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Indigenous Rights and Interests in a Changing Arctic Ocean: Canadian and Russian Experiences and Challenges

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Abstract
The Arctic has been home to Indigenous peoples since long before the international legal system of sovereign states came into existence. International law has increasingly recognized the rights of Indigenous peoples, who also have status as Permanent Participants in the Arctic Council. In northern Canada, the majority of those who live in the Arctic are recognized as Indigenous. However, in northern Russia, a much smaller percentage of the population is identified as Indigenous, as legal recognition is only accorded to groups with a small population size. This article will compare Russian and Canadian approaches to recognition of Indigenous peoples and Indigenous rights in the Arctic with attention to the implications for Arctic Ocean governance.

The article first introduces international legal instruments of importance to Indigenous peoples and their rights in the Arctic. Then it considers the domestic legal and policy frameworks that define Indigenous rights and interests in Russia and Canada. Despite both states being members of the Arctic Council and parties to the United Nations Convention on the Law of the Sea, there are many differences in their treatment of Indigenous peoples with implications for Arctic Ocean governance.

Keywords: *Indigenous rights, Indigenous peoples, Inuit, Arctic Council, UNDRIP*

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1 Introduction

The Arctic has been home to Indigenous peoples since long before the adoption of the international legal system of sovereign states. Though approximately 500,000 members of Indigenous communities currently live in the Arctic, the majority of the people who now call the Arctic home are not Indigenous peoples, but rather individual citizens who live in Arctic member states.[1]

Formally established in 1996, "the Arctic Council is the leading intergovernmental forum promoting cooperation, coordination and interaction among the Arctic states, Arctic Indigenous peoples and other Arctic inhabitants."[2] The eight Arctic states (Canada, the Kingdom of Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States) are all members of the Arctic Council – five of which are also Arctic Ocean coastal states.[3] These eight member states adopt Arctic Council decisions by consensus.[4] Permanent Participants may influence these decisions through "active participation."[5] Indigenous peoples are afforded status as Permanent Participants on the Arctic Council, with "full consultation rights" in relation to "negotiations and decisions."[6] Six Indigenous peoples' organizations are Arctic Council Permanent Participants: the Arctic Athabaskan Council (AAC);[7] the Aleut International Association (AIA);[8] the Gwich'in Council International (GGI);[9] the Inuit Circumpolar Council (ICC);[10] the Russian Association of Indigenous Peoples of Siberia and the Far North (RAIPON);[11] and the Saami Council (SC).[12] While Indigenous peoples' organizations have status as Permanent Participants on the Arctic Council, the Ottawa Declaration clearly states that this does not confer upon them any legal recognition as "peoples."[13] A third membership category on the Arctic Council, termed Observers, have no entitlement to participation in formal decision-making.[14]

A lack of effective Indigenous representation on the Arctic Council is evident, even with the Permanent Participant status of Indigenous peoples' organizations.[15] While adding more Permanent Participants or Indigenous organizations to the Arctic Council has been proposed, the structure of the Arctic Council limits additions – the number of Permanent Participants cannot be more than the number of states.[16] According to Sidorova, solving this problem of underrepresentation requires reconsideration of the legal concept of indigeneity.[17] Differences in the legal systems of the Arctic states, as well as differences in historical circumstances and governance ideologies, have produced significantly different perceptions of what it is to be Indigenous.[18] Both Canada and Russia are federal states, but with different federal structures. This has important implications for the legal recognition of Indigenous rights in both states.

For example, the Russian definition of indigeneity is based on population size; RAIPON only legally recognizes Indigenous groups with a population size of less

than 50,000, excluding the larger Komi and Sakha groups indigenous to the Arctic.[19] In Canada, the federal government has determined the process for recognizing Inuit status.[20] Aboriginal rights and title in traditional lands[21] and opportunities for land claims and self-governance have been affirmed in Canada.[22] In contrast, Russia does not recognize Indigenous title,[23] and it appears that "Russia's domestic policy concerning Indigenous rights has been regressive."[24]

This article expands on the comparison between the Russian and Canadian definitions of indigeneity and the resulting effects on Indigenous representation in the Arctic Council[25] and beyond. This article briefly discusses the prominent international legal instruments affecting Indigenous peoples and their rights in the Artic, followed by the current structure, and future ambitions, of the domestic legal frameworks for Indigenous rights and interests in Russia and Canada.

2 International law, Indigenous peoples, and the Arctic[26]

International human rights law is clearly relevant to all people in the Arctic, whether as Indigenous peoples or as individuals,[27] or both.[28] Yet ratification of international human rights treaties is inconsistent among Arctic states.[29] Notably, in recent years, there has been increased attention on the importance of intersectional human rights issues in the Arctic region, such as the implications of climate change for the realization of the human rights of Indigenous women as well as the importance of their contributions to climate governance.[30]

States have acknowledged the legal importance of self-determination of peoples, including Indigenous peoples, who seek sovereignty and self-governance, but do not desire to become sovereign nation states.[31] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) highlights the relationship between the human rights of individuals and the collective rights of peoples who exercise internal self-determination. UNDRIP recognizes significant inherent rights of Indigenous peoples, including the right to self-determination; the right to autonomy and self-government; the right to lands and territories; and the right to practice and revitalize their cultural traditions and customs, among others.[32] As a United Nations General Assembly resolution, UNDRIP is often described as not legally binding.[33] Yet it does codify aspects of customary international law and reflects norms of self-determination that are well established in international treaty law, therefore playing a significant role in the protection of Indigenous peoples' rights.[34] Moreover, it is arguable that the legal normativity of UNDRIP must be understood from the perspective of Indigenous peoples themselves, rather than only through the eyes of states.[35] While Canada originally voted against the adoption of UNDRIP, it later reversed its position and expressed support. Russia abstained.[36]

Though they are also non-binding legal instruments, the Rio Declaration on Environment and Development[37] and Agenda 21[38] recognize the vital role of Indigenous peoples, communities, and knowledge in sustainable development and in addressing concerns for biodiversity and resource management. International

human rights law and the protection of the environment are clearly linked.[39] It is clear that Indigenous peoples of the north have a role to play in the sustainable management of the Arctic Ocean.

Both Canada and the Russian Federation are parties to the United Nations Convention on the Law of the Sea (LOSC).[40] Chircop *et al.* have explored the relationship between UNDRIP and the LOSC. UNDRIP may provide a supplementary and interpretive role to the law of the sea, especially in the areas of international environmental law and protection of the marine environment.[41] The reliance of states on the LOSC framework for Arctic Ocean claims has raised concerns for Canada's Inuit, who worry that recognition and protection of their Inuit Aboriginal title to ice and water will not be respected.[42]

3 Domestic legal frameworks

While international law may influence the legal status of Indigenous peoples, it is domestic law that has the most practical implications. The following sections outline the domestic laws of Russia and Canada as they pertain to the recognition of Indigenous peoples and their rights.

3.1 Russia

3.1.1 The legal framework: Identity and rights

Within the Russian Federation, the relationship between Indigenous peoples and the state is governed by codified laws. Three Articles in the Constitution of the Russian Federation are relevant to this discussion.[43] Article 69 says:

> The Russian Federation shall guarantee the rights of Indigenous small-numbered peoples in accordance with the universally-recognized principles and norms of international law and international treaties of the Russian Federation.

However, the term "small-numbered peoples" is not defined.[44] Article 69 does not extend rights to other Indigenous peoples in Russia, that is, large-numbered peoples.

Article 15(4) of the Russian Constitution, proclaims, at least in theory, the superiority of international law over national, domestic legislation:[45]

> The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Article 15(4) has been used to argue for increased recognition and protection of human rights within the Russian Federation.[46] However, despite its potential, there are no examples of this provision being used to expand Indigenous rights, specifically, by courts or the executive branch of the Russian state.[47]

Also relevant is Article 26(1):

> Everyone shall have the right to determine and indicate his nationality. No one may be forced to determine and indicate his or her nationality.[48]

Arguably, this provision allows any citizen to identify as Indigenous. In practice, however, this is not the case. In fact, the issues around establishing and documenting Indigenous identity are highly controversial and remain unresolved.[49] The discussion that follows demonstrates the complexity of these determinations.

The Federal Law (FL) of 30 April 1999 No. 82-FZ "On guarantees of the rights of Indigenous small-numbered peoples of the Russian Federation" is the cornerstone provision. It defines "Indigenous small-numbered peoples" as peoples who are living on their traditional lands and maintaining their traditional lifestyle, economic activities, and crafts, numbering less than 50,000 people and who recognize themselves as an independent ethnic community.

The law grants Indigenous small-numbered peoples the right to use traditional lands, free of charge, that are necessary for their traditional economic activities and crafts, as well as the right to participate, through representative councils, in government decisions on the protection of their primordial habitat, traditional way of life, economic activities, and crafts. Individuals who are members of Indigenous small-numbered peoples have the right to participate in the activities of their representative councils and receive priority recruitment in their specialty in organizations carrying out traditional economic activities and crafts on their traditional territories. Language rights, as well as rights to self-government, within the parameters allowed by law, and a right to judicial protection of the primordial environment, traditional way of life, economic activity, and crafts of Indigenous small-numbered peoples are specially secured. The law also provides for a right to compensation for damages to the traditional territories by economic activities.

FL No. 82-FZ distinguishes two groups of peoples. In the first group are persons permanently residing in places of traditional residence and traditional economic activity of Indigenous small-numbered peoples, leading a traditional way of life, carrying out traditional economic activities, and engaging in traditional crafts. In the second group are persons who are also Indigenous small-numbered peoples who live permanently in places of traditional residence and traditional economic activities, however, for these peoples, the traditional economic activity and traditional crafts are subsidiary activities in relation to their main activities in the national economy.[50] This separation makes it possible in some cases, at the discretion of officials, to allow or not allow Indigenous peoples to carry out traditional activities (hunting, fishing), depending on whether they belong to the first or the second group.

Despite FL No. 82-FZ identifying several factors that need to be taken into account when determining if a particular group of people fits the definition of Indigenous peoples, only population size is relatively unambiguous.[51] Larger ethnic groups that

are Indigenous, including Sakha and Komi, are excluded because of their population size. Hence, larger ethnic groups could be considered as Indigenous in a broader sense; however, they are not accorded the same rights, benefits, or federal protection as the smaller groups.[52]

Russian legislation distinguishes Indigenous small-numbered peoples and Indigenous small-numbered peoples of the North, Siberia, and the Far East of the Russian Federation as a specially regulated concept, and their rights are additionally reserved by Russian laws. The latter are the focus of this discussion.

The federal government set up two registers to make it easier for small-numbered Indigenous peoples to receive their benefits. Under the Order of the Government of the Russian Federation of 17 April 2006 No. 536-p "About the approval of the list of Indigenous small-numbered peoples of the North, Siberia and the Far East of the Russian Federation," only ethnic groups listed in the register are recognized as Indigenous peoples. Furthermore, the Order of the Government of the Russian Federation of 8 May 2009 No. 631-p "On approval of the list of places of traditional residence and traditional economic activities of Indigenous small-numbered peoples of the Russian Federation and the list of their traditional economic activities" puts further restrictions on who qualifies for the benefits.[53]

At the individual level, proving that one belongs to an Indigenous small-numbered people remains difficult.[54] No federal law sets the rules for proving membership in an Indigenous group. In some regions, a passport or a birth certificate with nationality marks suffice, however, in the Khabarovsk Territory, a birth certificate is not accepted. Many Indigenous people go to court to prove their nationality.[55] However, such court decisions are valid only for a specific issue, for example, the establishment of a preferential quota for fishing, and as soon as a new problem arises, people are advised to appeal to a court again.[56]

Moreover, regional legislation also impacts the legal identity regime of Indigenous peoples of the North, Siberia, and the Far East of the Russian Federation. For example, the Decree of the Government of the Republic of Sakha (Yakutia) dated 10 July 2000 No. 319 "On approval of the Regulation on the insert to the passport of a citizen of the Russian Federation with information on nationality."[57] This law provides that a resident of the Republic may apply for a page to be inserted into his or her passport indicating his or her nationality.

In an attempt to resolve issues around proving nationality, on 7 May 2020, a new law amending FL No. 82-FZ came into force.[58] This law establishes a system of registration of persons belonging to all Indigenous small-numbered peoples. Corresponding lists will be created within two years. The criteria for registration are described in great detail in an attempt to exclude arbitrary interpretation and make the requirements clear and transparent.[59]

Nevertheless, the proposed registers raise concerns. The law will create two categories of citizens: those who can confirm their nationality, live in traditional places of residence, and lead traditional lifestyles versus those who can confirm their

nationality, live on the same lands but for whom traditional lifestyle is subsidiary to other economic activities. This distinction has the potential to further restrict Indigenous peoples from exercising their rights. For example, if information about traditional economic activities by a particular person is not entered in the register, does this mean that this person cannot utilize their rights under the hunting legislation?[60]

The views of the Indigenous peoples themselves are divergent: some welcome the creation of a register that will make it easier for them to prove their status and access benefits, while others believe that this will lead to an unequal set of rights among the representatives of the same group of Indigenous peoples.[61]

3.1.2 Indigenous rights to use of natural resources

The Russian Federation owns most of its natural resources.[62] The general provision in Article 9 of the Constitution stipulates that "[l]and and other natural resources shall be utilized and protected in the Russian Federation as the basis of life and activity of the people living in corresponding territories. Land and other natural resources may be in private, state, municipal and other forms of ownership". The fact that the list of ownership forms is open suggests that there are no obstacles to the establishment of a new form of ownership, namely, the property of Indigenous communities in the Russian Federation.

The uses of natural resources are regulated through a variety of legal acts. These include the Federal Land Code, Forest Code, and Water Code, the federal laws on hunting, fishing, and many others. Similar to Article 20 of UNDRIP, which protects the right of Indigenous peoples to engage freely in all their traditional and other economic activities, Russian laws establish that Indigenous small-numbered peoples have the right to priority use of wildlife,[63] traditional fishing,[64] and hunting in order to ensure the traditional way of life and traditional economic activities.[65]

The right to hunt was subject to an appeal to the Constitutional Court.[66] The decision is the first positive result for the protection of the rights of Indigenous peoples of the North, Siberia, and the Far East. A Russian citizen, Gennady Shchukin, is an ethnic Dolgan. He is one of the founders and is Chairman of the family (patrimonial) communities of the Indigenous Dolgan peoples and the President of the local Association of Indigenous Small-numbered Peoples of the North of Taimyr Dolgano-Nenets Municipal District in the Krasnoyarsk region (the Association). In 2018, Shchukin was found guilty of an offence under the Criminal Code of the Russian Federation, which prohibits incitement of illegal hunting by a group of persons by prior agreement. As the President of the Association, he persuaded other members to entrust reindeer hunting to community hunters. A total of 217 reindeer were shot and processed based on eight reindeer for each community member in a calendar year. The question before the Constitutional Court was whether the right to hunt freely for the purpose of maintaining a traditional way of life and carrying

out traditional economic activities pursuant to Article 19 of the FL "On hunting and on the conservation of hunting resources and amendments to certain legislative acts of the Russian Federation" ("On hunting") could be transferred between community members. Referencing the FL "On guarantees of the rights of Indigenous small-numbered peoples of the Russian Federation," the Constitutional Court concluded that the special rights to use wildlife resources in an amount not exceeding personal needs are granted to all persons belonging to Indigenous small-numbered peoples, and not only to those who have hunter status. The Court reasoned that for all these individuals, regardless of their ability to hunt, the use of wildlife is the basis of their traditional livelihood.[67]

This Constitutional Court's judgment is binding. For Shchukin this entails a review of the judicial decisions made in his criminal case. For the Russian legal regulation, this interpretation of Article 19 of the law "On hunting" must be in strict accordance with the opinion of the Court. This decision could significantly affect the exercise of Indigenous rights to lead a traditional way of life and implement traditional nature management.[68]

Despite the ruling by the Constitutional Court, uncertainty remains as to who is entitled to exercise Indigenous rights. An example is the case of Andrei Danilov, the Saami activist who was refused a special mark on his hunting ticket.[69] Under Russian law, the right to hunt can be carried out only by a person who has a hunting ticket. Persons belonging to the Indigenous peoples of the North, Siberia, and the Far East of the Russian Federation can apply for a special inscription indicating that they are "[h]unting in order to ensure the conduct of traditional lifestyles and traditional economic activities is carried out freely (without any permits) in the volume of production of hunting resources necessary to meet personal consumption."[70]

Danilov's claim was considered in the Court of the City of Murmansk. The Court found in favor of the Ministry of Natural Resources of the Murmansk region and refused to mark Danilov's hunting ticket. The Court outlined a two-step test for determining if an activity is "hunting to ensure the conduct of traditional lifestyles and traditional economic activities." First, the applicant has to be a permanent resident in the traditional territories of the Indigenous small-numbered people of the North, Siberia, and the Far East. Second, the hunting activity must be fundamental to the applicant's existence. The Court found that although Danilov belonged to the category of the Indigenous small-numbered people, he did not reside in the traditional territory, as listed in the federal registry, and hunting was not fundamental to his existence. Instead, the Court noted that the Danilov lived in an apartment and was gainfully employed. This decision was upheld on appeal.[71]

Similar difficulties arise when Indigenous small-numbered peoples try to exercise their fishing rights.[72] Those members of Indigenous small-numbered peoples who do not reside in places listed in the federal registry cannot exercise their fishing rights.[73] Furthermore, applications for fishing grounds and quotas are impeded by complex bureaucratic rules and arbitrary decision-making, despite uncertainty whether such

applications are even necessary for Indigenous small-numbered peoples engaged in traditional fishing.[74]

Marine mammals have a special significance to the Russian Indigenous peoples of the North and the Far East.[75] Hunting these animals is regulated under the fisheries legislation at the federal and regional levels.[76] In Chukotka, the regional government adopted a series of measures aimed at supporting Indigenous marine hunters through financial incentives, training, and health benefits, as well as investments in scientific research and provision of health and safety inspections and search and rescue capabilities.[77]

Based on the case law and Russian legal structure outlined above, it is clear that achieving the objectives of Article 26 of UNDRIP, providing "Indigenous peoples [with] the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired" in the Russian Federation is difficult.

3.1.3 Self-organization, co-management, and economic development

The FL of 20 July 2000 No. 104-FZ "On the general principles of the organization of communities of Indigenous small-numbered peoples of the North, Siberia and the Far East of the Russian Federation (with changes and additions)" operationalizes the right of Indigenous peoples to self-organize into communities based on traditional affiliations, such as family ties or geographic proximity. These communities are to be created with the objective of protecting traditional territories and way of life, as well as the rights and legitimate interests of their members. Principles of organization include voluntary participation, equality, and transparency. The law also covers relations between these communities, the federal government, and local self-governing bodies.

While increasingly important in Canada, the 'co-management model' is not legally defined in the Russian Federation. The organization of national parks in Russia, such as Bikin National Park, may provide an example of such co-management of territories.[78] Bikin Park was created by the Resolution of the Government of the Russian Federation of 3 November 2015 No. 1187 "About creation of Bikin National Park" and has a total area of 1,160,469 hectares in the Pozharsky Municipal District of Primorsky Territory. The natural conditions and rich biological resources contributed to the formation of compact settlements of Udege and Nanai peoples, who have led a traditional way of life in the area for several centuries governed by methods of conservation.

The detailed provisions on the functioning of the Park are outlined in the Order of the Ministry of Natural Resources and Ecology of the Russian Federation of 12 August 2016 No. 429 "On approval of the Regulations on the Bikin National Park."[79] According to the Order, one of the Park's objectives is the protection of the habitat and traditional way of life of Indigenous small-numbered peoples. The Order bans

human economic activities in the Park that can damage the natural complexes and objects of flora and fauna, as well as cultural and historical objects. The Park is divided into five zones based on differentiated regimes of protection: a strictly protected zone, especially protected zone, recreational zone, operational support zone, and zone of traditional extensive nature use. The fifth zone (of traditional extensive nature use) is the largest, comprising approximately 68 percent of the total Park area.[80] Fishing and hunting by Indigenous peoples living within the territory of the Park is allowed in all zones except the strictly protected and especially protected zones.

One of the most significant provisions of the Order is Part 24 which states:

> Persons belonging to indigenous small-numbered peoples of the North, Siberia and the Far East of the Russian Federation may be involved in the implementation of measures for the conservation of natural complexes and objects of the national Park in order to protect the native habitat, traditional lifestyles, management and crafts of indigenous small-numbered peoples of the Russian Federation.

The President of the Russian Federation expressed support for this approach, noting the importance of involvement of Indigenous small-numbered peoples living within the Park in its creation and operations.[81] It is one of the rare cases where Russia recognizes the necessity to consider the interests of Indigenous peoples living in the territory in order to manage and preserve it.

Beringia Nature-Ethnic Park in the Bering Strait region is similar to Bikin in its focus on the conservation of biodiversity and culture of the Chukchi and Eskimo people.[82] In 2020, the federal government announced the creation of a marine protected area adjacent to the Park.[83] Commercial fishing, oil and gas exploration, and discharge of all waste from ships will be prohibited.[84] The creation of the new marine protected area will not affect the traditional way of life and economic activities of the Indigenous peoples.[85]

FL of 7 May 2001 No. 49-FZ "On territories of traditional nature use of Indigenous small-numbered peoples of the North, Siberia, and the Far East of the Russian Federation (with changes and additions)" is another tool in the Russian legal framework. It establishes the legal basis for the formation, protection, and use of the territories of traditional nature use of Indigenous peoples of the North, Siberia, and the Far East for their traditional nature use and traditional way of life, as well as conservation of biological diversity in these territories. Territories of Traditional Nature Use (TTNU) are nature reserves in which Indigenous peoples live and carry out traditional activities. TTNUs can be created at federal, regional, or local levels with the participation of Indigenous communities.[86]

Despite their potential, implementation of TTNUs has been slow. To date, none have been designated at the federal level.[87] The fact that most of the land in Russia is federally owned significantly limits the protective scope of the law.[88] Furthermore, originally TTNUs were defined as "specially protected environmental territories,"[89] triggering the application of the protective regime under FL No. 33-FZ "On the

specially protected environmental territories (with changes and additions)." In 2013, the word "environmental" was removed from the definition of TTNU, leaving the new term "specially protected territories" undefined under Russian law.[90]

In 2009, the federal government adopted a "Concept Paper on the Sustainable Development of Indigenous Peoples of the North, Siberia, and the Far East of the Russian Federation" (approved by Order of the Government of the Russian Federation of 4 February 2009 No. 132-r). The Concept Paper outlines main principles aimed at securing socio-economic potential, as well as preservation of the original habitat, traditional lifestyle, and cultural values. It sets out six objectives: preservation of the original habitat and traditional nature management to ensure and develop the traditional way of life of the Indigenous peoples of the North; development and modernization of the traditional economic activities of the Indigenous peoples of the North; improving the quality of life of the Indigenous small-numbered peoples of the North to the average Russian level; creating conditions for improving the demographic indicators of the small-numbered peoples of the North, including by reducing child mortality and increasing life expectancy to the average Russian level; increasing the availability of educational services for the Indigenous peoples of the North, taking into account their ethnic and cultural characteristics; and promoting the development of communities and other forms of self-government of the Indigenous peoples of the North. The Concept Paper is being implemented in three stages, with the last stage scheduled to end in 2025.[91]

A recent supplement to FL No. 82-FZ provides additional benefits. FL No. 193-FZ implements a program of state support for traditional economic activities of the Indigenous small-numbered peoples of the Russian Federation carried out in the Arctic zone. The adoption of this program signals that the development of the Arctic region, including assistance to the Indigenous peoples of the North, is an important direction for the activities of the federal government.

3.2 Canada

As one of eight Arctic states and one of the five Arctic Ocean coastal states, Canada has a significant interest and impact on Arctic Ocean management. Indigenous peoples from Canada are represented in the Arctic Council by three organizations with Permanent Participants status: the Arctic Athabaskan Council (AAC), the Gwich'in Council International (GCI), and the Inuit Circumpolar Council (ICC).[92]The ICC's Circumpolar Inuit Declaration on Sovereignty in the Arctic (Circumpolar Inuit Declaration) was written with the recognition of climate change and the changing Arctic Ocean at the forefront; the changing Arctic landscape as a result of melting ice increases access to the region by shipping and tourism, and eases oil and gas development.[93] The Circumpolar Inuit Declaration grounds the Inuit Indigenous claim for the Arctic region and calls for recognition and active participation of the Inuit community in international discussions affecting the Arctic, such as sustainable development and environmental security (Article 3). The Circumpolar Inuit

Declaration also asserts the right of self-determination, building on provisions in the LOSC and UNDRIP (Article 3.13).

In contrast to Russia's approach to joint jurisdiction,[94] Canada's *Constitution Act, 1867* divides jurisdiction between the federal and provincial parliaments. The federal parliament has jurisdiction over "Indians, and Lands reserved for the Indians,"[95] while the provinces have exclusive power over "Property and Civil Rights in the Province."[96] In addition, Canada's *Constitution Act, 1982* guarantees broad equality and fundamental civil and political rights for all Canadians in the *Canadian Charter of Rights and Freedoms* and affirms specific rights for Indigenous peoples (referred to as Aboriginal peoples) in its section 35.[97] Legislation has been enacted at both the provincial and federal level with goals to align Canadian law with UNDRIP – the *Declaration on the Rights of Indigenous Peoples Act*, SBC, c 44 and the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, respectively.

3.2.1 Constitution Act, 1982, *s. 35: Judicial interpretation of Aboriginal rights and title*

The inclusion of section 35 in Canada's *Constitution Act, 1982* was the result of extensive demonstrations and campaigns by Aboriginal organizations and activists for the explicit recognition of Aboriginal rights and title as already witnessed in the Canadian courts.[98] Section 35 reads:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, *Inuit* and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of *land claims agreements* or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are *guaranteed equally* to male and female persons. [emphasis added]

Section 35(2) defines Aboriginal peoples of Canada as including the Inuit. The majority of the Inuit population lives in 53 communities across Inuit Nunangat, encompassing 35 percent of Canada's landmass and 50 percent of its coastline (and includes land, water, and ice). The Inuit have lived in Inuit Nunangat since time immemorial. The Inuit have shown great resilience and retained their cultural identity; approximately 60 percent of Inuit report an ability to conduct a conversation in Inuktut, and the Inuit people continue to harvest seal, narwhal, and caribou to feed their families and communities.[99] Inuit Nunangat is recognized as the Canadian Inuit homeland in Canada's recent Arctic and Northern Policy Framework (discussed further below). The Framework also includes a specific Inuit Nunangat chapter to reflect and support Inuit self-determination.[100]

Despite a long colonial history,[101] Canada recognizes Aboriginal rights and title.[102] While section 35 recognizes existing Aboriginal rights, it does not define or create them. As a result, the Supreme Court of Canada has interpreted section 35

to include Aboriginal rights ranging from rights to land to rights to fish and hunt, among others. To establish a constitutionally protected Aboriginal right, the activity must be an element of a practice, custom, or tradition integral to the distinctive society or culture of the Aboriginal group asserting the right. The Aboriginal practice, custom, or tradition being practiced in its current form must be a logical evolution of the pre-contact practice.[103] Before 1982 (the patriation of Canada's Constitution), the Canadian government can show extinguishment of the Aboriginal right through clear and plain intent in legislation. However, after 1982, there can be no unilateral extinguishment of Aboriginal rights – extinguishment can only be done with consent, for example, by treaty agreements.[104]

Relationships between the government of Canada and Indigenous peoples are often governed by treaty agreements. Treaties may include Aboriginal rights and provide additional rights.[105] Aboriginal and Treaty rights cannot be restricted unless there is a valid legislative objective, such as public safety or conservation, and the restriction must be proportional and in accord with the historical relationship between Canada and Aboriginal peoples, including the *honor of the Crown*. Both the provincial and federal governments must act in conformity with the honor of the Crown and are subject to the fiduciary duties that lie with the Crown in dealing with Aboriginal interests.[106] Similar to Aboriginal rights, Treaty rights are also subject to extinguishment, and justification must be proven for any infringement.[107]

Aboriginal title is *sui generis* and creates an interest in the land. To qualify, the activity must be an element of a practice, custom, or tradition integral to the distinctive culture of the Aboriginal claimant, which can extend to tracts of land regularly used for hunting or fishing if the claimant exercised the right to possess it, manage it, use it, enjoy it and profit from its economic development.[108] Aboriginal title lands are inalienable, that is, can only be sold to the Crown, and are based on the prior exclusive occupation by Indigenous peoples before Canadian sovereignty. Aboriginal title is held communally as a collective right of Indigenous peoples and allows a broader entitlement that encompasses exclusive rights over and control of their Aboriginal title lands (including subsurface resources) with the restriction that uses be consistent with their group's nature and be preserved for the enjoyment of future generations.[109] Aboriginal title may be infringed on the basis of a broader public good, provided that the government discharges its duty to consult and accommodate, and its infringing actions are backed by a compelling and substantial objective, and consistent with the Crown's fiduciary obligation.[110]

3.2.2 Modern treaties and land claims agreements

There are twenty-nine modern treaties between Canada and Indigenous Nations, which cover 40 percent of Canada's land mass.[111] The first modern treaty in 1976 established three general categories of land: core lands for exclusive use by Indigenous peoples, shared jurisdiction lands, and public lands with specified Aboriginal rights.[112] Within core lands, Indigenous governments exercise governance over the use of

lands. Within shared jurisdiction, a number of Indigenous majority boards give recommendations to governments on land and water use.[113] Of particular importance to the Arctic region are the four Inuit land claims agreements:[114] *Inuvialuit Final Agreement* (1984);[115] *Nunavut Land Claims Agreement* (1993);[116] *Labrador Inuit Land Claims Agreement* (2005);[117] and *Nunavik Inuit Land Claims Agreement* (2007).[118] Co-management boards established under these agreements have jurisdiction over wildlife, land, and environmental issues. The boards vary in structure and mandate, but in general, bring together federal, territorial and Indigenous decision-makers.[119]

3.2.3 Duty to consult and accommodate

Aboriginal peoples have the constitutional right to Crown consultation and accommodation prior to any development that may affect their interests taking place.[120] The objective of the duty to consult and accommodate is to protect Aboriginal and Treaty rights (historic[121] and modern[122])[123] and to promote reconciliation between Indigenous peoples and Canada.[124] The Crown's duty to consult has a low threshold and arises where the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal rights or title and contemplates conduct that might adversely affect the Aboriginal right.[125] The duty to consult and accommodate requires meaningful two-way dialogue, done in good faith, with each Aboriginal group affected consistent with that group's strength of claim and the potential impact of the decision on those Aboriginal interests.[126] The strength of the right and the severity of the Crown's impact on the right reveal a spectrum of Crown duties that may be owed; from weak claims and weak impacts with lower consultation requirements, to strong claims and high impacts which require a greater consultation.[127] The consultation process may give rise to a duty to negotiate reasonable accommodation that may range from modifications to cancellation of the proposed development.[128] Agreement between the Crown and Aboriginal claimant is not required, and Aboriginal peoples are not given a veto on the use of their traditional lands.[129] In addition, Aboriginal claimants may not frustrate the Crown's reasonable good faith attempts at consultation and accommodation.

The government may delegate its duty to consult and accommodate to administrative bodies or tribunals, but this does not delegate the Crown's ultimate responsibility to ensure consultation is adequate.[130] An especially relevant example is *Clyde River (Hamlet) v Petroleum Geo-Services Inc*. The Inuit of Clyde River, Nunavut have defined Treaty rights to harvest marine animals.[131] The Proponent applied to the National Energy Board (NEB) to conduct seismic testing for oil and gas. The negative effects this testing would have on Inuit harvesting rights were undisputed. Yet the NEB granted authorization for the testing after a period of consultation with the Inuit (para 3). The Inuit of Clyde River appealed the authorization, and the Court found the consultation to be inadequate (paras 4, 24). The Court affirmed the constitutional duty to consult and accommodate under section 35 and held that the NEB, as a body with the power to decide questions of law, must comply with

the Constitution (para 35). The NEB cannot issue an authorization if the duty to consult has not been met (paras 35–42). If the Crown is going to rely on a regulatory process of an administrative body (such as the NEB) to fulfill its duty to consult, this should be made clear to Indigenous groups (paras 23, 46). When a regulatory process has not met the duty to consult, the Crown will be responsible to fill in the gaps (para 22). While the depth of consultation will depend on the circumstances (para 20), where Indigenous Nations have raised concerns, the NEB will be required to substantively address those concerns (para 11).

The Court concluded that the Inuit of Clyde River had rights to harvest marine mammals as protected in a treaty agreement. These rights were extremely important to their economic, cultural, and spiritual well-being, and the testing posed great risks to these rights (para 43). Therefore, the highest end of the consultation spectrum was owed to the Inuit in this case (para 44). As a result of the inadequate consultation by the NEB, and ultimately owed by the Crown, the NEB's authorization of the testing was quashed (para 4). Project approvals that do not conform with the duty to consult should be quashed (paras 24, 39).

3.2.4 Canada's Arctic and Northern Policy Framework

The Canadian federal government released its reinvigorated Arctic and Northern Policy Framework (the Framework) in September 2019.[132] The Framework demonstrates Canada's prioritization of the environmental protection and socio-cultural health of Indigenous peoples in the North.

The Framework was created to address long-standing issues regarding access to services, opportunities, and standards of living and inequalities in transportation, energy, communications, employment, community infrastructure, health, and education felt by residents of the North with special attention to Indigenous peoples.[133] The aim is to close gaps between the northern and southern residents of Canada and produce sustainable economic development.[134] The United Nations Sustainable Development Goals are specifically mentioned as a way of aligning and informing the Framework.[135]

The Framework was co-developed by the federal government, Indigenous peoples, and six territorial and provincial governments (Yukon, Northwest Territories, Nunavut, Newfoundland and Labrador, Quebec, and Manitoba).[136] The Framework recognizes that previous federal policies have been unsuccessful, and that this policy instead puts its success and future in the hands of the people who directly reside in the North.[137] The partnership and co-development are seen as a contribution to reconciliation.[138] The Framework includes chapters written exclusively by the Indigenous partners, allowing them to voice their aspirations and priorities directly.[139]

Investment and funding for Indigenous food production system projects and training, and participation of northerners (including youth) in the Arctic Council, research, and international learning opportunities, are specific examples of funding

and investment strategies that involve Indigenous peoples and their culture.[140] In addition, there are many infrastructure improvements, such as access to internet, transportation, water systems, mental health and addiction facilities, which reflect the priorities and interests of the Indigenous and non-Indigenous peoples in the North.[141]

In addition to co-development, continued collaboration between Indigenous groups and the rest of Canada, throughout the proposed 10-year implementation plan, is emphasized.[142] Engagement strategies include regional roundtables held in Arctic and northern communities, interest-based roundtables, and a public submissions process.[143] Self-determination is at the forefront of the co-development strategy.[144]The principles developed to guide the implementation of the Framework highlight that policy and programming will reflect a commitment to diversity and equality through the employment of analytical tools such as Gender-Based Analysis Plus (GBA+) to assess potential impacts on diverse groups of people.[145] This is consistent with the approach adopted in the new federal *Impact Assessment Act* (IAA)[146] and is designed to analyze sex and gender as factors underlying and intersecting with other identify factors that together may result in disproportionate impacts.[147] The IAA mandates early engagement with Indigenous communities, while also providing opportunities for Indigenous governing bodies to exercise jurisdiction in respect of impact assessments, and ensuring protection of Indigenous knowledge as part of the assessment process.[148] Together with the recent National Inquiry into Missing and Murdered Indigenous Women and Girls,[149] it is clear that increasing attention will be paid to intersectionality concerns raised by Indigenous women in the Arctic.

Finally, the Framework notes the pronounced effects of climate change on the Arctic, with the circumpolar Arctic warming two to three times faster than the global average.[150] This has implications for Indigenous peoples' connections with the land and water for their livelihood, as well as the continuation of their culture and traditional practices.[151] The principles developed to guide the implementation of the Framework mention that, as climate change is a lived reality in the region, initiatives will take into account its various impacts, including its impact on Indigenous northerners, who continue to rely on the land and wildlife for their culture, traditional economy, and food security.[152]

3.2.5 Arctic marine protected areas and co-governance structure

The Framework recognizes the importance of conservation and reducing development impacts on wildlife.[153] Holistic options for conservation include the advancement of Indigenous-led conservation and monitoring through Indigenous protected and conserved areas.[154]

The High Arctic marine conservation area, including the proposed 320,000 km^2 Tuvaijuittuq Marine Protected Area and completion of the 107,000 km^2 Tallurutiup Imanga National Marine Conservation Area, was announced in August

2019.[155] The federal government is providing CDN$55 million in funding to establish a joint Crown-Inuit governance model for the Tallurutiup Imanga National Marine Conservation Area, which will protect biologically rich Arctic waters. The agreement also creates an Inuit stewardship program managed by the Qikiqtani Inuit Association. This is a new collaborative governance model including Imaq, an Inuit advisory body, and the Aulattiqatigiit board, a joint Inuit/government consensus management board.[156] The "co-management of this area by Inuit and the federal government speaks to the critical importance of having Inuit involved in governance of their adjacent waters".[157]

In addition to the Framework, a new Inuit-Crown body was developed to foster the constructive partnership called for in the Framework. The joint political body will consist of a number of federal ministers and the heads of the Inuit Tapiriit Kanatami, Nunavut Tunngavik Incorporated, the Inuvialuit Regional Corporation, Makivik Corporation, and the Nunatsiavut government. The presidents of the National Inuit Youth Council, Pauktuutit Inuit Women of Canada, and the ICC-Canada will also sit on the committee as observers.[158]

4 Conclusion

This article seeks to highlight the approaches to the recognition of the rights of Indigenous peoples in Russia and Canada, with an emphasis on the relevance of these rights to Arctic Ocean governance. It provides only a snapshot of the complexities and development in this area in both countries. The focus of this article has been to outline the legal frameworks that provide a foundation and structure to the topic in each country, as the nuances to Indigenous peoples' self-determination and self-governance in the wake of the impacts of colonialism and reconciliation are far outside its breadth.[159]

Canada and Russia are both members of the Arctic Council with extensive Arctic coastlines and are both parties to the LOSC. Laws in both countries appear to provide priority access to resources on traditional lands to Indigenous people; however, a complex legal structure and processes often impede the effective exercise of these rights. The courts of both countries play an important role in defining the scope of Indigenous rights and their exercise.

Despite some similarities, it is clear there are many differences. These differences include different approaches to the domestic recognition of legal rights of Indigenous peoples, as well as the inclusion of Indigenous peoples in instruments of Arctic governance. In Russia, only the small-numbered peoples have Indigenous rights and these rights can be exercised under a narrow set of circumstances, despite their constitutional recognition. In contrast, Canada has an elaborate legal and policy framework for the recognition of Indigenous peoples' rights grounded in its Constitution. However, the exercise of these constitutional rights by Indigenous peoples remains controversial in some cases.[160]

Looking to the future it is clear that there is a place for development in the recognition and practice of Indigenous peoples' rights in both Canada and Russia. In both countries, co-management of protected areas sheds some hope. The Canadian Arctic and Northern Policy Framework also emphasizes the inclusion of Indigenous-led projects and consensus in the furtherance of reconciliation. Though the Russian government has not endorsed UNDRIP or a similar national framework, the International Work Group for Indigenous Affairs – a global human rights organization dedicated to promoting, protecting, and defending Indigenous Peoples' rights – highlights the work of Russia's Indigenous population to further their rights.[161]

Arguably, overarching everything is climate change. The implementation of Indigenous peoples' rights and recognition of their voices and knowledge is central to a holistic and successful fight against this global crisis, especially as it affects the use (and misuse) of the Arctic Ocean and its governance in the future.[162]

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NOTES

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102. *Calder*.
103. *R v Van Der Peet*, [1996] 2 SCR 507, paras 46–60; *R v Sappier*/*R v Gray*, 2006 SCC 54; *R v Powley*, 2003 SCC 43; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56. "Pre-contact" refers to before the arrival of Europeans.
104. *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].
105. *R v Adams*, [1996] 3 SCR 101.

106. *Sparrow*; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48; *Wewaykum Indian Band v Canada*, 2002 SCC 79.
107. *R v Badger*, [1996] 1 SCR 771; *Guerin v The Queen*, [1984] 2 SCR 335; *R v Marshall*, [1999] 3 SCR 456.
108. *Thomas v Rio Tinto Alcan Inc (Saik'uz First Nation v Rio Tinto Alcan Inc)*, 2015 BCCA 154, para 51.
109. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*]; *Tsilhqot'in Nation*.
110. *Tsilhqot'in Nation*, paras 75–77.
111. CIRNAC, "General Briefing Note on Canada's Self-government and Comprehensive Land Claims Policies and the Status of Negotiations," https://www.rcaanc-cirnac.gc.ca/eng/1373385502190/1542727338550 (last modified 15 September 2010). Additionally, there are 21 self-government agreements as per Canada's Aboriginal Self-government Policy, that recognize inherent rights of self-government in internal matters within the framework of Canada's Constitution. See CIRNAC, "The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government," https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136 (last modified 21 November 2019).
112. The James Bay and Northern Québec Agreement (Québec: Éditeur official du Québec, 1991). See also D. Laidlaw and M. M. Passelac-Ross, *Sharing Land Stewardship in Alberta: The Role of Aboriginal Peoples* (Calgary: Canadian Institute of Resources Law, 2012).
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115. CIRNAC, "1984 – The Western Arctic Claim – The Inuvialuit Final Agreement' and 'Amendments to the Western Arctic Claim – The Inuvialuit Final Agreement," https://www.rcaanc-cirnac.gc.ca/eng/1100100030598/1542738100588.
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119. G. White, *Indigenous Empowerment through Co-management: Land claims boards, Wildlife management, and Environment regulation* (Vancouver: UBC Press, 2020).
120. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 [*Mikisew Cree First Nation*].
121. *Mikisew Cree First Nation*.
122. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*].
123. *Haida Nation*.
124. *Mikisew Cree First Nation*.

125. *Haida Nation*; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43.
126. *Haida Nation; Mikisew Cree First Nation; Tsleil-Waututh Nation v Canada*, 2018 FCA 153 [*Tsleil-Waututh Nation*].
127. *Haida Nation; Mikisew Cree First Nation.* Duties at the low end of the spectrum may require giving notice of the decision and disclosing information while duties at the high end of the spectrum may require deep consultation, an opportunity to voice concerns, formal participation in the decision-making process, written reasons that address concerns, accommodation, funding to participate, and consent (*Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*]; *Delgamuukw*).
128. *Haida Nation*; *Beckman*.
129. *Haida Nation; Tsilhqot'in Nation*.
130. *Haida Nation*; *Tsleil-Waututh Nation*.
131. *Clyde River*.
132. For discussion on Canada's domestic and international undertakings leading up to the 2019 Arctic and Northern Policy Framework, see P. W. Lackenbauer, "Canada's Emerging Arctic and Northern Policy Framework: Confirming a Longstanding Northern Strategy," in *Breaking the Ice Curtain? Russia, Canada, and Arctic Security in a Changing Circumpolar World*, eds, P. W. Lackenbauer and S. Lalonde (Calgary: Canadian Global Affairs Institute, 2019), 13–42; Arctic and Northern Policy Framework.
133. Ibid., "Foreword from the Minister."
134. Ibid.
135. Ibid., and "Our Future: Promoting Sustainable Development."
136. Ibid., "Foreword from the Minister."
137. Ibid., "A Shared Vision."
138. Ibid.
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140. Ibid., "What Have We Done So Far?"
141. Ibid.
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145. Ibid, "Annex: Principles for the Arctic and Norther Policy Framework.".
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152. Ibid., "Annex: Principles for the Arctic and Northern Policy Framework."

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