/NCR10615510-v1-BREA_FINAL_REPORT.PDF> [Report].

61 *Ibid* at E.21.

62 *Ibid*.

63 US, Congressional Research Service, *Changes in the Arctic: Background and Issues for Congress*, CRS Report R41153 (Washington, DC: Congressional Research Service, 24 March 2022) at 62.

64 US, The Secretary of the Interior, *Comprehensive Analysis and Temporary Halt on all Activities in the Arctic National Wildlife Refuge Relating to the Coastal Plain Oil and Gas Leasing Program*, Order No 3401 (Washington, DC: US Department of the Interior, 1 June 2021).

65 Betsy Baker, "Filling an Arctic Gap: Legal and Regulatory Possibilities for Canadian-US Cooperation in the Beaufort Sea" (2009) 34:1 Vt L Rev 57 at 82 [Baker, "Arctic Gap"].

has recognized that the Arctic is "geopolitically important" with global interest "surging as climate change and natural hazards profoundly affect the Arctic."[66]

For the residents of the Beaufort Sea region, including Inuit in the US and Canada, Arctic climate policy decisions are of crucial importance. Inuit have been effective advocates for global action on climate change for many decades. In 2019, Inuit Tapiriit Kanatami (ITK), an organization that protects and advances the rights and interests of Inuit in Canada, released its National Inuit Climate Change Strategy. In it, ITK explained:

> The National Inuit Climate Change Strategy identifies the coordinated actions that are necessary within five priority areas to meet our adaptation, mitigation and resilience-building needs in the face of rapid climate change, and a quickly evolving climate policy environment. The Strategy lays out practical objectives to advance Inuit-driven climate actions, and guidance on how to work with us to protect our way of life and support the sustainability of our communities in the face of our changing climate reality.[67]
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> …
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> We are determined to actively shape climate policies and actions so that they are inclusive and effective for Inuit, improving our quality of life rather than adding to the burden of socio-economic inequities too many Inuit already face.[68]
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> …
>
> Our hunters are particularly challenged by increasing risks and safety issues. The weather is difficult to predict even for the most experienced hunters, ice conditions are rapidly changing and increasingly unpredictable, and wildlife movements and distributions differ from known variations. There are ripple effects on our livelihoods, local economies and the learning and development of our youth as our food sharing networks and our abilities to share and teach our land-based knowledge, skills, values and language are tested. These activities lie at the core of our cultural identity.[69]

There are also national interests at play. In 2021, about one quarter of Russia's gross domestic product came from its activities in the Arctic.[70] Russia also recently "reopened and strengthened Cold War military installations," demonstrating a strong interest in the Arctic.[71] China has also recently sought to increase its influence in the Arctic.[72]

In April 2021, US Air Force General Glen D. VanHerck, opined that in order for the US "to be on the playing field" it must maintain a presence in the Arctic to "help the U.S. better

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66 Government of Canada, "Arctic and Northern Policy Framework International Chapter," online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1562867415721/1562867459588>.

67 Inuit Tapiriit Kanatami, "National Inuit Climate Change Strategy" (2019) at 5, online: <www.itk. ca/wp-content/uploads/2019/07/ITK_Climate-Change-Strategy_English.pdf>.

68 *Ibid* at 10.

69 *Ibid*.

70 C Todd Lopez, "U.S. Must Get 'On the Field' in Arctic to Defend National Interests There" (15 April 2021), online: *US Department of Defense* <www.defense.gov/News/News-Stories/Article/Article/2573729/us-must-get-on-the-field-in-arctic-to-defend-national-interests-there/.

71 *Ibid*.

72 *Ibid*.

compete in the Arctic and continue to be aware of Russian activities in the region."[73] As climate change causes ice to melt in the Arctic, prospects for resource development and transportation increase. Arctic nations and Inuit communities are once again focusing on safeguarding their national interests in the Arctic, resolving the maritime boundary dispute, and developing potential binational resource governing agreements.

According to the 2020 Northern Oil and Gas Annual Report prepared by the Government of Canada, it began negotiating "a Beaufort Sea oil and gas co-management and revenue-sharing agreement with the Government of Yukon, the Government of Northwest Territories and the Inuvialuit Regional Corporation," signifying Canada is aware of the extent to which Inuit rights are impacted by Beaufort Sea resource management decisions.[74] Furthermore, on 16 December 2021, the US-Canada Arctic Dialogue was to

> maximize collaboration on shared Arctic priorities, including safeguarding national and homeland security interests, promoting international cooperation through the Arctic Council, combating climate change including by reducing black carbon in the Arctic region, adapting to climate change and increased accessibility, and promoting sustainable economic development.[75]

These documents demonstrate that Canada and the US are likely to co-operate to develop binational governance agreements to manage the Beaufort Sea region. Importantly, any diplomatic talks between the nations to negotiate such agreements must include affected Inuit communities at the negotiating table.

C. INUIT VOICES IN INTERNATIONAL NEGOTIATIONS

Scholars who have examined the historically relevant treaties and international laws relevant to the Beaufort Sea dispute have argued that the best solution may be that the federal governments of Canada and the US share the region, employing joint oversight methods. It is suggested that the two countries could develop agreements such as "joint development of mineral resources, cross-border unitization of mineral resources, the designation of special areas for fisheries purposes, and various forms of bilateral cooperation."[76] The literature has proposed binational models that would further Canadian and US sovereignty in the Arctic, and "provide concrete examples of how national legal systems can interrelate to fill gaps in arctic governance and regulation."[77] Other scholars have suggested that while Canada and the US have been pursuing judicial resolution through the avenues such as the UN Charter, more "financially advantageous and amicable results" would come from sharing the region through "diplomatic ventures" governed by bilateral agreements.[78]

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73 *Ibid*.

74 Canada, Crown-Indigenous Relations and Northern Affairs Canada, *Northern Oil and Gas Annual Report 2020*, Catalogue No R71-47E-PDF (Ottawa: Crown-Indigenous Relations and Northern Affairs Canada, 2021) at 7.

75 Office of the Spokesperson, "The United States and Canada Hold Virtual Arctic Dialogue" (16 December 2021), online: *US Department of State* <www.state.gov/the-united-states-and-canada-hold-virtual-arctic-dialogue/>.

76 Bekker & van de Poll, *supra* note 5 at 198.

77 Baker, "Arctic Gap," *supra* note 65 at 59.

78 Au et al, *supra* note 2 at 224.

Inuit of the Beaufort Sea region have legal rights to participate in the international negotiations between Canada and the US to advocate for their own rights and interests. Though diplomatic efforts to reach an international co-operative agreement of the Beaufort Sea dispute between Canada and the US is a reasonable option, it would not be legally sound without permitting Inuit communities to also be a party to any such agreements.

As Indigenous inhabitants of the onshore region of the Beaufort Sea, Inuit have legal rights attached to their land and the accompanying offshore resources. Inuit land and resource rights in the region results in an entitlement to participate in the international negotiations because any concession either nation makes will directly affect Inuit legal interests. Participation must be meaningful and include, among other things, the opportunity for Inuit to make proposals and engage in the decision-making process for any binational agreement that may impact their rights. Inuit have voiced this for many years. For example, Inuit of Inuit Nunangat signed *A Circumpolar Inuit Declaration on Sovereignty in the Arctic*, which was adopted by the ICC in April 2009. It reads, among other important sections:

> 1.5 Inuit are an indigenous people of the Arctic. Our status, rights and responsibilities as a people among the peoples of the world, and as an indigenous people, are exercised within the unique geographic, environmental, cultural and political context of the Arctic. This has been acknowledged in the eight-nation Arctic Council, which provides a direct, participatory role for Inuit through the permanent participant status accorded the Inuit Circumpolar Council (Art. 2).
>
> …
>
> **Inuit as active partners**
>
> 3.3 The inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require states to accept the presence and role of Inuit as partners in the conduct of international relations in the Arctic.[79]

Similarly, the Utqiaġvik Declaration, adopted by the ICC in 2018, reads:

> 13. Mandate ICC to strengthen its role within other international, multinational and bilateral fora including the European Union (EU) and others by participating in meetings related to the Arctic;
>
> …
>
> 15. Direct ICC to advance the rights of Inuit in the United Nations Intergovernmental Conference that will be negotiating an agreement for Marine Biodiversity of Areas Beyond National Jurisdiction.[80]

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79 "A Circumpolar Inuit Declaration on Sovereignty in the Arctic" (2015) 39:5 LawNow 12 at 13, 15 [emphasis omitted].

80 Inuit Circumpolar Council Canada, "Utqiaġvik Declaration 2018" (19 July 2018), online: <secure servercdn.net/45.40.145.201/hh3.0e7.myftpupload.com/wp-content/uploads/2018_Utqiagvik_Declaration.pdf>.

The ICC has also consistently voiced a need for Inuit to be a part of negotiating agreements, for example when it announced:

> Inuit must be part of any decision making, whether it is using the Arctic Ocean for extractive industries, fisheries, shipping, legislation or marine policies that impact the people who live there. "It is the Inuit position that any action or intervention that affects our ice, the Arctic Ocean and the lands we live upon must protect the environment, wildlife and, therefore, Inuit, in such a way that we can continue to live off this land and sea. This is the standard of sustainable use that we insist upon."[81]

The Arctic Council has also consistently voiced a need for Inuit to take part in negotiating international agreements. Established in 1996, the Arctic Council is an "intergovernmental forum promoting cooperation" on issues in the Arctic "among the Arctic States, Arctic Indigenous peoples, and other Arctic inhabitants."[82] The Arctic Council's Permanent Participant (PP) organizations possess full consultation rights for the Arctic Council's negotiations and decision-making.[83] PP organizations attend Arctic Council meetings and sit with Member States (namely, US, Canada, Denmark, Finland, Iceland, Norway, Russia, and Sweden) and Working Group delegates (for example, The Arctic Contaminants Action Program).[84]

For example, in February 2020, Jenifer Nelson, an Indigenous leader in Arctic policy who served on the Arctic Council's Task Force on Telecommunications in the Arctic (TFTIA), stated:

> Even though the Arctic is our home, others still assume they can speak for us and interfere in our ability to help shape Arctic policy…. Currently, the United States refuses to acknowledge climate change — unlike every other Arctic nation. If not for the existence of permanent participant groups like the Aleut International Association, the United States representation at the Arctic Council would've unilaterally declared that the people of this Arctic nation aren't worried about climate change when that just fundamentally isn't true.
>
> Moving forward, I would like to see more Native people involved in shaping Arctic policy at the highest level. It's our table, after all. Our planet. Life in the Arctic is changing rapidly, and it will only continue to do so in the years to come.[85]

It is due to the tireless efforts of such Indigenous leaders and Inuit organizations and many more that Canada has begun engaging in consultations with Inuit regarding the Arctic. For example, on 3 October 2018, Canada signed the International Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (the CAOFA).[86] The US is also a signatory. The CAOFA, which came into force on 25 June 2021, provides a framework for

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81 ICC, "ICC Calls on the Global Community," *supra* note 21.

82 Arctic Council, "About the Arctic Council," online: <www.arctic-council.org/about/>.

83 Arctic Council, "History of the Arctic Council Permanent Participants" (28 August 2015), online: <www.arctic-council.org/news/history-of-the-arctic-council-permanent-participants/>.

84 *Ibid*.

85 Jenifer Nelson, "It's Our Table: Indigenous People Shaping Arctic Policy" (25 February 2020), online: <www.thearcticinstitute.org/our-table-indigenous-people-shaping-arctic-policy/>.

86 Fisheries and Oceans Canada, "Canada Signs International Agreement to Prevent Unregulated Fishing in the High Seas of the Central Arctic Ocean" (3 October 2018), online: *Government of Canada* <www.canada.ca/en/fisheries-oceans/news/2018/10/canada-signs-international-agreement-to-prevent-unregulated-fishing-in-the-high-seas-of-the-central-arctic-ocean.html>.

signatories to work co-operatively using joint scientific research and monitoring to better understand Arctic fish stocks and "prevent unregulated fishing in the high seas of the central Arctic Ocean" to promote sustainability.[87] Arctic Indigenous representatives participated in the negotiation process, including ICC members who formed part of the Canadian delegation.[88] As a result, the CAOFA contains a number of provisions recognizing Indigenous communities' interests and their knowledge in decision-making. For example, the preamble recognizes "the interests of Arctic residents, including Arctic indigenous peoples, in the long-term conservation and sustainable use of living marine resources and in healthy marine ecosystems in the Arctic Ocean and underlin[es] the importance of involving them and their communities."[89]

A further example of Arctic Indigenous participation is the recent international negotiations to modernize the Columbia River Treaty. In 1961, the Columbia River Treaty was signed by Canada and the US with the goal of co-operative development of the water resources in the Columbia River Basin.[90] The Canadian government's decision in April 2019 to involve First Nations in the negotiations with the US was welcomed by National Chief Perry Bellegarde of the Assembly of First Nations (AFN), an advocacy organization that represents First Nation citizens in Canada.[91] This is because decisions taken pursuant to the Columbia River Treaty have historically had unfavourable effects on First Nations peoples, such as damage to burial sites and fish stocks ("a traditional food source with cultural and spiritual significance").[92]

Accordingly, the AFN's 2018 Annual General Assembly passed the Resolution 23/2018 (*First Nations Participation in the Re-negotiation of the Columbia River Treaty*), which called for First Nations to directly participate during the Columbia River Treaty modernization negotiations, as opposed to providing limited input during the negotiations.[93] Canada agreed to this request in April 2019. In response, AFN National Chief Bellegarde stated:

> The decision to include the Ktunaxa Nation, Secwepemc Nation and Syilx Okanagan Nation in the negotiations on the Columbia River Treaty is an important and necessary step…. Canada must respect the right of First Nations to be involved in any activities that affect their rights and their traditional territories. I have advocated for Canada to extend an official role for First Nations in negotiations of international

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87 Fisheries and Oceans Canada, "International Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean," online: *Government of Canada* <www.dfo-mpo.gc.ca/international/arctic-arctique-eng.htm>.

88 *Ibid*.

89 *Agreement to prevent unregulated high seas fisheries in the central Arctic Ocean*, Canada, China, Denmark in respect of Greenland, Iceland, Japan, South Korea, Norway, Russia, the United States of America and the European Union, 3 October 2018 (entered into force 25 June 2021).

90 *Treaty between Canada and the United States of America relating to Cooperative Development of the Water Resources of The Columbia River Basin*, Canada, the United States of America, 17 January 1961 (entered into force 16 September 1964).

91 Assembly of First Nations, "AFN National Chief Perry Bellegarde Says Involvement of First Nations in Columbia River Treaty Negotiations is the Right Move That Will Lead to Better Outcomes" (2 May 2019), online: <www.afn.ca/afn-national-chief-perry-bellegarde-says-involvement-of-first-nations-in-columbia-river-treaty-negotiations-is-the-right-move-that-will-lead-to-better-outcomes/> [AFN, "Treaty Negotiations"].

92 *Ibid*.

93 Assembly of First Nations, "2018 Annual General Assembly" Resolution 23/2018 (24 July 2018), online: <www.afn.ca/wp-content/uploads/2018/08/2018_Resolutions_ENG.pdf>.

> agreements, and the AFN passed a national resolution supporting direct First Nation participation in Columbia River Treaty. Foreign Affairs Minister Freeland has done the right thing by including these First Nations. This should be part of a broader move to involve First Nations in all national and international negotiations where our rights can be impacted. There is the added benefit that involving First Nations leads to better decisions and better outcomes.[94]

By contrast, the US has been reluctant to follow Canada's lead to include Indigenous peoples in the Columbia River Treaty negotiations despite numerous Indigenous advocates urging otherwise. In May 2018, the executive director of the Upper Columbia United Tribes, D.R. Michel, stated that the US State Department's continued exclusion of Indigenous peoples in the negotiations was unacceptable because:

> For one, it's unlawful. The sovereignty of each tribal government is not being respected.
>
> …
>
> Second, it's unethical. The current management of the Columbia River Basin has hurt tribes and Canada's First Nations. Salmon are sacred to indigenous peoples. When salmon were blocked from waters in the upper basin, tribes didn't receive restitution. The loss of salmon impacted our diets and health, lifestyles and culture.
>
> Third, it's shortsighted. The tribes and First Nations of the Columbia River Basin have lived in and cared for this land and water for thousands of years. It is the territory of our ancestors, and we are put here to take care of it.
>
> …
>
> Tribes and First Nations must be at the table in these negotiations.
>
> …
>
> The indigenous peoples of the Columbia River Basin who have lived with these rivers from time immemorial, and suffered from the dams, will give voice to the voiceless: our rivers, animals, fish and generations unborn. We are firm that any negotiations must include us at the table where decisions will determine the fate of our rivers, our communities and our common home.[95]

With climate change creating a more accessible Beaufort Sea, Arctic policy development and resource management is becoming increasingly important. Inuit in both Canada and the US must have a voice in the international negotiations that will result in agreements that affect Inuit health, lifestyle, and cultures. Inclusion of Inuit in the negotiations to resolve the Beaufort Sea boundary dispute can either take the form of individual affected Inuit communities each participating in the negotiations or, according to the ICC's sovereignty declaration, Inuit across all four countries are one people and would therefore likely negotiate

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94 AFN, "Treaty Negotiations," *supra* note 91.

95 DR Michel, "Columbia River Treaty Negotiations Must Include Tribes, First Nations," *The Seattle Times* (13 May 2018), online: <www.seattletimes.com/opinion/columbia-river-treaty-negotiations-must-include-tribes-first-nations/>.

as one party. In the author's opinion, this decision is best left to the Inuit to determine which method would best represent their needs and accomplish their goals.

III. PUBLIC POLICY CONSIDERATIONS

With the background of the Beaufort Sea boundary dispute, this article turns to the first source of Inuit rights to the international negotiating table: public policy considerations.

The law-making process in Canada and the US involves drafting legislation that consider public policies, which includes asking whether the legislation will meet the needs of affected communities. Therefore, when the federal governments of Canada and the US develop laws governing the ecosystem and resources of the Beaufort Sea, they must consider the proposed law's impact on Inuit communities who would be affected.

During the passing of a law, legislatures ask: "Is the idea behind the bill good?" "Does it meet people's needs?" "Who will be affected by this bill?"[96] These questions are intended to address policy considerations that require governments to take into account the concerns of local residents that may be adversely affected by laws or treaties. The US rule-making process includes publishing proposed rules in the Federal Register and asking the public for comments and considers the feedback to make appropriate changes.[97] A similar process is followed in Canada.[98] Consequently, since Inuit communities living in the Beaufort Sea region will be most affected by Arctic policies and management, including the process of extraction of natural resources in this region, any laws developed must specifically consider the affected Inuit. For example, in May 2021, the President of Inuit Tapiriit Kanatami, Natan Obed, stated "it was important to advance Inuit self-determination in research, and ensure that Inuit contribute to and benefit from scientific research in Inuit Nunangat, the Inuit homeland stretching across northernmost parts of Canada from the North Atlantic to Beaufort Sea."[99] This statement was made in reference to the 3rd Arctic Science Ministerial where individuals from Arctic and non-Arctic countries, as well as representatives from Arctic Indigenous peoples, met and "focused on using international scientific cooperation to act on urgent challenges facing the Arctic."[100]

In order to preserve their habitation, food security, and unique culture, Inuit communities must have the right to participate in the international negotiations that may result in co-operative agreements governing the Beaufort Sea and its resources. This is not a new concept as "[m]odern treaties, or comprehensive land claim settlements, include provisions that

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96 Parliament of Canada, "The Process of Passing a Bill," online: <lop.parl.ca/About/Parliament/Education/ourcountryourparliament/html_booklet/process-passing-bill-e.html>.

97 USA Gov, "How Laws Are Made and How to Research Them," online: <www.usa.gov/how-laws-are-made>.

98 Parliament of Canada, *supra* note 96.

99 Levon Sevunts, "Canada Urges Arctic Science Collaboration and Indigenous Research Priorities," *Radio Canada International* (10 May 2021), online: <www.rcinet.ca/en/2021/05/10/canada-urges-arctic-science-collaboration-and-indigenous-research-priorities/>.

100 *Ibid*.

enable Indigenous groups to own land, participate in managing land and resources, share in revenue generated from resource development and govern themselves."[101]

For centuries, Inuit residing in the Beaufort Sea region have relied upon the resources of the area, primarily for subsistence.[102] Fishing, hunting, and gathering activities are integral to Inuit culture and economy.[103] It is already established policy to consult with the residents of the Beaufort Sea region on the use of fish, wildlife, and plants. Residents of the region "serve on several advisory committees … which provide input to state and federal management agencies"[104] demonstrating that the Alaskan Government understands the importance of community members having a voice in how their lands and resources are protected and exploited. This should extend to the Beaufort Sea territorial dispute negotiations because a decision on co-operative use will affect the rights of Inuit communities in the region. These rights include: rights to be consulted by federal agencies taking actions that have substantial direct effects on Indigenous groups; rights to the historic preservation of property; subsistence rights, and the right to practise Indigenous religions on the lands and the waters. In addition to Inuit rights, since Inuit living in the Beaufort Sea region will be most affected by Arctic policies and management decisions, any laws governing the Beaufort Sea must specifically consider the affected Inuit communities.

The potential negative effects on Inuit lands and resources is significant. A study using computer modeling to predict the behaviour of oil spills in the Beaufort Sea found that in the case of a "blowout" oil spill it is "almost certain that oil would spread across international boundaries."[105] A very large oil spill and gas release "would severely affect marine and freshwater vegetation and wetlands along the coastlines of the Beaufort and Chukchi seas for months to years."[106] This is extremely problematic for Inuit communities because the majority of their food comes from fishing and hunting in the Arctic Ocean.[107]

A recent analogous event has foreshadowed the impact of an oil spill on Indigenous communities. On 21 July 2016, Husky Energy Inc. spilled between 200,000 and 250,000 litres of oil and diluent into the North Saskatchewan River in Canada.[108] Due to this oil spill, the Indigenous people of this region, the Cree Nation, lost their right to practise their way of life.[109] This included a loss of fishing and hunting on the now contaminated river, gathering

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101 Keith Crowe, "Comprehensive Land Claims: Modern Treaties," *The Canadian Encyclopedia* (2 March 2015), online: <www.thecanadianencyclopedia.ca/en/article/comprehensive-land-claims-modern-treaties>.

102 State of Alaska, Alaska Department of Natural Resources Division of Oil and Gas, *Beaufort Sea Areawide Oil and Gas Lease Sales: Preliminary Finding of the Director* (Anchorage: Alaska Department of Natural Resources, 12 April 2019) at 5-1 [Alaska, *Preliminary Finding*].

103 *Ibid*.

104 *Ibid*.

105 Bob Weber, "Arctic Oil Spills Likely to Spread Across Borders: Study," *Global News* (25 July 2014), online: <globalnews.ca/news/1473758/arctic-oil-spills-likely-to-spread-across-borders-study/>.

106 US, Department of the Interior, *Beaufort Sea: Hypothetical Very Large Oil Spill and Gas Release* (OCS Report BOEM 2020-001) (Anchorage: Bureau of Ocean Energy Management, January 2020) at 64.

107 Alaska, *Preliminary Finding*, *supra* note 102.

108 Joel Senick, "Husky Energy Pipeline Leaks Oil into North Saskatchewan River," *The Canadian Press* and *Global News* (21 July 2016), online: <globalnews.ca/news/2840096/saskatchewan-government-says-husky-energy-pipeline-leaks-oil-into-river/>.

109 Francois Biber, "Sask. First Nation Wants Husky Energy to Step Up Oil Spill Response," *CBC News* (27 August 2016), online: <www.cbc.ca/news/canada/saskatoon/james-smith-cree-nation-husky-oil-response-1.3738595>.

medicines and roots from their environment, and recreational activities such as swimming.[110] Likewise, Inuit residing in the Beaufort Sea region would be substantially and directly affected by changes to the area, including oil and gas exploration projects. Inuit voices must be heard in any negotiations for any potential agreements between Canada and the US regarding the Beaufort Sea and its resources. Since the law-making process in Canada and the US involves drafting legislation that consider public policies, including asking whether the legislation will meet the needs of affected communities, Canada and the US must not enter into treaties or binational agreements governing the Beaufort Sea region without first considering affected Inuit communities and their specific needs, as Inuit communities enumerate those needs.

IV. LAND CLAIM AGREEMENTS AND STATUTES

Inuit in Canada and the US have rights and interests to the Beaufort Sea, which are enumerated in land claim agreements and statutes with their respective countries. Section 35(1) of Canada's *Constitution Act, 1982* recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada,"[111] including Inuit in section 35(2).[112] Section 35(3) stipulates that treaty rights "includes rights that now exist by way of land claims agreements or may be so acquired."[113] Importantly, Canadian courts have interpreted section 35 as creating a "duty to consult" Aboriginal peoples in "decisions that may adversely affect as yet unproven Aboriginal rights and title claims," which requires the Crown to "balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."[114]

Conversely, the US Constitution under article I, section 8, clause 3 merely mentions that, "Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[115] The consequence of this limited reference to Native American relations is that "[t]he trust relationship between the federal government and American Indian and Alaska Native tribes is established in a very diffuse way, by specific statutes, treaties, court decisions[,] executive orders, regulations and policies."[116] Nonetheless, owing to land claim agreements and statutes, Inuit in both countries do own areas of land in the Beaufort Sea coastal region, which entitle Inuit to an equal seat at the negotiating table in the Beaufort Sea boundary dispute. These agreements and statutes will be explored in detail below, first looking at Canada and then turning to the US.

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110 *Ibid*.

111 "Aboriginal peoples of Canada" is a legal term defined in the Constitution. Where this article refers to the Canadian legal term, "Aboriginal peoples" is used; otherwise, Inuit or Indigenous peoples is used.

112 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

113 *Ibid*.

114 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 50 [*Haida Nation*].

115 US Const art I, § 8, cl 3. "Indian" is a legal term used in the US. Where this article refers to the US legal term, "Indian" is used; otherwise, Inuit or Indigenous peoples is used.

116 Betsy Baker, "From the Gulf of Mexico to the Beaufort Sea: Inuit Involvement in Offshore Oil and Gas Decisions in Alaska and the Western Canadian Arctic" (2013) 43:10 Environmental L Reporter 10925 at 10929 [footnotes omitted].

A. CANADA

1. *INUVIALUIT FINAL AGREEMENT* OF 1984

The *Inuvialuit Final Agreement* of 1984 is a regional land claim agreement (land and resources agreement) between the Committee for Original Peoples' Entitlement (which represents the Inuvialuit of the Inuvialuit Settlement Region) and the Government of Canada.[117] The *IFA* was drafted with the intention of clarifying the rights, privileges, and benefits of land and resources in the Inuvialuit Settlement Region (ISR).[118] The *IFA* covers "certain lands in the Northwest Territories and Yukon Territory in and to which the Inuvialuit have claimed an interest based on traditional use and occupancy" and "in exchange for the surrender of that interest, the Government of Canada has assumed certain obligations under the [*IFA*] in favour of the Inuvialuit of the Inuvialuit Settlement Region."[119] It is the result of ten years of negotiations and is considered "a ground-breaking achievement that still affects the lives of all Inuvialuit and everyone who lives and works in the [ISR]."[120]

The Beaufort Sea is contained within the ISR.[121] The ISR is made up of Crown Lands and Inuvialuit Private Lands, which are "further divided into lands in which the Inuvialuit have ownership of surface and subsurface minerals referred to as class 7(1)(a) lands, and lands with only surface rights referred to as 7(1)(b) lands."[122] Of the ISR area, "Inuvialuit own approximately 15,000 square kilometres of subsurface lands and approximately 90,000 square kilometres of surface lands."[123] Critically, with respect to water management, section 7(85)(a) of the *IFA* stipulates that

> [n]otwithstanding Inuvialuit ownership of beds of rivers, lakes and other water bodies.
>
> (a) Canada shall retain the right to manage and control waters, waterways, beds of rivers, lakes and water bodies for the purpose of the management of fish, migratory game birds, migratory non-game birds, and migratory insectivorous birds and their habitat, and the Inuvialuit shall not impede or interfere with that right.[124]

Canada also retains the right to manage and control waters for functions relating to navigation and transportation as well as to ensure protection of community water supply.[125]

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117 Indian and Northern Affairs Canada, *The Western Arctic Claim: The Inuvialuit Final Agreement*, 5 June 1984, online: *Government of Canada* <publications.gc.ca/collections/collection_2017/aanc-inac/R74-34-1985-eng.pdf> [*IFA*].

118 Bill C-49, *An Act to approve, give effect to and declare valid the Agreement between the Committee for Original Peoples' Entitlement, representing the Inuvialuit of the Inuvialuit Settlement Region, and the Government of Canada and to amend the National Parks Act in consequence thereof*, 2nd Sess, 32nd Parl, 1984 (assented to 28 June 1984).

119 *Ibid*, Preamble.

120 Inuvialuit Regional Corporation, "About IFA-101," online: <ifa101.com/about-ifa-101>.

121 For a map of the ISR, see *IFA*, *supra* note 117 at 38, Annex A.

122 Aurora Research Institute, "Inuvialuit Settlement Region," online: <nwtresearch.com/licensing-research/scientific-research-license/supporting-information/inuvialuit-settlement-region>.

123 Inuvialuit Regional Corporation, "Inuvialuit Lands," online: <irc.inuvialuit.com/ lands>.

124 *IFA*, *supra* note 117, s 7(85)(a).

125 *Ibid*, ss 7(85)(b)–(c).

Pursuant to the *IFA* project screening requirements, proponents of a project in the ISR must engage Inuvialuit government institutions and community organizations, such as Inuvialuit and northern residents, at the beginning of a project.[126]

The principles of the *IFA* are: "(a) to preserve Inuvialuit cultural identity and values within a changing northern society; (b) to enable Inuvialuit to be equal and meaningful participants in the northern and national economy and society; and (c) to protect and preserve the Arctic wildlife, environment and biological productivity."[127] Furthermore, section 16(11) stipulates that guidelines "relating to social and economic interests, including employment, education, training and business opportunities to favour natives, shall be considered and applied, as reasonably as possible, to each application for exploration, development or production rights."[128] Despite these stipulations, these provisions are only a domestic consideration that would be affected by the outcome of any bilateral agreement, but would not provide direct support for a broader right for Inuit to be involved in international negotiations.

Importantly, under the *IFA*, it is assumed that the ISR would extend to the US-Canada border, as defined by Canada because the *IFA* uses the 141st meridian line to define the ISR.[129] Scholars have noted that "making boundary concessions to the United States could consequently represent an infringement of Inuvialuit rights that are protected under Canadian law."[130] If Canada ceded parts of the ISR to the US, Inuvialuit could be entitled to compensation from Canada due to the violation of the *IFA*.[131] Accordingly, Canada usually quickly denounces "any perceived infringement of its sovereignty or sovereign rights in the area."[132]

If Canada cedes portions of the Beaufort Sea to the US, Inuvialuit of the ISR will have their rights directly and immediately impacted. This provides persuasive support for the proposition that Inuvialuit communities of the Beaufort Sea region are entitled to have their voices in the boundary dispute heard at the international level before any concessions are made that will negatively affect their rights.

2. *NORTHWEST TERRITORIES LANDS AND RESOURCES DEVOLUTION AGREEMENT* OF 2013

The Government of Canada, the Government of the Northwest Territories, and the Inuvialuit Regional Corporation (IRC), are parties to the 2013 *Northwest Territories Lands and Resources Devolution Agreement*.[133] Section 3.20 of the *NWT Devolution Agreement* requires the Government of Canada, the Government of the Northwest Territories, and the IRC to "commence negotiations for the management of Oil and Gas resources in the

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126 Report, *supra* note 60 at 2-18.
127 *IFA*, *supra* note 117, s 1.
128 *Ibid*, s 16(11).
129 Bekker & van de Poll, *supra* note 5 at 174 [footnotes omitted].
130 *Ibid*.
131 John Thompson, "Solution in Sight for Beaufort Sea Spat," *Yukon News* (17 March 2010), online: <www.yukon-news.com/news/solution-in-sight-for-beaufort-sea-spat/>.
132 Bekker & van de Poll, *supra* note 5 at 174.
133 *Northwest Territories Lands and Resources Devolution Agreement*, 25 June 2013, online (pdf): *Government of Canada* <rcaanc-cirnac.gc.ca/eng/1390503182734/1600263856046> [*NWT Devolution Agreement*].

Beaufort Sea."[134] This gives the Inuvialuit Regional Corporation a powerful legal tool to demand involvement in the negotiations over control of the Beaufort Sea region. The Beaufort Sea dispute unequivocally impacts ownership rights to resource extraction in the region.

Schedule 6 to the *NWT Devolution Agreement* is an *Agreement for Coordination and Cooperation in the Management and Administration of Petroleum Resources in the Inuvialuit Settlement Region*.[135] Importantly, the *Coordination Agreement* concerns resources that "straddle, or potentially straddle, the Onshore and the offshore."[136] The rights described in the *Coordination Agreement* entitle the IRC to participate in international discussions about the Beaufort Sea maritime boundary dispute. Any concession Canada may make in negotiations with the US would directly affect the IRC's interests.[137] Prohibiting the IRC's presence during negotiations would prevent the Inuvialuit from contributing to the management of resources in the Beaufort Sea. Failing to invite Inuit communities in Canada, including the IRC, to play a meaningful role in international negotiations regarding management of the Beaufort Sea resources would frustrate the purpose of the *Coordination Agreement*.

B. UNITED STATES

1. *ALASKA NATIVE CLAIMS SETTLEMENT ACT* OF 1971

In the US, in 1958 the *Alaska Statehood Act* granted the State of Alaska a right to all minerals within its jurisdiction, specifically requiring Alaska to retain mineral interests when conveying land.[138] However, in 1997 the Supreme Court of the United States decided *United States v. Alaska*, where the US Federal Gvernment claimed "a right to offer lands in the Beaufort Sea for mineral leasing."[139] The Supreme Court held that the federal government retained ownership of *submerged lands* within the National Petroleum Reserve-Alaska (NPRA).[140] It also ruled that the US had not transferred to Alaska any offshore submerged lands within the Arctic National Wildlife Range at statehood.[141]

In 1971, Congress enacted the *Alaska Native Claims Settlement Act* to provide for rapid "settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims."[142] *ANCSA* settled land claims "differently than the 'land into trust' framework developed for tribal nations within the 'Lower 48.'"[143] It is described as having "created a legal framework to settling Alaska Native land claims, fishing and hunting rights, and

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134 *Ibid*, c 3, s 3.20.
135 *Ibid* at Schedule 6 [*Coordination Agreement*].
136 *Ibid*, c 5, s 5.2(a).
137 Bekker & van de Poll, *supra* note 5 at 174.
138 *Alaska Statehood Act*, Pub L No 85-508, 72 Stat 339 (1958).
139 *United States v Alaska*, 521 US 1 (1997) at 1.
140 *Ibid* at 4.
141 *Ibid* at 2.
142 *Alaska Native Claims Settlement Act*, Pub L No 92-203, 85 Stat 688 (codified as 43 USC § 1601(a) (1971)) [*ANCSA*].
143 National Congress of American Indians, "Tribal Nations and the United States: An Introduction" (February 2020) at 28, online: <www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf> [footnotes omitted].

provided for economic development."[144] The *ANCSA* provided recently created Native corporations in Alaska the right to choose and acquire both land and mineral estates from the federal domain, within certain boundaries.[145] This permitted Native corporations and individuals to obtain land estate interests. The *ANCSA*, however, extinguished Aboriginal fee simple ownership to any additional lands in Alaska and Aboriginal claims to land, water, hunting, and fishing rights within Alaska.[146] Alaska Natives received approximately $960 million in compensation for extinguishing all land claims.[147] Under the *ANCSA*, 40 million acres of land was divided and allotted to 13 for-profit regional Native corporations and over 200 village corporations who then managed these Native lands and resources in Alaska.[148] Importantly, however, the *ANCSA* did not result in protections to Alaska Natives' hunting, fishing, and gathering rights.

2. *ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT* OF 1980

As the *ANCSA* did not protect Native hunting, fishing, and gathering rights, nine years later Congress addressed the issue of protecting subsistence uses by enacting Title VIII of the *Alaska National Interest Lands Conservation Act*.[149] The *ANILCA* prioritized subsistence uses on "public lands" (that is, "land situated in Alaska which, after December 2, 1980 are federal lands") by rural residents in Alaska after such rights were extinguished by *ANCSA*.[150] Section 810 includes a provision mandating federal agencies study the effect of projects on subsistence and protect Native subsistence in land-development decisions.[151] It is unlikely, however, that Inuit in Alaska will be able to successfully trigger section 810 of *ANILCA* with regards to subsistence rights in the Beaufort Sea region. This is because the Supreme Court has held, for example, in *Amoco Production Co. v. Village of Gambell, Alaska*:

> By ANILCA's plain language, § 810(a) applies only to federal lands within the State of Alaska's boundaries, since the Act defines "public lands" to mean federal lands situated "in Alaska," which phrase has a precise geographic/political meaning that can be delineated with exactitude to include coastal waters to a point three miles from the coastline, where the [outer continental shelf] commences.[152]

While *ANILCA* may not be triggered, there are other legal tools that may be triggered if Inuit subsistence uses are substantially directly affected by federal action. In 2000, President of the US Bill Clinton signed *Executive Order 13175 Consultation and Coordination with Indian Tribal Governments*.[153] Under this Order, "Indian tribe" includes Alaska Native

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144 *Ibid*.
145 *ANCSA*, *supra* note 142, § 1616.
146 Joris Naiman, "ANILCA Section 810: An Undervalued Protection for Alaskan Villagers' Subsistence" (1996) 7:2 Fordham Envtl LJ 211 at 234–35.
147 US Department of Health and Human Services, "American Indians and Alaska Natives – What About Alaska?," online: *Administration for Children and Families* <www.acf.hhs.gov/ana/fact-sheet/american-indians-and-alaska-natives-what-about-alaska>.
148 National Congress of American Indians, *supra* note 143.
149 Pub L No 96-487, 94 Stat 2371 (1980) (codified as 16 USC § 3101 (1980)) [*ANILCA*].
150 Robert T Anderson, "Sovereignty and Subsistence: Native Self-Government and Rights to Hunt, Fish, and Gather after ANCSA" (2016) 33:2 Alaska L Rev 187 at 214, n 172.
151 *ANILCA*, *supra* note 149, § 810.
152 480 US 531 at 1397 (1987).
153 65 Fed Reg 67249 (9 November 2000) [Executive Order 13175].

tribes.[154] Still in force today, Executive Order 13175 declares that there exists "a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States."[155] Executive Order 13175 mandates that a federal agency cannot promulgate rules with "tribal implications" (refers to rules that "have substantial direct effects on one or more Indian tribes")[156] or impose substantial direct compliance costs on Native American governments, unless it consults with tribal officials early in the process before promulgation or compliance costs are paid to the tribe.[157]

In January 2021, President Joe Biden reaffirmed Executive Order 13175 in his administration's *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*.[158] Executive Order 13175 requires the US Government to consult with Native Americans if a rule will have "tribal implications," which will likely be the case if concessions are made by the US to Canada during Beaufort Sea negotiations.[159] Implications on Inuit way of life includes loss of subsistence, loss of sacred land, and a risk of losing their environment, for example, in the event of an oil spill. If US Government action will have a substantial direct effect on Inuit way of life, the federal government's obligation to "consult with tribal officials" is triggered.[160]

3. ARCTIC SLOPE REGIONAL CORPORATION SETTLEMENT AGREEMENT WITH ALASKA OF 1991

According to the State of Alaska, the Beaufort Sea, including the region Alaska wishes to lease to oil and gas companies for exploration, is owned by the State of Alaska, the US Federal Government, Native corporations, the North Slope Borough (made up of eight Inuit communities), and individuals.[161] The North Slope Borough owns *surface estate* in the Beaufort Sea region as a result of the State's municipal entitlement program.[162] In 1991, the State of Alaska and the Arctic Slope Regional Corporation executed a Settlement Agreement.[163] In the Settlement Agreement, the mineral estate of seven *onshore* tracts adjacent to the Beaufort Sea became owned jointly by Alaska and the Arctic Slope Regional Corporation (representing the business interests of its Iñupiaq shareholders), with Kuukpik Village Corporation as the owner of the land estate.[164] Kaktovik Inupiat Corporation also has inholdings within Arctic National Wildlife Refuge in Bullen Point, which is an area off the coast of the Beaufort Sea.[165] These onshore and land estate interests are valuable. Inuit onshore legal ownership in the region implicates their interests in any offshore activities. For example, if the federal government approved a transportation pipeline to move oil and gas from the Beaufort Sea underneath Inuit-owned lands; these distribution networks would

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154 *Ibid*, § 1(b).
155 *Ibid*, § 2(a).
156 *Ibid*, § 1(a).
157 *Ibid*, § 5.
158 86 Fed Reg 7491 (26 January 2021).
159 Executive Order 13175, *supra* note 153, § 5(a).
160 *Ibid*, § 3(3).
161 Alaska, *Preliminary Finding*, *supra* note 102, at 3-1.
162 *Ibid* at 3-2.
163 *1991 Settlement Agreement Between Arctic Slope Regional Corporation and the State of Alaska*, 0067070.01 (17 December 1991).
164 *Ibid*.
165 "Kaktovik – The North Slope Borough," online: *Official Website of the North Slope Borough* <www.north-slope.org/our-communities/kaktovik>.

likely interfere with Indigenous rights by having substantial direct effects on the land and waters used for traditional purposes, subsistence, and religious practices.

4. FURTHER LEGISLATIVE ENTITLEMENTS

In order to fill the legal gaps created by *ANCSA* extinguishing Native American fee simple rights, additional US statutes can be analyzed for evidence of Inuit interests in the region. The *National Historic Preservation Act* of 1966 was enacted to promote preservation of historic properties in order to prevent loss or substantial alteration.[166] Under section 106, federal agencies must "consider the potential impact of their projects on historic properties."[167] A pipeline moving natural gas from the Beaufort Sea to other parts of the country may interfere with Inuit historic properties. Importantly, "[t]ribes are mandatory consulting parties to the Section 106 process."[168] *NHPA* obligates federal agencies to engage in consultations with different stakeholders, including "State Historic Preservation Officers …, Tribal Historic Preservation Officers …, Indian tribes (including Alaska Natives), and Native Hawaiian Organizations."[169] *NHPA* regulations stipulate that Indian tribes possess a unique status of consultation, requiring federal agencies to help in identifying historical properties, "including those located off tribal lands."[170] Therefore, if Inuit in Alaska demonstrate historical areas in the Beaufort Sea region that could be affected by a federal agency's project, this would trigger consultation requirements under *NHPA*.

Similarly, pursuant to the procedural mandate of the *National Environmental Policy Act*, certain federal agencies must meet the substantive laws of other statues.[171] For example, *NEPA*'s requirement for an Environmental Impact Assessment is triggered if an agency is proposing a federal action that may significantly affect the environment.[172] If the process of resource extraction impacts the environment of the Beaufort Sea region, *NEPA* may be triggered. This would require the US Government to assess the ways in which its activities may impact Inuit communities' environments.

An additional similar instrument is the *American Indian Religious Freedom Act* of 1988, which recognizes the inherent right of Native Americans to freely practise their religion.[173] Some "Native Americans often practice site-specific religions, attaching religious significance to particular natural sites such as high mountain peaks or secluded valleys."[174] The *AIRFA* recognizes that the US Government has failed in understanding Native American religion and commits the government to treat Native American religious ceremonies and

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166 Pub L No 89-665, 80 Stat 915 (codified as 16 USC § 470 (1966)) [*NHPA*].

167 S Rheagan Alexander, "Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review" (2012) 32:3 Pace L Rev 895 at 897.

168 *Ibid* at 898.

169 National Park Service, "Federal Agency Compliance with Section 106 of the National Historic Preservation Act," online: <www.nps.gov/history/tribes/National_Section_106.htm>.

170 David A Lewis, "Identifying and Avoiding Conflicts Between Historic Preservation and the Development of Renewable Energy" (2015) 22:3 NYU Envtl LJ 274 at 303–304 [footnotes omitted; emphasis omitted].

171 Pub L No 91-190, 83 Stat 852 (codified as 42 USC § 4321 (1970)) [*NEPA*].

172 *Ibid*, s 102(2)(c).

173 Pub L No 95-341, 92 Stat 469 (codified as 42 USC § 1996 (1978)) [*AIRFA*].

174 Michael J Simpson, "Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act" (1993) 54:1 Mont L Rev 19 at 34.

traditions with more sensitivity.[175] More specific to the Arctic region, Inuit "[r]eligious belief and practice were based on the need to appease spirit entities found in nature. Hunting, and specifically the land-sea dichotomy, was the focus of most rituals and taboos."[176] Inuit in Alaska are entitled to meaningful consultation during any international negotiations of the Beaufort Sea because this region has significant association with Inuit religious belief and practice and therefore necessitates accommodation. However, this argument is limited by the Establishment Clause of the US Constitution that prohibits the government from passing laws "respecting an establishment of religion."[177]

If Inuit lands and religious practices are affected by future activities, such as offshore leasing or through pipeline development, their interests are undoubtedly at stake in the Beaufort region. As legal stakeholders in this region with unique statutory rights, Inuit voices must be heard during the Beaufort Sea maritime boundary international negotiations.

V. INDIGENOUS RIGHTS DEVELOPED BY THE COURTS

Next, this article examines the common law, constitutional rights, and judicial precedents of Indigenous communities in Canada and the US. In this regard, Inuit in Canada have clearer judicial principles as compared with their US counterparts. In the US, it has been said that there has been a "consistent erosion of the federal common law rights of Indigenous Peoples" that began in the late twentieth century.[178] This erosion of common law rights, however, came with a simultaneous increase in the enactment of statutes that defined the federal relationship with Native Americans,[179] as discussed in the section above.

Indigenous rights developed by the courts in Canada and the US dictate overarching and sometimes overlapping principles, including that the federal governments owe fiduciary duties, the duties to consult, and the duties to accommodate Indigenous communities. These rights support the position that Inuit are entitled to be meaningfully consulted in international negotiations involving the Beaufort Sea.

A. THE "TRUST-LIKE RELATIONSHIP" AND FIDUCIARY DUTIES

The highest courts in both Canada and the US have defined a general "trust-like relationship" between Indigenous peoples and the respective federal governments of their nations. While the US Supreme Court has described a "trust-like relationship" in the Federal Government's dealings with Native Americans, this relationship is interpreted more narrowly than it is by Canadian courts. Therefore, Inuit in Canada would likely have stronger support through this principle than Inuit in the US.

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175 Diane Brazen Gould, "The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion" (1986) 71:3 Iowa L Rev 869 at 878.

176 Barry M Pritzker, *A Native American Encyclopedia: History, Culture, and Peoples* (New York: Oxford University Press, 2000) at 543.

177 US Const amend I.

178 David S Case & David A Voluck, *Alaska Natives and American Laws*, 3rd ed (Fairbanks: University of Alaska Press, 2012) at 5.

179 *Ibid* at 5, 23.

In Canada, the Supreme Court of Canada has stated that the "relationship between the Government and aboriginals is trust-like."[180] In the landmark 1984 Supreme Court decision on Indigenous rights, *Guerin v. The Queen*, the Supreme Court ruled that the Crown owed a "fiduciary duty" to the First Nations of Canada and the Supreme Court recognized Aboriginal title to be a *sui generis* ("of its own kind") right.[181] This important ruling enshrined the special relationship between the Crown and Aboriginal peoples.

Twenty-five years after *Guerin*, the Supreme Court of Canada decided *Ermineskin Indian Band and Nation v. Canada*.[182] *Ermineskin* affirmed the importance of the fiduciary relationship as stated in *Guerin*. The Supreme Court, however, also recognized an exception in which First Nation interests that do not arise out of a treaty right recognized under section 35(1) of the *Constitution Act, 1982* are protected by a lower standard of fiduciary obligation.[183] Specifically, the Supreme Court established that if "bands" (within the meaning of the *Indian Act*) did not have a treaty right at play, the Crown's fiduciary duties under section 35(1) may not be engaged, as they were not in this case.[184] This distinction suggests that when a treaty right is impacted, the Canadian Government must meet the highest standard of fiduciary obligations. These cases support the Crown's obligations to include the Inuvialuit in the diplomatic discussions over resolving the territorial Beaufort Sea dispute, because rights that arise from land claim agreements are treaty rights pursuant to section 35(3) of the *Constitution Act, 1982*.[185]

Under the US common law, the federal government is said to hold "trust responsibilities" over Native American resources.[186] "Trust responsibilities" has been said to refer "most accurately to obligations arising from a divided property interest in which one party holds and manages the legal interest in property for the equitable benefit of another."[187] With respect to assessing the federal-Native trust responsibility, courts imply "there are various 'fiduciary,' 'guardianship,' or other 'obligations of trust'" even when there is no property interest at issue.[188] The "federal-Native common law relationship is difficult to define in general terms because the obligations inherent in the relationship vary with time and specific subject."[189]

In 1942, the US Supreme Court summarized the federal government's general trust responsibilities with Indian tribes in *Seminole Nation v. United States*, stating:

> In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest

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180 *R v Sparrow*, [1990] 1 SCR 1075 at 1108 [*Sparrow*].
181 [1984] 2 SCR 335 at 385 [*Guerin*].
182 2009 SCC 9 [*Ermineskin*]; *Constitution Act, 1982*, *supra* note 112, s 35(1).
183 *Ermineskin*, *ibid* at para 67.
184 *Ibid*; *Indian Act*, RSC 1985, c I-5.
185 *Constitution Act, 1982*, *supra* note 112, s 35(3).
186 Case & Voluck, *supra* note 178 at 22 [footnote omitted].
187 *Ibid*.
188 *Ibid* [footnotes omitted].
189 *Ibid*.

> responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[190]

The federal government is obligated to safeguard tribal property if it holds title in trust for the benefit of the tribal nation, including protecting tribal self-governance and land preservation (including tribal resources and treaty rights).[191]

In *U.S. v. Mitchell*, 1983, the US Supreme Court highlighted "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[192] The US Supreme Court found "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."[193] These statements were re-emphasized by the US District Court in *Begay v. Public Service Co. of N.M.* almost 30 years later.[194]

Years later, the US Court of Appeal, District of Columbia Circuit decided a landmark decision in *Cobell v. Salazar*, where it was alleged the US Government failed to meet its obligations under the "trust-like relationship."[195] The plaintiffs, Elouise Cobell (Blackfeet) and other Native American representatives brought a class action to compel the federal government to produce an accounting and payment process for the trust funds held for American Indians.[196] The plaintiffs claimed that the Department of the Interior breached its trust obligations when it grossly mismanaged tribal lands and lost track of billions of dollars belonging to American Indians.[197] The class action was settled after Congress passed the *Claims Resolution Act of 2010*, which provided, "$1.4 billion for settlement of individual accounts and mismanagement claims, $1.9 billion for a Trust Land Consolidation Fund to purchase 'fractionated' individual Indian trust lands, and $60 million for an Indian Education Scholarship Fund."[198] This substantial settlement signifies the importance of the "trust-like relationship" and potential harm that results when the US fails to meet its obligations to make decisions in the best interest of the affected Native Americans. In addition, settlements such as these support the proposition that, in accordance with the "trust-like relationship," the US Government must ensure that its choices are in the best interests of the affected Inuit while making decisions concerning the Beaufort Sea.

While the US Supreme Court has described a "trust-like relationship" in the federal government's dealings with Native Americans, it is different from how Canadian courts have applied the concept. In the US, although there is an "undisputed existence of a *general* trust relationship between the United States and the Indian people," that relationship alone is not enough to impose fiduciary duties.[199] The "trust-like relationship" in the US can be asserted if there is a statute or regulation that explicitly identifies a trust duty owed to Native

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190 316 US 286 at 296–97 (1942).
191 National Congress of American Indians, *supra* note 143 at 23.
192 *United States v Mitchell*, 463 US 206 at 225 (1983) [citations omitted].
193 *Ibid*.
194 710 F Supp (2d) 1161 at 1196 (2010).
195 679 F (3d) 909 (DC Cir 2012).
196 *Ibid*.
197 *Ibid*.
198 National Congress of American Indians, *supra* note 143 at 34.
199 *United States v Navajo Nation*, 537 US 488 at 490 (2003) [citations omitted, emphasis added].

Americans in specific situations.[200] This has long raised a fundamental problem for Alaska Natives. Alaska Natives have historically, some argue arbitrarily, been distinguished from Native Americans residing in the Lower 48 States. In 1871, "[t]reaty-making with Indian tribes was terminated by Congress" shortly after the purchase of Alaska.[201] As a result, Native Americans in Alaska do not have any treaties with the US.[202] This made it unfeasible for Native Americans in Alaska to put land in trust with the US Government.

In recent years, there has a been a political push for Native Americans in Alaska to have the option to put land in trust. Until January 2015, tribes in Alaska were not permitted "to put land in trust on the theory that it wasn't allowed under the Alaska Native Claims Settlement Act."[203] President Barack Obama's administration eliminated the "Alaska Exception" in order to permit Native Americans in Alaska to submit applications to put land in trust, which would, among other things, give tribes the right to govern that land.[204]

In May 2019, the US House passed Bill H.R. 375, *To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes, and for other purposes*, and, while it was read twice in the Senate and referred to the Committee on Indian Affairs, it was never passed by the Senate.[205] Bill H.R. 375 would have clarified whether tribes in Alaska can put land in trust.[206]

Therefore, it would be more difficult for Inuit in Alaska to enforce the trustee duties of the US Government that come with a trust-like relationship as compared to Inuit in Canada. Still, there are alternate avenues through judicial precedents to protect and promote Indigenous interests, as discussed below.

Fiduciary obligations require federal governments to make decisions in the best interests of affected Indigenous peoples. It can also require the government to meaningfully consult with the affected Indigenous groups prior to enacting laws that will infringe on their interests. In 1990, the Supreme Court of Canada released *Sparrow*, a precedent-setting decision that examined Canada's fiduciary obligations to Aboriginal peoples. The Supreme Court set the criteria to determine whether governmental infringement on an Aboriginal right "in existence when the *Constitution Act, 1982* came into effect" had "justification."[207] The Supreme Court held that under the *Constitution Act*, *1982*, "[s]ection 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights."[208] Thus, "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples."[209]

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200 *Ibid*.

201 "Tribal Governance: Treaties," online: *The University of Alaska Fairbanks* <uaf.edu/tribal/academics/112/unit-1/treaties.php>.

202 National Congress of American Indians, *supra* note 143 at 34.

203 Liz Ruskin, "US House Bill Clears Path for Alaska Tribes to Put Land in Trust," *Alaska Public Media* (15 May 2019), online: <www.alaskapublic.org/2019/05/15/us-house-bill-clears-path-for-alaska-tribes-to-put-land-in-trust/>.

204 79 Fed Reg 76888 (2014) at 25 CFR § 151.

205 US, Bill HR 375, *To amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian Tribes, and for other purposes*, 116th Cong, 2019.

206 Ruskin, *supra* note 203.

207 *Sparrow*, *supra* note 180 at 1091.

208 *Ibid* at 1077.

209 *Ibid* at 1108.

The Supreme Court in *Sparrow* developed "the test for *prima facie* interference with an existing Aboriginal right and for the justification of such an interference."[210] The first part asks whether an Aboriginal right has been infringed on.[211] A government activity threatens to infringe on an Aboriginal right if: (1) it is considered unreasonable by the court; or (2) the regulation imposes undue hardship; or (3) it denies the right holders "their preferred means of exercising that right."[212] If a prima facie interference is found, the analysis proceeds to the issue of justification, which asks: "what constitutes legitimate regulation of a constitutional Aboriginal right?"[213] An infringement might be justified if there is a "valid legislative objective," which would involve the following analysis:

> Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.
>
> …
>
> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
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> …
>
> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.[214]

In the Beaufort Sea region, the rights of Inuit may be infringed during the course of any federal government action in the implementation of any binational governing regime agreements between Canada and the US. Accordingly, in order to satisfy its fiduciary duties to act in the best interests of Inuit communities, the Government of Canada must acknowledge and support Inuit's participation in any future diplomatic negotiations for the Beaufort Sea and its resources.

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210 *Ibid* at 1111.
211 *Ibid*.
212 *Ibid* at 1112.
213 *Ibid* at 1113.
214 *Ibid* at 1113–14, 1119.

This position, however, faces its challenges. After *Sparrow*, the Supreme Court of Canada further clarified that the government's general fiduciary duties arise in limited contexts where unique "Aboriginal interests" are subject to the Crown's discretionary decision-making. In *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, the Supreme Court highlighted the narrow scope of fiduciary duties between Canada and Indigenous peoples.[215] The Supreme Court summarized the law on fiduciary duties as follows:

> In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.
>
> A fiduciary duty may also arise from an undertaking, if the following conditions are met:
>
> > (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.[216]

These fiduciary duties have been applied to cases where the Government of Canada has discretionary powers over the reserve lands of First Nations, as well as cases where Canada or a provincial or territorial government has discretionary decision-making power over Aboriginal or treaty rights (in which case it requires justification of infringements as outlined in *Sparrow*).[217]

This narrow scope, in addition to the fact that many modern treaties in Canada have eliminated unilateral Crown discretion over Inuit-owned lands, has made it more difficult to argue that fiduciary duties are owed in certain circumstances. With respect to the Beaufort Sea, in order for these fiduciary duties to be triggered, the Government of Canada negotiating an international agreement governing the Beaufort Sea resources and management must lead to an infringement of the *IFA*, which can still be justified under the *Sparrow* test.[218]

In order to justify an infringement, the Crown would need to show that it fulfilled its obligations to consult and accommodate the Indigenous rightsholders, but the same principle should apply to any established Aboriginal or treaty right.[219] More generally, the Crown's duty to consult and, potentially accommodate, is triggered by "asserted" Aboriginal rights ("asserted" Aboriginal rights are rights not established through treaty or judicial declaration. They have "not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown

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215 *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14.
216 *Ibid* at paras 49–50, citing *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 36.
217 *Sparrow*, *supra* note 180.
218 *Ibid*.
219 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 77.

to consult with the group asserting title and, if appropriate, accommodate its interests"[220]). Arguably, the Crown could consult with Inuit community representatives separately from international negotiations regarding the Beaufort Sea. However, practically, politically, and ethically, the Crown should favour bringing Inuit communities directly into international negotiations, rather than attempting to fulfil its duty to consult through separate Crown-Inuit consultations.

Recently, a noteworthy Canadian case was released that has implications for Inuit in US. This case may provide Inuit in Alaska with a new avenue to exercise the protections under the Canadian Constitution. In April 2021, the Supreme Court released *R. v. Desautel*, which held that "persons who are not Canadian citizens and who do not reside in Canada can exercise an Aboriginal right that is protected by s. 35(1)" of the *Constitution Act, 1982*.[221] This includes Aboriginal rights "to hunt for food, social and ceremonial purposes."[222] The majority of the Supreme Court found that, "an interpretation of 'aboriginal peoples of Canada' in s. 35(1) that includes Aboriginal peoples who were here when the Europeans arrived and later moved or were forced to move elsewhere, or on whom international boundaries were imposed, reflects the purpose of reconciliation."[223]

Inuit in Alaska may be considered "aboriginal peoples of Canada."[224] Researchers believe that 4,500 years ago, early Indigenous inhabitants, the "Paleo-Eskimos," formed small settlements along the Alaskan and Canadian coasts.[225] These peoples inhabited the "northern Arctic coast for the next 3,000 years, developing regional cultural variants in Canada and Greenland."[226] Eventually, the "Neo-Eskimo Thule" (ancestors of the modern Inuit) spread eastward through "Paleo-Eskimo" territories.[227] At the time of European contact, the "Neo-Eskimo Thule" people became the Alaskan Iñupiat, Canadian and Greendlandic Inuit, and Siberian Yupik.[228]

As a result, if Inuit in Alaska decide to pursue remedies in Canada and they can demonstrate they were in Canadian territory when the Europeans arrived, the Canadian courts may rule that they have the ability to exercise an Aboriginal right that is protected by section 35(1) of Canada's *Constitution Act, 1982*, including the right to hunt and fish for food, social, and ceremonial purposes. This could arguably trigger fiduciary duties owed to Inuit living in Alaska. In this regard, Inuit in Alaska could be entitled to sit with the Canadian delegation in any international negotiations discussing the Beaufort Sea's management and resource development.

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220 *Ibid* at para 2.
221 2021 SCC 17 at para 1.
222 *Ibid* at para 62.
223 *Ibid* at para 33.
224 *Ibid*.
225 Raff et al, *supra* note 15 at 603.
226 *Ibid*.
227 *Ibid*.
228 *Ibid*.

B. DUTY TO CONSULT AND ACCOMMODATE

In Canada, Indigenous peoples' "use and occupancy of the lands and waters form a core consideration of what is now widely accepted to constitute Canadian sovereignty."[229] As a result, the law has recognized a duty to consult and accommodate Indigenous groups in circumstances where treaty and Aboriginal rights could be effected. This is, in part, based on Indigenous peoples' "inter-connectedness with the land imposes special obligations on the Canadian State to ensure that its practices are representative of their rights, interests, and wishes as recognized in both domestic and international law."[230]

In the 2004 seminal case, *Haida Nation*, the Supreme Court of Canada described the government's duty to consult Indigenous groups before exploiting lands because "depending on the circumstances … the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests *pending resolution of the claim*."[231] This was meant to prevent the Crown from "unilaterally exploit[ing] a claimed resource during the process of proving and resolving the Aboriginal claim to that resource."[232] So essential is the duty to consult that the Supreme Court of Canada ruled, once it exists, the Crown has a continuing duty to "determine the nature and extent of such adverse effects" of its actions on Indigenous groups.[233]

In *Haida Nation*, the Supreme Court further made clear that even if Aboriginal title to land had not yet been legally proven, the government still owes a "duty to consult with Aboriginal peoples and accommodate their interests" and that the duty to consult "arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[234] In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, the Supreme Court expanded on this test, finding:

> This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[235]

Therefore, even if Inuit in Canada have not legally proven a right to the Beaufort Sea, the government must still meaningfully consult and potentially accommodate their interests.

There is precedent for Inuit communities establishing Aboriginal title in Canada. In *Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Development*, a Federal Trial Court upheld an exclusive right of occupancy for Inuit.[236] The plaintiffs (the Hamlet of Baker Lake; the Baker Lake Hunters and Trappers Association and Inuit Tapirisat of Canada; and individual Inuit who lived, hunted, and fished in the Baker Lake Area) sought, among other

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229 P Whitney Lackenbauer, Suzanne Lalonde & Elizabeth Riddell-Dixon, *Canada and the Maritime Arctic: Boundaries, Shelves, and Waters* (Peterborough: North American and Arctic Defence and Security Network, 2020) at iv.
230 *Ibid*.
231 *Haida Nation*, *supra* note 114 at para 27 [emphasis added].
232 *Ibid*.
233 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 13.
234 *Haida Nation*, *supra* note 114 at paras 16, 35.
235 2010 SCC 43 at para 31.
236 [1980] 1 FC 518.

things, "an order restraining the government defendants from issuing land use permits, prospecting permits, granting mining leases and recording mining claims which would allow mining activities in the Baker Lake Area."[237] The Court examined the elements necessary to establish Aboriginal title and developed the following test, whereby the plaintiff must prove:

1. That they and their ancestors were members of an organized society.

2. That the organized society occupied the specific territory over which they assert the aboriginal title.

3. That the occupation was to the exclusion of other organized societies.

4. That the occupation was an established fact at the time sovereignty was asserted by England.[238]

In applying the test in that case, the Court found that the Baker Lake Inuit had established "[a]n aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit."[239] The Court further found that the "aboriginal title in issue has not been extinguished."[240]

The aforementioned cases are important precedent legal sources of entitlement for Inuit communities whose rights in the Beaufort Sea and its resources may be adversely affected by the Crown's actions.

A recent example of a case where a government was found to have failed in its duty to consult is the 2017 Supreme Court of Canada decision *First Nation of Nacho Nyak Dun v. Yukon*.[241] After years of negotiations, the Yukon and federal governments and 14 Yukon First Nations entered into the Umbrella Final Agreement, which led to several modern land claims agreements (Final Agreements).[242] These agreements recognized the traditional territories of these First Nations and their right to participate in managing the Peel Watershed's public resources in Yukon.[243] In 2009, after years of research and consultation with First Nations in accordance with the Final Agreements, the Peel Watershed Planning Commission (the Commission) commenced the land use approval process and submitted its Final Recommended Plan to Yukon and the First Nations impacted by the Plan.[244] Ultimately, however, Yukon adopted a final plan that was substantially different than the Commission's Final Recommended Plan, which proposed increased access and development of the region, and affected First Nations then filed an action that sought to quash Yukon's plan and order Yukon to re-conduct a second round of consultation.[245]

At trial, the judge ruled that "Yukon did not act in conformity with the process set out in the Final Agreements" during its second consultation because it introduced "changes that had

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237 *Ibid* at 524.
238 *Ibid* at 557–58.
239 *Ibid* at 563.
240 *Ibid* at 521.
241 2017 SCC 58 [*First Nation of Nacho Nyak Dun*].
242 *Ibid* at para 2.
243 *Ibid* at para 11.
244 *Ibid* at para 17.
245 *Ibid* at para 6.

not been presented to the Commission" and the Commission's Final Recommended Plan had been "invalidly modified."[246] Accordingly, the trial judge "quashed Yukon's second consultation and its final plan."[247] The Yukon Court of Appeal allowed the appeal in part, setting aside the trial judge's order that Yukon re-conduct the second consultation.[248]

The Supreme Court allowed the appeal in part, ruling that Yukon's changes to the Final Recommended Plan "did not respect the land use plan approval process" in the Final Agreements and its conduct was "not becoming of the honour of the Crown."[249] The Supreme Court ruled that in order to fulfil "consultation" as defined in the Final Agreements, Yukon was required to "provide notice in 'sufficient form and detail' to allow affected parties to respond to its contemplated modifications to a Final Recommended Plan, then give 'full and fair consideration' to the views presented during consultations before it decide[d] how to respond to the Final Recommended Plan."[250] Accordingly, the Supreme Court quashed Yukon's final plan and the parties were returned to the land use plan approval process.[251]

In another landmark case released in 2017, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, the Supreme Court of Canada held that the Crown had not satisfied its duty to consult with the Inuit of Clyde River when a federal tribunal and regulatory agency authorized offshore seismic oil and gas testing in Nunavut.[252] The Supreme Court ruled:

> [T]he consultation that occurred here fell short in several respects. First, the inquiry was misdirected…. No consideration was given in the [federal agency]'s environmental assessment to the source — in a treaty — of the [Inuits]' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.
>
> Furthermore, although the Crown relies on the processes of the [federal agency] as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.
>
> Finally, and most importantly, the process provided by the [federal agency] did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[253]

The Supreme Court also noted that the changes made to the project due to consultation were "insignificant concessions in light of the potential impairment of the Inuit's treaty rights."[254]

First Nation of Nacho Nyak Dun and *Clyde River (Hamlet)* are important decisions from the Supreme Court of Canada outlining the high standards governments in Canada must meet to satisfy their duties to consult and accommodate affected First Nations groups, including

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246 *Ibid* at para 27.
247 *Ibid*.
248 *Ibid* at para 29.
249 *Ibid* at paras 3, 57.
250 *Ibid* at para 41.
251 *Ibid* at para 53.
252 2017 SCC 40 [*Clyde River (Hamlet)*].
253 *Ibid* at paras 45–47 [citations omitted].
254 *Ibid* at para 51.

Inuit. This provides support for the proposition that Inuit communities potentially affected by any international agreement resolving the Beaufort Sea dispute may be entitled to meaningful consultation and accommodation on this issue. This article argues that, as a result of judicial precedents and the Inuit rights outlined in this article, consultation and accommodation should include providing affected Inuit communities with a seat at the negotiating table alongside Canada and the US.

However, under certain circumstances, Canadian courts have found that the government may not have to consult with a First Nation before entering into an international treaty negotiation. For example, in *Hupacasath First Nation v. Canada (Foreign Affairs)*, the applicant, Hupacasath First Nation (HFN), brought an application for judicial review concerning the ratification of the *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (CCFIPPA).[255] This decision was restricted to addressing the duty to consult with HFN specifically, and does not directly speak to whether such duty is owed to other First Nations groups.[256]

HFN argued that Canada was "required to engage in a process of consultation and accommodation with First Nations, including HFN, prior to ratifying or taking other steps that will bind Canada under the CCFIPPA."[257] In dismissing HFN's application, Chief Justice Crampton found:

> (i) The potential adverse impacts that HFN submits the CCFIPPA may have on its asserted Aboriginal rights, due to changes that the CCFIPPA may bring about to the legal framework applicable to land and resource regulation in Canada, are non-appreciable and speculative in nature. I also find that HFN has not established the requisite causal link between those alleged potential adverse impacts and the CCFIPPA.
>
> (ii) The same is true with respect to the potential adverse impacts that HFN submits the CCFIPPA may have on the scope of self-government which it can achieve.
>
> (iii) Therefore, the ratification of the CCFIPPA by the Government of Canada … without engaging in consultations with HFN would not contravene the principle of the honour of the Crown or Canada's duty to consult HFN before taking any action that may adversely impact upon its asserted Aboriginal rights.[258]

The Federal Court of Appeal dismissed HFN's appeal, finding that the Federal Court had not made a palpable and overriding error when it found that HFN "had not demonstrated a causal relationship between the Agreement and potential adverse impacts on asserted Aboriginal claims or rights."[259] The Federal Court of Appeal further found that the potential

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255 2013 FC 900 at para 1.
256 *Ibid* at para 22.
257 *Ibid* at para 2.
258 *Ibid* at para 3.
259 *Hupacasath First Nation v The Minister of Foreign Affairs Canada and the Attorney General of Canada*, 2015 FCA 4 at para 88.

adverse effects of the Agreement on HFN's rights were "non-appreciable" and "speculative" and, therefore, Canada did not have to consult with HFN prior to executing the agreement.[260]

Where there is a legal duty to consult, the government must provide "meaningful consultation" with Aboriginal peoples.[261] Under Canadian constitutional law and judicial precedent, consultation and accommodation are to be viewed on a spectrum, from minimal consultation to "deep consultation," which "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[262]

For the Inuit of the Beaufort Sea region, meaningful consultation and accommodation is crucial in order to prevent resources from being exploited before Inuit communities have had an opportunity to meaningfully contribute to diplomatic discussions regarding the boundary dispute, decision-making, and policy development for this Arctic region.

In contrast, US courts have interpreted the duty to consult Inuit communities in a more restricted manner than Canadian courts due to the federal paramountcy doctrine. For example, in *Inupiat Community of Arctic Slope v. United States*, 1982, the US District Court of Alaska ruled that "claims of sovereign power over the oceans whether made by one of the several states … or by any other native tribe is inconsistent with national sovereignty and must fail."[263] The issue was whether the state or federal government held the right to lease mineral resources of the ocean seabed.[264] Following precedent, the US District Court of Alaska concluded that under "constitutional law, the federal government must be possessed of paramount rights in offshore waters."[265] Citing *United States v. Maine*, the District Court described the federal paramountcy doctrine as:

> [A]s a matter of "purely legal principle … the Constitution … allocated to the federal government jurisdiction over foreign commerce, foreign affairs and national defense" and that "it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea."[266]

Additionally, the District Court found that a tribe under federal jurisdiction "loses all elements of external sovereignty including the capacity to acquire sovereignty over or ownership of unclaimed lands."[267] The Ninth Circuit US Court of Appeals affirmed the District Court's decision and the US Supreme Court denied the Inupiat Community of the Arctic Slope's petition for writ of certiorari.[268]

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260 *Ibid*.
261 *Haida Nation*, *supra* note 114 at para 42.
262 *Ibid* at para 44.
263 *Inupiat Cmty of Arctic Slope v United States*, 548 F Supp 182 at 185 (D Alaska 1982), aff'd 746 F (2d) 570 (9th Cir 1984).
264 *Ibid*.
265 *Ibid* at 187.
266 *Ibid* at 186–87, citing 420 US 515 at 522–23 (1975).
267 *Ibid* at 187.
268 485 US 972 (1988).

Under this judicial precedent on federal paramountcy doctrine, it would be challenging to successfully bring a claim in Alaska for consultation and accommodation that would not be superseded by the federal paramountcy doctrine. Nevertheless, in *People of Village of Gambell v. Hodel,* 1989, the US Court of Appeals for the Ninth Circuit held that "aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest."[269] The Court noted that it was settled law that "federal sovereignty is 'subject to' the Indians' right of occupancy."[270] The Court reversed the lower Court's ruling and held that the "federal government's paramount interests in the [outer continental shelf] do not extinguish the asserted aboriginal rights of the Villages. That it subordinates those aboriginal rights is certain."[271] Therefore, *Village of Gambell* provides support for Inuit in the Beaufort Sea region to legally assert concurrent interest in the outer continental shelf with the federal government. This concurrent interest would arguably, at a minimum, require the US Government to consult and accommodate Inuit in the Beaufort Sea region when it comes to developing laws governing the outer continental shelf of this region.

In addition to laws within each respective nation, Inuit have internationally accepted legal norms to support their claim to an equal seat at the negotiating table for the Beaufort Sea.

VI. INTERNATIONAL LEGAL NORMS

International legal norms outlined by the United Nations, of which both Canada and the US are Member States, support Indigenous peoples' rights to their lands and resources. Both countries must honor their international promises and consult Inuit concerning future diplomatic negotiations to settle this international dispute. In 2007, the United Nations General Assembly adopted the *United Nations Declaration on the Rights of Indigenous Peoples*.[272] This legally persuasive document recognizes the urgent need for Member States to respect Indigenous peoples' legal interests in their lands and resources. A U.N. Declaration expresses commitment on important international matters.

Although not binding under the law, "[t]he Declaration can be used as a guide and a measuring stick for laws that are now on the books and for laws that may be proposed. Does such a law measure up to the standards of the Declaration?"[273] *UNDRIP* may also be used "to inform the interpretation of domestic law" and a court "will favour interpretations of the law embodying UNDRIP's values."[274] *UNDRIP* may further "be used to support and

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269 869 F (2d) 1273 at 1277 (1989) [*Village of Gambell*].

270 *Ibid*.

271 *Ibid*.

272 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/Res/61/295 (2007) [*UNDRIP*].

273 Robert T Coulter, "The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law" (2009) 45:3 Idaho L Rev 539 at 552.

274 *Nunatukavut Community Council Inc and Todd Russell, on their own behalves and on behalf of the Members of Nunatukavut Community Council Inc v the Attorney General of Canada and Nalcor Energy*, 2015 FC 981 at para 103.

advocate for positive legislation and positive government action relating to Indian peoples."[275] *UNDRIP* includes the following important and relevant Articles:

> *Article 18*
>
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> *Article 29*
>
> 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
>
> *Article 32*
>
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order *to obtain their free and informed consent prior to the approval of any project* affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
>
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.[276]

These Articles speak directly to the Indigenous peoples' rights to their territories and the resources. The Articles also emphasize that Member States shall consult with Indigenous peoples with regard to decisions made that affect their lands. *UNDRIP* directly relates to Inuit residing in the Beaufort Sea region and supports the argument that both Inuit in Canada and the US are entitled to a seat at the negotiation table as Inuit communities in the region are in the best position to bargain and advocate for their own interests.

UNDRIP also contains procedural Articles, including the following key Article:

> *Article 27*
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> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to

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[275] Coulter, *supra* note 273 at 552.
[276] *UNDRIP*, *supra* note 272, arts 18, 29, 32 [emphasis added].

> their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[277]

Article 27 supports Inuit claims to meaningful inclusion in any process, including international negotiations, that affects their rights, and supports a claim that Inuit communities are entitled to inform any such process itself and the shape it takes.

Canada and the US were among only four nations to refuse to endorse *UNDRIP*. While the US has not endorsed *UNDRIP* as of this writing, it has agreed to support the Declaration, stating:

> The United States supports the Declaration, which … has both moral and political force…. Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.[278]

Canada initially refused to endorse *UNDRIP*; however, in 2016, the Minister of Indigenous and Northern Affairs under Justin Trudeau's Liberal Government announced that Canada became a full supporter, without qualification, of *UNDRIP*.[279]

There have been attempts to implement *UNDRIP* into Canadian domestic law. In 2016, Bill C-262, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, was introduced in the House of Commons.[280] Senators and Members of Parliament voiced "fears of economic and legal consequences if Canada were to align its laws with UNDRIP."[281] Private member's Bill C-262 did not obtain royal assent because the Senate delayed its consideration of the Bill and it died when Parliament was dissolved. The Liberal Party of Canada subsequently announced they would "once again campaign on a promise to legislate UNDRIP if re-elected."[282]

In December 2020, Bill C-15, *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*, which purports to affirm *UNDRIP*, was introduced in Canada.[283] Bill C-15 passed and received royal assent on 21 June 2021 as the *United Nations Declaration on the Rights of Indigenous Peoples Act*. Bill C-15 compels the Government of Canada to review and "ensure that the laws of Canada are consistent with the [United

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277 *Ibid*, art 27.

278 US Department of State, Release from the Office of the Special Representative for Global Intergovernmental Affairs, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples" (12 January 2011), online: <2009-2017.state.gov/s/srgia/154553.htm>.

279 Tim Fontaine, "Canada Officially Adopts UN Declaration on Rights of Indigenous Peoples," *CBC News* (10 May 2016), online: <www.cbc.ca/news/indigenous/canada-adopting-implementing-un-rights-declaration-1.3575272>.

280 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2018. This bill did not become law.

281 Justin Brake, "'Let Us Rise with More Energy': Saganash Responds to Senate Death of C-262 as Liberals Promise, Again, to Legislate UNDRIP," *APTN National News* (24 June 2019), online: <www.aptnnews.ca/national-news/let-us-rise-with-more-energy-saganash-responds-to-senate-death-of-c-262-as-liberals-promise-again-to-legislate-undrip/>.

282 *Ibid*.

283 Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2021 (assented to 21 June 2021), SC 2021, c 14.

Nations Declaration on the Rights of Indigenous Peoples]."[284] Canada must also "prepare and implement an action plan" to realize the purposes of *UNDRIP*.[285] Bill C-15 stipulates "what must be included in the action plan such as measures to address injustice and discrimination against Indigenous peoples, measures to promote mutual respect through human rights education, and accountability measures with respect to the implementation of UNDRIP."[286] However, critics have pointed out that it does not include a definition of "free, prior and informed consent," which is important because under *UNDRIP*, a key Article would require that Canada "obtain 'free, prior and informed consent' from Indigenous Peoples on any decisions that affect their lands or rights," which is critical for resource development on their lands.[287] The Inuit must have the right to freely give or withhold consent to government action that may affect their lands or rights in the Beaufort Sea region.

Under international legal norms, Inuit in both Canada and the US are entitled to meaningfully participate in any future international negotiations involving the Beaufort Sea region. Inuit "lands, territories and resources" are implicated in this dispute.[288] As such, they should be included in diplomatic discussions and consulted in order to protect their interests. *UNDRIP* and corresponding outcome documents carry political weight and may induce the federal governments to act on their commitments to co-operating with Inuit in the Beaufort Sea region. In addition, the governments must also consider the policy implications on Inuit concerning future diplomatic negotiations to settle this territorial dispute.

In recent years, Canada has shown efforts to consult with Indigenous governments and organizations in the Arctic. In 2016, the Indigenous and Northern Affairs Minister appointed a "Minister's Special Representative" who met with partners including Arctic leaders, land claim organizations, and Indigenous organizations to discuss the future of the Arctic region.[289] Owing to the information gathered during these meetings, the Government of Canada announced on 4 October 2018 that it would "negotiate a Beaufort Sea oil and gas co-management and revenue-sharing agreement with the governments of the Northwest Territories and Yukon, and the Inuvialuit Regional Corporation."[290] Canada also announced it would "work with Northern partners to co-develop the scope and governance framework for a science-based, life-cycle impact assessment review every five years."[291] This suggests Canada's willingness to meaningfully consult and accommodate Indigenous inhabitants of the Beaufort Sea region. Once *UNDRIP* mandates are fully adopted, it logically flows that Inuit possess the right to participate in any future talks with Canada and the US Government regarding the Beaufort Sea boundary dispute.

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284 *Ibid*, s 5.

285 *Ibid*.

286 Julie Abouchar et al, "Canada: The United Nations Declaration on the Rights of Indigenous Peoples in Canada: Bill C-15 Introduced" *Mondaq* (18 December 2020), online (blog): <www.mondaq.com/canada/indigenous-peoples/1017562/>.

287 Teresa Wright, "Feds Pressed to Define 'Free, Prior and Informed Consent' in UNDRIP Bill," *The Canadian Press* (20 April 2021), online: <www.ctvnews.ca/politics/feds-pressed-to-define-free-prior-and-informed-consent-in-undrip-bill-1.5395092>; *UNDRIP*, *supra* note 272, art 32(2).

288 *UNDRIP*, *ibid*, art 27.

289 Mary Simon, "A New Shared Arctic Leadership Model" (March 2017), online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/149208558500/537865 44718>.

290 Government of Canada, "Arctic Offshore Oil and Gas," online: *Crown-Indigenous Relations and Northern Affairs Canada* <www.rcaanc-cirnac.gc.ca/eng/1535571547022/1538586415269>.

291 *Ibid.*

VII. CONCLUSION

In order to balance the need to protect the way of life of Inuit communities and the Arctic ecosystem while still exploring resource extraction in the Beaufort Sea, all stakeholders must work in co-operation. This collaboration must include Inuit of the Beaufort Sea region in Canada and the US. As a result of historic melting of the ice in the Arctic region and increased international attention on Arctic management, an international agreement resolving the Beaufort Sea boundary dispute seems inevitable. Crucially, as numerous Inuit leaders and organizations have argued, Inuit communities that would be affected by any new laws or international agreements governing the Beaufort Sea and its boundaries, are entitled to sit at the negotiating table with Canada and the US.

This article argued that Inuit in both Canada and the US have legal rights to be involved in international negotiations involving the Beaufort Sea. First, as a result of public policy considerations, the governments of Canada and the US must consider Inuit communities when developing laws that affect those communities. Second, Inuit have rights and interests to the Beaufort Sea emerging from land claim agreements and statutes with their respective countries. Third, Indigenous people have constitutional and common law rights that provide additional support for this proposition. However, the US legislative and common law principles are not as comprehensive and consistent in their judicial application as compared to Canada. This article also examined the pertinent international legal norms that support Indigenous participation in decision-making processes that impact their rights. Taken together, Inuit communities affected by laws governing the Beaufort Sea region have a right to meaningfully participate in any future negotiations involving Canada and the US to resolve the Beaufort Sea boundary dispute.

With warming temperatures making the Arctic region more accessible, territorial dispute resolutions of these areas are becoming of increasing importance. It is essential that the Indigenous communities of these areas be given a voice in the negotiations over boundary lines and resource access. As Chair of the Inuvialuit Game Council, Frank Pokiak, said in reference to the dependence of the communities in the Inuvialuit Settlement Region on "marine, rather than land-based, animals for their food," "if it wasn't for the Beaufort Sea I don't think the Inuvialuit would exist today."[292]

[292] Canada, National Energy Board, *Review of Offshore Drilling in the Canadian Arctic: Preparing for the Future* (Ottawa: National Energy Board, 2011) at 12 [emphasis omitted].